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Permanent Representations to the Council of Europe
Strasbourg
France

23 February 2021

Dear Permanent Representative,

THE CASE OF KAVALA v. TURKEY AND THE NEED FOR INFRINGEMENT PROCEEDINGS UNDER ARTICLE 46.4 ECHR

In recent years, Amnesty International has reported extensively on the arbitrary use of criminal law to silence human rights defenders and government critics in Turkey. The ongoing pre-trial detention of Osman Kavala and of Selahattin Demirtaş, despite the European Court of Human Rights' binding judgments ruling for their immediate release, reveals a judicial system unwilling to safeguard the protection of human rights.¹

In the absence of any progress towards the release of Mr Kavala, as requested by the Court's December 2019 judgment, and despite a strongly worded Interim Resolution and two decisions of the Committee of Ministers, Amnesty International is urging Council of Europe member states to support the initiation of infringement proceedings under article 46 § 4 in the case of *Kavala v. Turkey*.

Additionally, the Committee of Ministers should, at their 9-11 March meeting on implementation of judgments, call on Turkey to immediately release Selahattin Demirtaş, as requested by the Grand Chamber in December 2020². His arbitrary detention for the last four years must urgently come to an end.

The case of Osman Kavala

In its 10 December 2019 judgment, the Court considered that the pre-trial detention and other measures taken against Osman Kavala pursued "an ulterior purpose" namely, to reduce him to silence as an NGO activist and a human rights defender. The Court found that those measures were likely to have a dissuasive effect on the work of human rights defenders and called on Turkey to "take every measure to put an end to his detention and to secure his immediate release".³ The Court further concluded that the Constitutional Court did not rule "speedily" on the lawfulness of his detention within the meaning of Article 5 §4 of the ECHR with regard to the duration of the Constitutional Court's review of the legality of the detention order.⁴

¹Amnesty International Rule 9.2 Communication to the Committee of Ministers on the implementation of *Kavala v. Turkey*, 19 May 2020.

² Selahattin Demirtaş v. Turkey (No. 2), (Application no. [14305/17](#))

³ Case of Kavala v. Turkey, Application no. 28749/18, 11 May 2020, Para 231-232: The Court found a violation of Article 18 in conjunction with Article 5 § 1(c)ECHR; see Court Conclusions, paragraph 7.

⁴ Case of Kavala v. Turkey, (Application no. 28749/18), 11 May 2020, Para 196.

Amnesty International welcomes the Council of Europe Committee of Ministers' Interim Resolution⁵ adopted in December in the case of *Kavala v. Turkey*, strongly urging the authorities, for the third time, "to assure the immediate release of Osman Kavala" deprived of his liberty since October 2017. The Committee once again found the "strong presumption that the applicant's current detention is a continuation of the violations found by the Court". It regretted the lack of progress on the "determination by the Constitutional Court of the applicant's complaint lodged on 4 May 2020" and urged the authorities to "take all steps at their disposal to ensure that the Constitutional Court completes its examination of the applicant's complaint without further delay and in a manner compatible with the spirit and conclusions of the Court's judgment."

The sequence of criminal proceedings against Mr. Kavala, following the Court's judgment and the Committee of Ministers' Decisions of September and October 2020 and its December 2020 Interim Resolution, confirm that Osman Kavala's current detention consists of an extension of the violations found by the Court. More information on the judicial proceedings against Mr Kavala is available in the Annex to this letter.

In her address to the Parliamentary Assembly in January 2021, the Secretary General of the Council of Europe Marija Pejčinović Burić noted the Turkish Constitutional Court's refusal to release Osman Kavala and his detention as "utterly wrong", and pointed out the need for "enhancing efficiency, effectiveness and tangible impact in implementation of judgments."⁶ Also the Chair of the Committee of Ministers, German Minister of Foreign Affairs Heiko Maas, called on Turkey to "immediately release Osman Kavala and other political prisoners, in line with the ruling of the European Court of Human Rights."⁷ To the Parliamentary Assembly, Mr Maas stressed the priority given by the Chairmanship to the implementation of judgments and the possibility of using "other options we have to increase the pressure on defaulting Member States and we will also work towards their application if necessary".⁸

The Parliamentary Assembly has also called on Turkey to release Osman Kavala"⁹ and stressed that "the legal obligation for the State Parties to the Convention to implement the Court's judgments is binding on all branches of State authority and cannot be avoided through the invocation of technical problems or obstacles which are due, in particular, to the lack of political will, lack of resources or changes in national legislation, including the Constitution."¹⁰ The Assembly urged the Committee of Ministers to "use once again the procedures provided for in Article 46, paragraphs 3 to 5, of the Convention, in the event of implementation of a judgment encountering strong resistance from the respondent State."¹¹

Turkey's continuous imprisonment of Osman Kavala is contrary to its obligation to secure to everyone within its jurisdiction the rights and freedoms enshrined in the ECHR, as provided in its Article 1. The sequence of new, baseless, and inconsistent criminal procedures pursued against Mr Kavala since the Court's judgment in 2019, and the lack of action by the Constitutional Court to ensure his release, confirm the political nature of his persecution. It further shows an unacceptable contempt for the Court and for the Committee of Ministers. Such refusal to abide by the final judgment must meet the strongest resolve by the Committee of Ministers through the initiation of infringement proceedings under Article 46 § 4 of the ECHR.

The case of Selahattin Demirtaş

Decisive and urgent action by the Committee of Ministers is further needed in the case of Selahattin Demirtaş v. Turkey (no. 2), at its March 2021 DH Meeting. Selahattin Demirtaş, a prominent former parliamentarian and co-chair of the Peoples' Democratic Party, has been remanded in pre-trial detention for more than four years. In December 2020, the Grand Chamber found that his detention "pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society" and that he was deprived of his liberty because of exercising his Convention rights, in violation of Article 18 in conjunction with Article 5 of the

⁵ Committee of Ministers Interim Resolution CM/ResDH(2020)361, 3 December 2020.

⁶ Address by the CoE Secretary General, Opening of the first part-session of the Parliamentary Assembly, Strasbourg 25 January 2021.

⁷ Speech by German Foreign Minister Heiko Maas, German Bundestag debate on the 14th Human Rights Report of the Federal Government, December 2020.

⁸ See PACE debate with the Chair of the Committee of Ministers, 26 January 2021, verbatim record.

⁹ PACE Resolution 2357 (2021), Para 10.13.

¹⁰ PACE Resolution 2358 (2021) on the Implementation of Judgments of the European Court of Human Rights.

¹¹ PACE Recommendation 2193 (2021), para 2.2.

ECHR.¹² The Committee of Ministers should call on Turkey to immediately and unconditionally release Selahattin Demirtaş' and ensure that he can be brought to the position he would have enjoyed had the violations not occurred.

The Committee of Ministers must remain committed to tackling the systemic failures that enable the prolonged arbitrary detention for "ulterior motives" of Osman Kavala and Selahattin Demirtaş. General measures are urgently needed to ensure the independence of the judiciary, including by removing political pressure on judges and prosecutors. This would contribute to end the prolonged and arbitrary prosecution and detention of human rights defenders, lawyers, politicians, journalists, writers, and others solely for exercising their rights to freedom of expression, association and peaceful assembly.

Political persecution cannot be tolerated in Council of Europe Member States. It is the duty of the Committee of Ministers to ensure that the release of Osman Kavala and Selahattin Demirtaş are its foremost priority.

Yours sincerely,



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Europe Director
Amnesty International

¹² Case of Demirtas v Turkey (No.2), (Application no. 14305/17), Grand Chamber Judgement, 22 December 2020, para 339 and 437.

ANNEX

A chronology of events in the criminal proceedings against Osman Kavala since the European Court of Human Rights' (ECtHR) judgment on Kavala v. Turkey of 10 December 2019

Since his detention in October 2017, Osman Kavala has been remanded in prison under three separate charges: Article 309 (attempting to overthrow the constitutional order – relating to the allegations regarding the 2016 failed coup), Article 312 (attempting to overthrow the government – relating to the allegations regarding the 2013 Gezi Park protests) and Article 328 (espionage). He is currently remanded in pretrial detention under Art 328; having been acquitted of the Gezi Park related charges and having been detained for two years without an indictment under charges relating to the failed coup. In its ruling in December 2019, the ECtHR addressed the violation of Osman Kavala's rights in relation to his pre-trial detention under both articles 309 and 312.

The events that followed the ECtHR's judgment, as well as the Committee of Ministers' Decisions of September and October 2020 and its December 2020 Interim Resolution¹³, confirm that Osman Kavala's current detention and the relentless judicial harassment he has been facing consist of an extension of the violations found by the Court:

- On 18 February 2020, Osman Kavala was acquitted by the Istanbul Heavy Penal Court No.30 from the charge of "attempting to overthrow the government with violence and force" under Article 312 of the penal code and of all other charges in relation to the Gezi Park protests together with eight other civil society figures. Instead of being released¹⁴ he was detained and remanded in pre-trial detention the next day on the charge of 'attempting to overthrow the constitutional order' under Article 309¹⁵ of the Penal Code by decision of an Istanbul Criminal Judgeship of Peace, despite the absence of any evidence against him. Council of Europe Commissioner for Human Rights Dunja Mijatovic then described the arrest of Osman Kavala as 'amounting to ill-treatment.'¹⁶ The Secretary General of the Council of Europe Marija Pejčinović Burić wrote to the Turkish Minister of Justice inquiring on the disciplinary investigation initiated against the three judges who had acquitted Osman Kavala.¹⁷
- Following a new indictment accepted on 9 October 2020, and on the basis of charges that had been considered insufficient and rejected by the ECtHR in its December 2019 judgment, Osman Kavala faces a life sentence without the possibility of parole for 'attempting to overthrow the constitutional order' (Art 309) and up to 20 additional years of imprisonment for 'espionage' (Art 328).¹⁸
- On 29 December 2020, the Constitutional Court ruled that Osman Kavala's current detention did not violate his right to liberty and security.¹⁹ This was the second time the Constitutional Court rejected Mr Kavala's application regarding the legality of his pre-trial detention.
- In its judgment of 22 January 2021, the Istanbul Regional Court of Appeals overturned the February 2020 acquittals of Osman Kavala and eight other civil society figures in relation to the Gezi events disregarding that the ECtHR had found that Kavala's arrest and pre-trial detention took place in the absence of evidence to support a reasonable suspicion he had committed an offence (violation of article 5, paragraph 1 of the ECHR) .
- On 5 February 2021, in line with the Regional Appeals Court's recommendation, the Heavy Penal Court No. 36 ruled to merge Osman Kavala's prosecution on the accusations of 'attempting to overthrow the constitutional order'

¹³ CM/Del/Dec(2020)1377bis/H46-38, 3 September 2020; CM/Del/Dec(2020)1383/H46-22, 1 October 2020; Interim Resolution CM/ResDH (2020)361, 3 December 2020.

¹⁴ Amnesty International Rule 9.2 Communication to the Committee of Ministers in the case of Kavala v Turkey, 19 May 2020.

¹⁵ Note: Osman Kavala was first detained under Art 309 of the penal code in 2017 when he was remanded in pre-trial detention. In Kavala v. Turkey, the Court examined the violation of his rights in relation to both Art 309 and 312. No indictment was drawn up under Art 309 during the first two years of his pre-trial detention, the time limit that a person can be held in prison pending trial. Thus, on 11 October 2019, Osman Kavala's pre-trial detention under Art 309 was lifted by decision of the prosecutor. This charge was then reintroduced following his acquittal and lifted again on 20 March 2020 after he was remanded under Art 328 (espionage) on 9 March 2020.

¹⁶ <https://www.coe.int/en/web/commissioner/-/the-reaction-of-the-council-of-europe-commissioner-for-human-rights-to-the-re-arrest-of-osman-kavala>

¹⁷ <https://rm.coe.int/20200221-abdulhamit-gul-minister-of-justice-turkey/16809c93de>. In their communications to the Committee of Ministers, the Turkish authorities have stated that the disciplinary process was still ongoing.

¹⁸ <https://www.amnesty.org/en/latest/news/2020/12/turkey-authorities-urged-do-the-right-thing-and-free-osman-kavala/>

¹⁹ <https://www.amnesty.org/en/latest/news/2020/10/turkey-istanbul-court-accepts-absurd-new-indictment-against-osman-kavala/>

and ‘espionage’ with the Gezi Park prosecution in which the acquitted civil society actors and Osman Kavala will be tried again on the charge of ‘attempting to overthrow the government’. The decision to merge the two prosecutions undermines the government’s argument that the espionage charge under which Osman Kavala is currently detained is separate and different to those examined by the ECtHR in its *Kavala v Turkey* judgment.

- While the court hearing was taking place on 5 February 2021, President Erdogan publicly called Osman Kavala a representative of George Soros in Turkey and blamed his wife, distinguished scholar Prof. Ayşe Buğra, of being among those provoking the ongoing student protests at the Boğaziçi University where she teaches.²⁰ Since Mr Kavala’s detention in October 2017, President Erdoğan has made various public comments coinciding with key moments in the judicial proceedings against Mr. Kavala, which were considered by the ECtHR in its judgment finding a violation of Article 18 of the ECHR.

20 “Erdogan Blames Jailed Philanthropist’s Wife for Stirring Protest”, 5 February 2021.