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**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***

Introduction

1. On 19 November 2018, the Council of Europe Commissioner for Human Rights (hereinafter: ‘the Commissioner’) informed the European Court of Human Rights (hereinafter: ‘the Court’) of her decision to intervene as a third party in the Court’s proceedings, in accordance with Article 36, paragraph 3 of the European Convention on Human Rights (hereinafter: ‘the Convention’), and to submit written observations concerning the case of *Kavala v. Turkey*. This case relates to the arrest and detention of the applicant, a civil society activist and human rights defender in Turkey. It also relates to the alleged use of this detention for purposes other than those prescribed in the Convention, and in particular as a means to silence the applicant as a civil society activist.
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.¹ 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 strengthen the role and capacity of her Office for the protection of human rights defenders, notably by continuing to meet with a broad range of defenders during her country visits and to report publicly on the situation of human rights defenders.²
3. The present intervention is based on the work of Commissioner Dunja Mijatović on Turkey, including a contact mission to Turkey from 15 to 19 October 2018, during which she met civil society representatives and officials and specifically raised the case of the applicant. This submission also draws on her continuous monitoring of the country, as well as on the work of her predecessors, Thomas Hammarberg, Commissioner for Human Rights from 1 April 2006 to 31 March 2012, and Nils Muižnieks, Commissioner for Human Rights from 1 April 2012 to 31 March 2018.
4. Section I of the present written submission focuses on major issues concerning the situation of human rights defenders in Turkey; Section II contains observations on the Gezi events; Section III deals with the general problems concerning the use of detentions by the Turkish judiciary; Section IV looks at the general problems in the criminal justice system and the effectiveness of the Constitutional Court’s review of detentions. These sections are followed by the Commissioner’s conclusions.

I. Major issues concerning the situation of human rights defenders in Turkey

5. The Commissioner believes that the applicant’s arrest, as well as his initial and continued detention, without an indictment for more than 400 days as of the time of writing of the present submission, should be seen against a backdrop of continuously increasing pressure on civil society and human rights defenders in Turkey in recent years. In addition to the Commissioner’s Office, several other bodies of the Council of Europe³ and UN mechanisms⁴ expressed deep concern about this situation. The Commissioner also considers that the particular circumstances of the applicant’s case contributed significantly to an already existing chilling effect affecting the environment for civil society, including human rights defenders in the country.
6. The applicant, a businessman and philanthropist, is a prominent civil society activist and human rights defender in Turkey. Over decades, he participated in the foundation of and supported numerous NGOs and civil society initiatives in Turkey, with their focus ranging from human rights, culture, social studies and historical reconciliation to the protection of the environment. These include, among others and in no particular order, (formerly Helsinki) Citizen’s Assembly, Turkish Economic and Social Studies Foundation (TESEV), TEMA Foundation (working against erosion and environmental

¹ [Resolution \(99\)50](#) on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

² [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.

³ See, for example, [Resolution 2156\(2017\)](#) of the PACE on the functioning of democratic institutions in Turkey reopening the monitoring procedure in respect of Turkey, 25 April 2017, paras. 26-27.

⁴ See, for example, a [joint statement](#) by three UN Special Rapporteurs and a Chair-Rapporteur, 14 July 2017.

degradation), Open Society Foundation, Truth Justice and Memory Centre (working on transitional justice issues), History Foundation, Peace Foundation and Turkish Foundation of Cinema and Audiovisual Culture (organising film festivals). In recent years, the applicant has been focusing his work on *Anadolu Kültür*, an NGO which seeks to contribute to peace, reconciliation and respect for human rights by promoting artistic and cultural initiatives, in particular outside the major cultural centres of Turkey. Many projects of this NGO have been supported by numerous world-renowned art foundations and the European Union, and involved collaborations with various local authorities around Turkey.

7. The applicant has been a long-standing and trusted partner of many international bodies working on human rights in Turkey, including the Commissioner's Office. All four Commissioners since the inception of the Office have been in contact with many of the NGOs he helped to found or with him personally. He and these NGOs have been reliable and objective sources of information about the human rights situation in Turkey, always displaying the highest level of professionalism, dedication and respect for human rights. The Commissioners received no indication during their numerous dealings with them of any incitement to violence or crime, or justification and trivialisation of violence on their part. The applicant also co-founded in 1983 a significant publishing house in Turkey, *İletişim Yayınları*, which has played a key role in the dissemination of the Council of Europe's human rights standards, including, for example, by translating and publishing a compilation of opinions by the Commissioner's predecessor in 2012. Finally, the applicant was involved in the establishment in 2014, and the administration of, the European School of Politics in Istanbul, part of the Council of Europe's network.
8. Thanks to his particularly varied civil society activism spanning decades, the applicant is very well-connected in Turkish civil society and has collaborated with many prominent national and international NGOs and human rights defenders. His arrest and initial detention, as well as the length of his continued detention, have had a profound chilling effect on civil society in Turkey. The Commissioner gained a sense of this impact during her contact mission to Turkey in October 2018: her civil society interlocutors, many of whom knew the applicant personally, perceived his detention as a reprisal to his civil society activism and as motivated by a will to intimidate human rights defenders in Turkey. The apparent arbitrariness of his continued detention, with no evidence being made public of criminal wrongdoing and no indictment and given the applicant's extensive human rights work and exclusively peaceful activities, had fostered a sense of insecurity and the feeling that the same might happen to any human rights defender.
9. The Commissioner also believes that the present case is a clear illustration of the increasing pressure on civil society and human rights defenders in Turkey in recent years. This pressure has notably included a series of specific attacks by politicians and a general political discourse targeting civil society activists, in particular by suggesting that reporting on alleged human rights violations perpetrated by the authorities furthers the aims of terrorist organisations and is by extension an attack on the Turkish State. These statements frequently result in actions by public officials to restrict such work. For example the police and local authorities started to prevent NGOs, including Amnesty International, from visiting certain areas of the country following a statement of the President of the Republic in April 2016 whereby NGOs publishing reports on the human rights situation needed to be "countered".⁵
10. The Commissioner notes that this pressure increased following the declaration of a state of emergency in July 2016, both in numbers and intensity. A major development during this period was the outright closure of NGOs by executive decrees and the liquidation of all their assets, without any judicial involvement or decision. Despite the urgent call of the Commissioner's predecessor at the very beginning of the state of emergency to put an immediate end to this practice,⁶ more than 1,500 associations, foundations and trade unions were closed, with no explanation or reasoning other than that they were "assessed" by the executive as belonging to, "acting in union with" ("*iltisak*"), or having

⁵ Memorandum on the human rights implications of anti-terrorism operations in South-Eastern Turkey, by Nils Muižnieks, Commissioner for Human Rights, [CommDH\(2016\)39](#), 2 December 2016, paras. 69-70.

⁶ Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Commissioner for Human Rights, [CommDH\(2016\)35](#), 7 October 2016, paras. 35-39.

had contacts with (“irtibat”) a terrorist organisation. Understandably, this created an unprecedented degree of legal uncertainty and dissuasive effects for the entire civil society sector in Turkey.

11. In addition, there have been instances of apparently selective governmental audits against some of the oldest civil society organisations working in the field of human rights, such as the Turkish Human Rights Association and the Turkish Human Rights Foundation, well-known for their detailed reports on human rights violations in Turkey. A number of pending court cases against these NGOs have ensued. Severe restrictions were also imposed on the day-to-day functioning of NGOs, including, for example, an indiscriminate and indefinite ban in Ankara on all public events focusing on the human rights of LGBTI persons. The Commissioner notes that this ban is being maintained despite the lifting of the state of emergency.
12. It appears from recent events that the Turkish judiciary is also increasingly following the line of reasoning according to which criticism by human rights defenders constitutes *per se* an illegitimate attack on the state and the Turkish government. In a Memorandum on freedom of expression, the Commissioner’s predecessor had for instance noted that the problem of judicial harassment for acts or statements which should be protected under freedom of expression, had generalised from media and journalism to all sectors of Turkish society, including politicians, academics, ordinary citizens expressing themselves on social media, but also NGOs and human rights defenders.⁷ In a written submission to the Court in April 2017, the Commissioner’s predecessor also cited many examples of serious interferences with NGOs, including by the judiciary, concluding that “there are clear indications that human rights defenders working on the human rights situation in South-Eastern Turkey [...] have been subjected to various forms of reprisals and intimidation in retaliation for their legitimate activities”.⁸
13. The Commissioner’s Office also published several statements on the situation of human rights defenders in Turkey in 2017, for example concerning the sentencing of Murat Çelikkan,⁹ another partner of the Commissioner’s Office; the detention of Taner Kılıç, the Chair of Amnesty International Turkey,¹⁰ or the unjustified arrest and criminal proceedings against eight human rights defenders participating in a digital security and information management workshop in Istanbul in July 2017.¹¹
14. These developments suggest a consistent effort on the part of the Turkish authorities to restrict the work of human rights defenders, resulting in a hostile and dissuasive environment for their work which is fundamental in a democratic society. According to the Commissioner, the applicant’s arrest, as well as initial and continued detention, significantly contributed to this hostile environment, a fact that the Turkish authorities must be aware of.
15. In written submissions to the Court regarding the situation of journalists and parliamentarians in Turkey, the Commissioner’s predecessor argued that the laws and criminal proceedings were being used to silence dissenting voices in Turkey, an assessment that the Court shared in a recent judgment.¹² The Commissioner considers that the same argument is applicable to human rights defenders. In particular, the background regarding the Turkish authorities’ crackdown on civil society described above, combined with the failure to produce convincing evidence of criminal wrongdoing at the outset of the proceedings and thereafter (for example, with no indictment more than 400 days after the applicant’s arrest at the time of writing), creates a strong presumption that punishment and intimidation of civil society activists and human rights defenders was one of the principal purposes behind this and other similar arrests and detentions.
16. For the Commissioner, a more recent development in connection with the applicant’s case that reinforced this presumption of the use of criminal proceedings as a form of reprisal was the arrest on 16 November 2018 of thirteen prominent academics, civil society activists and human rights defenders

⁷ Memorandum on freedom of expression and media freedom in Turkey, by Nils Muižnieks, Commissioner for Human Rights, [CommDH\(2017\)5](#), 15 February 2017, para. 65.

⁸ Third Party Intervention of 25 April 2017, *Abdullah Kaplan v. Turkey* and others, by Nils Muižnieks, Commissioner for Human Rights, [CommDH\(2017\)13](#), para. 37ff., conclusions.

⁹ [Statement](#) by Nils Muižnieks, Commissioner for Human Rights of 18 May 2017.

¹⁰ [Statement](#) by Nils Muižnieks, Commissioner for Human Rights of 10 June 2017.

¹¹ [Facebook post](#) by Nils Muižnieks, Commissioner for Human Rights of 18 October 2017.

¹² *Selahattin Demirtaş v. Turkey (No. 2)*, judgment of 20 November 2018 (not final), paras. 271-274.

in Turkey, which included the Director of the European School of Politics in Istanbul and several other partners of the Commissioner's Office.¹³ The Commissioner is concerned about the form of these arrests and the contents of the accusations levelled against the persons.

17. For example, rather than being summoned by the prosecutor for questioning, these persons were arrested with dawn raids by the police to their houses, sending an intimidating message. It is noteworthy that the content of the accusations levelled against them, according to a press note distributed by the Istanbul Directorate of Security, posits as an established fact that the applicant is the head of a criminal organisation, while only citing presumed activities which are legal and non-violent in nature and should be protected under Articles 10 and 11 of the Convention. One such activity was used as a basis to detain an academic working on civil society issues, Yiğit Aksakoğlu, whereas the other persons were released under judicial control with a travel ban. The Commissioner considers that this event indicates, on the one hand, ignorance of or deliberate disregard for Convention standards and the case-law of the Court, and on the other hand, an unduly biased and hostile attitude towards civil society actors by the prosecuting authorities. It is also discouraging in view of an expected normalisation of the human rights situation in Turkey after the lifting of the state of emergency in July 2018.

II. Observations about the Gezi events

18. It appears both from the judicial process concerning the applicant, as well as the abovementioned arrests of 16 November 2018, that presumed activities in relation with the Gezi events form the core of the accusations in this case. The Commissioner believes that her Office can offer an objective insight about these events, due to the extensive work it conducted on them. Notably, the Commissioner's predecessor visited Turkey in the immediate aftermath of the events from 1 to 5 July 2013, holding meetings with a wide range of civil society actors who had been involved in the Gezi events and discussing the events at length with the Turkish authorities, including the Minister of Justice, the Undersecretary of the Ministry of the Interior and the Governor of Istanbul of the time. He published his conclusions on these events in a report devoted to the conduct of law enforcement officials in Turkey, with a focus on the policing of demonstrations.¹⁴
19. The Gezi events were triggered by the excessive use of force against a small number of peaceful protesters trying to stop the cutting of trees in Gezi Park in Istanbul and the construction of a shopping centre on Taksim Square at the end of May 2013. Another important factor was the failure of the mainstream media to report on the initial events owing to self-censorship. The initial confrontation led to a wave of demonstrations against the government across Turkey, unprecedented both in their geographic scope and in the numbers of participants (2.5 million across 79 of the 81 Turkish provinces, according to the estimates of the Ministry of the Interior). During the initial phases of the events, the involvement was very broad, including professional associations such as Chambers of Architects and Engineers, Bar Associations and Medical Associations, trade unions, and many NGOs active in different sectors, such as the environment, women's rights, LGBTI rights, and human rights in general, as well as citizens' platforms and other spontaneous initiatives co-ordinating the participation of civil society. Among these, the "Taksim Solidarity" was very prominent at the outset and often considered to be the most representative. Accordingly, the Commissioner's predecessor had also met its representatives during his aforementioned visit (the applicant was not part of this civil society platform).
20. Thus, although a general discontent against government policies, and notably the perceived shrinking of the civic space, was an underlying theme for the protestors, many of whom had not been involved in civil society activities or demonstrations previously, the participation was extremely heterogeneous. Given this context, the Commissioner considers that the thesis that the Gezi events could have been orchestrated by a single person or organisation has no credibility. Furthermore, the extensive examination of the events by the Commissioner's Office does not suggest in any way that the mainstream public demands of the protestors extended to an unlawful and violent overthrow of the

¹³ [Statement](#) by Dunja Mijatović, Commissioner for Human Rights of 20 November 2018.

¹⁴ Report by Nils Muižnieks, Commissioner for Human Rights, following his visit to Turkey from 1 to 5 July 2013, [CommDH\(2013\)24](#), 26 November 2013.

government and the Turkish constitutional order, or that these demonstrations can be seen as an attempt to hinder the government from carrying out its duties through violence (an offence punishable with an aggravated life sentence). While violent groups undoubtedly joined the demonstrations on several occasions and increased tensions with the police, available information points to the fact that the overwhelming majority of protestors demonstrated peacefully.

21. The Gezi events were also marked by heavy-handed interventions by the authorities, and the Commissioner's Office had received a large number of serious, consistent and credible allegations of human rights violations committed by officials against peaceful demonstrators or bystanders, backed up by significant evidence. The overwhelming majority of these allegations were not effectively investigated by the Turkish judiciary following the long-standing pattern of impunity of security forces in Turkey, leading the Commissioner's predecessor to conclude in 2016 that the authorities' response had been clearly inadequate despite several judgments of the Court finding a general, systemic problem concerning the lack of effective investigations into allegations of excessive use of force in the policing of demonstrations.¹⁵
22. It is also noteworthy that the aforementioned 2013 report devoted a section on a pattern already emerging at the time of reprisals by administrative and judicial authorities against persons or groups for their non-violent action in the demonstrations. The report details a large number of measures corroborating this interpretation, including investigations of health workers, fines imposed on TV stations, dismissals of journalists ostensibly under government pressure, as well as numerous measures taken against professional associations, academics, businesses or social media users because of their perceived involvement in or support for the Gezi events. The Commissioner observes that the effects of such reprisals continued well after the events, with the addition of hundreds of protestors in several provinces receiving criminal sentences for their participation in demonstrations considered illegal by courts. The Commissioner also notes that a new wave of criminal proceedings appears to have been initiated or re-activated against many persons in different provinces in recent weeks, more than five years after the events.
23. Based on these findings, the Commissioner concludes that the response of the Turkish judiciary to the Gezi events displays on the whole a lack of adherence to international standards, in particular to the Convention and the case-law of the Court, both in terms of impunity of security forces and the respect for the right to peaceful demonstrations. For the Commissioner, this pattern of selectivity suggests an acceptance by the Turkish judiciary of prevailing political arguments defended by members of the executive and pro-government media, which portray the Gezi events as a terrorist enterprise and impute them to an international and national conspiracy against the government and the Turkish state, without the requisite standards of due process and impartiality, in particular as regards the evidentiary threshold necessary to investigate and establish criminal wrongdoing regarding such serious charges.
24. The Commissioner would also like to place recent criminal proceedings concerning Gezi events, including the present case, in a context of further reduction of the Turkish authorities' already insufficient tolerance to non-violent protests after the Gezi events, notably during the state of emergency. Among numerous other examples, a telling illustration of this reduced tolerance was the banning and dispersal by force of Saturday Mothers (a silent sit-in demonstration concerning enforced disappearances held every week since 1995), on the occasion of their 700th weekly peaceful protest in Istanbul in August 2018 and thereafter.

III. General problems concerning the use of detentions by the Turkish judiciary

25. The Commissioner would like to stress the fact that the use of detention in criminal proceedings and its effects on the enjoyment of human rights in Turkey has been a serious long-standing concern for her Office and other international human rights bodies. Already in 2003 in his report on Turkey, Alvaro Gil-Robles, Commissioner for Human Rights from 15 October 1999 to 31 March 2006, expressed his concerns that the actions of the prosecuting authorities which lead to investigations, searches or detention, even in the absence of convictions, may result in judicial harassment.¹⁶ The issue of the

¹⁵ [CommDH\(2016\)39](#), *op. cit.*, para. 86.

¹⁶ Report by Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Turkey, [CommDH \(2003\)15](#), 19 December 2003, paras. 44-45.

misuse of detentions in Turkey was also treated extensively by subsequent Commissioners. Their findings show a consistent pattern in the practice of the Turkish judiciary deviating from international and European human rights standards, including premature arrests, insufficiently motivated initial pre-trial detention decisions, serious deficiencies in the review procedures concerning the continuation of detentions, as well as the length of detentions.

26. As regards the practice of prosecutors in connection with arrests, in a report published in January 2012 the Commissioner's predecessor highlighted numerous problematic practices, including the fact that the prosecutors appeared to "exercise little restraint in initiating proceedings, including in unmeritorious cases", and that arrests of suspects happened "at a very early stage of the investigations, which is one of the reasons for which suspects spend a long time remanded in custody before even their indictment". He also pointed to a long-established practice of Turkish prosecutors of "going from arrest of suspected persons towards evidence, rather than collecting evidence to establish well-founded suspicions in the first place", noting that in most cases collection of evidence continued even after the indictment. He therefore recommended that "before conducting operations leading to arrests, the police and prosecutors should gather all available evidence, including evidence justifying the need for detention on remand".¹⁷ The Commissioner considers that these concerns still continue to be applicable.
27. As regards the judiciary's approach to detentions in general, the same report devoted a full section to the issue of excessive resort to and length of remands in custody, highlighting very serious shortcomings stemming from defective reasoning of detention decisions, and particularly the automaticity of those extending detention; failure to resort to alternatives to detention; long periods suspects spend in detention amounting to a form of "internment by remand"; and the lack of an effective domestic remedy.¹⁸
28. The Commissioner considers that more recent work of her Office shows clearly that the current practice of the Turkish judiciary regarding detentions indicates no improvement compared to the situation examined in 2011, despite several legislative amendments to the criminal procedure. Although the initial period after the introduction of the individual application procedure before the Turkish Constitutional Court and progressive judgments of the latter provided some prospects for improvement, the current situation is the result of more and more lower courts resisting the more Convention-compliant case-law of the Constitutional Court in the matter of detentions (see also under Section IV).
29. The Commissioner points to a large number of cases currently pending before the Court and her predecessor's written submissions concerning some of these cases. Most notably, the Commissioner considers that the observations of her predecessor in the written submission on cases concerning the freedom of expression and right to liberty of journalists in Turkey¹⁹ are applicable, *mutatis mutandis*, to on-going criminal proceedings against human rights defenders, including the applicant. As regards arrests and initial pre-trial detention, these concern in particular:
 - a high number of cases where the suspects' arrest, initial and continued pre-trial detention were based on spurious charges with no *prima facie* evidence, and thus the failure to establish reasonable suspicion within the meaning of the Court's case-law (the lack of any reference to material evidence other than purely journalistic activities, given the seriousness of the charges in these cases, had been particularly striking);
 - even where reasonable suspicion may exist, failure to demonstrate other relevant and sufficient grounds to justify deprivation of liberty;
 - the stereotypical, formulaic and abstract nature of the detention orders of criminal judges of the peace, lacking any detailed analysis and reasoning regarding the specifics of the case;
 - the problems of the so-called "catalogue crimes", still part of the Turkish legal order, which create a legal presumption in favour of detention, purely based on the offence under which the prosecutor happens to bring charges, and leads to the quasi-automaticity of detention.

¹⁷ Report by Thomas Hammarberg, Commissioner for Human Rights, following his visit to Turkey from 10 to 14 October 2011: administration of justice, [CommDH\(2012\)2](#), 10 January 2012, paras. 22 and 23.

¹⁸ *Ibid.*, paras. 27 to 43.

¹⁹ Third Party Intervention of 10 October 2017, *Ahmet Hüsrev Altan v. Turkey* and others, by Nils Muižnieks, Commissioner for Human Rights, [CommDH\(2017\)29](#).

30. The Commissioner also notes that the question of unjustified arrests and detentions within the context of the exercise of the right to freedom of expression is a key component of the supervision of the execution of judgments of the Court by the Committee of Ministers, which has been consistently urging the Turkish authorities to take the necessary general measures to ensure compliance with the judgments of the Court. As recently as September 2018, Turkey was urged “to take rapidly more concrete and results-oriented measures to ensure that the relevant legislation, in particular the Criminal Code and Anti-Terrorism Law, is not interpreted broadly, in breach of Convention rights, so that criminal proceedings are not initiated against individuals for expressing views which do not incite violence or hatred and, in particular, that such individuals are not subjected to detention”.²⁰ The Commissioner considers that the same patterns of overbroad interpretation of criminal law provisions, the lack of restraint in initiating criminal proceedings and the defective reasoning in initial detention orders, are also manifest in the approach of the Turkish judiciary to civil society activists and the work of human rights defenders.
31. As regards the question of judicial review of continued detention, the Commissioner observes that the system of horizontal appeals among judges of the peace, criticised by her predecessor and by the Venice Commission,²¹ created a closed system where the denial of requests for release is virtually automatic, without sufficient reasoning and based on formulaic enumerations. This problem appears to have become even more marked for all lower criminal courts and the Court came to a similar conclusion in a recent judgment.²²
32. The Commissioner would also like to refer to the observations contained in the aforementioned written submissions to the Court regarding the fact that the principle of equality of arms is routinely undermined by the denial of access to the investigation file of suspects which seriously curtails their ability to challenge their continued detention. The Commissioner notes that decisions to restrict access to the investigation file, including for example very crucial witness testimonies, the credibility of which can therefore not be challenged, are currently being taken almost as a matter of course based on highly stereotypical formulas. A particularly worrying pattern reported to the Commissioner, especially for cases which attract political attention like the present case, is that despite restriction decisions, information from the investigation file seems to be used frequently in smear campaigns against suspects in pro-government media.²³ For the Commissioner, this could be an indication that the motivation behind these decisions is the restriction of defence rights of the suspects, rather than the protection of the integrity of the investigation. The applicant’s case is a particularly striking illustration of this more general problem: the restriction to the investigation file is all the more problematic for an investigation which had already lasted more than four years at the time of his arrest and concerns acts supposedly committed in 2013.

IV. General problems in the criminal justice system and the effectiveness of the Constitutional Court’s review of detentions

33. The Commissioner considers that it is expedient to place the issue of detention also within the context of serious problems affecting the Turkish criminal justice system as a whole, which have a strong incidence on issues and practices concerning deprivation of liberty, including at the trial stage. One such problem concerns indictments: regarding the practice of prosecutors, the Commissioner’s predecessor had pointed to the problem of indictments, expressing concern about the fact that they can become overly long, sometimes running into thousands of pages, especially in cases relating to terrorism and organised crime, owing to the fact that they are often limited to “a compilation of pieces of evidence, such as long, indiscriminate transcripts of many wire-tapped telephone conversations, some of which reportedly bear little relevance to the offence in question”. He recommended that the prosecutors should have the qualifications and resources needed in order to appropriately filter and

²⁰ [Decision](#) of the Minister’s Deputies at their 1324th Meeting, 18-20 September 2018 (DH).

²¹ Venice Commission Opinion No. 852/2016 on the duties, competences and functioning of the criminal peace judgeships, [CDL-AD\(2017\)004](#), 13 March 2017.

²² *Selahattin Demirtaş v. Turkey (No. 2)*, judgment of 20 November 2018 (not final), paras. 193-194.

²³ For recent examples, see for instance articles of [8 November](#), [21 November](#), and [26 November](#) 2018.

assess evidence and “prepare indictments of a high quality, containing sound legal analysis which connects essential pieces of evidence to the accusation”.²⁴

34. The Commissioner considers that this problem of quantity over quality, often also listing as “evidence” statements or acts which should be protected under the Convention, including mere contacts with persons of interest to the investigation, continues to apply. This could be seen more recently in the indictment which led to the conviction of several collaborators of the daily *Cumhuriyet* newspaper, for example, criminalising in essence the editorial line of the newspaper.
35. In the Commissioner’s view, this issue is linked to a more general, deep-seated problem in the attitudes and practices of the Turkish judiciary. Already in his aforementioned 2012 report, the Commissioner’s predecessor had expressed deep concerns about the use of the Turkish Criminal Code and Anti-Terrorism legislation to punish acts or statements which are deemed by judicial authorities merely to coincide with the aims of, or supposed instructions given by, a terrorist organisation, where there is no material evidence to prove membership of the said organisation. He had made a connection between this problem and the deep-rooted state-centred attitudes of judges and prosecutors, recommending serious efforts to sensitise them to the case-law of the Court concerning in particular the frontier between terrorist acts and acts falling under the scope of the rights to freedom of thought, expression, association and assembly.²⁵
36. The work of the Commissioner’s Office clearly shows that this pattern continued to operate after this report and was significantly reinforced during the state of emergency. The aforementioned written submission to the Court in October 2017 contains the observations that the erosion of the independence of the judiciary, which started in 2013 and was seriously aggravated during the state of emergency, created a general climate of fear within the Turkish judiciary. Noting the fact that almost one fourth of the members of the judiciary were dismissed without any individualised reasoning in this period (many of whom being subsequently arrested); several incidents strongly suggesting a direct or indirect interference by the executive with the assessment of judicial authorities; as well as a constitutional amendment seriously restricting the independence of the judiciary,²⁶ the Commissioner’s predecessor had argued that the remaining judges and prosecutors reverted to their state-centred approach, offsetting any past progress.²⁷
37. The Commissioner considers that the judicial pressure on civil society and human rights defenders, including the applicant, stems from that same general pattern. The Turkish judiciary appears to be set in its worrying approach to cases which it perceives as threatening the state, often based on the prevailing discourse at the highest political level portraying human rights defenders as enemies of the state or terrorist sympathisers, targeting them both personally and as a group. In such cases, the prosecutors and courts appear to impugn a criminal motive or presumed intention on the suspect first, before collecting or examining the available evidence, rather than going from evidence towards guilt. This approach manifests itself at every stage of the criminal proceedings, including investigations, arrests and detentions, but also increasingly when it comes to convictions and sentencing.
38. This results in a situation whereby actions which should be considered legal in a democratic society, including statements and acts protected under the Convention, are re-interpreted as circumstantial evidence used to prove criminal intent to commit very serious offences, undermining legal certainty and reinforcing the chilling effect described above. For the Commissioner, this has the risk of resulting in judgments of intentions (“*procès d’intention*”), where no amount of material evidence can prove the person’s innocence.
39. The Commissioner sees the question of the effectiveness of the individual application procedure to the Turkish Constitutional Court as a remedy in detention cases against this general background. She has regard to a number of contextual elements casting doubt on this effectiveness, in particular with respect to the issue of “speediness”. In two separate written observations submitted to the Court regarding the detentions of journalists and members of parliament, the Commissioner’s predecessor had observed the long delay in examining the applications in question despite the urgency of the

²⁴ [CommDH\(2012\)2](#), *op. cit.*, para. 24.

²⁵ *Ibid.*, para. 150.

²⁶ Also see, for example, GRECO compliance report on Turkey, [GrecoRC4\(2017\)16](#), 18 October 2017, para. 116.

²⁷ [CommDH\(2017\)29](#), *op. cit.*, paras. 38 to 42.

situation and the numerous human rights at stake. The Commissioner considers that a delay of almost one year as of the time of writing of the present submission could also not be seen as “speedy” given the circumstances described above, in particular regarding the manifest disconnect between the seriousness of the alleged crimes and the non-violent nature of the acts in question, and the profound chilling effect this case continues to exert on Turkish civil society.

40. While noting the judgments of the Constitutional Court in the cases of Mehmet Altan and Şahin Alpay of January 2018, regarding which the European Court held that the delay before the Constitutional Court had not amounted to a violation because of the extraordinary circumstances prevailing in Turkey, the Commissioner observes that no further judgment has been forthcoming from the Constitutional Court since then regarding the numerous other applicants on whose cases the Commissioner’s Office had submitted written observations to the Court at the same time. In this connection, it is noteworthy that the statistics of the Constitutional Court indicate that it had received 15 976 applications concerning the right to liberty and security of the person between September 2012 and September 2018, while rendering 104 judgments finding a violation of this right in the same period.²⁸
41. The Commissioner further notes that Mehmet Altan was only released more than five months after the judgment of the Constitutional Court, because of the failure of lower courts to comply with that judgment, whilst openly challenging the authority of the Constitutional Court. Moreover, Mehmet Altan was convicted to an aggravated life sentence on the basis of the evidence considered not even sufficient for his initial pre-trial detention by the Constitutional Court and by the European Court and this conviction was later upheld on appeal. Throughout this process, the Commissioner notes that the judges of the lower courts were encouraged in this approach by a consistent discourse at the highest political level, mirroring concerns expressed by the Commissioner’s predecessor to the Court in other cases.²⁹
42. According to the Commissioner, the considerations detailed above are an indication that lower courts in Turkey continue to deliberately ignore and disregard the spirit of the judgments and the clear case-law of the Constitutional Court in detention cases, which constitutes a serious blow to the rule of law where lower courts should be strictly bound with the decisions of higher courts. The result is a situation where the Constitutional Court is constrained to act as an appeal court for detention decisions, a role that it cannot be expected to fulfil. This situation goes against the spirit of the individual application procedure and jeopardises the effectiveness of the Constitutional Court as a domestic remedy as a whole.
43. The caseload of the Constitutional Court cannot be expected to diminish given the systemic nature of this problem, making unreasonable delays inevitable in the absence of far-reaching general measures to ensure a much better compliance with this case-law by prosecutors and lower courts. The Commissioner notes that this is a major concern in the supervision process of the Court’s judgments concerning Turkey as well, where the Committee of Ministers “invited the authorities to implement further, extensive, training measures to ensure that prosecutors and lower instance courts consistently apply the case law of the Constitutional Court, which follows the reasoning of the European Court and which is binding on them”.³⁰

Conclusions

44. The Commissioner sees the arrest, initial and continued detention of the applicant as forming part of a broader pattern of escalating reprisals in Turkey against civil society activists and human rights defenders for their legitimate work. It is also indicative of a will to delegitimise and to retroactively criminalise the Gezi events more than five years after the facts, and by extension, to discourage the exercise of the right to freedom of peaceful assembly to protest against the policies of the Turkish government.

²⁸ [Official statistics](#) accessed on the website of the Turkish Constitutional Court.

²⁹ [CommDH\(2017\)29](#), *op. cit.*, para. 42.

³⁰ [Decision](#) of the Minister’s Deputies at their 1324th Meeting, 18-20 September 2018 (DH).

45. The Commissioner highlights in particular that:

- Owing to his wide-ranging civil society and human rights work spanning decades, the applicant's arrest and detention are highly symbolic and have caused a profound chilling effect on Turkish civil society and human rights defenders;
- the assumptions about the Gezi events behind these criminal proceedings are conducive to a climate of fear for the very large number of persons who peacefully participated in these demonstrations and discourage the exercise of the right to peaceful assembly in the country;
- numerous problems concerning resort to pre-trial detention in the practice of the Turkish judiciary, systematically attested in the Court's case-law, continue to operate, including defective reasoning ordering initial or continued detention which fails to reference credible evidence to establish reasonable suspicion, to address the factual grounds of the case and the individual circumstances of the suspect. The legal presumption created by "catalogue crimes" continues to exacerbate these problems;
- prosecutors routinely order the arrest and request the detention of suspects without sufficient evidence in the investigation file and spend long periods preparing indictments when the suspects are deprived of their liberty, which becomes an arbitrary form of punishment in itself and contributes to the above-mentioned chilling effect;
- numerous instances of judicial actions targeting not only human rights defenders, but also journalists, academics and members of parliament, in particular in cases where there is a clear encouragement from ruling politicians to that effect, indicate that criminal laws and procedures are currently used by the judiciary to silence dissenting voices. This is accompanied by a pattern of impugned motives, and using as "evidence" an indiscriminate compilation of non-violent statements and acts, particularly those protected under the Convention;
- there is currently no indication of a significant improvement in the practice of the Turkish judiciary regarding these concerns following the lifting of the state of emergency in July 2018;
- the systematic delays affecting the review by the Turkish Constitutional Court of the lawfulness of detentions casts serious doubts on the effectiveness of the individual application procedure in these cases. The Commissioner considers that the Constitutional Court has neither the capacity, nor should it have the role, to act as an appeal court for all detention cases, against a background where lower courts systematically ignore its case-law and are encouraged to do so.

46. Against this background, the Commissioner cannot connect such use of initial and continued pre-trial detention, including the routine restrictions to investigation files, with any of the legitimate aims prescribed by the Convention.