

SECRETARIAT / SECRÉTARIAT

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRÉTARIAT DU COMITÉ DES MINISTRES

COMMITTEE
OF MINISTERS
COMITÉ
DES MINISTRES



Contact: Zoë Bryanston-Cross
Tel: 03.90.21.59.62

Date: 10/11/2020

DH-DD(2020)1007

Document distributed under the sole responsibility of its author, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1390th meeting (December 2020) (DH)

Communication from NGOs (Human Rights Watch, the International Commission of Jurists, and the Turkey Human Rights Litigation Support Project) (02/11/2020) and reply from the authorities (10/11/2020) 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 Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

* * * * *

Document distribué sous la seule responsabilité de son auteur, sans préjuger de la position juridique ou politique du Comité des Ministres.

Réunion : 1390^e réunion (décembre 2020) (DH)

Communication d'ONG (Human Rights Watch, the International Commission of Jurists, and the Turkey Human Rights Litigation Support Project) (02/11/2020) et réponse des autorités (10/11/2020) concernant 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 des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

DGI - Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the ECHR
F-67075 Strasbourg Cedex France
E-mail: dgi-execution@coe.int



Sent by email

2 November 2020

Submission by Human Rights Watch, the International Commission of Jurists, and the Turkey Human Rights Litigation Support Project pursuant to Rule 9.2 of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments, Additional Observations on the Implementation of *Kavala v. Turkey* (Application no. 28749/18) final judgment

I. Introduction:

1. In line with Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, Human Rights Watch, the International Commission of Jurists and the Turkey Human Rights Litigation Support Project (“the NGOs”) hereby present an additional communication regarding the execution of the European Court of Human Rights (“the Court” or “ECtHR”) judgment in the case of *Kavala v. Turkey* (Application no. 28749/18).
2. In *Kavala v. Turkey*, the ECtHR, on 10 December 2019, found violations of Article 5(1) (right to liberty and security), Article 5(4) (right to a speedy decision on the lawfulness of detention) and Article 18 (limitation on use of restrictions on rights) of the European Convention on Human Rights (“the Convention” or “ECHR”) taken together with Article 5(1). The Court required the Government of Turkey to take measures to end the detention of human rights defender Osman Kavala and to secure his immediate release. The Court stated that any continuation of Mr. Kavala’s detention would prolong the violations and breach the obligation to abide by the Court’s judgment in accordance with Article 46(1) of the Convention. The judgment became final on 11 May 2020. Despite the Court’s clear findings and mandatory order, Mr. Kavala remains in detention as of the date of this submission.
3. In their initial submission dated 29 May 2020, the NGOs underlined that decisions taken to prolong Mr. Kavala’s detention had been guided by political expediency and there had been a concerted political effort by the Turkish authorities to prevent Mr. Kavala’s release. These bases for their action are evident in the sequence of court orders prolonging Mr. Kavala’s detention, the actions of the executive and prosecutors in relation to the judicial procedures against him, and the lack of due consideration of the ECtHR’s findings and objective deliberation as to the legality of any deprivation of liberty.¹ The NGOs made several

¹ Submission by Human Rights Watch, the International Commission of Jurists and the Turkey Human Rights Litigation Support Project pursuant to Rule 9.2 of the Committee of Ministers’ Rules for the Supervision of the

recommendations to the Committee of Ministers, on the issues of the general and individual measures, to ensure full implementation of the ECtHR's judgment and Mr. Kavala's immediate release on the ground that the Court's judgment clearly applies to his ongoing detention.²

II. Process before the Committee of Ministers:

4. The Committee of Ministers, in its 1377bis meeting (1-3 September 2020) (DH considered that the information available to the Committee raised a strong presumption that Mr. Kavala's current detention was a continuation of the violations found by the Court.³ In its decision, the Committee urged the authorities to ensure that Mr. Kavala's application before the Constitutional Court "is examined within the shortest possible timeframe and with full regard to the European Court's findings" and to ensure Mr. Kavala's immediate release pending this judgment. As for the general measures, the Committee asked Turkey to provide information, in its upcoming action plan, on the general measures it planned to take in relation to the Court's findings on Article 18 of the Convention in conjunction with Article 5, including measures to ensure the full independence of the judiciary.
5. Mr. Kavala's application was expected to be reviewed and concluded by the Constitutional Court on 29 September 2020. However, following the presentation of a new bill of indictment filed against Mr. Kavala to the Istanbul 36th Assize Court, the Constitutional Court has postponed without offering a new date review of the application. Mr. Kavala remains in detention.
6. In its 1383rd meeting of 29 September – 1 October 2020, the Committee of Ministers noted this delay in the Constitutional Court process and expressed its "strong hope that the Constitutional Court concludes its examination in the shortest possible timeframe and in line with the ECtHR's judgment".⁴ The Committee criticised Mr. Kavala's ongoing detention and the authorities' failure to act in accordance with the Committee's earlier decision. Calling for Mr. Kavala's immediate release again, the Committee requested the prompt conclusion of the cases related both to the Gezi Park and 15 July 2016 coup attempt, in line with the ECtHR's findings. The Committee also asked its Secretariat to work on a draft interim resolution to be considered if Mr. Kavala has not been released by its 1390th meeting on 1-3 December 2020.

III. The new bill of indictment against Osman Kavala:

7. The Prosecutor's bill of indictment delaying the Constitutional Court judgment concerns Mr. Kavala's alleged involvement in the 15 July 2016 coup attempt. It was filed on 28 September 2020 (see Annex I for the indictment in Turkish)⁵ and approved on 8 October 2020 by the Istanbul 36th Assize Court. This court, which will be hearing the case, also

Execution of Judgments, Initial Observations on the Implementation of *Kavala v. Turkey* (Application no. 28749/18) final judgment, 29 May 2020: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)501E](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)501E).

² Ibid.

³ 1377bis meeting (1-3 September 2020) (DH) - H46-38 Mergen and Others (Application No. 44062/09) and Kavala (Application No. 28749/18) v. Turkey: [CM/Del/Dec\(2020\)1377bis/H46-38](https://www.coe.int/t/Doc/CM/Del/Dec(2020)1377bis/H46-38)

⁴ 1383rd meeting (29 September - 1 October 2020) (DH) - H46-22 *Kavala v. Turkey* (Application No. 28749/18): [CM/Del/Dec\(2020\)1383/H46-22](https://www.coe.int/t/Doc/CM/Del/Dec(2020)1383/H46-22),

⁵ English translation of the indictment has been submitted to the Committee by the Government with its submission dated 20 October 2020, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a032a3.

decided to prolong Mr. Kavala's pre-trial detention in the course of the same deliberation (see Annex II for the interim hearing report of the court).⁶ The first hearing is scheduled to take place on 18 December 2020, after the upcoming Committee of Ministers meeting. The Prosecutor H.Y., who drafted the indictment, has since been promoted to Deputy Justice Minister by a Presidential decision on 15 October 2020. The promotion took place a week after the local court's approval of the controversial indictment, lending well founded credence to concerns about executive interference in judicial and, in the present case, prosecutorial decisions as detailed below.⁷

8. In the indictment, Mr. Kavala is charged with two offences under two articles of the Turkish Penal Code: "attempting to overthrow the constitutional order by force and violence" requiring aggravated life-time imprisonment (Article 309); and "securing for purposes of political or military espionage information that should be kept confidential for reasons relating to the security or domestic or foreign policy interests of the state," carrying up to 20 years' imprisonment (Article 328).⁸ The indictment contains no concrete evidence justifying the allegations of these serious offences and Mr. Kavala's ongoing detention. The indictment has several serious deficiencies that are evidently non-compliant not only with Turkey's obligation to faithfully execute the judgments of the European Court of Human Rights, but also with its obligation to respect and protect rights to freedom of expression (Article 10 ECHR) and association and assembly (Article 11 ECHR).
9. First, despite the fact that Mr. Kavala was acquitted of all charges in the Gezi Park trial by the Istanbul 30th Assize Court in February 2020, his prosecution in that trial is widely referenced in the indictment without even mentioning his acquittal.⁹ Different elements from the Gezi Park trial are referred to by the Prosecutor, who concludes that Mr. Kavala had coordinated the Gezi Park "uprising" with the support of foreign forces, including the Open Society Foundation and George Soros. These allegations, for which Mr. Kavala has been acquitted, are presented to the local court by the Prosecutor as factors relevant to understanding Mr. Kavala's alleged intent, his 'illegal' activities, and the basis of the

⁶ "Tensip zaptı".

⁷ Decision no: 2020/461, cited in <https://www.duvarenglish.com/human-rights/2020/10/18/prosecutor-who-penned-2nd-kavala-indictment-promoted-as-deputy-justice-minister/>.

⁸ Relevant charges are Turkish Penal Code No. 5237:

Article 309 (1): *Those using force and violence to attempt to overthrow the constitutional order of the Republic of Turkey or introduce a different order or actually prevent this order are punished with aggravated life imprisonment.*

Article 328 (1): *(1) A person who secures 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 a penalty of imprisonment for a term of fifteen to twenty years.*

⁹ Between pages 5-11 of the indictment, a separate part is dedicated to the Gezi Park protests related allegations against Osman Kavala and there are several other lengthy references to the same allegations through the rest of the 64-page document.

charges against him.¹⁰ Underlining this, the Prosecutor alleges that Mr. Kavala's activities against the Republic of Turkey started with the Gezi Park protests.¹¹

10. Second, the indictment includes as purported evidence of criminal conduct, Mr. Kavala's legitimate activities as a human rights defender, and civil society activist.¹² The Prosecutor speculates that Mr. Kavala established NGOs that appeared to be engaged in legal activities, but served illegal purposes and he ensured that those NGOs received support in order to use these institutions as tools "in revealing the divisions in the society and deepening them".¹³ The Prosecutor goes on to allege that Mr. Kavala, through Anadolu Kültür A. Ş., the NGO which was formed as a limited public company,¹⁴ provided funding for "divisive projects" concerning "Turkish citizens of Kurdish, Armenian, Greek, Christian, Jewish, Assyrian and Yezidi origin". In the Prosecutor's view, that could trigger social segregation.¹⁵ Some of the facts relied on by the Prosecutor to support his allegations related to this are as follows:

- The allegation that Mr. Kavala provided funding for three documentaries, which are described by the Prosecutor as "provocative work aiming at destroying the Kurdish origin people's sense of belonging to the Republic of Turkey";¹⁶
- The organisation of a 2015 concert "In Memoriam: 24 of April" in memory of the Armenian intellectuals sent to their deaths in 1915, which are described as a way of bringing forward "1915 incidents" by Mr. Kavala to express allegations of genocide and carry out lobbying activities against Turkey at an international level.¹⁷

11. Third, the charges under Article 309 and 328 of the Penal Code against Mr. Kavala are, as underlined by the ECtHR,¹⁸ predominantly based on his alleged contacts with US academic H.J.B. and some other individuals, and are not supported by other relevant facts in the indictment. Particularly, Mr. Kavala is accused of having played a role in the 15 July 2016 coup attempt and espionage through his alleged connections with H.J.B, who is also charged with the same offences in the indictment. The Prosecutor tries to make inferences and draw parallels between Mr. Kavala's and H.J.B.'s activities, meetings, and

¹⁰ Original words in the bill of indictment:

Turkish version: "*Şüpheliye atılı anayasal düzeni değiştirmeye teşebbüs ve siyasal askeri casusluk suçlarının anlaşılabilmesi için öncelikle şüpheli Mehmet Osman KAVALA'nın organize ettiği Gezi Kalkışması sürecine göz atmak gerekmektedir.*"

English version: "*In order to understand the offences of attempting to overthrow the constitutional order and political-military espionage attributed to the suspect Mehmet Osman Kavala, the Gezi Park process that had been orchestrated by him must be looked into.*" p. 33.

¹¹ Ibid, p. 61.

¹² See, Solidarity Network for Human Rights Defenders, "The New Kavala Indictment Constitutes the Denial of Law", 14 October 2020: <https://www.turkeylitigationssupport.com/blog/2020/10/14/the-new-kavala-indictment-constitutes-the-denial-of-law>; and Human Rights Watch and the International Commission of Jurists, "Second Politically Motivated Trial for Rights Defender," October 26, 2020: <https://www.hrw.org/news/2020/10/26/turkey-2nd-politically-motivated-trial-rights-defender>.

¹³ Bill of indictment, p. 61.

¹⁴ The limited public company Anadolu Kültür A. Ş. was set up by Osman Kavala in 2002. It works to promote peace, reconciliation and human rights by supporting artistic and cultural initiatives

¹⁵ Bill of indictment, p. 31.

¹⁶ The documentaries "Rojava'nın Işıkları – Kadın Devrimi" (Lights of Rojava – Women Revolution), "Küçük Kara Balıklar" (the Little Black Fish(es)) and "1994", see p. 32 of the bill of indictment.

¹⁷ Ibid.

¹⁸ See paras. 154 and 159 of the judgment.

international travels and lists the movements of both in an attempt to link them with one another. There are numerous events cited in the indictment, but the indictment does not even attempt to show any causal links between the events. In support of the alleged offences, the indictment only relies on the fact that the applicant's mobile phone and that of H. J. B. had emitted signals from the same base receiver station in Istanbul several times between 2013 and 2016, that Mr. Kavala and H.J.B. had met in a restaurant on 18 July 2016 and that they had had two brief calls on 8 October 2016.¹⁹ The Prosecutor accepts that Mr. Kavala and H.J.B. had actually had little "direct contact", which would appear to grossly undermine any allegation of "criminal collaboration" between them. He goes on to suggest flatly but without any substantiation that this was because H.J.B. "knew and applied the intelligence tactics and methods" and "they showed extra effort for that".²⁰

12. Fourth, the Prosecutor alleges in relation to Article 328 of the Penal Code that Mr. Kavala committed the act of "securing, for purposes of political or military espionage, information that should be kept confidential for reasons relating to the security or domestic or foreign policy interests of the state". His detention under this charge was ordered by the Istanbul 10th Criminal Judgeship of the Peace on 9 March 2020.²¹ In its submissions to the Committee of Ministers, the Government argued that this was a new charge that had not been addressed by the ECtHR in its judgment and therefore the failure to release Mr. Kavala cannot be seen in the context of the non-execution of the ECtHR judgment. The NGOs argued in their submission to the Committee, however, that the detention order "*referred to the same investigation file that had been ongoing in relation to the coup attempt and that it relied on the same facts which had already been reviewed by the ECtHR and found insufficient to justify detention (paragraphs 154 and 155).*" The NGOs further submitted that "*[t]he judge ordering [Mr. Kavala's] detention repeated substantially the same reasoning to detain Mr. Kavala as the earlier decision concerning his alleged involvement in the coup attempt, focusing on his alleged contacts with H.J.B. and offering no specific new facts or any reference to a different investigation file. In other words, the only difference between this [...] detention order and the previous orders is the legal qualification of the same acts.*"²²

13. The bill of indictment confirms this assessment. As can be seen from the text, it cites both charges against Mr. Kavala, espionage and attempting to overthrow the constitutional order; both charges against Mr. Kavala are based on the same facts and same reasoning; more specifically, for both charges as stated above, the indictment heavily focuses on Mr. Kavala's alleged contacts with H.J.B. to establish that Mr. Kavala had committed this offence. According to the Prosecutor's submissions in relation to Article 328 of the Penal Code, Mr. Kavala was the local collaborator of H.J.B and the actions, contacts and activities of Mr. Kavala and H.J.B. were aimed at "analyzing the sociological, economic and political base of [the] country, determining the nerve endings of the society and activating them when necessary." According to the Prosecutor, Mr. Kavala, through the NGOs he

¹⁹ See pages 36 - 38 and 56 of the bill of indictment.

²⁰ See page 39 of the bill of indictment.

²¹ It should also be noted that on 20 March 2020, Osman Kavala was released once again – as he had been on 11 October 2019 - on the charge of "attempting to overthrow the constitutional order" (Article 309 of the Turkish Penal Code) after continuation of his detention on a renamed charge under Article 328 had been ensured by the decision of the Istanbul 10th Criminal Judgeship of Peace.

²² Supra note 1.

established and supported, “obtained information that has sociological, economic and political content, which should be kept confidential in terms of the security of the state or domestic or foreign political benefits of the state”.²³ The Prosecutor fails to provide any plausible explanation as to why working on the sociological, economic, and political context of the country by civil society organisations and producing analysis involving in these subjects amount to collecting and making available “confidential information”. He also could not provide any facts casting doubt on Mr. Kavala’s intent of promoting human rights in the country as a civil society activist. The logical consequence of the Prosecutor’s astonishing assertion is that any kind of NGO activity could be classified as ‘espionage’ as research and information gathering on human rights abuses, reporting, and making findings public are among the main activities of civil society.

14. As discussed in some detail in the NGOs’ 29 May 2020 submission (paras 13-25), the ECtHR has already examined in the *Kavala v. Turkey* judgment the complaints of Mr. Kavala regarding the same investigation concerning his alleged involvement in the 15 July 2016 coup attempt and relies on the same facts. The Court clearly stated that the initial court order to detain Mr. Kavala in November 2017 for attempting to overthrow the constitutional order under Article 309 of the Penal Code, and the repeated prolongation of his detention on that charge, was based on insufficient evidence to justify even the suspicion of the offence. The Court pointed out that the accusations against Mr. Kavala concerning the attempted coup of 15 July 2016 were predominantly based on the existence of contacts between the applicant and H.J.B. In its judgment, the ECtHR found on this question that the very same facts that are now invoked again by the Prosecutor in the new indictment were not sufficient to justify suspicion against Mr. Kavala and “it cannot be established on the basis of the file that the applicant and H.J.B. had *intensive contacts*” (emphasis added, para. 145). Based on that, the Court held that the evidence in the case file was insufficient to justify any suspicion against Mr. Kavala (paragraph 154) and underlined that “*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 [Mr. Kavala] could have been involved in an attempt to overthrow the constitutional order.*” (paragraph 155). Despite the above findings of the Court, the indictment in question does not contain any “tangible and verifiable facts or evidence” to support the accusation against Mr. Kavala of attempting to overthrow the constitutional order by force and violence or espionage.²⁴
15. In its judgment, the ECtHR also criticised heavily the approach of the Prosecutor to the legitimate activities of a human rights defender and civil society activist. According to the Court, the activities Mr. Kavala was charged with were legal non-violent activities and “clearly related to the exercise of a Convention right” (para. 146); the activities identified by the Prosecutor as evidence of a crime were, among others, the applicant’s meetings and phone conversations with domestic and international stakeholders; his involvement in the work of other NGOs (para. 148); his legal and non-violent activities (para. 149); and meetings Mr. Kavala had with different individuals. In its judgment, the Court concluded that “it has not been demonstrated in a satisfactory manner that the applicant was deprived

²³ Bill of indictment, p. 61.

²⁴ “In the Court’s opinion, it is quite clear that a suspicion of attempting to overthrow the constitutional order by force and violence must be supported by tangible and verifiable facts or evidence, given the nature of the offence in question”, *Kavala v. Turkey*, ECtHR, paragraph 155.

of his liberty on the basis of a ‘reasonable suspicion’ that he had committed a criminal offence.” (paragraph 156). The Court therefore determined that Mr. Kavala’s ongoing detention under this investigation and Gezi park trial constituted a violation under Article 5(1) of the Convention.

16. In its interim hearing report of 8 October 2020, the Istanbul 36th Assize Court decided to extend Mr. Kavala’s pre-trial detention on charges of “attempting to overthrow the constitutional order by force and violence” (Article 309) and “securing for purposes of political or military espionage information that should be kept confidential for reasons relating to the security or domestic or foreign policy interests of the state” (Article 328).²⁵ This, together with other details provided above, confirms that the scope of the ECtHR’s judgment fully covers Mr. Kavala’s current detention on charges relating to the two offences set out in Articles 309 and 328 of the Penal Code.

IV. Ongoing interference with the judiciary by the executive:

17. In *Kavala v. Turkey*, together with its findings on Article 5 of the Convention, the ECtHR found a violation of Article 18 in conjunction with Article 5(1). In its reasoning, the Court referred, among other things, to a wide range of legitimate activities of Mr. Kavala relied on by the prosecution (paragraph 222); the irrelevance of the charges against him and his lawful activities that were used as evidence of the alleged offences (paragraph 223); the time lapse between the time of the alleged offences, Mr. Kavala’s detention and the indictment against him (paragraphs 226 and 228); and the links between the developments in the judicial proceedings and the actions of the executive concerning Mr. Kavala, including public speeches from President Recep Tayyip Erdoğan (paragraph 229). The Court found on these grounds that the detention of Mr. Kavala “pursued an ulterior purpose, namely to reduce him to silence as a human rights defender” (paragraph 230) and the measures used against him “were likely to have a dissuasive effect on the work of human-rights defenders” (paragraph 232).
18. In their Rule 9.2 submission of 29 May 2020, the NGOs provided the Committee of Ministers with a detailed explanation on the issues related to the Court’s evaluation on Article 18 of the Convention.²⁶ These submissions, together with the discussions around the content of the indictment that are elaborated above, and the Court’s findings on Articles 5(1) and 18 Convention confirm that the new indictment has been drafted not to bring in good faith any bona fide new allegations, but rather to be used as a tool to justify the prolongation of Osman Kavala’s unlawful detention.
19. This is evident in the timing of the Prosecutor’s indictment and the announced day for the deliberation of the Constitutional Court on the case concerning the lawfulness of Mr. Kavala’s detention following his release in February 2020 in the Gezi Park trial. Both dates were around the Committee of Ministers’ 29 September – 1 October 2020 meeting in which *Kavala v. Turkey* was part of the agenda. The indictment was finalised a day before the Constitutional Court was due to rule on Mr. Kavala’s application on 29 October 2020. The

²⁵ Meanwhile, the Istanbul 36th Assize Court decided that Mr. Kavala be released on the charge of “attempting to overthrow the constitutional order” stating that the decision of detention of Mr. Kavala on this charge had been taken mistakenly. See, Gökçer Tahincioğlu, “Mahkeme hata yaptığını yeni fark etti; ‘Kavala için tahliye olduğu suçtan tutukluluğa devam kararı vermişiz’”: <https://t24.com.tr/haber/mahkeme-hata-yaptigini-yeni-fark-etti-kavala-icin-tahliye-oldugu-suctan-tutukluluğa-devam-karari-vermişiz.909173>.

²⁶ Supra note 1, paras 18-21 and 33-57.

Constitutional Court used the indictment as the reason to postpone its deliberation to an indeterminate date. There is no plausible explanation for this postponement on two grounds: First, the Constitutional Court had access to the whole investigation file already, unlike the applicant and his lawyers. The judges of the Court were able to see and evaluate the evidence in the file that the Prosecutor used as basis for his indictment. Second, the application to the Constitutional Court concerned Mr. Kavala's detention following his release in the Gezi Park trial. The ECtHR found in *Alparslan Altan v. Turkey* that evidence obtained after an initial detention -this is in case the Constitutional Court wanted to see if there was new evidence in the file- should not be used to justify the initial detention which had taken place prior to it being available.²⁷

20. Prosecutor H. Y.'s promotion to deputy Justice Minister on 15 October 2020 is another key development illustrating the executive's ongoing control of the judiciary in Turkey. As Deputy Justice Minister, H. Y. has also been made an *ex officio* member of the Council of Judges and Prosecutors. The promotion came days after his indictment had been approved by the Istanbul 36th Assize Court in a case concerning a detained human rights defender who has been personally targeted by the person behind the promotion, President Recep Tayyip Erdoğan. This constitutes a strong indication to the public and judiciary that the President supports the problematic indictment and the actions of the judicial authorities against Mr. Kavala. It also gives credibility to concerns that the criminal prosecutions concerning perceived opponents of the government in Turkey are at least unduly influence, and likely effectively controlled, by the executive, and the actions of the judiciary complying with its policies are rewarded.
21. The ECtHR, in its *Kavala v. Turkey* judgment, took similar factors into account while finding a violation of Article 18 in conjunction with Article 5(1) of the Convention. In their previous submission to the Committee of Ministers, the NGOs referred to the President's speeches following Mr. Kavala's release in February 2020 publicly criticising the local court's judgment on his acquittal. The sequence of events since that submission, which have been set out above, shows that there is still an ongoing effort to keep Mr. Kavala behind bars for the same reasons identified by the ECtHR in its judgment. Therefore, Mr. Kavala's ongoing detention must be seen as the prolongation of the Article 18 violation that had been found by the Court.

V. Conclusion:

22. In sum, there is no concrete evidence in the new indictment to justify the allegation that Mr. Kavala had been involved in an attempt to overthrow the constitutional order or espionage. Under these circumstances, Mr. Kavala's current detention was ordered in disregard of the ECtHR's judgment, as it relied on the same vague assertions and insufficient evidence that cannot justify suspicion against him. Mr. Kavala's ongoing detention and the new indictment filed against him demonstrates that he still continues to be the subject of a campaign of persecution. All these actions targeting his legitimate human right activities as a human rights defender and civil society activist are intended to reduce him to silence and deter others from carrying out similar activities.²⁸ In light of the above, the NGOs invite the Committee of Ministers to:

²⁷ *Alparslan Altan v. Turkey*, ECtHR, Application no. 12778/17, 16 April 2019, paras 138 and 139.

²⁸ *Supra* note 1.

- i.** consider adopting the relevant recommendations formulated in their submission of 29 May 2020;²⁹
- ii.** take further steps to end immediately Mr. Kavala's ongoing detention, which has now exceeded three years;
- iii.** recognise at its 1390th 1-3 December 2020 meeting that the continuing detention of Osman Kavala violates Article 46 of the Convention concerning the binding nature of final judgments of the ECtHR and may trigger Article 46(4) infringement proceedings against Turkey; and
- iv.** take the necessary general measures identified in the NGOs submission of 29 May 2020 to implement the ECtHR's ruling concerning Article 5 and 18 of the Convention in *Kavala v. Turkey* and its findings in relation to human rights defenders.

²⁹ Supra note 1, pp 17-18.

Appendix:

I. Bill of indictment,

II. 8 October 2020 interim hearing report of the Istanbul 36th Assize Court.



***Permanent Representation
of Turkey
to the Council of Europe***

DGI

10 NOV. 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Strasbourg, 9 November 2020

**2020/33766324/31944547
Kavala (28749/18) v. Turkey**

Ms Ovey,

I enclose herewith the Turkish Government's Submission in response to the rule 9.2 communication of Human Rights Watch, the International Commission of Jurists and the Turkey Human Rights Litigation Support Project concerning the execution of the above-mentioned judgment.

Please accept, Ms Ovey, the assurances of my high consideration.

Çağla Pınar TANSU SEÇKİN
Co-Agent of the Government of the Republic of Turkey
before the ECtHR
Deputy to the Permanent Representative

Enc.: As stated

Ms Clare OVEY
Head of Department a.i.
Department for the Execution of Judgments of the ECHR
Directorate General Human Rights and Rule of Law
Council of Europe

Ankara, November 2020



**THE TURKISH GOVERNMENT'S SUBMISSION
IN RESPONSE TO THE RULE 9.2 COMMUNICATION OF
*HUMAN RIGHTS WATCH, THE INTERNATIONAL COMMISSION OF JURISTS AND
THE TURKEY HUMAN RIGHTS LITIGATION SUPPORT PROJECT***

Kavala v. Turkey (no. 28749/18)

1. The Turkish authorities would like to make the following explanations in response to the submission of *Human Rights Watch, the International Commission of Jurists and the Turkey Human Rights Litigation Support Project* (“the NGOs”) with respect to the case of *Kavala v. Turkey (no. 28749/18)*.

2. At the outset, the Communications of the Turkish Government to the Committee of Ministers (“CM”) submitted on 29 May 2020, 7 July 2020, 11 September 2020 and 30 October 2020 in respect of the *Kavala* case comprise Turkey’s actions regarding the issues raised in the communication of *the NGOs*. The Turkish authorities would like to reiterate their submissions in this regard.

3. In this submission, the authorities would like to clarify the following issues raised in the communication of *the NGOs*.

A. Legal Grounds for the Applicant Mehmet Osman Kavala’s Current Detention

4. 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.

5. 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. The first hearing will be held on 18 December 2020. The indictment in question and the date of the hearing were served on the applicant by the Penitentiary Institution.

6. Upon the submission of the above-mentioned bill of indictment to the Assize Court, the First Section of the Constitutional Court postponed the examination, which had previously declared to take place on 29 September 2020 in the agenda of the Constitutional Court, concerning the individual application of the applicant dated 4 May 2020 in order to examine the bill of indictment in question.

7. The agenda of the Constitutional Court is followed up-to-date on the Constitutional Court's website.

8. The Constitutional Court, as a High Court, determines its own agenda according to its working order, its workload and its procedure for the order of examination. Therefore, the Constitutional Court will fix a date for examination of the individual application lodged by the applicant.

B. As to Other Allegations of *the NGOs*

9. As regards the allegation of *the NGOs* that new facts or concrete evidence have not included in the new bill of indictment, the Turkish authorities would like to state that the trial process has started and is ongoing, that the power to assess and decide on a bill of indictment and evidence collected and to be collected belongs only to the independent and impartial trial court, that every person has the right to defence and to a fair trial, and that these rights are respected. Assessment and acceptance of a bill of indictment is a procedural act regulated in the Code of Criminal Procedure, and the content of a bill of indictment is assessed in the course of the trial. Therefore, everybody should respect the on-going judicial proceedings and wait for the conclusion of the decision to be rendered by the relevant court.

10. As set out under Article 138 of the Constitution, judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming to the law. Furthermore, no organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.

11. As regards *the NGOs* allegation that the indictment contained shortcomings and that these shortcomings are incompatible with the obligations of Turkey under Articles 10 and 11 of the Convention (§ 8 of the communication of *the NGOs*), the Turkish authorities reminds

that by the relevant bill of indictment, a new trial process has started and still continues, that an assessment cannot be made in this regard, and that, besides, in its decision of *Kavala v. Turkey* dated 10 December 2019, the Court did not examine any complaint under Articles 10 and 11 of the Convention.

12. As regards *the NGOs* allegations concerning the bill of indictment and the appointment to the post of Deputy Minister of Justice, the Turkish authorities notes that it is irrelevant to make a connection between these two things, and that this allegation is speculative. Appointment of judges and public prosecutors to senior executive positions at the Ministry of Justice is a general practice in Turkey. As a matter of fact, almost all mid-level and senior executives at the Ministry of Justice are judges and public prosecutors. Appointment is made on the basis of a person's competence and professional experience. Many judges and public prosecutors are assigned to the units of the Ministry of Justice.

13. The Turkish authorities would like to reiterate that the investigation and prosecution proceedings in the Republic of Turkey, one of the founding members of the Council of Europe, are conducted by independent and impartial public prosecutors and courts. Moreover, this allegation of *the NGOs* is of no relevance, directly or indirectly, to the execution of the European Court's judgment of *Kavala v. Turkey*.

14. Moreover, it cannot be accepted that *the NGOs* consider the legal process carried out in respect of the applicant as "persecution". The first-instance court will reach a conclusion pursuant to the Constitution and the relevant law provisions on the basis of evidence obtained in the course of the on-going judicial proceedings against the applicant. Objections, legal remedies, an individual application to the Constitutional Court and an application to the ECtHR can be resorted to against conclusions to be reached by the judicial authorities.

15. In the light of the above-mentioned explanations, the speculative allegations of *the NGOs* are unacceptable.

CONCLUSION

16. The Turkish authorities kindly invite the Committee of Ministers to take into consideration the above-mentioned explanations within the scope of the execution of the *Kavala* case.

17. Furthermore, the Turkish authorities would not like to speculate on the claims raised in the communication that are not subject to any current application or judgment of a violation.