TO THE CHAIR OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE
(Kavala v. Turkey [Application No. 28749/18])

A) A Short Summary of the Series of Detentions of Osman Kavala until 2 April 2021

- Osman Kavala was placed in pre-trial detention on **1 November 2017** on the charges of "attempting to overthrow the government" (Article 312 of the TCC) and "attempting to overthrow the constitutional order by force" (Article 309 of the Turkish Criminal Code ["TCC"]). The first charge was based on the allegation that he financed, organized, and directed the Gezi Park protests, while the second charge was based on his alleged involvement in the coup attempt on 15 July 2016.

- As stated in Article 4 of the letter sent by the Government of Turkey to your Committee on **30 August 2021**, the charges were separated by the Prosecutor's Office on 5 February 2019 on the grounds that there was no de jure or de facto connection between them. On **19 February 2019**, the "Gezi Indictment" was issued on the first charge (Article 312 of the TCC).

- The Prosecutor's Office revoked the decision of pre-trial detention on the second charge (Article 309 of the TCC) on **11 October 2019**. The detention for the first charge has continued throughout the proceedings.

- On **22 May 2019**, the Constitutional Court held by ten votes to five, including the votes of the President and the Deputy President of the Constitutional Court, that the detention of Osman Kavala did not constitute any violation of rights.

- On **10 December 2019**, the ECtHR stated that the findings regarding these two allegations were not sufficient to raise reasonable doubt, and ruled unanimously that Article 5(1) of the European Convention on Human Rights was violated, while also holding by six votes to one that Article 18 of the European Convention on Human Rights was violated.

- On **18 February 2020**, Osman Kavala and eight other defendants were acquitted in the Gezi Park trial heard in the 30th Assize Court.

- On the same day, Osman Kavala was arrested by the Prosecutor's Office on the charge of "attempting to overthrow the constitutional order through force" (Article 309 of the TCC), the second charge for which he was released on **11 October 2019**.

He was placed in pre-trial detention the next day.

- On **9 March 2020**, he was placed in pre-trial detention for a third charge, the charge of "Obtaining information that must be kept confidential due to its nature for national security or the domestic and foreign interests of the state, for the purposes of political and military espionage" under Article 328(1) of the TCC. This new charge was

based on the evidence and facts in the investigation file regarding the alleged violation of Article 309 of the TCC.

- On **20 March 2020**, the second decision of pre-trial detention issued against Osman Kavala on the alleged violation of Article 309 of the TCC was revoked.

- The judgment of the European Court of Human Rights (ECtHR) was finalized on **12 May 2020** when the Panel of the Grand Chamber dismissed the appeal of the Government of Turkey.

- A bill of indictment was issued on **29 September 2020** regarding the second (Article 309 of the TCC) and third charges (Article 328 of the TCC). Although the articles that were allegedly violated were different, the prosecution included a large part of the indictment of the Gezi trial, which ended in the acquittal of the defendant, in the new indictment on the grounds that it would contribute to the "understanding" of the charges.

  Osman Kavala's detention has been continued during the trial, which began in the 36th Assize Court, without any new justification.

- On **29 December 2020**, the Constitutional Court dismissed the second application of Osman Kavala regarding his detention by 8 votes to 7, including the votes of the President and the Deputy President of the Constitutional Court. The reasoned decision was not published until **23 March 2021**.

- On **22 January 2021**, the Istanbul Circuit Court of Appeal (Appellate Court) overturned the decision of acquittal of Osman Kavala and eight other defendants in the Gezi trial and requested that the 30th Assize Court join the two cases involving different charges against Osman Kavala. Likewise, it stated that another case regarding Gezi protests (Çarşı Case), which involved different defendants and was at the stage of appeal, could be joined with these two cases.

- In the trial regarding the second charge (Article 309 of the TCC) and the third charge (Article 309 of the TCC), the 36th Assize Court joined the two cases and withdrew from the case on **5 February 2021** in contravention of the opinions of the defense,

even though the charges were related to different articles and had no de jure connection. Although the bill of indictment of this case included no new evidence regarding the third charge for which Osman Kavala was placed in pre-trial detention and the witnesses heard had no incriminating statements about Osman Kavala, the Court ruled that Osman Kavala's detention would continue on the grounds that H. J. B., the other defendant in the case, had not yet been arrested and that Osman Kavala was suspected to escape.

- On **5 March 2021** Istanbul 30th Assize Court ruled for the continued detention of Osman Kavala (ANNEX 1).

- On **29 March 2021** as the attorneys of Osman Kavala, we submitted our reasoned request for release to the 30th Assize Court (ANNEX 2).

- Examining the detention on **2 April 2021**, after the decision of joining the two cases, the 30th Assize Court held by two vote to one that Osman Kavala's detention would continue (ANNEX 3).

  The dissenting opinion included in the decision is as follows: "*I hold the opinion that the defendant should be released with judicial control measures, including 'international travel ban', 'obligation to report to the nearest police station every week on Mondays and Thursdays', and 'ban on leaving the province of Istanbul'; believing that the defendant can be supervised adequately and efficiently with judicial control measures and that such measures would be reasonable, considering the possibility of any change in the nature of the charge of 'Obtaining Classified State Information for the Purposes of Political and Military Espionage', the length of his detention, and the fact that the defense of the defendant has already been raised and that the relevant evidence has been collected to a large extent.*"

B) The Judgment of Constitutional Court dated 23 March 2021 – Reasonings for Dissenting Votes

On 29 December 2020, the General Assembly of the Constitutional Court ruled with 8 to 7 votes, including the vote of the President and the deputy presidents of the Constitutional Court, that the right to liberty and security of Osman Kavala under Article 19 of the Constitution was not violated. The reasoned judgment of the Constitutional Court was published in the Official Gazette approximately three months later, on 23 March 2021. The President of the Constitutional Court and 6 other members explained their dissenting vote by stating that Osman Kavala's **pre-trial detention without any powerful indicator of crime violated his rights and freedoms** under Article 19 of the Constitution and that the majority opinion **did not comply with the established case-law of the Constitutional Court, which**

acknowledges the presence of powerful indicators of crime as a condition for detention. Each of the reasonings for dissenting vote is in line with the ECHR and the judgments of the ECtHR.

Brief Summary of the Reasonings for Dissenting Votes

- The bill of indictment does not include any explanation *"regarding what state secrets the applicant has obtained them, how and where he has obtained them"* (Zühtü Arslan, para. 24; Gökcan, para. 7).[1] Therefore, *"the allegation of espionage does not have any substance* (Gökcan, para. 11).[2]

- It was alleged that the applicant *"used information that must be kept confidential, in favor of foreign states and against Turkey, through the non-governmental organizations he founded and supported".* However, the specific piece of information that must have been kept confidential or how the applicant obtained it was not explained. Such an allegation *"may easily lead similar activities of other NGOs to be*

considered as acts of espionage" (Yıldırım para. 32; Akıncı para. 8),[3] and *"each NGO may be rendered ineffective and dysfunctional with similar allegations"* (Arslan para. 25).[4]

- The only concrete fact about the crime of espionage is the alleged frequent contact between the applicant and H. J. B.. This allegation, which was based on the fact that their mobile phones sent signals to the same base station,* was put forward as the ground for the charge of *"attempting to overthrow the government"* (Article 312 of the TCC) in the decision of pre-trial detention issued on 1 November 2017. However, the ECtHR ruled that this allegation was not sufficient to raise reasonable doubt. The new bill of indictment does not include any new evidence related to this allegation, which was put forward as the main justification for the charge of espionage *"The fact that mobile phones send signals to the same base station cannot be interpreted as that the owners of those mobile phones came together or met and cannot be shown as evidence for a strong suspicion of the crime of espionage."* Such an interpretation *"may lead to worrisome situations in terms of human rights"* (Yıldırım para. 27).[5]

- As no information is provided about the content of the alleged conversations between the applicant and H. J. B, the allegation is based only on presumptions (Arslan para. 21; Dursun and Hakyemez para. 27).[6]

- None of the pieces of evidence specified in the third decision of pre-trial detention issued against the applicant on 9 March 2020 were obtained after 1 November 2017, when the applicant was placed in pre-trial detention for the first time, or even after 2016. Therefore, the detention cannot be considered as a proportional measure since it was not explained why issuing a third decision of pre-trial detention four years later based on the same pieces of evidence was necessary (Arslan para. 52; Gökcan para.

13; Yıldırım para. 39; Dursun and Hakyemez para. 43 and 45; Akıncı para. 11; Kuz para. 2[b]).[7]

The entire letter of dissenting opinion of President Zühtü Arslan is in ANNEX 4. An English translation of the dissenting opinions to the detailed ruling by the Constitutional Court published in the Official Gazzette on 23.03.2021 shall be shared with you as soon as possible.

C) Current Status

1. As the representatives of Osman Kavala, we submitted our petition stating our request for release with detailed reasonings to the Istanbul 30th Assize Court on **29 March 2021**.

2. The Istanbul 30th Assize Court conducted a new review of the detention on **2 April 2021**.

3. The decision to dismiss the request for release was justified by using exactly the same expressions as in the decision of dismissal dated **5 March 2021**. The fact that the date of the previous decision was (inadvertently) placed on the new decision indicates that the court panel has not deemed it necessary to make a new evaluation of our defense.

4. The next review of the detention will be conducted at the hearing to be held by the Istanbul 30th Assize Court on **30 April 2021** with the participation of attorneys.

CONCLUSION

1. The fact that judiciary bodies first separated judicial processes and then joined them in violation of the code of criminal procedure proves that there is no evidence that justify Osman Kavala's detention. The three allegations made against Kavala based on Articles 312, 309, and 328 of the TCC are used as justifications for one another. Nevertheless, the decision of joining the two cases invalidated the claim that the third decision of pre-trial detention issued against Osman Kavala after the judgment of the ECtHR was based on another charge, which was put forward by the Government to justify the non-implementation of the judgment of the ECtHR. In his letter of reasoning for dissenting vote, Engin Yıldırım, a member of the Constitutional Court, stated that this unreasonable judicial process was similar to the situation of Josef K, who found himself in a legal spiral and maze in Kafka's novel The Trial: "*In the*

present case, the fact that the applicant was released twice and placed in pre-trial detention three times with allegations based on almost the same fact without providing any important new piece of evidence that will raise strong suspicion is similar to a Kafkaesque legal spiral" (Yıldırım, para. 43).

2. It is understood that the measures taken by the authorities of the Government of the Republic of Turkey do not aim to ensure the immediate release of Osman Kavala, despite the clear statement of the Committee of Ministers regarding the applicant's release. The joining of two cases which involve different articles, actions, and defendants will create a new political case that will take a long time. In this case, we are seriously concerned that this decision will be used to ensure the continuity of the detention of Osman Kavala. Although the Government of Turkey claims that the judgments of the ECtHR are complied with, no reference was made to the judgment of the ECtHR in the decisions of the Appellate Court or other courts, and the ECtHR judgment regarding Osman Kavala's immediate release is ignored.

3. In conclusion, we declare that the violation of the European Convention on Human Rights is still ongoing in the trial of the applicant, and we respectfully request the necessary actions be taken to ensure the implementation of the judgment regarding his "immediate release."

Applicant's Attorney
Atty. Dr. Köksal Bayraktar

DH-DD(2021)386: Rule 9.1 Communication from the applicant in Kavala v. Turkey.
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[1] **Zühtü ARSLAN, paragraph 24; GÖKCAN, paragraph 7**

24. Within the context of this information about the criminal offence of espionage, regarding the particular case in hand, the essential question about the establishment of the existence of proof of guilt beyond a reasonable doubt is: *"What information belonging to the state that needs to remain secret has the applicant acquired?"* The answer to this question exists neither in the arrest warrant nor in the indictment. More importantly, there is neither any explanation regarding what state secrets the applicant has obtained, from whom he has obtained them, how and where he has obtained them nor can it be deduced from the investigation documents as to what secret information H.J.B., with whom the applicant is assumed to have "close contact", has in his possession and how he has acquired it.

7. The ***subject*** of the criminal offence of espionage on which the detention is based, is "***information that needs to remain secret*** due to its nature as regards the security of the state and its domestic or foreign political interests". In other words, the subject matter of the offence is *"state secrets"*. A secret is information to which those who do not need to know it are not privy, it is information that should not be revealed and the secrecy of which should be protected for the benefit of its owner. As in the case of secrets which are confined to the most restricted realms of a real person's private life or those pertaining to the commercial information of a firm, information that is visible through open sources, information that may be known by many relevant or irrelevant individuals, or which may occasionally become open information cannot be said to be secret. When the issue is one of state secrets, these are also not any and all types of secret information, but information which, by its nature is secret (blocked off to those who do not have a need to know them), and *which is deemed*

necessary to remain secret due to the state's security or political interests. Moreover, the fact that the secret information in question needs to remain secret as such, must be declared so, through the will of the state body concerned. Therefore, it should be stated that such information characterised as "state secrets" are secrets that need to be placed in the custody of a relevant state organisation or official and as information the secrecy of which must be protected. In these circumstances, in order to refer to the criminal offence that is being charged, first and foremost, there should exist some specific secret pertaining to a certain topic and held in the custody of a relevant state body/official, registered as classified information which is being sought after (targeted) by the perpetrator with the aim of espionage. In order to make such a charge, the relevant body should be able to indicate which state secret regarding which state body and which topic is being targeted. This should be indicated, so that the defendant can offer a defence as to the nature of that information and whether it is a state secret or not.

[2] **GÖKCAN, paragraph 11**

11. Essentially, if the subject matter of the criminal offence does not exist, there is no need to investigate further. For instance, even if it is determined that the perpetrator has met a trader who is known to purchase stolen goods, unless it can be demonstrated that goods that might be stolen exist or there is an attempt to steal them (for instance the perpetrator is trying to open the door or climb up the window of the premises where the goods are), the criminal charge of theft may not be levelled against the perpetrator. In this sense, in the absence of a reasonable answer to the question, "which state secret has been or was going to be obtained from where?" investigation into evidence regarding the deed element of the crime is neither necessary nor logically possible. Yet, in the file that has been examined, in the section about the detention decision or subsequent procedures, evidence or clue regarding when and how the suspect has initiated the execution of the act through an action conducive to obtaining the information that needs to remain secret (state secret), vis-à-vis which state body could not be demonstrated. In fact, in the investigation documents, there exists no claim that a specific state secret was trying to be seized from wherever or whomever it was being held in custody.

[3] **YILDIRIM paragraph 32; AKINCI paragraph 8**

32. The prosecution has claimed that the applicant purposely obtained, through the non-governmental organizations (NGOs) he founded and supported, and used in favor of foreign states and against Turkey information with a sociological, economic, and political content which had to be kept confidential due to reasons of state security and internal/external political benefit. In this connection, the prosecution has presented the applicant's activities at ... PLC as "evidence." It must be taken into account first and foremost that the ... Foundation was a legitimate organization until it discontinued its activities of its own accord as was the ... PLC which still operates freely. The investigating authorities have not explained how work done on sociological, economic, and political subjects related to Turkey; the collection of information and data about same, and the conduct of analyses thereon by NGOs that have been founded legally, are operating legally, and are not subject to legal action on charges to the contrary qualify as information which has to be kept confidential due to reasons of state security and internal/ external political benefit and constitutes a crime. Such an approach may very well lead to the branding as espionage activities of similar work done by other NGOs. Finally, no facts arousing suspicion were set forth regarding the applicant's support of such activities.

8. The prosecution has claimed that the applicant purposely obtained, through the NGOs he founded and supported, and used in favor of foreign states and against Turkey information with a sociological, economic, and political content which had to be kept confidential due to reasons of state security and internal/external political benefit. In this connection, the prosecution has based its claims on the applicant's activities at the ... Foundation and ... PLC. It is understood, first of all, that the ... Foundation was a legitimate organization until it discontinued its activities of its own accord as was the ... PLC which still operates freely. It could not be explained how NGOs' working on sociological, economic, and political subjects related to Turkey and producing ideas on these matters qualify as information which has to be kept confidential due to reasons of state security and internal or external political benefit, how they are related to the attempted coup, and how they constitute a crime. Such a claim may very well lead to the branding as espionage activities of similar work done by all other NGOs. Collecting information on sociological, economic, and political subjects and disclosing this information and findings to the public are among the basic goals and activities of non-governmental organizations. No facts arousing suspicion that the

[4] **ARSLAN paragraph 25**

25. It has been asserted that through the non-governmental/civil society organisations he has founded and supported, the applicant has acquired information that needs to remain secret as regards the state's security and political interests and that he has used this information against the benefit of Turkey and for the benefit of foreign states. It should be pointed out that the most important task of civil society organisations is to undertake studies, analyses, develop reports and make proposals about the country's social, economic and political issues. Indeed, civil society organisations can be used for the purpose of espionage. However, whether a civil society organisation undertakes activities which may be construed to amount to espionage or is used for the purpose of covering up such activities must be demonstrated not through conjectural and general accusations but by basing them on solid information, documents and facts. Otherwise, every civil society organisation may be rendered ineffective and dysfunctional through similar charges. In the investigation documentation which is the subject of the existing application, what secret information the civil society organisations the applicant is linked with, how they have used them so as to be against the interests of Turkey and to which countries they have given them have not been described.

*The communication surveillance document (HTS Documents) revealed that the signals were not sent to the same base stations but to different base stations that are close to each other.

[5] **YILDIRIM paragraph 27**

27. Presenting the fact that the applicant's phone transmits via the same cell tower as H.J.B.'s as a proof of the espionage charge in the absence of detailed evidence may give rise to worrisome situations as regards human rights. As is known, a large number of mobile phones may transmit simultaneously via the same cell tower in settlements with large populations since a great many mobile phones may be present in the area served by that cell tower. Therefore, the fact that mobile phones used by different persons are present and transmitting in the area served by the same cell tower may not, of itself, be interpreted as proof that those persons have met or engaged. In the particular case, the applicant, too, has stated that his office is in a central location where there are many hotels and that his mobile phone may have picked up signals from the same cell tower as the mobile phone of a person staying in one of these hotels. The fact that the mobile phone of the applicant and that of H.J.B. intermittently

transmitted via the same cell tower may not be considered as evidence of a strong suspicion of the crime of espionage.

[6] **ARSLAN paragraph 21; DURSUN and HAKYEMEZ paragraph 27**

21. Moreover, based on Historical Traffic Records (HTS) and base station records, it was claimed that the applicant communicated with H.J.B. on various dates. Likewise, if, for a moment it is assumed that these communications did take place, no information whatsoever is provided regarding the contents of these communications, nor even a claim regarding the same. In the event the records indicating the occurrence of phone conversations with H.J.B., who was born and brought up in Istanbul and who has undertaken academic studies on Turkey, are regarded as a strong indication towards the criminal offence of obtaining for the purpose of political or military espionage, information about the state that needs to remain secret, a situation that is legally utterly untenable would emerge, whereby everyone who has somehow had a phone conversation with this individual over the years would be guilty of espionage beyond a reasonable doubt and could therefore be arrested. Therefore, claiming that individuals with whom an academician purportedly working for foreign intelligence services has had communications, have committed the crime of espionage solely due to these communications, without any verification regarding the contents of the said communications would only be possible by intangible evaluations based on assumptions.

27. In the particular case, the most critical shortcoming as regards the tenet of strong indication of crime, which is a prerequisite for arrest, as it bears upon the arrest order for the crime of espionage is acting upon assumptions that are not supported by any specific information or document about the content of any conversation or meeting between the applicant and H.J.B. The prosecution has not presented any content matter or other specific information about such a meeting, offering as evidence only the fact that mobile phones transmitted via the same cell tower at various times, an encounter in a restaurant, and attending the same conference – judging by which the court has ordered the arrest of the applicant.

[7] **ARSLAN paragraph 52; GÖKCAN paragraph 13; YILDIRIM paragraph 39; DURSUN and HAKYEMEZ paragraph 43 and 45; AKINCI paragraph 11; KUZ paragraph 2[b]**

52. It is observed that the rationale provided by the investigation and prosecution authorities for their decision to extend custody period and for the objection to their decision lacks the due attention and substance to justify the period of custody lasting nearly three years and is merely made up of printed statements repeating the same points. In the decisions regarding the extension of custody, there is neither any mention of a tangible fact indicating the existence of proof beyond a reasonable doubt

that the applicant has committed the criminal offence of espionage nor the reason for the investigation and trial having to be carried out with the applicant remaining in custody. On the other hand, considering that information provided as proof regarding the charge levelled against the applicant for the subject detention had to a large extent been already gathered and that the measure of detention was taken many years after the date this information was gathered and most importantly, during this period, as indicated by the investigating authorities, the applicant did not abscond, despite having travelled abroad numerous times and returned to Turkey each time, the rationale citing "absconding" or "destroying, concealing or altering evidence" is totally nonconcrete and not supported with convincing solid facts.

13. Moreover, although an examination of the principle of proportionality is not necessary when it has been determined that no evidence for detention exists; since an evaluation is made in the rationale of the majority view, it may be useful to refer to this issue also. It is observed that the applicant's relationship with the individual named HJB at the date when his initial statement was taken regarding previous charges is also queried. Considering that in the investigation file, there exist no new facts or pieces of evidence obtained in the later stages, it is not clear why prosecution has waited for four years for levelling charges and taking the measure of detention regarding the said relationship, although the prosecution was in possession of the same information from the outset, and no further evidence was later reached. In these circumstances, it is not possible to reach the conclusion that detention due to levelling of charges four years later should be construed as an urgent and necessary requirement in a democratic society (necessitated by public good for the soundness of the investigation and prosecution) and that it is proportionate.

39. In the particular case, the applicant was interrogated on 31/10/2017 regarding his liaison with the individual named H.J.B. as part of the investigation concerning the attempted coup of 15 July, which served as the basis for his arrest order issued on 1/11/2017. The prosecution was in possession of the evidence of the applicant's liaison with H.J.B. as of the moment the investigation related to this first arrest got under way. The investigating authorities have not presented any findings of fresh evidence of this liaison. Moreover, no information exists as to the scope and content of the conversation and liaison that are referred to as a crime. Hence, the information and reasoning in the arrest order fail to make it clear why it proved necessary to arrest the applicant after four years acting upon his mentioned liaisons. The reasoning presented remains direly inadequate in satisfactorily convincing a reasonable observer of the legality of the arrest.

43. In the particular case, it is about this very point that violation emerges regarding proportionality in the legality of the arrest because the arrest order for the applicant issued for the crime of supplying state information which had to be kept confidential for political and military espionage purposes is backed by no other evidence than those in the investigation file about the two previous arrests. Two releases and three arrests were ordered for the applicant in the investigation file that held the same evidence the newest batch of which was dated 8/10/2016. No fresh evidence has been presented in the arrest order pertaining to the applicant's individual application file other than those in

REPUBLIC OF TURKEY
ISTANBUL

30TH HIGH CRIMINAL COURT

INTERIM DECISION

FILE NO: Case No. 2021/17

CHIEF JUDGE : Mahmut BAŞBUĞ 125412
JUDGE : Şule YILDIZ 215682
JUDGE : Sercan KARAGÖZ 219180
CLERK : Ferhat TOKA 13457

In view of the fact that the Istanbul 36th High Criminal Court ruled on 5 February 2021 that the detention of the defendant on the charge of Obtaining Classified State Information for the Purposes of Political and Military Espionage shall continue and that the Case File No. 2020/298 of the Istanbul 36th High Criminal Court shall be consolidated with the case file of our court;

Although the representatives of the defendant, Mehmet Osman KAVALA; namely Atty. Köksal BAYRAKTAR, Atty. Deniz Tolga AYTÖRE, and Atty. İlkan KOYUNCU, requested the review of the detention of the defendant at a hearing, as there is no obligation to conduct such a review at a hearing under Article 108(3) of the Code of Criminal Procedure (CCP) or to obtain an opinion under Article 105 of the CCP, an evaluation as to whether the detention of the defendant, MEHMET OSMAN KAVALA, on the charges stated above shall continue pursuant to Article 108 of the CCP has been conducted based on the case file as follows:

The file has been examined.

IT IS HEREBY DECREED THAT:

In accordance with the examination conducted in the light of the provision on the length of detention in paragraph 1 of Article 108(3) of the CCP:

As there has been no change in the legal status since the court's last-dated evaluation on the detention based on the present file, it has been decided to evaluate the file.

As a result of the examination of the file, it has been ruled by majority vote

that as it has been understood that judicial control measures would be inadequate, considering the quality and nature of the charge brought against the defendant, Mehmet Osman KAVALA; the current stage of the trial; the presence of concrete evidence supporting a strong suspicion of crime; and the upper limit of the penalty stipulated in the law for the crimes with which the defendant has been charged, the **DETENTION OF THE DEFENDANT SHALL CONTINUE;**

that the request for release submitted by the representatives of the defendant, Osman KAVALA; namely Atty. Köksal BAYRAKTAR, Atty. Deniz Tolga AYTÖRE, and Atty. İlkan KOYUNCU, on 1 March 2021 shall be **DISMISSED** for the reasons stated above;

that a copy of the decision shall be **SENT TO THE DEFENDANT AND HIS ATTORNEY**; and

that the defendant shall be notified that he has the right to appeal to the Istanbul 31st High Criminal Court against the decision to continue his detention, by submitting a petition to our court or making a statement to the clerk of our court or to the director of the prison or detention center where he is detained; and

that the detention of the defendant shall be evaluated on 2 April 2021 based on the case file and, if it is ruled on this date that the detention shall continue, at a hearing to be held on 30 April 2021. 5 March 2021

REPUBLIC OF TURKEY
ISTANBUL
30[TH] HIGH CRIMINAL COURT

INTERIM DECISION

FILE NO: Case No. 2021/17

CHIEF JUDGE : Mahmut BAŞBUĞ 125412
JUDGE : Yusuf AYDIN 165839
JUDGE : Sercan KARAGÖZ 219180
CLERK : Ferhat TOKA 13457

In view of the fact that the defendant has been detained on the charge of Obtaining Classified State Information for Purposes of Political or Military Espionage;

The file has been examined.

IT IS HEREBY DECREED THAT:

In accordance with the examination conducted in the light of the provision on the length of detention in paragraph 1 of Article 108(3) of the Code of Criminal Procedure;

As there has been no change in the legal status since the last-dated evaluation of the court on the detention based on the present file, it has been decided to evaluate the file.

As a result of the examination of the file, it has been ruled by majority vote

that as it has been understood that judicial control measures would be inadequate, considering the quality and nature of the charge brought against the defendant, Mehmet Osman KAVALA; the current stage of the trial; the presence of concrete evidence supporting a strong suspicion of crime; and the upper limit of the penalty stipulated in the law for the crimes with which the defendant has been charged, the **DETENTION OF THE DEFENDANT SHALL CONTINUE**;

that the request for release submitted by the representatives of the defendant, Osman KAVALA; namely Atty. Köksal BAYRAKTAR, Atty. Deniz Tolga AYTÖRE, and Atty. İlkan KOYUNCU, on 29 March 2021 shall be **DISMISSED** for the reasons stated above;

that a copy of the decision shall be **SENT TO THE DEFENDANT AND HIS ATTORNEY**; and

that the defendant shall be notified that he has the right to appeal to the Istanbul 31[st] High Criminal Court against the decision to continue his detention, by submitting a petition to our court or making a statement to the clerk of our court or to the director of the prison or detention center where he is detained. 05 March 2021

Chief Judge 125412	Judge 165839	Judge 219180	Clerk 134571
electronically signed	***electronically signed***	***electronically signed***	***electronically signed***

DISSENTING VOTE

I respectfully disagree with the Majority's opinion that the detention of the defendant, Mehmet Osman KAVALA, should continue, as I hold the opinion that the defendant should be released with judicial control measures, including "international travel ban" pursuant to subparagraph (a) of Article 109(3) of the Code of Criminal Procedure (CCP) No. 5271, "obligation to report to the nearest police station every week

on Mondays and Thursdays" pursuant to subparagraph (b) of Article 109(3) of the CCP, and "ban on leaving the province of Istanbul" pursuant to subparagraph (k) of Article 109(3) of the CCP; believing that the defendant can be supervised adequately and efficiently with judicial control measures and that such measures would be reasonable, considering the possibility of any change in the nature of the charge of "Obtaining Classified State Information for Purposes of Political or Military Espionage" brought against the defendant under Article 328(1) of the Turkish Criminal Code (TCC), the length of his detention, and the fact that the defense of the defendant has already been raised and that the relevant evidence has been collected to a large extent.

Judge 219180
electronically signed

DISSENTING OPINION OF PRESIDENT ZÜHTÜ ARSLAN

1. The majority of our court members has not found any violation regarding the applicant's complaints that his arrest based on the charge of acquiring for the purpose of political or military espionage, information belonging to the state that needs to remain confidential was unlawful and that his detention period has exceeded the reasonable time frame; and has decided that his complaint claiming that his detention period during the investigation phase exceeded the maximum time limit foreseen by law was inadmissible.

2. Before evaluating the detention decision which is the subject of the specific application to the court, the investigation and prosecution process carried out since 2017 should be briefly mentioned. Initially, in the Istanbul Chief Prosecutor's investigation file No. 2017/96115, three separate charges were levelled against the applicant – based on existing findings – namely, (a) attempting to overthrow the government of the Republic of Turkey or to prevent it from undertaking its duties, (b) attempting to overthrow the constitutional order and (c) acquiring for the purpose of political or military espionage, information belonging to the state that needs to remain confidential. During the applicant's interrogation, he was questioned regarding the incidents and facts purported to be the basis for the aforementioned charges and his relationship with foreign national H.J.B. in particular, which constitutes the main grounds for the detention decision that is the subject of the specific application.

3. On 1/11/2017, Istanbul 1st Magistrate's Court ruled for the detention of the applicant as per Article 312 of the Turkish Criminal Code in connection with the Gezi Park events and Article 309 of the Turkish Criminal Code in connection with the allegation that the applicant is linked to the 15 July coup attempt. Both in the detention order and in the arrest warrant, it was stated that, *"there is concrete evidence of proof beyond a reasonable doubt that the applicant has committed the crime of changing the constitutional order through the use force and violence by taking part in the coup attempt through the establishment of close and extensive relations beyond that which is usual with H.J.B., a ringleader of the coup and with foreign individual and individuals during the coup attempt process undertaken at the S. Hotel in Büyükada on 15-16 July 2016".*

4. The investigation carried out against the applicant regarding the Gezi Park events was separated from the file on 14/12/2018 and the investigation continued through file no. 2018/21099. The indictment was prepared within this framework and the trial began at the Istanbul 30th Assize Court. During this period, regarding the detention order issued during the 15 July coup attempt investigation carried out based on investigation file No. 2017/96115, the prosecutor decided of his own motion to release the applicant *ex officio* on 11/10/2019.

5. The Constitutional Court ruled on the applicant's individual application

claiming the detention was unlawful and reached the decision that there was no violation regarding the claim. The Constitutional Court, determined that there was concrete evidence of proof beyond a reasonable doubt regarding the detention in connection with the Gezi Park events while it did not make a separate evaluation

regarding the detention in connection with the 15 July coup attempt (*Mehmet Osman Kavala* [GK], A. No: 2018/1073, 22/5/2019).

6. Meanwhile, the European Court of Human Rights (ECHR) ruled that there was no proof beyond reasonable doubt that the applicant committed a criminal offence and that therefore, there was a violation of Article 5(1) of the European Convention of Human Rights. According to ECHR, *"in the absence of other relevant and sufficient circumstances the mere fact that the applicant had had contacts with a suspected person or with foreign nationals cannot be considered as sufficient evidence to satisfy an objective observer that he could have been involved in an attempt to overthrow the constitutional order"*. (Kavala v. Turkey, A.No: 28749/18, 10/12/2019, § 148)

7. At the end of the trial charging that the applicant was the leader and organiser of the Gezi Park incidents, Istanbul 30th Assize Court ruled for the applicant's acquittal and release on 18/2/2020. Following this ruling, he was detained once again on 19/2/2020 by the Magistrate's Court due to the charges regarding the 15 July coup attempt for which a release ruling had been given earlier.

8. The applicant was also detained on 9/3/2020 for the charge of acquiring for political or military espionage, information belonging to the state that needs to remain confidential which is the subject of the specific application. In the detention order, it was stated that there was proof beyond reasonable doubt that the said criminal offence had been committed, while at the same time, applicant's contacts with H.J.B. were also provided.

9. Eleven days after this detention order, it was decided to release the applicant as the maximum detention period foreseen in the law regarding the charge of overthrowing the constitutional order in relation with the 15 July coup attempt was exceeded.

10. On 28/9/2020 a criminal lawsuit was filed against the applicant with the charge of attempting to overthrow the constitutional order and acquiring for the purpose of political or military espionage, information belonging to the state that needs to remain confidential. The indictment basically claimed that the applicant had telephone conversations the nature of which was not known with the other suspect H.J.B., that their phones received signals from the same base station, that they had met at dinner at a restaurant after the 15 July coup attempt, that prior to the coup attempt, the applicant travelled abroad many more times compared with other years, that he set up and

supported seemingly legal civil society organisations serving an illegal purpose in order to activate the nerve endings of the society and that he was the Turkish arm and local collaborator of H.J.B., who had a direct organic link with foreign intelligence agencies.

11. Upon briefly outlining the incidents and facts as such, we may move on to the complaints which make up the subject matter of the existing individual application.

A. Lawfulness of detention

a. Existence of proof beyond a reasonable doubt

12. The right to personal liberty and security is a constitutional right safeguarding individuals against arbitrary deprivation of their freedoms. This basic right is among the most crucial safeguards central to all political systems bound by the rule of law. That the intervention against personal liberty shall not be arbitrary, is a basic safeguard that needs to be observed not only during ordinary times but during periods when extra-ordinary procedures of administration are adopted (*Aydın Yavuz et al.* [GK], A.No: 2016/22169, 20/6/2017, §§ 347, 348).

13. Moreover, arbitrary application of the measure of detention in the absence of conditions stipulated in the Constitution and the laws would also harm the principle of the presumption of innocence, which is enshrined in Article 38 of the Constitution as follows: *"No one shall be considered guilty until proven guilty in a court of law"*. As emphasised by the Constitutional Court, *"presumption of innocence requires that during trial, a person's freedom is the rule while his/her detention is the exception"* (*Mustafa Ali Balbay*, A.No: 2012/1272, 4/12/2013, § 103).

14. The measure of detention is a severe restriction of personal liberty and security. Therefore, detention may be resorted to only in obligatory situations and when the legal conditions for its implementation exist. Otherwise, detention ceases to be a measure to prevent the individual from absconding or destroying, concealing or tampering with evidence and it can turn into a means of punishment.

15. In accordance with paragraph 3 of Article 19 of the Constitution, detention may only be implemented regarding individuals about whom there is *evidence of proof beyond a reasonable doubt*. Proof beyond a reasonable doubt is a *sine qua non* for implementing the measure of detention. To this end, the charge must be supported with strong, convincing evidence (*Mustafa Ali Balbay*, § 72).

16. In the detention order, which is the subject of the specific application, the primary premise of the charge is the applicant's contact with H.J.B. According to the officials undertaking the investigation, H.J.B., who is an academic with US citizenship and works at a think tank as a Middle East analyst and expert, has intensive and deep links with the PKK/KCK and FETÖ/PDY terror organisations. It has been claimed that H.J.B. joined a perfunctory meeting organised at a hotel in Büyükada on 5 July 2016

and followed the coup attempt from here, established all the necessary international contacts, that he met with the applicant at a restaurant on 18 July 2016 also and then left Turkey.

17. Meanwhile, the applicant stated that he had known H.J.B. since 2000, that they came together at some international conferences, that none of these conferences were secret, that in fact, public servants attended some of them, that there were many hotels in the area where his office was located and that it was understandable that their telephones would receive signals from the same base station and that he did not meet this individual in a restaurant in Karaköy and that he merely ran into him there.

18. Investigating authorities were not able to produce solid evidence contrary to the statements of the applicant regarding his connection with H.J.B. Both in the detention order as well as in the indictment, intangible claims directed through certain deductions based on some assumptions were expressed as facts indicating that the criminal offence levelled against the applicant was committed. Beyond that, no concrete information regarding the contents of either face-to-face conversations or telephone conversations claimed to have taken place between the applicant and H.J.B. was provided.

19. The most concrete assertion regarding the relationship between the applicant and H.J.B. is that they met and talked a few days before the 15 July coup attempt at a restaurant in Karaköy. The applicant has insisted that such a meeting and conversation did not take place and that he ran into the said individual at a restaurant he went to with two experts in cultural heritage, that H.J.B. came to the said restaurant with another group and sat at a different table. In a statement given by one of the academicians who attended the meeting in Büyükada, it was stated that the applicant did not sit at the same table with H.J.B. and that he left the restaurant with the group he was with.

20. In the investigation documents no indication contrary to the applicant's defence and the witness statement could be provided. Moreover, even if it is assumed for a moment that such a meeting did take place, no claim exists regarding the contents of this meeting. Therefore, it is not possible to accept that such a meeting assumed to have taken place is a strong indication that the applicant committed the criminal offence of espionage levelled against him.

21. Moreover, based on Historical Traffic Records (HTS) and base station records, it was claimed that the applicant had telephone conversations with H.J.B. on various dates. Likewise, if for a moment it is assumed that such conversations did take place, there exists no information, or even a claim regarding their content. In the event the records indicating the occurrence of phone conversations with H.J.B., who was born and brought up in Istanbul and who has undertaken academic studies on Turkey, are

regarded as a strong indication towards the criminal offence of obtaining for the purpose of political or military espionage, information about the state that needs to remain confidential, a situation that is legally utterly untenable would emerge, whereby everyone who has somehow had a phone conversation with this individual over the years would be guilty of espionage beyond a reasonable doubt and could therefore be arrested. Therefore, claiming that individuals with whom an academician purportedly working for foreign intelligence services has had communications, have committed the crime of espionage solely due to these communications, without any verification regarding the contents of the said communications would only be possible by nonconcrete evaluations based on assumptions.

22. In this context, the most significant issue regarding the specific application is that, let alone a strong indication regarding the existence of the criminal offence of political or military espionage for which the applicant was detained, not even a simple doubt has been offered to that end. According to paragraph 1 of Article 328 of the Turkish Criminal Code, *"a person who acquires 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 fifteen to twenty years imprisonment." According to the rationale of the article, *"the information that is acquired must be such that it must remain confidential for reasons relating to the security or domestic or foreign political interests of the State"*, that is, *"it must by its nature be secret information"*.

23. The very constituent of the criminal offence of political or military espionage is *"acquiring information that needs to remain confidential (state secrets) for the purpose of political or military espionage"* (O. Yaşar, H.T. Gökcan, M. Artuç, *Yorumlu-Uygulamalı Türk Ceza Kanunu (Turkish Criminal Code with Interpretations and Practical Implementation.* , 2nd Edition, Volume 6, Ankara: Adalet Yayınevi, 2014, p. 9074). The subject matter of the offence on the other hand is *"information that needs to remain confidential due to its nature"*, in other words, information in the nature of *"state secrets"*. (M. Balcı, *Siyasal veya Askerî Casusluk Suçu (The Criminal Offence of Political or Military Espionage)*, Ankara: Adalet Yayınevi, 2018, p.98; regarding *"state secret"* also see:. İ.Özgenç, *Suç Örgütleri (Criminal Organisations)*, 12th Edition, Ankara: Seçkin Yayıncılık, 2019, pp.348-372).

24. Within the context of this information about the criminal offence of espionage, regarding the particular case in hand, the crucial question about the establishment of the existence of proof of guilt beyond a reasonable doubt is: *"What information belonging to the state that needs to remain secret has the applicant acquired?"* The answer to this question exists neither in the arrest warrant nor in the indictment. More importantly, there is neither any explanation regarding what state secrets the applicant has obtained, from whom he has obtained them, how and where he has obtained them nor can it be deduced from the investigation documents as to

what secret information H.J.B., with whom the applicant is assumed to have "intensive contact", has in his possession and how he has acquired it.

25. It has been asserted that through the non-governmental/civil society organisations he has founded and supported, the applicant has acquired information that needs to remain confidential as regards the state's security and political interests and that he has used this information against the benefit of Turkey and for the benefit of foreign states. It should be pointed out that the most important task of civil society organisations is to undertake studies, analyses, develop reports and make proposals about the country's social, economic and political issues. Indeed, civil society organisations can be used for the purpose of espionage. However, whether a civil society organisation undertakes activities which may be construed to amount to espionage or is used for the purpose of covering up such activities must be demonstrated not through conjectural and general accusations but by basing them on solid information, documents and facts. Otherwise, every civil society organisation may be rendered ineffective and dysfunctional through similar charges. In the investigation documentation which is the subject of the existing application, what secret information the civil society organisations the applicant is linked with, how they have used them so as to be against the interests of Turkey and to which countries they have given them have not been described.

26. Moreover, what kind of linkage exists between the charge levelled against the applicant and the documentaries seized from the applicant, his support for the shooting of the documentary and his organising a meeting about the "Armenian incidents" was not provided. That the applicant travelled abroad more frequently prior to 15 July 2016 compared to other years was offered as evidence but no explanation was provided for the contents of these travels and most importantly, for the linkage with the charges levelled against the applicant. It is therefore not possible to accept that this and similar claims are proof beyond reasonable doubt that the applicant has committed the criminal offence of espionage.

27. At this juncture, the court's majority view that the main feature of the criminal offence of espionage is confidentiality and that therefore, *"somewhat different criteria should be adopted regarding the kind and level of evidence sought in the beginning of the investigation or during the period when protective measures such as detention are implemented"* (§§ 91, 92) should be dwelled upon. The majority view does not provide what different criteria regarding the *"kind and level of evidence"* was adopted. However, it is understood that as a whole, the view that the proof of guilt beyond a reasonable doubt should be approached in a *flexible* manner regarding detention in connection with the charge of espionage has been adopted.

28. Firstly, it should be stated that while examining the lawfulness of detention, the remit of the Constitutional Court is, as also underscored by the majority, *"not to determine which criminal offence the actions levelled on the applicant is the subject*

of", but *"to determine whether the facts provided by the investigating authorities and taken as the basis of detention are of a nature that are proof of guilt beyond a reasonable doubt vis-à-vis the applicant"* (§§ 90, 91). Therefore, what needs to be focused on is whether the evidence offered in the detention order may in fact be admitted as proof of guilt beyond a reasonable doubt.

29. Whether the evidence provided in the investigation documents constitutes proof of the guilt levelled against the applicant beyond a reasonable doubt should indeed be explored by taking into consideration the circumstances of each specific incident. In this context, the nature of the charge levelled against the applicant could to a certain extent be taken into consideration. Moreover, it may be admitted that compared to many other criminal offences, the investigating authorities are in a more difficult position regarding the establishment of the evidence related to the charge.

30. Nevertheless, all these premises do not remove the obligation that there must exist proof beyond a reasonable doubt to be able to make a detention decision for whatever criminal offence. Therefore, based on the premise that the main feature of the criminal offence of espionage is confidentiality, acknowledging abstract and general explanations based on hypotheses as proof beyond a reasonable doubt may, in the final analysis, render meaningless and dysfunctional the safeguards regarding individual freedom and security provided by the Constitution and the laws.

31. Moreover, even if for a moment, it is recognised that, as distinct from other offences, the type and level of evidence related to the criminal offence of espionage regarding proof beyond a reasonable doubt may need to be differentiated *at the*

beginning of the investigation or during the stage when the measure of detention is being implemented, the end result will not change in the application in hand. This is because at the time the Constitutional Court passed a judgement regarding the application, the evidence had already been gathered, prosecution had started and the first hearing was carried out. In other words, while the Court was examining the lawfulness of the detention, it had the means of evaluating not just the evidence provided at the beginning of the investigation but all actions levelled against the applicant in the indictment. However, it could not be demonstrated as to what features of the evidence regarding the specific incident constituted proof beyond a strong, reasonable or simple doubt that the criminal offence of espionage levelled against the applicant was committed.

32. It is understood that proof beyond a reasonable doubt, which is the prerequisite for the applicant's being detained based on the criminal offence of political or military espionage, could not be established based on the justification provided. I am therefore of the opinion that the measure of detention applied against the applicant regarding the said offence is unlawful.

b. Proportionality of the Detention

33. On the other hand, it is not possible to agree with the majority's evaluation that the detention was proportionate. In order for the measure of detention to be lawful, it is not adequate to have proof of guilt beyond a reasonable doubt. Detention must also be proportionate. Therefore, it is mandatory that an evaluation be undertaken regarding the circumstances of the specific incident from a viewpoint of *necessity* which is a constituent element of proportionality. Regarding the necessity of the detention, two interlinked issues must be dealt with. Firstly, how much later following the date the charge was levelled against the applicant was he detained and whether during this time frame the investigating authorities remained inactive should be considered. Secondly, whether the applicant was previously detained based on the same evidence and if so, whether the second detention is linked to the previous charge should be examined.

34. The Constitutional Court has examined the necessity of the detention when there exists a substantial time period between the date the investigation started and the date of detention. In the event the measure of detention is resorted to after a long period of inactivity, the investigating authority has the obligation to demonstrate why the detention was necessary. The Court found that the detention of an individual nearly four years after the date the subject offence related to the detention was claimed to have taken place and nearly two years after the Constitutional amendment introduced an exception to legislative immunity is disproportionate (*Eren Erdem*, AB.No: 2019/9120, 9/6/2020, § 176). Likewise, The Constitutional Court ruled that detention of an individual nearly two years after an investigation was launched against him without providing new facts was disproportionate (*A.C.*, A.No: 2016/64868, 27/2/2020, § 74).

35. The meetings the applicant is alleged to have had with H.J.B. is related to the period between 2013-2016. As explained above (see §§ 2, 3), it is known that this information was in possession of the investigating authority since the beginning of the

process. The information about the contact provided as evidence for the applicant's detention on 9/3/2020 based on the charge of espionage has been in the investigation file for over three years in its general format. During this period, no new factual information regarding the contents of the said contact which would justify detention due to the espionage charge has been provided. Therefore, the investigating authority has not provided an explanation as to why it was necessary to detain the applicant on charges of espionage around three years after his contact with H.J.B. was established.

36. Moreover, in many of its judgements, the Constitutional Court underlined that in the event individuals who were acquitted while they were being tried in detention were detained a second time in connection with new investigations based on different facts and evidence, the investigating authorities had to demonstrate why this detention was necessary and proportionate. According to the Court, if the applicant is acquitted in the trial regarding the charge that was the subject of the first detention measure, even if some new evidence is reached "if the charge which is the subject of the second

some new evidence is reached, *"if the charge which is the subject of the second detention measure is based on the same facts with the charge regarding the first detention"*, it cannot be said that the second detention is necessary and proportionate (see: *Abdullah Kılıç*, A.No: 2016/25356, 8/1/2020, §§ 84, 85; *Cihan Acar*, A.No: 2017/26110, 27/2/2020, §§ 74, 75; *Yetkin Yıldız*, A.No: 2018/3292, 23/6/2020, §§ 68, 69).

37. During the last three years three detentions based on the same evidence, three discharges and one acquittal decision were given about the applicant. The relation between the applicant and H.J.B. has been included in all detention orders from the very outset. Issues about this relationship were recognised in the first detention order as proof beyond a reasonable doubt regarding the charge levelled against the applicant in connection with the 15 July coup attempt. Although the applicant was discharged for this charge, upon the decision to acquit and release him in the case about the Gezi Park incidents, the applicant was detained again for a second time for the same charge. In this second detention also, it is observed that the relationship with H.J.B. was taken as the basis for proof beyond a reasonable doubt for the charge in question. Likewise, the applicant's being detained for the third time shortly after the second detention with the charge of political or military espionage was also based on his relationship with H.J.B.

38. While deciding to detain the applicant the second and third time, no new facts and findings were provided regarding the nature and contents of the relationship with H.J.B. In these circumstances, it is not possible to state that the investigation documents provided the reason why it was necessary to detain the applicant -- about whom a release decision had been given earlier *ex officio* -- a third time, this time with the charge of espionage, essentially based on the same facts, despite being detained for a second time for the previous charge of attempting to overthrow the constitutional order.

39. To conclude, despite (a) the investigating authorities having had access to information regarding the applicant's relationship more than three years ago, (b) no (new) facts regarding the nature and contents of this relationship are in existence, (c) the fact that previously, detention orders were issued twice, due to the same evidence and (d) most importantly, the fact that although a release was granted *ex officio*

regarding one of these detention orders, that the same evidence was this time admitted as the basis for the detention related to the charge of political and military espionage demonstrates that the measure of detention which is the subject of the individual application was disproportionate.

B. Detention during the investigation process exceeding the maximum period foreseen by law

40. Detention period not to exceed a certain time limit during the investigation process is an important safeguard put in place by Article 18 of Law No. 7188 dated 17/10/2019, amending paragraph (4) of Article 102 entitled "Detention Period" of the

Code of Criminal Procedure No. 5271. In relation to the subject charge regarding the application, this period is *"one year and six months, and may be extended a further six months by the provision of a justification"*. Therefore, the period of detention during the investigation process may not exceed two years.

41. Moreover, the Constitutional Court has ruled that in cases where an investigation and prosecution about an individual involving more than one charge is being handled over a single case file, the maximum detention period must be calculated not separately for each charge, but as a single length of period for the entirety of the charges. According to the Court, *"since the measure of detention is not a sanction, calculating the maximum period of detention for each and every charge within the same file separately is not acceptable"* (see: *Burak Döner*, A.No: 2012/521, 2/7/2013, § 48; *Abdullah Ünal*, A.No: 2012/1094, 7/3/2014, § 41). In accordance with this jurisprudence, the periods the applicant has remained in custody as of the first date of detention must be calculated as a single period.

42. In the specific incident in hand, the applicant who was also detained between the dates 1/11/2017-11/10/2019 as per detention order in connection with the charge of overthrowing the constitutional order was detained with the same charge on 19/2/2020 and also on 9/3/2020 – within the scope of the same file—this time due to political or military espionage. Although, the detention measure regarding the charge of attempting to overthrow the constitutional order was subsequently lifted, detention based on the charge of espionage continued. In these circumstances, the total period of detention of the applicant up until 8/10/2020, the date the indictment was admitted, was 1 year, 18 months and 29 days. Therefore, the maximum detention period of two years during the investigation phase foreseen by law has been exceeded. Nevertheless, on 20/3/2020, Istanbul 3rd Magistrate's Court ruled for the release of the applicant in connection with the charge of attempting to overthrow the constitutional order based on the justification that since he was detained for over two years regarding the said charge, the maximum detention period foreseen by law had been exceeded.

43. Moreover, it is difficult to say that the possibility of filing an indemnity lawsuit foreseen in Article 141 of Law No.5271 is an effective remedy at this stage. Firstly, since the safeguard of a maximum detention period has been put in place recently, there is no clear arrangement or judicial precedent allowing for resorting to this remedy before the trial has come to an end.

44. In cases where *the applicant is released* at the date the application is being examined in view of applications filed with the complaint of the reasonable time period for detention or the maximum detention period foreseen by law being exceeded, the Constitutional Court has ruled, by referring to the Court of Cassation's established jurisdiction whereby indemnity could be sought without waiting for the main case to come to a conclusion or the judgement regarding this case to be finalised, that filing an

indemnity lawsuit foreseen in Article 141 of Law No.5271 is a legal remedy that needs to be exhausted (see: *Erkam Abdurrahman Ak*, A.No: 2014/8515, 28/9/2016, §§ 58, 61; *İrfan Gerçek*, A. No: 2014/6500, 29/9/2016, §§ 41, 44). However, in the specific case in hand, while the applicant's detention is continuing, there is no Court of Cassation ruling allowing the applicant to claim indemnity before the trial has come to an end in the event the detention during the investigation phase has exceeded the maximum period foreseen by law. Therefore, at this stage, it cannot be stated that the remedy foreseen in Article 141 of the Criminal Procedural Law is an effective remedy that must be exhausted in connection with the claim that detention has exceeded the period foreseen by law.

45. In view of the reasons cited above, instead of deciding on inadmissibility due to legal remedies not being exhausted for the applicant's cited complaint, I am of the opinion that the complaint should be found admissible and a ruling of violation should be provided.

C. Detention exceeding reasonable time frame

46. The applicant has claimed that he was detained for the same actions for a long period of time, that his detention exceeded the reasonable time frame and the majority of the court members did not find a violation with this complaint either. Article 19, paragraph 7 of the Constitution safeguards detained individuals' right to request that trials are concluded within a reasonable time frame or request their release during the investigation or prosecution phase.

47. According to the Constitutional Court, the rights of "being tried within a reasonable time frame" and "requesting release" should be considered not as an alternative to one another but as complementing each other. In accordance with the right of requesting to be released described here, individuals detained within the framework of a criminal investigation or prosecution may request from the judicial authorities concerned that they rule for their release. Paragraph seven of Article 19 of the Constitution stipulates that in every phase of detention, in the review done both upon the judicial authorities *ex officio* ruling of their own motion or upon the individual's request for release, legitimate reasons for detention should be provided (*Halas Aslan*, A.No: 2014/4994, 16/2/2017, §§ 66, 67).

48. In this connection, the rationale for court decisions regarding the continuation of detention is pivotal. In determining whether the reasonable time frame has been exceeded in detention, rationale for decisions rejecting requests for release as well as rationale for decisions given in response to objections to the decisions and whether this rationale is relevant and adequate for the continuation of detention should be evaluated. The rationale for decisions to continue detention must clearly include, as a prerequisite

for detention, *"evidence justified with concrete facts, demonstrating proof without a reasonable doubt, the existence of the reasons for detention and the measure of*

detention being proportionate" (*Halas Aslan*, § 75).

49. In the specific incident, as indicated in the majority decision, the applicant who was taken into custody on 18/10/2017 and detained on 1/11/2017 has been detained for nearly 2 years and 10 months based on the charge brought against him as of the date a decision was made on his individual application regarding the subject case file (§ 129). The detention of the applicant for such a long time based on the same evidence which does not constitute proof beyond a reasonable doubt is not acceptable. In fact, since proof beyond a reasonable doubt must exist in every phase of detention, continuation of unlawful detention will in any case be in contravention of paragraph seven of Article 19 of the Constitution.

50. Even if, for a moment one would agree with the majority view that in the specific incident, there is proof and indications of guilt beyond a reasonable doubt as regards the first detention, it should still be decided that the applicant's detention has exceeded the reasonable time frame. In fact, in some applications where it has determined the existence of proof and reasons beyond a reasonable doubt, the Constitutional Court has not found it reasonable that individuals should be detained over two years based on charges repeating the same issues and with irrelevant and inadequate justifications (*Hanefi Avci*, A.No: 2013/2814, 18/6/2014, § 85).

51. In the examinations regarding the detention undertaken by various magistrate's courts about the applicant during the investigation phase on 6/5/2020, 20/5/2020, 4/6/2020, 3/7/2020, 29/7/2020, 17/8/2020 and 11/9/2020, issues including the nature and quality of the charge, the existing state of evidence and the fact that all evidence not having been gathered, existence of concrete evidence of guilt beyond a reasonable doubt, the upper limit of the penalty stipulated by law, the suspicion of the applicants absconding and hiding, provisions of release on judicial control being inadequate and the measure of detention being proportionate were touched upon generally and in an abstract manner. Whereas in the prosecution phase, in addition to the above justifications for the continuation of detention, in decisions dated 6/11/2020, 23/11/2020, 4/12/2020 and 18/12/2020, the applicant's requests for release and his objections regarding their rejection were not found admissible by providing reasons such as the defence of the applicant had not yet been received, that some witnesses had not yet been heard, and that there was proof leading to suspicion of evidence being destroyed, concealed and tampered with.

52. It is observed that the rationale provided by the investigating and prosecuting authorities in their decisions regarding the continuation of detention and objections thereof was not of a diligence and quality of content that would justify the detention being maintained for about three years and that it was merely printed versions of the same points. In the decisions regarding the continuation of detention, there was neither any mention of any solid fact beyond a reasonable doubt about the criminal offence of espionage being committed by the applicant nor any explanation as to why the investigation and trial should be carried out while the applicant was in detention.

However, considering that information provided as evidence regarding the subject charge against the applicant had already been put together to a large extent and that the measure of detention was implemented several years after the said evidence was gathered, and most importantly, as indicated by the investigating authorities, the fact that the applicant did not abscond although he travelled abroad many times during this period and that he returned to Turkey each time, the justification of "absconding" or "destroying, concealing and tampering with evidence" remains totally abstract and not supported with convincing, solid facts.

53. Moreover, in the rationale of decisions to continue detention, why the measure of controlled judicial supervision included in Article 109 of Law No.5271 as an alternative to detention was not considered adequate, has not been discussed along with their arguments. In the rationale, mention was made only of the nature of the levelled charge and the opinion that controlled judicial supervision would not be adequate considering the severity of the sanction foreseen was provided, but the situation was not customised to the applicant's personal circumstances.

54. As it can be ascertained from these explanations, in decisions regarding the extension of the applicant's detention, evidence demonstrating proof beyond a reasonable doubt, the existence of the reasons for detention and that the measure of detention was proportionate could not be clearly demonstrated by a justification based on solid facts. Therefore, it cannot be said that the rationale provided is sufficient to justify nearly three years' detention in the circumstances of the specific case in hand.

55. Based on the rationale provided above, due to the fact that the measure of detention implemented against the applicant is unlawful and since his detention exceeds the reasonable time frame and the maximum period foreseen by law for the investigation phase, since I believe the right of individual freedom and security within the scope of paragraph seven of Article 19 of the Constitution is violated, I do not agree with the opposing view of the majority.

President

Zühtü
ARSLAN