

**Submission by the Council of Europe Commissioner for Human Rights**

in proceedings before the European Court of Human Rights pursuant to Article 46 § 4 of the European Convention on Human Rights

**in the case of *Kavala v. Turkey* (application No. 28749/18, judgment of 10 December 2019)**

## Introduction

1. Further to her correspondence with the European Court of Human Rights (hereinafter: 'the Court') in March 2022, the Commissioner hereby submits her comments in the case of *Mehmet Osman Kavala v. Turkey*. These proceedings concern the question referred to the Court by the Council of Europe Committee of Ministers (hereinafter: 'the Committee of Ministers') as to whether Turkey has failed to fulfil its obligations under Article 46 § 1 of the Convention with particular regard to the Court's indication under Article 46 and the individual measures required.
2. According to her [mandate](#), the Commissioner fosters the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the Convention; identifies possible shortcomings in the law and practice concerning human rights; and provides advice and information regarding the protection of human rights across the region. The Commissioner has a specific role with regard to human rights defenders further to the adoption of a Declaration by the Council of Europe Committee of Ministers on 6 February 2008, inviting the Commissioner to provide strong and effective protection for human rights defenders, notably by continuing to meet with a broad range of defenders during country visits and to report publicly on the situation of human rights defenders.<sup>1</sup>
3. The importance of prompt, full and effective implementation of the judgements of the European Court of Human Rights for the authority of the Court and the Convention system as a whole, has been consistently highlighted by the successive Commissioners. Noting that the authority and the efficiency of the human rights protection system based on the Convention is undermined where national authorities choose not to fully comply with judgments of the Court, the previous Commissioner called non-implementation of the Court's judgement a shared responsibility.<sup>2</sup>
4. Thus, with the present submission the Commissioner aims to contribute to the protection of the Convention system by assisting the Court in ruling on whether Turkey has fulfilled its obligation under Article 46 § 1 of the Convention. The Commissioner has been closely monitoring the situation of Osman Kavala as an emblematic illustration of the serious challenges facing human rights defenders in Turkey in general. This submission draws on her extensive work in this context, in particular her third party intervention of 20 December 2018 before the Court in this case<sup>3</sup> and the submission to the Committee of Ministers in the context of the Committee's supervision of the execution of the judgement (hereinafter: 'Rule 9 submission').<sup>4</sup> Section I of the present submission provides the Commissioner's observations on the implementation by Turkey of individual measures required by the Court's judgement relating to the applicant's detention. In Section II, the Commissioner seeks to place the same issue in the broader legal and political context prevailing in Turkey, which she finds crucially important for assessing whether Turkey has acted in good faith and in a manner compatible with the "conclusions and spirit" of the judgment.

### I. Implementation by Turkey of individual measures relating to the applicant's detention

5. According to the Court's case-law, the whole structure of the Convention rests on the general assumption that public authorities in the State party act in good faith. That structure includes the supervision procedure, and the execution of judgments should also involve good faith and take place in a manner compatible with the "conclusions and spirit" of the judgment. Moreover, the importance of the good faith obligation is paramount where the Court has found a violation of Article 18, the object and purpose of which is to prohibit the misuse of power.<sup>5</sup> The Court has also held that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, and that these principles extend equally to the execution process.<sup>6</sup>

<sup>1</sup> [Declaration](#) of the Committee of Ministers on Council of Europe Action to improve the protection of human rights defenders and promote their activities, adopted on 6 February 2008.

<sup>2</sup> Commissioner for Human Rights of the Council of Europe, Human Rights Comment [Non-implementation of the Court's judgement: our shared responsibility](#), 23 August 2016.

<sup>3</sup> [Third party intervention](#) by the Council of Europe Commissioner for Human Rights, under Article 36 paragraph 3, of the European Convention on Human Rights Application no. 28749/18, *Mehmet Osman Kavala v. Turkey*, 20 December 2018.

<sup>4</sup> [Submission](#) by the Council of Europe Commissioner for Human Rights under Rule 9.4. of the Rules of the Committee of Ministers for the supervision of the execution of judgements and the terms of friendly settlements in the case of *Kavala v. Turkey* (application no. 28749/18, judgment of 10 December 2019), 18 June 2020.

<sup>5</sup> *Ilgar Mammadov v Azerbaijan*, Grand Chamber [judgment](#) of 29 May 2019 in proceeding pursuant to Article 46 § 4 of the Convention, para. 214.

<sup>6</sup> *Ibid.* para 215.

Finally, the Court has held that under Article 46 of the Convention in exercising their choice of individual measures, the State party must bear in mind their primary aim of achieving *restitutio in integrum*.<sup>7</sup>

6. In its judgement of 10 December 2019, the Court found that the applicant's arrest and pre-trial detention took place in the absence of evidence to support a reasonable suspicion he had committed an offence (violation of Article 5, paragraph 1, of the Convention) and pursued an ulterior purpose, namely to silence him and dissuade other human rights defenders (violation of Article 18 taken in conjunction with Article 5, paragraph 1). The Court considered that the government must take every measure to put an end to the applicant's detention and to secure his immediate release.<sup>8</sup>
7. Prior to initiating the present proceedings by an interim resolution adopted on 2 February 2022, the Committee of Ministers adopted seven decisions and two interim resolutions in this case, recalling the obligation of *restitutio in integrum* and calling for measures to restore the applicant as far as possible to the position he would have enjoyed had the violations not occurred, while stressing that such measures should be compatible with the conclusions and spirit of the Court's judgment, involving good faith on the part of the respondent State, which is of paramount importance where the Court has found a violation of Article 18.
8. In their submission in the present proceedings of 2 February 2022, the Turkish government asserted that "Turkey has never refused to implement any judgement of the European Court of Human Rights and certainly does not refuse to abide by the Kavala judgement". This was underpinned by the government's argument that the applicant's current detention is based on a charge related to espionage (Article 328 of the Turkish Criminal Code) that has not been brought before the Court, and that is currently being examined by the 13<sup>th</sup> Istanbul Assize Court.
9. The Commissioner has already addressed such assertions. In her Rule 9 submission, she noted that some of the evidence used to substantiate the charges related to espionage, mainly concerning the applicant's contacts with H.J.B cannot be considered as new. She also noted that these facts were already part of the original investigation against the applicant and had been accordingly scrutinised by the Court and rejected as not providing a sufficient basis for reasonable suspicion for the purposes of Article 5 of the Convention. The Commissioner reiterates that, were it to be accepted that Turkey is absolved of its obligation under Article 46 to execute this judgement due to the mere requalification of the offence by using the same, *a priori* lawful acts as basis for the detention, this would void the obligation of its substance by allowing the indefinite detention of the applicant simply by continuing to modify the charges.
10. In this regard, the Commissioner notes that legal reclassification of facts already assessed as insufficient by the Court to justify the applicant's detention has featured in subsequent cases before the Court against Turkey. In the judgement<sup>9</sup> in one such case raising issues under Article 18 in conjunction with Article 5, the Court held that "instituting new criminal investigations in relation to facts previously considered insufficient to justify detention, by means of a new legal classification, would make it possible for the authorities to circumvent the right to liberty". This has led the Court to consider in that case that "the continuation of the applicant's pre-trial detention, on grounds pertaining to the same factual context, would entail a prolongation of the violation of his rights as well as a breach of the obligation on the respondent State to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention", and to conclude that "the respondent State must take all necessary measures to secure the immediate release of the applicant."
11. The Commissioner considers that the authorities have taken steps to circumvent the applicant's right to liberty, having as priority to keep him in detention, and that they have therefore not acted in good faith and in a manner incompatible with the "conclusions and spirit" of the judgment. This can be illustrated notably by the failure of the prosecutor to adduce any evidence showing a reasonable suspicion that the applicant "obtained information which is classified on national security concerns or foreign political interests with the intention of spying on political and military affairs" (Article 328 of the Turkish Criminal Code). The Commissioner recalls the well-established case-law of the Court according to which "reasonable suspicion" means the existence of facts or information which would

<sup>7</sup> Ibid. para. 150.

<sup>8</sup> *Kavala v. Turkey*, [judgment](#) of 10 December 2019, paras. 239 and 240.

<sup>9</sup> *Selahattin Demirtaş v. Turkey (No.2)*, Grand Chamber [judgment](#) of 22 December 2020, paras. 440, 441 and 442.

satisfy an objective observer that the person concerned may have committed the offence. In light of that standard, the Commissioner reiterates that evidence of mere contact with a suspect is an unacceptably low threshold to justify the detention of a person for such a serious offence or to satisfy exigencies of legal certainty.<sup>10</sup>

12. In this connection, the Commissioner finds particularly noteworthy that seven of the 15 judges of the Turkish Constitutional Court, including the president and the vice-president of the Court, voted against the majority decision of 29 December 2020 finding no violation of the applicant's right to liberty and security under Article 19 of the Constitution, all of them submitting their dissenting opinions. In particular, in his dissenting opinion, Mr Zühtü Arslan, the President of the Constitutional Court, concluded "that neither the strong indication as to the commission of the offence of political or military espionage for which the applicant was detained, nor even a simple suspicion could be raised. [...] [I]t is understood that the strong indication as to the commission of the offence, which is a prerequisite for the applicant's detention for the offence of political or military espionage, could not be established. Therefore, I believe that the detention measure imposed on the applicant for the said offence is unlawful."<sup>11</sup>

## **II. Some aspects concerning the prevailing legal and political context**

13. Considering the paramount importance that the Court attaches to the good faith obligation where it has found a violation of Article 18, the Commissioner finds it relevant to briefly recall some aspects concerning the legal and political context within which the applicant's detention occurred and is maintained. In her Rule 9 submission, the Commissioner stressed that the fact that the President of the Republic immediately and openly criticised the acquittal of the applicant by the trial court, by qualifying it as a "manoeuvre", in a case where the European Court of Human Rights had already established a clear link between the President's statements and the prosecutor's actions, was a strong indication that the same dynamics which led to finding a violation of Article 18 in conjunction with Article 5 § 1 were still in operation regarding the applicant. She also noted that the three judges who acquitted the applicant were immediately subjected to disciplinary investigations by the Turkish Council of Judges and Prosecutors, prompting a reaction by the Secretary General of the Council of Europe who drew attention to the strong chilling message sent to the Turkish judiciary by this action.<sup>12</sup>
14. The Commissioner observes that the prosecutor has continued to ignore Turkey's obligations under the Convention, by pursuing criminal proceedings against the applicant based on the same evidence and facts that the Court's judgment found to be insufficient to show a reasonable suspicion that the applicant committed a criminal offence. As already noted by the Commissioner in her Rule 9 submission, unlike the three judges who decided to follow the Court's reasoning in this case, to the Commissioner's knowledge, the prosecutor has not faced any disciplinary consequences for his actions. The Commissioner also finds of relevance statements from the applicant's lawyers that in his final opinion of 4 March 2022, submitted to the Istanbul 13th Assize Court in the criminal proceedings against the applicant, the prosecutor requested the applicant's conviction and sentencing only in relation to the charges related to the so-called Gezi events (under Article 312 of the Turkish Criminal Code). In the Commissioner's opinion, this corroborates the conclusion that the charge of espionage was introduced solely with the aim of keeping the applicant in detention. This, and the timing of detention requests introduced by the prosecutor, clearly show that this aim prevailed over complying with a binding judgement of the Court.
15. Furthermore, the Commissioner considers that repeated public statements by high-level officials against the applicant's release and anticipating the expected outcome in the ongoing criminal proceedings against him do not only contravene the principle of presumption of innocence, as a fundamental principle of the right to a fair trial, but are a further confirmation that the applicant's ongoing detention is motivated by the same ulterior purpose found by the Court, and that the authorities have not acted in good faith.

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<sup>10</sup> See, Commissioner's Rule 9 submission in this case, para. 9.

<sup>11</sup> See, [Communication](#) from the authorities of 12 April 2021, in *the case of Kavala v. Turkey*, including an English translation of the Turkish Constitutional Court judgement of 29 December 2020 (the judgement was published in the Official Gazette on 23 March 2021).

<sup>12</sup> See, Commissioner's Rule 9 submission in this case, para. 10.

16. The Commissioner notes that in their submission of 2 February 2022 the authorities argued that the proceedings against the applicant are carried out by independent and impartial courts. In this regard, the Commissioner submits that her observation that the criminal proceedings against Osman Kavala and his detention are caused by and symptomatic of a wide range of serious problems affecting the Turkish justice system remains entirely relevant. Lastly, the Commissioner maintains her view, expressed in her Rule 9 submission, that the applicant's continued detention has further intimidated civil society activists and human rights defenders in Turkey, compounding the chilling effect observed by the Court in its judgement and further vindicating its findings in connection with Article 18 of the Convention.
  
17. Having considered the ongoing detention on remand of the applicant and the pursuit of criminal proceedings against him as a seamless extension and continuation of the violations found in the Court's judgement, the Commissioner is of the opinion that by not releasing the applicant from detention, the authorities failed to abide by the Court's judgement.