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Date: 29/11/2024

**DH-DD(2024)1415**

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Meeting: 1514<sup>th</sup> meeting (December 2024) (DH)

Communication from the applicant (25/11/2024) concerning the case of Kavala v. Türkiye (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 : 1514<sup>e</sup> réunion (décembre 2024) (DH)

Communication du requérant (25/11/2024) relative à l'affaire Kavala c. Türkiye (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.

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DGI Directorate General of Human Rights and Rule of Law  
Department for the Execution of the Judgments of the ECtHR

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Sent by email

25 November 2024

Dear Sir/Madam,

Re: *Kavala v. Türkiye* (Application No. 28749/18) Submissions pursuant to Rule 9.1 of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments

We represent Mr. Osman Kavala and we are writing to make further submissions pursuant to Rule 9.1 of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments.

We refer to our previous submissions, inter alia, dated 11 July 2022, 19 August 2022, 14 September 2022, 12 October 2022, 1 December 2022, 10 February 2023, 18 April 2023 and 11 July 2023, 30 August 2023, 1 December 2023, 8 February 2024, 29 May 2024 and 9 September 2024.

It is recalled that the judgment of the European Court of 10 December 2019 in Mr Kavala's case found violations of Articles 5(1), 5(4) and Article 18 taken together with Article 5(1). Further, the respondent state was also required 'to take all necessary measures to put an end to the applicant's detention and to secure his immediate release'. The infringement proceedings judgment of the Grand Chamber of the Court of 11 July 2022 found a violation of Article 46(1) of the Convention due to the failure to release Mr. Kavala from detention. Accordingly, the respondent Government was found to have failed to comply with the 2019 judgment.

That situation remains as Mr. Kavala has still not been released. Instead, he has been kept in detention for more than seven years in total, including almost five years since the Court's 2019 judgment.

It is further recalled, once again, that in the 2022 judgment, the Grand Chamber concluded that:

'It follows that the Court's finding in the *Kavala* judgment of a violation of Article 5 § 1, read separately and in conjunction with Article 18, vitiated any action resulting from the charges relating to the Gezi Park events and the attempted coup' (para. 145).

## A. Domestic legal developments

There have been no domestic legal developments whatsoever since our last submission. This amounts to a period of two years and four months since the infringement proceedings judgment of 11 July 2022.

### 1. Pending applications before the Turkish Constitutional Court

Mr. Kavala's third application to the Constitutional Court lodged on 9 June 2022 (Application No. 2022/60891) remains pending. This application was lodged following his conviction by the first instance court on 25 April 2022 in clear defiance of the Grand Chamber judgment. Even though the communication of the case to the Ministry of Justice took place on 22 July 2022; the Ministry of Justice submissions were received on 24 August 2022 and the applicant's replies to the Ministry's submissions were lodged on 21 September 2022, the Constitutional Court has still not delivered a judgment concerning this application.

Mr. Kavala's fourth application to the Constitutional Court lodged on 24 October 2023 (Application No. 2023/94719) also remains pending. This application was lodged following the Court of Cassation's judgment upholding Mr. Kavala's conviction on 28 September 2023. On 17 April 2024, the Turkish Constitutional Court communicated the submissions of the Ministry of Justice, lodged on 4 April 2024, to the applicant. In its submissions the Ministry made no reference whatsoever to either of the two European Court judgments in Mr. Kavala's case. Mr Kavala's replies to the Ministry's submissions were lodged on 9 May 2024.

### 2. Extraordinary remedies invoked by Mr. Kavala

On 26 March 2024, Mr. Kavala resorted to the extraordinary remedy of requesting a release and retrial under Article 311/1-e of the Criminal Procedural Code. The 13<sup>th</sup> Assize Criminal Court rejected his request on 2 April 2024. On 18 April 2024, Mr. Kavala appealed against this decision to the 14<sup>th</sup> Assize Court. On 25 April 2024, the 14<sup>th</sup> Assize Court rejected the appeal. On 30 April 2024, Mr Kavala filed a further appeal with respect to the decision of the 13<sup>th</sup> Assize Court of 2 April 2024 arguing that the refusal to order a retrial was a decision made by a panel of judges that was composed in violation of Articles 23/3 and 381/1 of the Criminal Law of Procedure.

On 6 May 2024, a new request for a retrial was filed with the 13<sup>th</sup> Assize Court. On 6 May 2024, an additional appeal was filed concerning the 13<sup>th</sup> Assize Court decision of 2 April 2024 requesting a reversal of the judgment for the benefit of the law (*kanun yararına bozma*). On 9 May the 14<sup>th</sup> Assize Criminal Court appointed a new presiding judge and a new member of the panel, replacing the judges who had previously been involved in

convicting Mr Kavala. His request was denied by the newly constituted panel of judges of the 13<sup>th</sup> Assize Criminal Court on 15 May 2024.

On 16 May 2024 Mr. Kavala appealed against the decision of 15 May 2024. The 14<sup>th</sup> Assize Court rejected Mr. Kavala's petition on 24 May 2024 - the final instance in the case of the invocation of the extra-ordinary legal remedy under Article 311 of the Criminal Procedural Court. On 26 June 2024, this final appeal was rejected. On 8 July 2024, a second request for annulment in favour of the law was made under Article 309 of the Code of Criminal Procedure. On 12 August 2024, the Istanbul 13th Court of Assize held that there was no need to issue a decision on this request. On 12 August 2024, an objection was filed by Mr Kavala against this decision. On 25 October 2024, the Istanbul 14th Court of Assize also held that there was no need to issue a decision. On 2 October 2024, the 13th Court of Assize sent the case file to the Istanbul Chief Prosecutor's Office's Ministry of Justice Correspondence Bureau so that the file could be forwarded to the Ministry of Justice. That is the last development of which we are aware, at the time of lodging this submission.

#### B. Other developments

On 28 September 2023, the Court of Cassation confirmed the convictions of four other individuals in the Gezi Park trial (Can Atalay, Çiğdem Mater, Mine Özerden, and Tayfun Kahraman) and their sentences of eighteen years' imprisonment for aiding Mr. Kavala in the commission of the crime of 'attempting to overthrow the government'. Given that the Court held that any action resulting from the charges related to the Gezi part events and the attempted coup are vitiated by the infringement proceedings judgment with respect to Mr. Kavala (paras 145 and 172), these individuals are also unlawfully detained as they could not have assisted in the commission of a crime for which no legal evidence exists.

The individual petitions of all these individuals, with the exception of Mr. Atalay, are also pending before the Turkish Constitutional Court.

In the case of Can Atalay, who was elected as a Turkish Labour Party member of parliament for Hatay on 14 May 2023, the Turkish Constitutional Court delivered multiple decisions, finding violations of his right to be elected to public office and carry out political activities and his right to liberty and security of the person (see, inter alia, Şerafettin Can Atalay (No 2) GC Application No 2023/53898 of 25 October 2023 and Şerafettin Can Atalay (No 3) GC Application No 2023/99744 of 21 December 2023). Following a decision to remove his status as member of parliament, the Constitutional Court further delivered an annulment decision on 21 December 2023 (which was published in the Official Gazette on 1 August 2024) declaring such a decision as null and void. The Constitutional Court in its judgments also ordered the immediate release of Mr. Atalay. However, none of these judgments has been complied with by the trial court. This is the same trial court that convicted Mr. Kavala and sentenced him to aggravated life imprisonment.

An emergency session to address the annulment judgment of the Constitutional Court was voted down by members of parliament belonging to the Justice and Development Party and the National Movement Party on 16 August 2024 and the session also saw a member of the Justice Development Party physically assaulting the speaker, a member of the Turkish Labour Party.<sup>1</sup> A second request to hold a session to address the Constitutional Court judgment was made on 3 September 2024 by the main opposition party, the Republican Peoples Party. This request was denied by the Chair of the Turkish Grand National Assembly holding that the parliament had not received a decision from the court confirming that the consequences of his conviction were removed from his record. Therefore, the Chair of the Parliament invoked the refusal to implement binding Constitutional Court judgments by other courts as a reason for not convening a session to restore the rights of an elected member of parliament.

The open resistance to complying with the Constitutional Court judgments displayed by lower instance courts, the Court of Cassation and the government members of parliament in the case of Mr. Can Atalay has significant repercussions for the execution of the judgments of the European Court in the case of Mr. Kavala. This is because Mr. Atalay is imprisoned for aiding and abetting Mr. Kavala.

### C. Mr Kavala's second application to the European Court of Human Rights

Mr. Kavala submitted his replies to the Government's submissions in the case of *Kavala v Türkiye* (No. 2) (Application No. 2170/24) on 4 November 2024. The Government's replies on just satisfaction are due to be submitted to the Court by 3 December 2024. The Court will then be in a position to come to judgment on this case.

For the avoidance of any doubt whatsoever, Mr Kavala's introduction of another application to the European Court does not in any way affect the ongoing obligations of the Turkish authorities to fully implement the European Court judgments of 2019 and 2022 and the Committee of Ministers' obligations to ensure the implementation of both judgments.

### Conclusion

Mr. Kavala has been unlawfully deprived of his liberty for seven years, including almost five years since the Court's 2019 judgment requiring his 'immediate release'. It is two years and four months since the Grand Chamber judgment finding the Turkish authorities to be in violation of Article 46(1) of the Convention, because of their failure to release Mr Kavala.

The developments in Türkiye since the Court's 2019 judgment confirm that the following understanding and practices have become prevalent in the different levels of the judiciary, which are endorsed by the executive and other public authorities:

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<sup>1</sup> <https://gazeteoksijen.com/turkiye/tbmmdeki-can-atalay-oturumunda-neden-kavga-cikti-neler-yasandi-220168?sayfa=2>

- the European Court's judgments relating to arbitrary detention can in practice be dismissed in cases where new charges are laid, by relying on the same evidence or by adding trivial points to the earlier evidence; and
- the European Court's judgments relating to arbitrary detention in effect become inapplicable after conviction decisions, even if such decisions are based on the same evidence that the European Court has already examined and found to be insufficient even to establish a 'reasonable suspicion'.

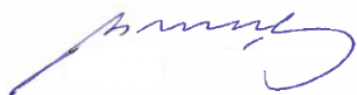
It is also the case that the 'chilling effect' created by Mr Kavala's prolonged, arbitrary and unlawful detention is felt much more keenly following his conviction in 2022 and his sentence to aggravated life imprisonment. Furthermore, there is a growing concern amongst human rights defenders and civil society activists in Türkiye that applications to the European Court of Human Rights are losing their effectiveness as a means to protect human rights, since the Court's judgments and the infringement procedure are considered as non-binding by the Turkish authorities.

Therefore, Mr Kavala strongly believes that there is an urgent need to counter these practices and perceptions by taking action which could constitute an effective intervention.

Accordingly, in summary, Mr Kavala requests that the following steps be undertaken:

- a) At its December 2024 meeting, the CM should require the Turkish authorities to produce a new, urgent individual measures action plan which provides a clear timeline as to when and how Mr. Kavala will be released from detention and acquitted; and
- b) The Complementary Joint Procedure should now be instigated, in accordance with PACE resolutions 2319 (2020) and 2518 (2023).

Yours faithfully,



Professor Başak Çalı and Professor Philip Leach