



Reference: **TIGO IOR 10/2021.2345**

Permanent Representations to the Council of Europe
Strasbourg, France

18 November 2021

Dear Permanent Representative,

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

I am writing to you once more to ask for your support to 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 1419th DH meeting of the Committee of Ministers on execution of judgments to be held from 30 November to 2 December.

At the time of writing this letter, Osman Kavala remains in arbitrary pre-trial detention in the Silivri prison for over four years while in Strasbourg the European Court for Human Rights faces difficult questions as to its authority. Clearly, the time has come for the Council of Europe and its member states to take charge of their shared responsibility to protect and uphold the European Convention's system by ensuring the implementation of this binding judgment with the release of Osman Kavala. This is all the more necessary to avoid that political persecution becomes normalized as a routine item of ordinary meetings of institutions designed precisely to prevent such gross human rights abuses.

The flagrant absence of any progress by the Turkish authorities to implement this judgment must lead to the consequences foreseen in the Convention. Osman Kavala has been subjected to continuous and renewed judicial harassment, despite the European Court of Human Rights' binding judgment, seven decisions and an Interim Resolution by the Committee of Ministers calling for his immediate release. Clearly, the diplomatic 'crisis' and intimidatory tactics that followed the joint statement by the ambassadors of various Council of Europe member states, the observers to the Committee of Ministers' Canada and the United States, and New Zealand on 18 October, marking Osman Kavala's four years of arbitrary detention, should not lead to the weakening of the Committee of Ministers response' and on the contrary, should trigger a bolder reaction to defend and uphold the authority of the Court.

The case of Osman Kavala

In its 10 December 2019 judgment, the Court considered that the pretrial 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".¹ 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.²

¹ *Case of Kavala v. Turkey*, Application no. 28749/18, became final on 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.

² *Idem*, Para 196.

Amnesty International welcomes the Committee of Ministers' last decision, adopted at its 1411th meeting held on 14-16 September, noting that "the failure of the Turkish authorities to remove the negative consequences for the applicant of the violations found by the Court, in particular to ensure the applicant's immediate release, despite the Committee's repeated appeals, suggests a refusal by the respondent State to abide by the final judgment of the Court in the present case". The Committee decided "that it is necessary, in order to ensure the implementation of the judgment, to make use of proceedings under Article 46 § 4 of the Convention, and expressed their resolve to serve formal notice on Turkey of their intention to commence these proceedings in accordance with Article 46 § 4 of the Convention at their 1419th meeting (30 November – 2 December 2021) (DH), in the event that the applicant is not released before then." ³

The diplomatic crisis in October further highlighted the politically motivated nature of Osman Kavala's imprisonment, with the President making several highly prejudicial comments targeting Osman Kavala.⁴ These statements have further undermined his fair trial rights including the right to be presumed innocent until proven guilty. Following the Turkish President's public comments, Osman Kavala announced his decision to stop appearing in court and presenting a defence, having lost his trust that he may receive a fair trial. Meanwhile, the prosecution of Osman Kavala continues with a new, inexplicably merged trial in which he is one of 52 defendants. This trial began on 8 October, with the second hearing scheduled for 26 November. This new prosecution is indicative of the authorities' determination to keep Osman Kavala in pre-trial detention for as long as possible.

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, June and September 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.

Political persecution must not be tolerated in Council of Europe Member States. It is the duty of the Committee of Ministers to launch infringement proceedings under art 46.4 of the ECHR in the case of Kavala v. Turkey to ensure the release of Osman Kavala, and to exercise its responsibility to protect and uphold the European Convention on Human Rights.

Yours sincerely,

Nils Muižnieks



Europe Director, Amnesty International

³ 1411th meeting, 14-16 September 2021 (DH), Kavala (Application No. [28749/18](#)) and Mergen and Others group (Application No. [44062/09](#)) v. Turkey; <http://hudoc.exec.coe.int/ENG?i=004-55161>,

⁴ <https://www.ft.com/content/01510667-6b38-48f9-ab61-0971c216c454>

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 Resolution⁵, 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 released⁶ he was detained and remanded in pre-trial detention the next day on the charge of 'attempting to overthrow the constitutional order' under Article 309⁷ 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.'⁸ 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.⁹
- 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).¹⁰
- On 29 December 2020, the Constitutional Court ruled that Osman Kavala's current detention did not violate his right to liberty and security.¹¹ 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

⁵ CM decisions in relation to *Kavala v. Turkey* (Application No. 28749/18) .

⁶ Amnesty International Rule 9.2 *Communication to the Committee of Ministers in the case of Kavala v Turkey*, 19 May 2020.

⁷ 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.

⁸ <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>

⁹ <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.

¹⁰ <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/>

¹¹ <https://www.reuters.com/article/turkey-security-kavala-idINKBN2930TE>

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 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.¹² 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 prosecution¹³ 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 first hearing in the merged prosecution in which there are now 52 defendants¹⁴ was held on 8 October when the Court decided on a majority of two to one to continue the pre-trial detention of Osman Kavala. The next hearing will take place on 26 November 2021
- On 18 October, ambassadors of USA, Canada, Germany, France, the Netherlands, Denmark, Sweden, Finland, Norway, and New Zealand issued a public statement¹⁵ calling on Turkey to release Osman Kavala in line with the binding ruling of the European Court of Human Rights. The ambassadors were called to a meeting with Turkey's Foreign Affairs Minister the next day. On 21 October, President Recep Tayyip Erdogan responded with a public demand that the Minister of Foreign Affairs declare the ambassadors 'persona non grata', referring to Osman Kavala as 'Soros leftover'. The next day, Osman Kavala issued a statement regarding his decision to no longer attend the hearings in the trial or present a defence. A further statement issued by some embassies on 25 October reiterated the signatory countries' commitment to the Vienna Convention on Diplomatic Relations and to human rights. In Turkey, this was presented as a step back by the ten countries and a diplomatic victory for President Erdogan.

¹¹ "Erdogan Blames Jailed Philanthropist's Wife for Stirring Protest", 5 February 2021.

¹³ 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).

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

¹⁵ <https://tr.usembassy.gov/statement-on-four-years-of-osman-kavalas-detention/>