

## **Submission by the Council of Europe Commissioner for Human Rights**

under Rule 9.4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements

in the case of

***Kavala v. Turkey* (application no. 28749/18, judgment of 10 December 2019)**

## Introduction

1. This submission by the Council of Europe Commissioner for Human Rights (hereinafter: “the Commissioner”) is addressed to the Committee of Ministers of the Council of Europe, in accordance with Rule 9.4 of the Rules of the Committee of Ministers<sup>1</sup>, in the context of the supervision of the execution of the judgment of the European Court of Human Rights (hereinafter: ‘the Court’) in the case of *Kavala v. Turkey* (application no. 28749/18). This judgment relates to the detention of the applicant, a businessman and human rights defender, in violation of Article 5 § 1, Article 5 § 4, and Article 18 taken in conjunction with Article 5 § 1 of the European Convention on Human Rights (hereinafter: ‘the Convention’).
2. According to her mandate, the Commissioner fosters the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the European Convention on Human Rights; identifies possible shortcomings in the law and practice concerning human rights; and provides advice and information regarding the protection of human rights across the region.<sup>2</sup> The Commissioner has a specific role with regard to human rights defenders further to the adoption of a Declaration by the Council of Europe Committee of Ministers on 6 February 2008, inviting the Commissioner to provide strong and effective protection for human rights defenders, notably by continuing to meet with a broad range of defenders during country visits and to report publicly on the situation of human rights defenders.<sup>3</sup>
3. The present submission aims to assist the Committee of Ministers in its examination of this case. The submission is based on the Commissioner’s work on Turkey in general, most notably her February 2020 report following her visit to Turkey in July 2019,<sup>4</sup> during which the Commissioner met the applicant at the penitentiary campus in Silivri. It is also based on her continuous monitoring of the human rights situation in Turkey. The Commissioner has been closely monitoring the situation of Osman Kavala, as an emblematic case affecting human rights defenders in Turkey in general. She notes, in this connection, that in finding the aforementioned violations in its *Kavala v. Turkey* judgment, the Court extensively referred to the Commissioner’s third party intervention relating to this case which were submitted to the Court on 20 December 2018.<sup>5</sup> The Commissioner’s views on the general dysfunctions of the Turkish judiciary which have led to the violations of Osman Kavala’s human rights, along with those of many other human rights defenders, as well as other individuals and groups, such as members of Parliament, journalists and lawyers, can be found in this third party intervention and the Commissioner’s aforementioned report.
4. Section I of the present written submission contains the Commissioner’s observations regarding the ongoing detention of Osman Kavala, with a focus on the urgent individual measures that Turkey must be expected to take under Article 46 of the Convention in order to put an end to the violations found by the Court. Section II aims to give a brief summary of the Commissioner’s findings and recommendations concerning the systemic problems in the Turkish justice system, in so far as they may be relevant for the supervision of the execution of this judgment by the Committee of Ministers with respect to general measures necessary to prevent the occurrence of similar violations. This is followed by the Commissioner’s conclusions.

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<sup>1</sup> [Rules of the Committee of Ministers](#) for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 and [amended on 18 January 2017](#)).

<sup>2</sup> [Resolution](#) (99)50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

<sup>3</sup> [Declaration](#) of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities, adopted on 6 February 2008.

<sup>4</sup> Report by Dunja Mijatović, Commissioner for Human Rights, following her visit to Turkey from 1 to 5 July 2019, [CommDH\(2020\)1](#), 19 February 2020.

<sup>5</sup> Third Party Intervention of 20 December 2018, *Mehmet Osman Kavala v. Turkey*, by Dunja Mijatović, Commissioner for Human Rights, [CommDH\(2018\)30](#).

## I. Individual measures and the ongoing detention of the applicant

5. The Commissioner notes that immediately after the applicant's acquittal and release on 18 February 2020 in the context of the so-called Gezi trial, he was re-arrested and re-detained under Article 309 of the Turkish Criminal Code (attempt to overthrow the constitutional order) for his alleged involvement in the coup attempt of 15 July 2016. The Commissioner made a public statement in reaction to this development on 19 February 2020. Noting, among others, the manner in which this new arrest and detention occurred and the fact that they were based on evidence already examined by the European Court of Human Rights, the Commissioner affirmed that "these allegedly new charges brought against Osman Kavala have no credibility and for me, this arrest amounts to ill-treatment".<sup>6</sup> The competent criminal judgship of the peace (also known as magistrate's court) nevertheless ordered the applicant's detention.
6. The Commissioner observes that, as the lack of a solid legal basis for this detention under Article 309 of the Criminal Code became increasingly clear, due to its obvious disregard of the judgment of the Court as well as its irregularity from the point of view of Turkish criminal procedure, the prosecutor introduced yet another request to detain the applicant on 9 March, this time under Article 328 of the Turkish Criminal Code regarding espionage. This request was again granted by the criminal judgship of the peace and the detention was subsequently prolonged.
7. The Commissioner understands from the communication of the Turkish authorities to the Committee of Ministers of May 2020,<sup>7</sup> that the government considers that this latest charge and, thus the applicant's present detention, is based on new evidence and is distinct from the subject matter of the present judgment. The authorities therefore argue that this detention has no bearing on the individual measures Turkey needs to take to execute this judgment. The Commissioner submits her view that this argument is untenable, for a wide array of reasons set out below, which relate to both the new charges themselves and the legal and political context within which they have been introduced.
8. Contrary to the government's assertions in their communication of May 2020, some of the evidence used to substantiate the new charges, mainly concerning the applicant's alleged contacts with H.J.B., cannot be considered as new. These facts were already part of the original investigation against the applicant and have been accordingly scrutinised by the Court and rejected as not providing a sufficient basis for reasonable suspicion for the purposes of Article 5 of the Convention. In the Commissioner's opinion, were it to be accepted that Turkey is absolved of its obligation under Article 46 to execute this judgment due to the mere requalification of the offence by using the same, *a priori* lawful acts as a basis for detention, this would void this obligation of its substance by allowing the indefinite detention of the applicant simply by continuing to modify the charges.
9. Furthermore, the Commissioner notes that the relevant article of the Turkish Criminal Code which was used to detain the applicant for the third time concerns "obtaining information which is classified on the grounds of national security concerns or foreign political interests with the intention of spying on political and military affairs". The Commissioner is struck by the fact that, as it clearly appears both in the latest detention decision and the government's communication of May 2020, in requesting the applicant's detention under this new article, the prosecutor failed to adduce any evidence concerning the nature of the information or documents allegedly transmitted to a suspected criminal, or when and how this information was obtained in an unlawful manner with criminal intent. Despite the fact that this must be a major constituent element of the alleged crime, the magistrate's court did not scrutinise this matter further when granting the detention request and rejecting the applicant's objections. According to the established case-law of the Court, "reasonable suspicion" means the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. In the light of that standard, the Commissioner considers that evidence of mere contact with a suspect is an unacceptably low threshold to justify the detention of a person for such a serious offence or to satisfy exigencies of legal certainty.

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<sup>6</sup> [Statement](#) by Dunja Mijatović, Commissioner for Human Rights, 19 February 2020.

<sup>7</sup> [DH-DD\(2020\)47](#), Communication from the authorities (29/05/2020) in the case of Kavala v. Turkey, 2 June 2020.

10. The Commissioner also notes the general legal and political context within which this detention occurred. The fact that the President of the Republic immediately and openly criticised the acquittal decision concerning the applicant by the trial court, by qualifying it as a “manoeuvre”, in a case where the European Court of Human Rights had already established a clear link between the President’s statements and the prosecutor’s actions, is a strong indication that the same dynamics which led to the finding of a violation of Article 18 taken in conjunction with Article 5 § 1 are still in operation regarding the applicant. The Commissioner further notes that all three judges of the trial court who acquitted the applicant were immediately subjected to disciplinary investigations by the Turkish Council of Judges and Prosecutors, prompting a reaction by the Secretary General of the Council of Europe who drew attention to the strong chilling message sent to the Turkish judiciary by this action.<sup>8</sup>
11. The Commissioner also notes that the prosecutor appealed this acquittal decision; the appeal is still pending. This shows that the prosecutor chose to ignore Turkey’s obligations under the Convention by continuing criminal proceedings that have been found void of any evidence of wrongdoing by the Court. The submission of the prosecutor in support of this appeal clearly shows that he relies on the same evidence and the same arguments as in his original indictment which was examined in detail by the Court. Unlike the three judges who decided to follow the Court’s reasoning in this case, to the Commissioner’s knowledge, the prosecutor is not facing any disciplinary investigation for these actions.
12. For the Commissioner, this general context indicates beyond reasonable doubt that the applicant’s ongoing detention is motivated by the same ulterior purpose found by the Court in its judgment. The Commissioner also observes that the continued detention of the applicant has further intimidated civil society activists and human rights defenders in Turkey, compounding the chilling effect observed by the Court in its judgment and further vindicating its findings in connection with Article 18 of the Convention. In addition, this detention, combined with the three nominally separate criminal proceedings against the applicant and the timing of the detention requests introduced by the prosecutor, clearly indicates that the priority has been to keep the applicant in detention over legal considerations, including compliance with a binding judgment of the Court.
13. For these reasons, the Commissioner considers the ongoing detention on remand of the applicant and the pursuit of criminal proceedings against him as a seamless extension and continuation of the violations found in the Court’s judgment. Therefore, as far as urgent individual measures are concerned, the execution of this judgment would require the applicant’s immediate and unconditional release from detention. In the light of the Court’s case-law, the Commissioner further considers that the violation found by the Court of Article 18 in conjunction with Article 5 applies to the totality of the charges and pre-trial proceedings against the applicant,<sup>9</sup> and would necessitate the discontinuation of the criminal proceedings against him.

## **II. Observations regarding general measures**

14. As the Commissioner had already argued in her third party intervention regarding this case, the criminal proceedings against Osman Kavala and his detention are caused by and symptomatic of a wide range of serious problems affecting the Turkish justice system. These proceedings also reflect a systematic crackdown by the Turkish state against human rights defenders, along with other groups and individuals expressing legitimate dissent and criticism of the government and public officials in general. Both these issues have been the subject of an in-depth analysis in the Commissioner’s report on Turkey published in February of this year, which contains her extensive findings and recommendations.<sup>10</sup> The developments affecting the applicant since the Court’s judgment further confirmed the Commissioner’s findings.

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<sup>8</sup> [Letter](#) from the Secretary General of the Council of Europe to the Minister of Justice of Turkey, 21 February 2020.

<sup>9</sup> See proceedings under Article 46 § 4 in the case of *Ilgar Mammadov v. Azerbaijan*, Application no. 15172/13, Grand Chamber judgment of 29 May 2019.

<sup>10</sup> Report by Dunja Mijatović, Commissioner for Human Rights, following her visit to Turkey from 1 to 5 July 2019, [CommDH\(2020\)1](#), 19 February 2020.

15. The Commissioner is of the opinion, therefore, that in the absence of urgent and sweeping general measures along the lines she set out in her report, and without the implementation of recommendations made to Turkey by other Council of Europe bodies over the years, similar violations will indubitably continue to be found by the Court with regard to Turkey at an accelerating pace. The following is a summary of the Commissioner's main findings.
16. The Commissioner found that the situation concerning the administration of justice and judicial independence in Turkey, while being a long-standing concern of her Office, had deteriorated significantly in recent years, notably in the aftermath of the state of emergency effective from July 2016 to July 2018. She noted in particular the marked erosion of constitutional and structural guarantees for the independence of the judiciary, including the changes affecting the status of the Council of Judges and Prosecutors (HSK) contrary to the standards defined by the Committee of Ministers. She also noted a number of measures which have strongly affected the independence of judges, such as summary dismissals of judges and the recruitment of new judges in massive numbers using highly opaque procedures, as well as evidence that removals and transfers of judges are being used to affect the outcome of legal proceedings. The Commissioner's report sets out a large body of evidence pointing to an increased partiality of the judiciary to political interests and many cases where ulterior purposes similar to the case of the applicant are at work (Section 1.1 of the Commissioner's report). In the Commissioner's assessment, the present situation regarding the independence and impartiality of the judiciary represents an existential risk to the rule of law and the respect for human rights in Turkey.
17. The Commissioner examined in more detail the effects of these developments on the criminal justice system, where long-standing problems have been aggravated and compounded by new ones. Two of these problems relate to the misuse of detentions on remand (section 1.2.2 of the report) and the particularly non-Convention compliant and defective reasoning displayed by the criminal judgeships of the peace (section 1.2.4), who approve prosecutors' detention requests almost automatically, as demonstrated in the present case. The Commissioner reached the conclusion that, especially for supposed terrorism and organised crime cases, the disregard by the Turkish judiciary of elementary fair-trial guarantees and basic legal principles (such as presumption of innocence or no punishment without law), combined with a very loose and selective application of criminal laws to lawful acts, results in a level of legal uncertainty and arbitrariness which endanger the very essence of the rule of law. The strikingly loose application of espionage charges to the applicant, as referred to above, is an illustration of this problem. The Commissioner also raised serious concerns about the effectiveness of individual applications to the Constitutional Court as a domestic remedy for human rights violations, owing mainly to a systematic resistance of prosecutors and lower courts to comply with its Convention-compliant case-law (section 1.3.2).
18. Stressing the seriousness and urgency of the matter, the Commissioner recommended to the Turkish authorities, as a first step, to revert to the situation before the state of emergency in terms of constitutional and structural guarantees for the independence of judges and procedural fair-trial guarantees, and to reinforce them progressively. She also recommended a complete overhaul of the Turkish Criminal Code and Anti-Terrorism Law in the light of extensive guidance already provided by Council of Europe bodies.
19. Notwithstanding the need for these reforms, the Commissioner found that the main problem presently affecting the criminal justice system was the prevailing attitude within the judiciary stemming from a lack of independence and from partiality to political interests. Noting that training of judges and prosecutors, while necessary, has not so far proved enough to resolve these issues, she called on the Turkish executive to change course and start scrupulously respecting the independence of the judiciary in words and deeds, to respect decisions of courts which go against the executive's interests, and to implement measures to protect judges from reprisals and to encourage them in an institutionalised manner to privilege human rights over other interests.
20. Having examined the authorities' Judicial Reform Strategy and the first measures taken under it (section 1.4 of the report), the Commissioner considered that they fell far short of the comprehensive and resolute response needed given the gravity of the situation.

21. As regards civil society and human rights defenders, the Commissioner observed an increasingly challenging and hostile atmosphere affecting them, where the authorities display a predominantly negative attitude, including targeting and prosecuting them as criminals and terrorists for their legitimate and essential human rights work. The Commissioner made a number of recommendations regarding the regulatory framework affecting NGOs (sections 2.1.1 and 2.1.2), notably to curb excessive administrative discretion regarding the regulation of their activities. The Commissioner paid particular attention to the devastating impact of a number of sweeping measures taken during the state of emergency concerning NGOs, and called on the Turkish authorities to neutralise these effects, as well as to review their practice in view of numerous reports concerning the misuse of inspections and audits (section 2.1.3).
22. Of direct relevance to the general measures necessary to execute the present judgment, the Commissioner expressed her deep concern about an escalating political discourse targeting human rights defenders, smear campaigns against them in pro-government media amounting to defamation and hate speech, as well as the heavy influence of this discourse on the attitudes of administrative authorities, but increasingly also of the judiciary. She urged Turkish officials at all levels to refrain from using such discourse and stigmatising language equating human rights defenders with criminals and terrorists (section 2.2.1).
23. The Commissioner stated that criminal proceedings targeting human rights defenders was the most acute symptom of the mounting pressure they face in the country (section 2.2.2). Citing many examples of criminal investigations, proceedings, detentions and sentences imposed on human rights defenders, she found that these were too numerous and systematic to be considered individual occurrences, but that they instead pointed to a widespread pattern of misusing the judicial process to silence human rights defenders and discourage civil society activism. It was clear to the Commissioner that prosecutors and judges ignored or deliberately disregarded the relevant international standards, notably by re-interpreting legitimate activities human rights defenders ordinarily undertake in a democratic society as evidence of criminal activity, often with the encouragement of public officials at the highest level to that effect. Noting that these concerns are intimately tied to the problems affecting the judiciary noted above and her corresponding recommendations, she urged the Turkish authorities, including the Council of Judges and Prosecutors, to acknowledge the dire situation faced by human rights defenders and rectify it as an absolute priority.

## Conclusions

24. The Commissioner considers that the execution of the present judgment requires the immediate release of the applicant and the discontinuation of the criminal proceedings against him, since his ongoing detention and the criminal proceedings against him, rather than being distinct from the subject matter of the Court's judgment, are a seamless extension and continuation of the violations found by it.
25. As regards general measures, the Commissioner's extensive work on Turkey indicates that the prevention of similar violations would require Turkey to take a large number of fundamental and far-reaching measures, including but not limited to:
  - re-establishing and reinforcing constitutional and structural guarantees regarding the independence of the judiciary;
  - overhauling criminal legislation in the light of existing guidance by Council of Europe bodies;
  - ensuring that public officials stop interfering with the judicial process by labelling legitimate expressions of dissent and criticism, as well as human rights activism, as criminal activities in a context where the judiciary appears to be increasingly partial to political interests;
  - taking determined action to ensure compliance within the judiciary with elementary fair-trial guarantees and legal principles, in order to curb the widespread phenomenon of a selective and arbitrary application of criminal legislation to discourage and punish lawful acts;
  - taking new measures in order to protect judges from reprisals, such as undue disciplinary proceedings, removals and transfers, and to encourage them in an institutionalised manner to privilege human rights over other interests;

- taking robust action to address the long-standing problem of a non-Convention compliant use of detentions on remand, with a particular view to fundamental problems affecting criminal judgeships of the peace as a judicial formation;
- addressing the serious problems faced by human rights defenders in Turkey, including the regulatory framework concerning civil society and the negative attitude displayed by public officials, administrative and judicial authorities.