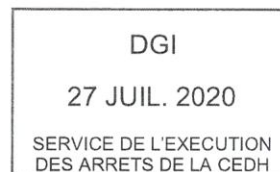


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**To the Chair of the Ministers' Deputies  
Committee of Ministers of the Council of Europe**

**Kavala v. Turkey (28749/18)**

Upon learning from the calendar of the Council of Europe that your esteemed Ministers' Deputies will meet on 1-3 September 2020 to review the judgment of the Second Section of the European Court of Human Rights dated 10 December 2019 and numbered 28749/18 and that the Committee of Ministers of the Council of Europe will meet on 1-3 September 2020 to make an assessment on the said case and relevant communications, we would like to submit this communication, considering it necessary to provide detailed information about our client, Osman Kavala, to Your Excellency.

Our client, Osman Kavala, will be able to gain his freedom as quickly as possible, and the charges brought continuously against him will thus be dropped by virtue of the decision to be given by your High Esteemed Deputies. As you are aware, our client is still detained despite the judgment of the Second Section of the European Court of Human Rights dated 10 December 2019, which stated in its conclusion that **the respondent State should secure the immediate release of Osman Kavala**. The current status of our client violates the core, essence, and several principles of the European Convention on Human Rights.

The details of the continuing violation can be explained as follows:

1- Our client was arrested on 18 October 2017 and placed in pre-trial detention on 1 November 2017. The decision of pre-trial detention was issued on charges of "attempting to overthrow the constitutional order and the Government of the Republic of Turkey or to prevent it from exercising its functions," without specifying the articles of the Turkish Criminal Code (hereinafter referred to as "TCC"). These offences are listed under Articles 309(1) and 312(1) of the TCC.

Accordingly, our client has been detained with restricted rights and freedoms in Istanbul Silivri Prison for two years and nine months.

2- Despite the judgments of the European Court of Human Rights and the Istanbul 30<sup>th</sup> High Criminal Court issued in favor of our client during this long period of detention, it is obvious that the judicial bodies of the Republic of Turkey do not act according to the legal consequences of these judgments in the first place.

It is because:

a- The period of pre-trial detention of our client has been continuing for two years and nine months without any interruption. Although the charges filed against our client during this process were related to a single incident and its components, judicial bodies have unlawfully extended this long period of pre-trial detention, which has already lasted for two years and nine months, merely by changing the articles of the TCC to be used as legal basis for detention each time. Detention is an integral process just like prison sentences; thus it is entirely inappropriate and grossly unjust to file other charges merely by changing the articles and the nature of the incidents and actions in the course of this process.



b- By acting this way, i.e. first making allegations of violation of Articles 309 and 312 of the TCC and then later on, of Article 328 of the TCC, the judicial bodies of the Republic of Turkey clearly violate Article 102(4) of the Code of Criminal Procedure (hereinafter referred to as "CCP").

Article 102(4) of the CCP provides as follows:

"The period of detention at the investigation phase shall not exceed six months for offences that do not fall under the jurisdiction of high criminal courts, and one year for offences that fall under the jurisdiction of high criminal courts. However, for the offences defined under Sections 4, 5, 6, and 7 of Chapter 4 of Volume 2 of the Turkish Criminal Code, the offences under the Anti-Terrorism Law, and collective offences, the period of detention shall be a maximum of one year and six months and may be extended for an additional six months by explaining the justifying reasons."

As can be clearly seen in the article, the period of detention shall not exceed two years, regardless of the nature of the alleged offence, whereas, our client has already been detained for two years and nine months.

3- The Istanbul 30<sup>th</sup> High Criminal Court issued an Acquittal Decision about our client on 18 February 2020. Since there shall be no detention in any proceedings after an Acquittal Decision is given by the court of competent jurisdiction, our client's status should have changed from detainee to released as of the abovementioned date.

4- Nevertheless, the judiciary organs have taken a completely different route and our client, who was ordered to be released upon the Acquittal Decision issued on 18 February 2020, was not released, but instead was taken into custody in the evening of the same day, and another decision of pre-trial detention was promptly given on 19 February 2020. Moreover, we would like to state that the decision of pre-trial detention issued on 19 February 2020 has no legal basis. It is entirely unfounded and unlawful.



Forasmuch as:

5- The criminal proceedings in which our client was acquitted and ordered to be released on 18 February 2020 were based on Article 312(1) of the TCC.

The mentioned article provides as follows:

"Article 312(1) of the TCC: Anyone who attempts to overthrow the Government of the Republic of Turkey by force and violence or to prevent it, whether fully or in part, from discharging its duties shall be sentenced to aggravated life imprisonment."

Following the decision of pre-trial detention issued pursuant to the specified article, the Bill of Indictment against our client was issued on 19 February 2019 based only on the charges defined under Article 312(1) of the TCC. Thereupon, the proceedings were conducted in the Istanbul 30<sup>th</sup> High Criminal Court on the basis of the alleged violation of Article 312(1), and ended with an Acquittal.

6- Taking notice of this situation, the judicial organs ex officio (directly) removed the order of pre-trial detention issued on 11 October 2019 in regard with the alleged violation of Article 309(1) of the TCC.

7- In brief, with respect to the decision of pre-trial detention issued on the basis of Articles 309(1) and 312(1) of the TCC, the detention pursuant to Article 309(1) of the TCC was ended on 11 October 2019, and only the detention pursuant to Article 312(1) of the TCC, which was mentioned in the Bill of Indictment, remained.

The latter was ended with the acquittal decision issued on 18 February 2020; which means that, on 18 February 2020, there was no decision of pre-trial detention based on any articles of the TCC in effect against our client.

8- Yet despite this clear fact, our client was not released on 18 February 2020, but arrested and again placed in pre-trial detention on 19 February 2020. This time, the basis



for the detention was alleged to be the violation of Article 309(1) of the TCC, which previously provided the basis for the order of pre-trial detention that was released by the prosecutor's ex officio decision on 11 October 2019.

9- The mindset that law is "a system that violates rights and freedoms of individuals" has not ended. The Istanbul 10<sup>th</sup> Criminal Judgeship of Peace was given another order of pre-trial detention against our client on 9 March 2020 on the basis of Article 328 of the TCC, instead of Article 309(1) of the TCC. Article 328 of the TCC provides as follows:

"A person who secures information that, due to its nature, must be kept confidential for reasons relating to the security or domestic or foreign political interests of the State, for the purpose of political or military espionage, shall be sentenced to a penalty of imprisonment for a term of fifteen to twenty years.

In the event that the offence is committed:

- a) to serve the interest of a country at war with Turkey, or
  - b) during wartime or such that it jeopardises the State's preparations for war or effectiveness in war or its military movements,
- the offender shall be sentenced to a penalty of aggravated life imprisonment."

It should be again emphasized that, our client was first detained on 1 November 2017 pursuant to Articles 309(1) and 312(1) of the TCC without specifying the article numbers in the detention order. Then, a Bill of Indictment was issued for the same file on 19 February 2019 only with respect to the alleged violation of Article 312(1) of the TCC. At the end of the same year, on 11 October 2019, the detention pursuant to Article 309(1) was ex officio removed. On 18 February 2020, an order of release was given together with the acquittal decision against the allegation of the violation of Article 312(1) of the TCC. Yet, on 19 February 2020, another order for pre-trial detention was given on the basis of Article 309(1) of the TCC. Nevertheless, the allegation regarding the violation of Article 309(1) of the TCC was once again revoked 20 days later, and another order of pre-trial detention was given alleging the violation of Article 328 of the TCC.



10- This picture reveals a flagrant violation of the law in general and of Turkish legislation and the European Convention on Human Rights in particular. It is one of the reasons of this communication being submitted to the Esteemed Council of Europe and the Committee of Ministers.

11- Our client, Osman Kavala, has unfortunately been detained since 20 March 2020 on the basis of an allegation with respect to Article 328 of the TCC, defining the crime of espionage. However, as is displayed in this communication, Turkish judiciary have only focused on a single incident and its components since 2017. This incident is related to the reorganization of the Taksim Gezi Park, its closure to pedestrians, and the construction of a large building on the park and includes the protests that took place between June and September 2013. These protests and the incident have been constantly under judicial review and investigation since 18 October 2017, at the time when our client was detained. It is utterly wrong to turn this matter into a case of espionage and not to provide any justifications so far or provide concrete evidence indicating espionage in terms of the people, places and time involved. It is likewise thoroughly unlawful to extend a person's period of detention that has already lasted for two years and nine months, by asserting an allegation of espionage simply in the last six months.

12- Furthermore, in the Judgment of the Second Section of the European Court of Human Rights dated 10 December 2019, the background and facts were explained as a whole, and the acts that were part of this one whole incident were described in relation to one another. For example, in paragraphs 154, and 155 of the judgment of the Second Section of the European Court of Human Rights, actions such as talking to certain people, communicating with them via mobile phone, running into them at a restaurant, and greeting them were explained, and it was noted that those were trivial actions. In short, the



Second Section of the European Court of Human Rights considered the incident as a whole and found that Articles 5 and 18 of the European Convention on Human Rights were violated.

**13-** Based on this judgment, we conclude that the Second Section of the European Court of Human Rights explicitly stated the inappropriateness of the attitude of the Turkish judiciary, in quest of allegations for certain offences and finalizing this drive with detention orders given by constantly changing the articles of the TCC as a basis for those allegations. As a result, continued pre-trial detention violates Article 5 of the European Convention on Human Rights.

**14-** Although the immediate release of our client was ordered in the judgment of the Second Section of the European Court of Human Rights, following a finding of violation, the Istanbul 30<sup>th</sup> High Criminal Court did not take this explicit order into consideration and continued the detention for two months until the acquittal decision. Later on, the Government of the Republic of Turkey filed an appeal against the judgment of the Second Section on 9 March 2020. This appeal was dismissed by the Second Section of the European Court of Human Rights on 12 May 2020, and the judgment of the Court was finalized at the end of this process since the case was not referred to the Grand Chamber.

**15-** Despite the judgment concluding that Articles 5 and 18 of the European Convention on Human Rights were violated and ordering the immediate release of our client, his detention still continues to date. This prolonged detention not only violates the Criminal Code of Procedure, but also displays non-compliance with an international judgment.



16- Those reasonings now being submitted to your Chair of the Ministers' Deputies were respectively submitted to the Presidency of the European Court of Human Rights, the Committee of Ministers of the Council of Europe, and the Office of the Council of Europe Commissioner for Human Rights. These communications are not being submitted as annexes, considering that they have already been included in your file.

17- In our defense during the investigations and proceedings conducted so far, we have, above all, claimed that our client did not act in breach of Article 312 of the TCC. In the reasoning sections of its 318-page judgment, the Istanbul 30th High Criminal Court also clearly stated that Osman Kavala did not commit the abovementioned offence. The court explicitly stated in its reasoning that there was no force or violence used in the incident; that an acquittal was given in another case heard before the Istanbul 33<sup>rd</sup> Criminal Court of First Instance in 2014; that some other defendants were acquitted of charges of being a member of an organization and being a member of an armed terrorist organization; that the report of the Financial Crimes Investigation Committee (MASAK) found that the Gezi events were not financed by the Open Society Foundation or Anadolu Kültür A.Ş.; that the witnesses heard before the court testified in favor of Osman Kavala; and that the communication minutes were not in compliance with the articles of the CCP that were in force on the date of the incident.

18- Certain aspects of the letter sent by the Government of the Republic of Turkey to the Committee of Ministers on 11 June 2020 are in need of further analysis. When compared with our communications, while the Government of the Republic of Turkey pointed out the same matters on a number of aspects regarding the judicial proceedings against Kavala; it is still considered necessary to explain the case to your Chair in its entirety with respect to other aspects.





a- Paragraph 9 of the response of the Government of the Republic of Turkey includes a sentence in stark contrast to the reality. In the last sub-clause of this paragraph it is provided that:

"By the Istanbul 30<sup>th</sup> Assize Court's decision ordering the applicant's acquittal, the detention order ... was lifted on 18 February 2020, and the applicant was released in this respect."

This statement and attitude aim to hide the truth. It is perplexing to view an official authority to make such an inaccurate statement. On the evening of 18 February 2020, the day when he was released and acquitted, our client, Osman Kavala, could not even enter his house for an hour. He was taken from the prison to the Istanbul Police Headquarters, kept in the Istanbul Police Headquarters for a full day under harsh and unpleasant conditions that we did not mention before, and was taken to the court to give statement after spending the whole night under the police detention. Our client was not even willing to share with us the distress and suffering he had to endure during the hours he spent at the Istanbul Police Headquarters. That being the case, it is appalling to see the official letter claiming his actual release. This is a complete misrepresentation.

b- In paragraph 10 of the Government's response, it was stated that our client, Osman Kavala, was taken under police custody on 18 February 2020 on account of the on-going investigation with respect to the offence of "attempting to overthrow the constitutional order of the Republic of Turkey through force and violence" (Article 309 of the TCC) due to his acts related to the coup attempt on 15 July 2016. This is also an inaccurate statement, because as stated in the preliminary paragraphs of this communication, the violation of Article 309 of the TCC was specified as a reason for pre-trial detention for the first time on 1 November 2017 without specifying the article number,



and this allegation was revoked ex officio on 11 October 2019 upon the issuance of the Bill of Indictment on the basis of Article 312(1) of the TCC. It should be emphasized that the allegation of violation of Article 309 of the TCC has now been made for the third time in the response letter of the Government. This statement also includes a misrepresentation, because this time, the violation of Article 328 of the TCC was unfortunately raised as the justification for the detention, instead of Article 309(1) of the TCC.

c- Paragraph 13 of the Government's response states that "The Istanbul Chief Public Prosecutor's Office detected and collected new evidence during the later stages of the on-going investigation as regards to the July 15 coup attempt. The Istanbul Chief Public Prosecutor's Office found evidence indicating that the applicant had committed the offence of 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 and on 9 March 2020 the Chief Public Prosecutor's Office requested the applicant's detention".

It must sadly be noted that this statement is, again, highly inaccurate and was only asserted in an effort to justify the violation of an individual's rights and freedoms. The incident called the Gezi Events took place between June and September 2013, but judicial bodies did not present any concrete evidence indicating the links between Osman Kavala obtaining the confidential information of the State and the time and place of, or the people involved in, the incident up until today. During this judiciary process, our client has been detained for two years and nine months, and no evidence was presented regarding the violation of Article 328 of the TCC during this prolonged period of time. As of today, no Bill of Indictment has been issued with respect to the alleged violation of Article 328 of the TCC. This fact alone shows the unfounded nature of the response letter of the Government.



d- Between the paragraphs 17 and 43 under the section "B", the Government of the Republic of Turkey explains in detail the measures taken in penitentiary institutions in the context of the COVID-19 pandemic. While the measures taken seem constructive, as stated in many media organs, the COVID-19 has spread also in the penitentiary institutions and created a sense of deep anxiety, discomfort, and uncertainty about the future amongst prisoners. The continued detention of our client perpetuates this condition of unrest.

19- Our client, Osman Kavala, is a distinguished Turkish intellectual who has carried out prominent activities in the economic and social life in Turkey by means of his education, knowledge and cultural background, has provided great services to Turkey, and has focused his attention on non-governmental organizations that have recently played important roles in the political and social life of the country. It is inappropriate for judicial bodies to investigate the Gezi Events after such a long period of time and describe this incident as a circumstance that can be held against our client. Our client has been detained for more than two years and nine months (it will be two years and ten months when the case will be examined by your Committee) due to this inappropriate and unjust position. As the current situation violates Articles 5(1), 5(3), 5(4), and 18 of the European Convention on Human Rights, we respectfully request that you order the immediate release of our client and also enforce Article 46(4) of the European Convention on Human Rights. 25 July 2020

Mehmet Osman Kavala's

Representative

Prof. Dr. Köksal Bayraktar

Av. Deniz Tolga Aytöre

Av. İlkan Koyuncu

