30 August 2021

TO THE CHAIR OF THE COMMITTEE OF MINISTERS

OF THE COUNCIL OF EUROPE

(Kavala v. Turkey [Application No. 28749/18])

As the lawyers of Osman Kavala we hereby present our view concerning the Action Plan and Additional Information submitted to the Committee of Ministers of the European Council by the Government of the Republic of Turkey on 20 July 2021 and 13 August 2021 concerning the case Kavala v. Turkey (application no. 28749/18).

An action plan is, according to the definition of the Committee of Ministers, 'a document setting out the measures the respondent state has taken and intends to take to implement a judgement of the European Court of Human Rights, including an indicative timetable for the adoption and implementation of those measures.'

However, the documents submitted to the Committee of Ministers by the Government of Turkey is not directed to implement the Court's judgement, but on the contrary, not to implement it. It reveals one more time the clear intention of the Government to evade the implementation of the Court's judgement on the Kavala case.

I. CURRENT DETENTION OF THE APPLICANT

1. The Government of Turkey stated that the detention order, which was issued against the Applicant under Articles 309 and 312 of the Turkish Criminal Code (TCC) and was subject to the judgment of the European Court of Human Rights (ECtHR), was revoked, and that his current detention is based on the order issued under only Article 328 of the TCC.

2. In a parallel vein, in its majority decision for the continuation of Kavala's detention on 2 August 2021, the Istanbul 30th Assize Court stated that 'There is no decision of the ECtHR to be implemented in respect of the current detention of the accused'.

3. However, the detention order issued on 9 March 2020 under Article 328 of the TCC (securing political or military espionage information that should be kept confidential for

reasons relating to the security or domestic or foreign interests of the state) is based on the same investigation file no. 2017/96115 and the same facts and findings are used for the detention order issued against the Applicant on 1 November 2017 under Articles 309 (attempting to overthrow the constitutional order by force and violence) and 312 of the TCC (attempting to overthrow the government by force and violence). These findings were reviewed by the ECtHR and were not found sufficient to satisfy reasonable suspicion criterion. None of the findings specified in the detention order issued against the Applicant by the Istanbul 10th Magistrate's Court on 9 March 2020 on the charge of political or military espionage was collected after the initial detention of 1 November 2017.

4. In fact, through its resolutions of 1-3 September 2020 (no. 1377), 29 September-1 October 2020 (no. 1383), and 9-11 March 2021 (no. 1398) the Committee of Ministers has expressed its opinion to the effect that "the information available to it raises a strong presumption that the applicant's current detention is a continuation of the violations found by the Court" and "urged the authorities for his immediate release". The opinions expressed in the documents submitted by the Government to the Committee of Ministers and the majority decision of 2 August 2021 of 2 August 2021 of the Istanbul 30th Assize Court therefore run contrary to the facts of the case and to the decisions of the Committee of Ministers.

5. As it is not possible for national authorities to continue the detention of the Applicant under Articles of 309 and 312 of the TCC due to the judgment of the ECtHR, the re-arrest of the applicant with the pretext of the investigation launched under Article 328 of the TCC, despite the lack of any new and concrete evidence in relation to the alleged crime, is aimed at circumventing the ECtHR's judgement and maintaining the unlawful detention of the applicant.

II. OUR COMMENTS WITH REGARD TO ARTICLE 5/1

6. Stressing that the Court has not reviewed any claim of violation of Article 6 of the Convention or found any violation of this Article in its *Kavala v. Turkey* judgment, the Turkish Authorities stated that the independence and impartiality of the judiciary cannot be examined under Article 5(1).

7. The Applicant does not agree with this view. As the Court stated in many of its judgments, authorities issuing detention orders in the context of Article 5 should be independent and impartial. The established case-law provides this (see *D.D. v Lithuania* judgment of 2012). The recent developments in Osman Kavala's case show that the judicial process has taken a form which reveals the intention to prolong his detention in violation of the ECtHR judgement. These developments involve the joinder of the cases with three allegations against Kavala (attempting to overthrow the constitutional order, attempting to overthrow the government, and espionage), and in the joinder of these with the one concerning the supporters of the Beşiktaş Football Club involved in the Gezi protests of 2013 (this case is known as the *Çarşı trial* in the media and will be referred as such in this text).

III. MERGER OF THE CASES

8. As Osman Kavala's trial with the charges of attempting to overthrow the constitutional order (Article 309 of the TCC) and espionage (Article 328 of the TCC) continued at the Istanbul 36th Assize Court, the verdict of acquittal of 18 March 2020 rendered on the case concerning the Gezi protests where Kavala was charged with attempting to overthrow the government (Article 312 of the TCC) was overturned by the 3rd Criminal Chamber of the Regional Court of Appeal. The Court of Appeal pointed at the joining of the proceedings with the case pending at the Istanbul 36th Assize Court, and also referred to the Çarşı trial before the 16th Criminal Chamber of the Court of Cassation, implying a connection between this particular case and the Gezi case concerning Kavala and other defendants.

9. The Çarşı trial had ended in December 2015 with the decision of the Istanbul 13th Assize Court to acquit all defendants of the main charges on the grounds that they had exercised their right to assembly and to convict a few persons for minor offenses. On 18 March 2021 the Court of Cassation's 16th Criminal Chamber overturned this decision and requested that the case to be joined with the Gezi trial concerning Kavala where the acquittal decision was overturned by the 3rd Criminal Chamber of the Regional Court of Appeal.

10. After these decisions of the higher courts, the case file in the appeal was brought before the Istanbul 30th Assize Court, which immediately applied to the 36th Assize Court, asking for consent for the joining of the cases, and following the granted consent, the two cases were consolidated. After this merger decision, the 30th Assize Court again requested consent for the merger with the Çarşı case from the 13th Assize Court where this case was referred to by the Court of Cassation.

11. In the first hearing of the case, the Istanbul 13th Assize Court, the judge deemed it necessary to take the statements of the defendants' lawyers regarding the joinder, and adjourned the hearing to 13.October.2021.

12. While the response of the 13th Assize Court to the request for consent to the joinder of the cases was thus delayed, the Chief Judge of the 30th Assize Court was temporarily appointed as the Chief Judge of the 13th Assize Court and he has responded to his own request. On 28 July 2021, the Istanbul 13th Assize Court sent a warrant to the Istanbul 30th Assize Court, indicating that it gave consent to the consolidation. The Chief Judge of the Istanbul 30th Assize Court, also acting as the Chief Judge of the Istanbul 13th Assize Court, then postponed the hearing which was scheduled to be held on 13 August 2021 and joined all the cases. A hearing for the monthly review Kavala's detention file was scheduled to be held on 2 August 2021 when the majority decision for the continuation of Kavala's detention was taken by the 30th Assize Court.

13. Article 331 of the CCP provides that temporary judges shall only be involved in decisions of emergency nature. Normally decisions related to merger of cases do not fall in this category. In this particular case, the fact that the temporary judge is the chief judge of the Istanbul 30th Assize Court, which had asked the Istanbul 13th Assize Court for its opinion, makes this practice even more extraordinary and raises serious doubts about the impartiality of the judge and fairness of the decision. In fact, what we see here is the most recent and most striking example of the frequent reassignments of the judges hearing the cases regarding Osman Kavala since the beginning of the proceedings, indicating that the political intervention in judiciary continues.

14. As a result of this extraordinary process, the case on the espionage charge, which had reached its final stage, has been submerged in other cases enabling the continuation of Osman Kavala's detention throughout the new trial process.

The merger proceedings were unlawfully carried out without fully obtaining the requests and statements of the defendants, their lawyers, and the Public Prosecutor as stipulated in the Law. The fact that the acquittal decisions in both cases related to Gezi events were overturned without any reasonable legal justification, and these cases were merged unlawfully and without any reasonable justification on the basis of a conspiracy theory according to which these people cooperated for the same purpose even though they did not know each other. It may take years for this merged, multi-defendant, multi-action political

case to be concluded, and it is very likely that Osman Kavala's detention will be continued with the potential to be politically used as evidence for the validity of this conspiracy theory.

IV. CONSTITUTIONAL COURT'S JUDGEMENT

15. The decision of the General Assembly of the Constitutional Court, finding no violation of the rights of Osman Kavala, was issued with the 7 dissenting votes (of 15 members), including the President of the Court and his deputies. The dissenting opinions, which are very important in their evaluation of the legal grounds of the majority decision, were published 4 months after the date of the ruling. These dissenting opinions have not been submitted to the Committee of Ministers by the Turkish Government.

16. The charge of espionage against Kavala and his re-arrest were based on the allegation that he had frequent and continuous contact with HJB, just as in the charge that he supported the coup attempt of 15 July. The new evidence allegedly found is not related to any concrete action implying the involvement of Osman Kavala but consists of findings leading to assumptions about HJB's relations abroad.

    Apart from the findings that the mobile phones of Kavala and HJB transmitted via the cell towers close to one another, other so called evidence, i.e. the movies on the flash drives and the data on his mobile phone, cannot be associated with the crime of espionage in any material or logical sense. However, in the Paragraph 93 of the majority decision of the Constitutional Court, it is stated that these, as a whole, could be considered as strong indication of crime. The majority did not examine these finding individually and review their association with acts of crime of espionage as described in the laws. In Article 90, the reason for this practice is justified as follows: "The scope of the Constitutional Court's review in individual applications does not cover the task of determining the subject of which crime the alleged acts of the applicant constitute or whether the elements of crime as stipulated in the relevant laws exist or not.'' As shown in the dissenting opinions, when examined individually and within the scope of crimes as defined in the laws, as was done by the ECtHR, it becomes clear that the findings are far from constituting concrete evidence for acts of espionage; they do not imply the occurrence of any such act. It is to be noted that the Constitutional Court decision refrained to make any reference to the ECtHR's judgement.

V. POLITICAL MOTIVATIONS CONTINUE TO DOMINATE THE CASE

17. In the aftermath of the Gezi events, a number of legal proceedings were carried out in relation to certain activities of protesters. However with the indictment prepared on February 19, 2019 after Osman Kavala's first detention, the Gezi protests were defined for the first time as a conspiracy planned and staged by foreign powers in order to overthrow the government, accusing Kavala of planning, directing, and financing the Gezi protests. This was not based on discovery of new facts and findings, but reflected the evolution of the political assessment of Gezi protests by the government. After the coup attempt on July 15, 2016, although there was no concrete evidence to support it, the opinion that the Gezi protests were a preparation for the coup attempt and that it was a conspiracy supported by foreign powers just like the coup attempt, was adopted by the President and certain politicians in the government.

18. After a series of statements directly blaming Osman Kavala, the President of Turkey has continued to state that the Gezi Park protests were an attack by foreign powers to overthrow the government. In section C on "High Level Political Messages" of the Communication on the Action Plan submitted by Turkey to the Committee of Ministers concerning the case Kavala v. Turkey dated 20 July 2021, several references were made to the President's messages expressing the importance attached to the independence and impartiality of the judiciary. What is not addressed is the inevitable influence of the President's statements concerning Osman Kavala and the Gezi park protests on the opinion of the judiciary and the fact that such statements violate the principles contained the case law of the ECtHR. In the *Sovtransavto Holding v. Ukraine* judgment (2002), the ECtHR concluded that the statements of the President of Ukraine that the interests of the state should be protected in the case raised significant suspicion about the impartiality of the court.

19. Under the heading related to the violation of Article 5(4) of the Convention, the Turkish Authorities announced the action plan to be implemented in full within 2 years within the scope of the latest regulations enacted by the government on 14 July 2021 regarding the functioning of the judiciary, and stated that the principle that detention is an exceptional measure will be strengthened. As stated in government's response in article 149, an amendment was issued specifying "mere charging with the catalogue crimes shall not be a

sufficient reason for detention, concrete evidence justifying the strong suspicion shall also be presented."

Even though Article 19 of the Constitution and Articles 100 and 101 of the CCP already set out this condition, it is useful that such an amendment was issued in order to remind the jurists of this basic requirement of law. However, at the hearing held to review the detention on 2 August 2021, after the amendments in question were enacted in the Parliament, the requests for release were denied on the grounds that there exist concrete evidence. When the Prosecutor demanded the continuation of Kavala's detention by referring to the nature of the existing evidence, as Kavala's lawyers we asked the evidence in question to be specified by reminding the court of the new regulations. Despite our request, the Chief Judge refrained to specify any specific evidence in words or writing and closed the session by saying that "this is the Prosecutor's opinion and statement". This practice indicates that political factors which led the ECtHR to find a violation of Article 18 are still in force and continue to be the main motivation of the applicant's detention.

CONCLUSION:

20. The implementation of the individual and general measures specified in the action plan presented by the Turkish Authorities did not have any positive impact on the unlawful detention of Osman Kavala, which has been continuing since 1 November 2017. The initiation of a new long-lasting political case with a large number of defendants through the consolidation of cases indicates that the detention of Osman Kavala will continue in violation of Article 46/1 of the Convention despite the warnings of the Committee of Ministers.

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