



Reference: **TIGO IOR 10/2021.1996**

Permanent Representations to the Council of Europe
Strasbourg
France

1 September 2021

Dear Permanent Representative,

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

Further to our letter dated 23 February 2021, I am writing to you to renew our call for the initiation of infringement proceedings under article 46 § 4 of the European Convention on Human Rights (ECHR) in the case of Kavala v. Turkey at the forthcoming 1411th DH meeting of the Committee of Ministers on execution of judgments to be held from 14 to 16 September.

The absence of any progress towards the release of Osman Kavala, who instead has been subjected to further judicial harassment, despite of the European Court of Human Rights' binding judgment, six decisions and an Interim Resolution by the Committee of Ministers calling for his immediate release, is symptomatic of a judicial system unwilling or unable to safeguard against political persecution.¹

Additionally, the Committee of Ministers should, at their 14-16 September DH meeting, call on Turkey to immediately release Selahattin Demirtaş, as requested by the Grand Chamber in December 2020². His arbitrary detention for the last five 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 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

Amnesty International welcomes the Committee of Ministers' latest decision adopted at its 1406th meeting held on 7-9 June reiterating the Committee's previous decisions and interim resolution which considered 'a strong presumption that [Osman Kavala's] current detention is a continuation of the violations found by the Court'. In the absence of any progress, the Committee further affirmed its determination "to ensure the implementation of the judgment through all the means at the

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

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

³Case 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.

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

disposal of the Organisation, including if necessary infringement proceedings under Article 46 § 4 of the Convention' if the applicant is not released.⁵ Yet, on 2 August, Turkey's judicial authorities have instead decided to merge the recently combined Gezi Park/espionage prosecutions with the unrelated retrial in the so-called Çarşı case, a long standing prosecution of 35 football supporters for their alleged participation in the 2013 Gezi Park protests. Although all 35 individuals had been acquitted in the first trial that concluded in December 2015, in March this year the Court of Cassation overturned the acquittals, recommending for reasons of 'legal and material connections' the joinder with the ongoing Gezi Park prosecution in which Osman Kavala and eight others⁶ saw their acquittals overturned in the Regional Appeals Court in January 2021.

This latest development is indicative of the authorities' determination to keep Osman Kavala in pre-trial detention for as long as possible, entangled in an ever more complex mass trial of 52 defendants. Clearly, this latest decision does not aim at serving the purposes of justice, but rather at delaying and impeding it. (See more details on these developments in the Annex to this letter).

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, the lack of action by the Constitutional Court to ensure his release, and the manner in which the judiciary is running roughshod of the most fundamental tenets of independence and impartiality, as displayed in the latest court decision to merge entirely unrelated cases, 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 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 sequence of criminal proceedings against Mr. Kavala, following the Court's judgment and the Committee of Ministers' Decisions of September and October 2020, March, April, May and June 2021 and its December 2020 Interim Resolution, confirm that Osman Kavala's current detention consists of an extension of the violations found by the Court. 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 along with measures that protect and enable the work of human rights defenders. The Committee of Ministers must consider, in the implementation of the Kavala judgment, that the "ulterior purpose" found by the Court was to reduce Osman Kavala to silence as an NGO activist and human rights defender, which would likely have a dissuasive effect on the work of human rights defenders. Consequently, it is for the Committee of Ministers as well to see that the implementation of this judgment includes measures addressing the increasing obstacles that many other human rights defenders in Turkey face for doing critical human rights work. This would contribute to end the judicial harassment, 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.

Furthermore, I take this opportunity to also urge the Committee of Ministers to take urgent and decisive action in the case of Selahattin Demirtaş v. Turkey (no. 2), at its September 2021 DH Meeting. Selahattin Demirtaş has been remanded in pre-trial detention for almost five 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 ECHR.⁷ At its forthcoming September meeting, 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.

⁵ CM Notes 1406/H46-31 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a29b7a

⁶ The Gezi Park trial of 16 defendants including Osman Kavala began in June 2019 and ended with the acquittals of Osman Kavala and eight others in February 2020. The remaining seven defendants' case was separated on grounds of being abroad during the trial. Following the decision of the Istanbul Regional Court (1st instance appeal court) overturning the acquittals all 16 were subjected to a retrial.

⁷ Case of Demirtaş v Turkey (No.2), (Application no. 14305/17), Grand Chamber Judgement, 22 December 2020, para 339 and 437.

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,

A handwritten signature in black ink that reads "Nils Muižnieks" followed by a horizontal line.

Nils Muižnieks
Europe Director
Amnesty International

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) of the Penal Code. 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 December 2019 ruling, the ECtHR addressed the violation of Osman Kavala's rights in relation to his pre-trial detention under both articles 309 and 312 of the Penal Code.

The events that followed the ECtHR's judgment, as well as the Committee of Ministers' Decisions of September and October 2020, March, April, May and June 2021, and its December 2020 Interim Resolution⁸, 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 released⁹ he was detained and remanded in pre-trial detention the next day on the charge of 'attempting to overthrow the constitutional order' under Article 309¹⁰ of the Penal Code by decision of an Istanbul Criminal Judgeship of Peace, despite the absence of any evidence brought against him. Council of Europe Commissioner for Human Rights Dunja Mijatovic then described the arrest of Osman Kavala as 'amounting to ill-treatment.'¹¹ 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.¹²
- 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).¹³
- On 29 December 2020, the Constitutional Court ruled that Osman Kavala's current detention did not violate his right to liberty and security.¹⁴ 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 the ECtHR's finding that Kavala's arrest and pre-trial detention had taken place in the absence of evidence to support a reasonable suspicion that 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' 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. With

⁸ CM decisions in relation to *Kavala v. Turkey* (Application No. 28749/18) .

⁹ Amnesty International Rule 9.2 *Communication to the Committee of Ministers in the case of Kavala v Turkey*, 19 May 2020.

¹⁰ 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.

¹¹ <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>

¹² <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.

¹³ <https://www.amnesty.org/en/latest/news/2020/12/turkey-authorities-urged-do-the-right-thing-and-free-osman-kavala/>

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

¹⁴ <https://www.reuters.com/article/turkey-security-kavala-idINKBN2930TE>

this decision, the prosecution was taken over by the Istanbul Heavy Penal Court No. 30, the court responsible for the Gezi Park trial.

- 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.¹⁵ 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.
- On 21 May 2021, the first hearing for the merged prosecution¹⁶ took place at the Istanbul Heavy Penal Court No. 30. The Court ruled to keep Osman Kavala in pre-trial detention and requested to join the (already merged) prosecution with the prosecution of 35 Beşiktaş Football Club supporters (Çarşı group) whose acquittals in 2015 were overturned by the Court of Cassation in April 2021. In reaching its decision, the Court of Cassation had stated that the judicial and de facto link between the Çarşı prosecution and the Gezi Park retrial must be considered, recommending the two cases be merged. At a hearing held on 12 July 2021, the Istanbul Heavy Penal Court No. 13 in charge of the Çarşı prosecution, accepted the Court of Cassation's ruling to overturn the 2015 acquittals but postponed the decision to join the case with that of the Gezi Park retrial, pending submissions to the court by the defendants' legal representatives.
- On 15 July, the request for the joinder was sent by the presiding judge of the Istanbul Heavy Penal Court No. 30 to the Istanbul Heavy Penal Court No. 13. The judicial holiday began on 20 July 2021. In order to deal with urgent matters during the judicial holiday, such as the review of pre-trial detention, judges are temporarily appointed to other courts. On 28 July, the presiding judge of the Istanbul Heavy Penal Court No. 30 who had sent the joinder request to the Istanbul Heavy Penal Court No. 13 and who had been temporarily appointed to the latter court, ruled to accept the joinder request. In other words, the temporary judge approved his own request on behalf of a different court, whilst ignoring the previous decision of the Heavy Penal Court No. 13 to consider defence counsels' submissions regarding the joinder.
- On 2 August, four days before the scheduled hearing in the merged Gezi/espionage prosecution of 6 August, an unscheduled hearing was held by the Istanbul Heavy Penal Court No. 30, ruling to continue Osman Kavala's pre-trial detention and to transfer the case to Istanbul Heavy Penal Court No. 13. The next hearing in the merged prosecution in which there are now 52 defendants¹⁷ will be held on 8 October 2021.

¹⁵ "Erdogan Blames Jailed Philanthropist's Wife for Stirring Protest", 5 February 2021.

¹⁶ The merger between the Gezi Park retrial in which Osman Kavala is facing charges of attempting to overthrow the government (Art 312 of the TPC) and the prosecution of Osman Kavala and Henri Barkey in which they are accused of espionage (Art 328 of the Turkish penal code) and attempting to overthrow the constitutional order (Art 309 of the TPC).

¹⁷ 35 individuals from Çarşı, 16 including Osman Kavala in the Gezi Park trial and Henri Barkey).