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Meeting: 1406th meeting (June 2021) (DH)

Communication from the applicant (28/05/2021) in the case of Kavala v. Turkey (Application No. 28749/18).

Information made available under Rule 9.1 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1406^e réunion (juin 2021) (DH)

Communication du requérant (28/05/2021) relative à l'affaire Kavala c. Turquie (requête n° 28749/18)
[anglais uniquement]

Informations mises à disposition en vertu de la Règle 9.1 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

28 May 2021

**TO THE CHAIR OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF
EUROPE**

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

1. In its 1404th meeting (12-17 May), the Committee of Ministers recalled the previous judgment of the ECtHR and interim resolution, which included a strong presumption that the current detention of Osman Kavala was a continuation of the violations found in the case of *Kavala v. Turkey* (Application No. 28749/18); noted with utmost concern that the recent judicial decisions of national authorities reinforced the conclusion that these authorities failed to take into consideration the findings of the ECtHR or their obligation to restore the situation prevailing prior to the violation under Article 46 of the ECHR; and urged authorities once again to ensure the immediate release of the applicant. Lastly, actively considering using all the means at the disposal of the Council, if necessary, it decided to move forward with a decision on the most appropriate means to be used at their 1406th meeting (7-9 June) in the event that the applicant has not been released by then.

Developments in the case of Osman Kavala since the last meeting of the Committee of Ministers are as follows:

2. In its decision taken at the hearing of 21 May 2021, the 30th Assize Court ruled that Osman Kavala's detention on the charge of "military and political espionage" under Article 328 of the TCC shall continue and stated that the defendant was already released in compliance with the judgment of the ECtHR (ANNEX-1). However, as the trial on the espionage charge which was fabricated by using the same evidence as in the other charges against him in order to circumvent the ECtHR ruling and the subsequent decisions of the Committee of Ministers had reached its final stage, a new round of trials has opened with the steps taken to consolidate the cases concerning Osman Kavala with each other and with the *Çarşı* trial. This will result in a case that will concern individuals who have no relationship with one another and who committed different actions, will be used for political purposes, and will be open to political influence. As a result of the consolidation of the cases, the judicial process will be extended until an unpredictable date, and the new case will serve the purpose of continuing the detention of Osman Kavala. This is yet another example of Turkish judiciary's relentless efforts of finding new ways, regardless of their lawfulness, to keep Osman Kavala in prison and to evade its obligation to abide by the judgement of the Court under the article 46 of the Convention. To achieve this purpose, the judiciary has resorted to a rather complex procedure.

3. During the proceedings against the applicant before the Istanbul 36th Assize Court under Article 328 of the TCC, the applicant was interrogated, and the witnesses were heard. Even though the case was at the decision stage and a release order was expected to be issued at the hearing held on 5 February 2021, the 3rd Penal Chamber of the Istanbul Appellate Court ruled that the cases shall be consolidated on the grounds of the “opinion in favor of the consolidation of the case file in the Istanbul 30th Assize Court and other case files,” and that the detention of the applicant shall continue. The Istanbul 30th Assize Court, which approved the consolidation one day before the hearing to be held on 5 February 2021, scheduled the next hearing for the case, which was heard under Article 328 of the TCC and reached the decision stage, on 21 May 2021.
4. Furthermore, in its judgment numbered 2020/573 E. (File), 2021/54 K. (Decision), the 3rd Penal Chamber of the Istanbul Appellate Court ruled that “it shall consider consolidating the case numbered 2014/201 E. and heard in the Istanbul 13th Assize Court, which had given a decision of acquittal with regard to the Gezi Park events, with this case in the event that the Criminal Chamber of the Supreme Court overturns the decision”. The decision in question was overturned by the 16th Criminal Chamber of the Supreme Court before 21 May 2021 on the grounds that “the case would be consolidated with the Gezi Park case in which Osman Kavala was tried”.
5. National judicial authorities, namely the 3rd Penal Chamber of the Istanbul Appellate Court, the 16th Criminal Chamber of the Supreme Court, and the Istanbul 36th Assize Court, reviewed the case files concerning Osman Kavala through the UYAP system and ruled by consensus that all the files shall be consolidated. Nevertheless, the proceedings before the Istanbul 13th Assize Court, of which judgment was later overturned by the 16th Criminal Chamber of the Supreme Court, began in 2014, and the name of the applicant was not even mentioned during these proceedings. The decisions given by the 3rd Penal Chamber of the Istanbul Appellate Court and the 16th Criminal Chamber of the Supreme Court regarding the consolidation of proceedings that concerned different defendants and were at different stages are clearly unlawful. In order for different cases to be consolidated under the Code of Criminal Procedures (CCP), at least one of the defendants in these cases must be common; i.e., at least one person must be tried as a “defendant” in each of the cases considered to be consolidated. Even this alone is not enough. According to the law, even though the same defendant is tried in each of the cases, it is unlawful to consolidate cases in the event that it fails to provide any benefit due to their subject matters and stages of trial and impedes or complicates the finding of concrete facts and the ensuring of justice. This matter was explained in the judgment of the General Criminal Assembly of the Supreme Court numbered 2014/5-52 E. 2014/354 K. and dated 11 July 2014 as follows: *“As all the evidence was collected in the proceedings against the defendant and there was no procedure to be carried out by the court of first instance other than the issuance of a judgment, the consolidation of cases would lead to the unnecessary prolongation of the trial against the defendant and harm the sense of justice in the society as the judicial procedures would be repeated”*.

6. On the other hand, in the trial of the applicant in the Istanbul 30th Assize Court, the court scheduled the review of the detention on 15 June 2021 and the hearing on 6 August 2021 and issued an interim decision that it shall ask Istanbul 13th Assize Court for its approval to consolidate this file with the File No. 2021/178, if necessary. (ANNEX-2).
7. In conclusion, national judicial authorities do not comply with the judgments of the ECtHR and the call of the Committee of Ministers that Osman Kavala shall be released immediately. Instead, they circumvent the judgment of the ECtHR by adopting unlawful methods and abusing laws and continue the prolonged detention, which constitutes a violation of his right to liberty.

Applicant's Attorney
Atty. Dr. Köksal Bayraktar

ANNEX-1- Record of the hearing, paragraph 8

8-) In the review conducted, it was understood that in the judgment it issued on 10 December 2019 regarding the Application No. 28749/18 of the detained defendant, the European Court of Human Rights (ECtHR) found a violation by a unanimous vote under Article 5(1) of the European Convention on Human Rights (ECHR) on the grounds that there is "lack of reasonable suspicion" and under Article 5(4) of the same convention on the grounds that "the lawfulness of the detention was not reviewed quickly by the Constitutional Court" and by majority vote under Article 18 of the Convention on the grounds that the purpose of the detention of the applicant, who is a Human Rights defender, was to silence him; that Article 90 of our Constitution provides that "International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made *with regard to* these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail"; that Article 46 of the European Convention on Human Rights, to which Turkey is a party, provides that "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution"; and that the subject matter of the said judgment of the ECtHR is the detention order issued by the Istanbul 1st Magistrate's Court against the defendant on 1 November 2017 under Articles 309 and 312 of the Turkish Criminal Code. It was also understood that the defendant was released on 18 February 2020 on the charges specified in the detention order under Article 312 of the TCC and on 20 March 2020 on the charges specified in the detention order under Article 309 of the TCC. It was found that the current detention of the defendant is based on the detention order issued by the Istanbul 10th Magistrate's Court on 9 March 2020 on the charge of "military and political espionage" under Article 328 of the TCC. In the light of the fact that there is no ECtHR judgment issued regarding the current detention of the defendant, that the defendant was already released in compliance with the judgment of the ECtHR dated 10 December 2019, and that there is no ECtHR judgment to be executed regarding the current detention of the defendant; as it was understood that there has been no change in the legal status since the court's last-dated evaluation on the detention and 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; it was ruled (*by majority vote*) that the requests for release submitted by the defendant and his representatives **SHALL BE DISMISSED** for the reasons explained above and that the **DETENTION OF THE DEFENDANT SHALL CONTINUE**.

ANNEX-2- Record of the hearing, paragraph 6

6-) The Istanbul 13th Assize Court shall be requested to send the File No. 2021/178 to our court to be reviewed for the examination of the consolidation of files and then returned, and if deemed necessary after the review of the file, the Istanbul 13th Assize Court shall be asked for its approval for consolidation with the File No. 2021/178.