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Meeting: 1411th meeting (September 2021) (DH)

Communication from the authorities (13/08/2021) concerning the case of Kavala v. Turkey (Application No. 28749/18) (appendices in Turkish are available at the Secretariat upon request).

Information made available under Rule 8.2a 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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Les documents distribués à la demande d'un/e Représentant/e le sont sous la seule responsabilité dudit/de ladite Représentant/e, sans préjuger de la position juridique ou politique du Comité des Ministres.

Réunion : 1411^e réunion (septembre 2021) (DH)

Communication des autorités (13/08/2021) relative à l'affaire Kavala c. Turquie (requête n° 28749/18) (des annexes en turc sont disponibles auprès du Secrétariat sur demande) **[anglais uniquement]**.

Informations mises à disposition en vertu de la Règle 8.2a des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Ankara, August 2021

Additional Information on the Execution of the Judgment of KAVALA v. Turkey (Appl. No. 28749/18)

1. In addition to information submitted in the action plan dated 19 January 2021, and in the updated action plan dated 16 July 2021, the Turkish authorities would like provide following information on individual and general measures to update the Committee of Ministers.

2. The Turkish authorities have summarised and submitted detailed and updated information as to the legal grounds for the applicant's current detention in the Communications to the Committee of Ministers ("CM") dated 29 May 2020, 11 June 2020, 18 June 2020, 7 July 2020, 16 July 2020, 11 August 2020, 11 September 2020, 25 September 2020, 30 October 2020, 10 November 2020, in the action plan dated 19 January 2021 and in the communications dated 18 February 2021, 19 February 2021, 30 March 2021, 12 April 2021, 4 May 2021, 17 May 2021, 25 May 2021, 1 June 2021, 15 June 2021 and in the updated action plan dated 16 July 2021. The Turkish authorities reiterate these explanations in this regard.

Legal Grounds for the Applicant Mehmet Osman Kavala's Current Detention

-Background

3. Under the investigation (no. 2017/96115) initiated by the İstanbul Chief Public Prosecutor's Office, on 1 November 2017 the applicant was placed in pre-trial detention by the İstanbul 1st Magistrate Judgeship in Criminal Matters pursuant to Article 100 § 3 of the Code of Criminal Procedure ("CCP") for "attempting to overthrow the constitutional order of the Republic of Turkey through force and violence" (Article 309 of the Turkish Criminal Code) as regards his role in the July 15 coup attempt and for "attempting, by the use of force and violence, to abolish the government of the Republic of Turkey or to prevent it, in part or in full, from fulfilling its duties" (Article 312 of the Turkish Criminal Code) as regards his role in the Gezi events. In its decision, the Magistrate Judgeship noted that there existed a strong suspicion that the offence in question had been committed, that the suspect could abscond, and that a measure of judicial control including conditional bail would be

insufficient.

4. On 5 February 2019 the Istanbul Chief Public Prosecutor's Office decided to disjoin the investigation (no. 2017/96115) into the accusation under Article 309 of the Turkish Criminal Code (attempting to overthrow the constitutional order) as regards the applicant's role in the July 15 coup attempt from the investigation (no. 2018/210299) into the accusation under Article 312 of the Turkish Criminal Code (attempting to overthrow the Government) as regards the applicant's role in the Gezi events.

5. The investigation conducted on the file no. 2018/210299 due to the applicant's acts as to the Gezi events was completed and a bill of indictment was lodged by the Istanbul Chief Public Prosecutor's Office on 19 February 2019. On 4 March 2019, the Istanbul 30th Assize Court accepted the indictment and, accordingly the criminal proceedings were initiated requesting the applicant's conviction for the offences of having attempted to overthrow the Government by force and violence within the meaning of Article 312 of the Turkish Criminal Code ("TCC"), and of having committed numerous offences disturbing public order - damaging public property within the meaning of Article 152 of the TCC, profanation of places of worship and of cemeteries within the meaning of Article 153 of the TCC, unlawful possession of dangerous substances within the meaning of Article 174 of the TCC, looting, etc. (see the judgment of *Kavala v. Turkey*, §§ 47 and 56).

6. In the meantime, following the decision of disjoin of the investigation files, the Istanbul Chief Public Prosecutor's office maintained the investigation with respect to Article 309 of the Turkish Criminal Code (attempting to overthrow the constitutional order) as regards the applicant's role in the July 15 coup attempt under file no 2017/96115. The applicant was released for charges under Article 309 on 11 October 2019.

7. The Istanbul 30th Assize Court conducted the trial in respect of the applicant, and on 18 February 2020, ruled on the acquittal and release of the applicant on the ground that lawful, concrete and definite evidence could not be obtained sufficiently for his conviction for the imputed offences.

8. The Istanbul Chief Public Prosecutor's Office filed an appeal against this decision pursuant to Article 272 of the CCP.

9. Upon this appeal, on 23 January 2021, the 3rd Chamber of the Istanbul Regional Appeal Court quashed the judgment of the Istanbul 30th Assize Court, which had acquitted the applicant from the offence of abolishing the government. This accusation was based on the Gezi events and the subject matter of the Court's judgment. Accordingly, the detention order which is the subject matter of the Court's judgment finding violation was lifted on 18

February 2020, and the applicant was released in this respect.

-Other investigation Against the Applicant

10. On 18 February 2020, the applicant was taken into custody by the order of the Istanbul Chief Public Prosecutor's Office under Article 91 of the CCP within the scope of the on-going investigation (no. 2017/96115) initiated for the offence of "attempting to overthrow the constitutional order of the Republic of Turkey through force and violence" (Article 309 § 1 of the TCC) due to his acts related to the coup attempt on 15 July 2016.

11. Upon the request of the İstanbul Chief Public Prosecutor's Office, on 19 February 2020 the İstanbul 8th Magistrate Judgeship ordered the applicant's detention on the ground that there existed strong suspicion that he had committed the offence of "attempting to overthrow the constitutional order of the Republic of Turkey through force and violence (Article 309 § 1 of the TCC)"

12. On 25 February 2020 the applicant's lawyers filed an objection against the detention order. After the examination of the objection, on the same date the Istanbul 8th Magistrate Judgeship, which ordered the detention of the applicant on 19 February 2020, rejected the objection and sent the file to the Istanbul 9th Magistrate Judgeship for the examination of the objection. On the same date, the Istanbul 9th Magistrate Judgeship rejected the objection in question.

13. Pursuant to Article 108 § 1 of the CCP, on 20 March 2020 the İstanbul Chief Public Prosecutor's Office lodged an application to the İstanbul Magistrate Judgeship on duty for a review of the detention order dated 19 February 2020. The Chief Public Prosecutor's Office expressed the opinion as to the applicant's release on the ground that two years lapsed since the applicant's detention in the investigation conducted for the offence of attempting to overthrow the constitutional order of the Republic of Turkey through force and violence (Article 309 § 1 of the TCC)

14. On 20 March 2020 the İstanbul 3 Magistrate Judgeship ordered the applicant's release in respect of the said offence on the ground that the term of pre-trial detention at the investigation stage shall not exceed two years according to the provision introduced by the Law no. 7188 on Article 102 § 4 of the CCP, which came into force on 24 October 2019 and limits the period of detention during the investigation stage. The Magistrate Judgeship noted the following in its decision:

"Having regard to the existing reports, the suspect's defence submissions, witnesses' statements, criminal reports and whole content of the file, there are pieces of evidence

indicating that there exists a strong suspicion that the suspect committed the imputed offence of attempting to overthrow the constitutional order. However, the suspect has been detained over 2 years for the imputed offence and the maximum length of detention for this offence is 2 years within the meaning of Article 102 § 4 of the CCP. Having regard to the fact that the suspect has been detained for another offence, that the evidence was collected, that there exists no possibility that the applicant would tamper with the evidence, and that the time he has spent in detention; it is considered that the detention measure would be severe. Accordingly, it is decided to accept the opinion of the Istanbul Chief Public Prosecutor's Office as to the applicant's release for the offence of attempting to overthrow the constitutional order, and to release the suspect immediately unless he has been detained or convicted for another offence..."

15. Consequently, the applicant's detention for the offence of *attempting to overthrow the Government* (Article 312 of the TCC) in the detention order dated 1 November 2017 was ended on 18 February 2020, which was subject matter of the Court's judgment, and his second detention started on 19 February 2020 for the offence of *attempting to overthrow the constitutional order* (Article 309 of the TCC) was ended on 20 March 2020.

-The Applicant's Detention for the Offence of 'spying on political and military affairs'

16. As indicated in aforementioned previous explanations, the applicant's current detention is based on the decision of İstanbul 10th Magistrate Judgeship dated 9 March 2020 pursuant to Article 100 of the CCP due to the existence of a strong suspicion that the applicant had committed the offence of "obtaining information which is classified on the grounds of national security concerns or foreign political interests with the intention of spying on political and military affairs" (Article 328 § 1 of the TCC).

17. The Istanbul Chief Public Prosecutor's Office completed the investigation in respect of the applicant and issued a bill of indictment on 28 September 2020, charging the applicant with the offences of "Obtaining Classified Information for Purposes of Political or Military Espionage (Article 328 of the Turkish Criminal Code)" and "Attempting to Overthrow the Constitutional Order (Article 309 of the Turkish Criminal Code)". The Istanbul Chief Public Prosecutor's Office filed the indictment in question to the Istanbul 36th Assize Court.

18. It should also be noted that although the indictment requested that the applicant be punished under both the Articles 309 and 328 of the TCC, the applicant is only detained under

Article 328 of the TCC.

19. On 8 October 2020 the Istanbul 36th Assize Court assessed the indictment in question and accepted it. On the same day, the Assize Court issued a preliminary proceedings report whereby it dismissed the applicant's lawyers request for release and ordered the applicant's continued detention, indicating that an objection may be filed against this decision. In its decision, the Assize Court pointed out to the existence of strong criminal suspicion of the applicant's having committed the imputed offence and held that detention was proportionate in view of the classification and nature of the imputed offence and the lower and upper limit of the sentence stipulated by the law for the offence in question. In accordance to the preliminary proceedings report, the Assize Court reviewed the applicant's detention on 6 November 2020 and, on 4 December 2020. The first hearing was held on 18 December 2020 and the Assize court ordered the applicant's continued detention. According to the said hearing, on 8 January 2021, the applicant's detention has been reviewed and the Assize court ordered the applicant's continued detention.

The Merger of the Cases Before the 30th Assize Court of Istanbul

20. On 5 February 2021, the last hearing was held and the Istanbul 36th Assize Court ordered again the applicant's continued detention. At this hearing, the İstanbul 36th Assize Court also assessed the quashing decision of Istanbul Regional Appeals Court. In accordance with the said decision, the İstanbul 36th Assize Court decided to merge the case files with the İstanbul 30th Assize Court and transmitted the case file to the latter. Therefore, the casefile before the Istanbul 36th Assize Court has been closed.

21. Upon the quashing decision of the Istanbul Regional Appeal Court, the Istanbul 30th Assize Court issued a preliminary proceedings report and on 21 May 2021 the first hearing was held. At the end of the hearing the Assize Court decided the applicant's continued detention by majority vote (2-1). As reasoning of the continued detention the Assize Court stressed that: *'...It has been understood that by the Court's decision no. 28749/18 and dated 10 December 2019, as regards the detained accused, it was decided, unanimously, that Article 5/1 of the Convention on account of "lack of reasonable suspicion", Article 5/4 of the Convention on account of the fact that "the lawfulness of the detention was not decided speedily by the Constitutional Court" and, by majority, that Article 18 on account of the fact that "the detention of the applicant, a human-rights defender, pursued an ulterior purpose, namely to silence him, had been violated. Pursuant to Article 90 of the Constitution, "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 7 May 2004 by Article 7 of the Law 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” and pursuant to Article 46/1 of the Convention to which Turkey is a party: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties and pursuant to Article 46/2 of the Convention: “The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution”. Accordingly, it has been understood in the examination carried out that the subject matter of the relevant decision of the Court was the detention order of 1 November 2017 rendered by the Istanbul 1st Magistrate Judgeship against the accused person under Articles 309 and 312 of the TCC and that the accused person was released in respect of the accusations within the scope of the relevant detention order on 18 February 2020 under Article 312 of the TCC and on 20 March 2020 under Article 309 of the TCC. It has been seen that the current detention of the accused person is relied on the charge of “military and political espionage” raised by the Istanbul 10th Magistrate Judgeship dated 9 March 2020, under Article 328 of the TCC. Therefore, having regard to the fact that it has been understood that there is no decision of the Court regarding the accused’s current detention, that the accused has already been released within the scope of the Court’s decision dated 10 December 2019 and that there is no decision of the Court to be implemented in respect of the current detention of the accused person and that no change has occurred in the legal situation since the last assessment regarding detention conducted by the Court and by taking into consideration the quality and nature of the offence imputed to the accused Mehmet Osman KAVALA, the current stage of the trial, the existence of the concrete evidence demonstrating strong suspicion for the imputed offence, the upper limit of the sentence prescribed for the imputed offence by the law, it has been understood that the judicial supervision measures will remain insufficient and decided for the foregoing reasons that the requests of accused person and his lawyers for release be dismissed and that the accused person’s detention be continued (by majority)’.

22. In addition, it was decided that the detention of the applicant shall be assessed on the basis of the file on 15 June 2021 and if the decision on continuation of detention is rendered on that date, it shall be assessed on 12 July 2021. Further, it was decided that the next hearing will be held on 6 August 2021.

23. On 15 June 2021, the Assize Court reviewed the applicant's detention and decided his continued detention by majority vote (2-1). Additionally, on 12 July 2021, the Assize Court reviewed again the applicant's detention and decided his continued detention by majority vote (2-1). The Assize Court, in its decisions, mainly mentioned the concrete evidence indicating strong suspicion of crime and stated that conditional bail would be insufficient.

24. On 22 June 2021, the 30th Assize Court of Istanbul asked to merge the case files with the 13th Assize Court of Istanbul on the ground that;

- there was legal and factual connection between the acts subject to trials,
- for the sake of judiciary unity,
- the fact that indictment in the 13th Assize Court was previous that the indictment before the 30th Assize Court,
- the fact that the judgment of the 13th Assize Court has been reviewed by a higher judicial organ (court of cassation) than the revision (regional appeal court) of the judgment of the 30th Assize Court.

The Merger of the Cases Before the 13th Assize Court of Istanbul
(Doc. No. 2021/178)

25. As stated in the indictment, the subject matter of the trial conducted before the Istanbul 13th Assize Court (docket no. 2014/201 before the quash) was the act of trying to have the 'Çarşı Fan Group' (Çarşı Taraftar Grubu) – a fan group for Beşiktaş Football Club - participate in the 'Gezi Park' actions by directing them towards the park area.

26. By its judgment dated 29 December 2015, the 13th Assize Court of Istanbul, rendered a decision of acquittal of all charges (7 charges such as Membership of an Organisation Established with the Purpose of Committing a Crime, Attempting to Overthrow the Government of the Republic of Turkey) against all the accuseds (35 persons) except 4 of them. These 4 accuseds were convicted of possession of prohibited items (such as guns-sound bombs).

27. Upon appeal, the said decision of the Istanbul 13th Assize Court was examined by the 16th Criminal Chamber of the Court of Cassation and on 18 March 2021 a decision of quash was rendered. The reason for the decision of quash was “...*Considering the existence of a comprehensive case file numbered 2019/74 before the Istanbul 30th Assize Court regarding the Taksim Gezi events, the existence of a legal and factual connection between the*

said file and this file, and the nature of the crime of membership of an organization (in terms of terrorism and criminal organization); it should be decided to merge the said case files and the legal status of the accuseds should be determined accordingly...”

28. After the decision of the Court of Cassation, on 12 July 2021, the first hearing was held before the 13th Assize Court of Istanbul with the docket number 2021/178 and the next hearing was determined as **8 October 2021**.

29. Although the 30th Assize Court of Istanbul had decided that the next hearing will be held on 6 August 2021, on the hearing held by its own motion on 2 August 2021, the 30th Assize Court decided to merge the case file with the case file docket no. 2021/178 before the Istanbul 13th Assize Court in accordance with the latter’s confirmation dated 28 July 2021 (See Annex 1). At the same hearing, the applicant’s detention has been reviewed and the Istanbul 30th Assize Court decided the applicant’s continued detention by majority (2-1). Thus, the case file before the Istanbul 30th Assize court (docket no. 2021/17) has been closed.

30. After the decision of merger of the cases, on 11 August 2021, the 13th Assize Court of Istanbul decided that the detention of the applicant shall be assessed on the basis of the file on 1 September 2021 and if the decision on continuation of detention is rendered on that date, it shall be assessed on 27 September 2021.

31. Lastly, it should be noted that, merger of the cases does not mean that these cases resulted from different legal qualification of the same facts. The subject matter of the judgment at hand is the applicant’s acts in relation with Gezi events. His current detention is ordered under different criminal proceedings, notably the offence of political or military espionage. In this respect, the authorities would like to reiterate that the applicant’s detention, which was the subject matter of the judgment at hand, has already ended. Additionally, the last merger of the cases aimed at a comprehensive determination of the legal status of all accuseds within the scope of the Gezi Events.

Conclusion

32. The Turkish authorities will maintain submitting further information on the individual and general measures taken or envisaged to be taken in due time. In this respect, the Committee of Ministers will be kept informed on further developments.

Annex 1: The Decision of the 13th Assize Court of Istanbul Dated 28 July 2021.