29 May 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, Initial Observations on the Implementation of Kavala v. Turkey (Application no. 28749/18) final judgment

Summary

In Kavala v. Turkey (Application no. 28749/18) 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) taken together with Article 5(1). The Court asked the Government of Turkey to take measures to end human rights defender Osman Kavala's detention and to secure his immediate release, and stated that any continuation of his 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.

Osman Kavala was detained by court order on 1 November 2017 on allegations of involvement in the 2013 Istanbul Gezi Park protests, and in the 15 July 2016 attempted military coup. On 18 February 2020, Kavala and his co-defendants were acquitted on charges of "attempting to overthrow the government by force and violence" in the Gezi Park trial but Kavala was not released from prison and a court detained him again immediately on the charge of "attempting to overthrow the constitution by force and violence" because of an ongoing 2016 coup related investigation against him. Directly before he was re-detained President Recep Tayyip Erdoğan had publicly criticized his acquittal. Weeks later he was detained once more on another charge but relying on the same evidence and investigation file. The sequence of court orders prolonging his detention and the lack of objective deliberation as to the legality of any deprivation of liberty indicates that decisions have been guided by political expediency and there has been a concerted political effort to prevent Kavala's release. In the purported coup-related investigation that has lasted over thirty months Kavala has not once been indicted.

The ECtHR ruled that the evidence on which to detain Kavala for the Gezi protests and the 2016 coup attempt was insufficient and that Kavala's detention and the charges against him "pursued an ulterior purpose, namely to silence him a human rights defender" (paragraph 230 of judgment). The violations ruled upon by the Court continue to be committed by the Turkish authorities.

With respect to general measures needed to faithfully execute the ECtHR judgment, the NGOs point to a systemic problem of executive interference in the judiciary evidenced by: executive control over the Council of Judges and Prosecutors responsible for appointments of judges and prosecutors, and disciplinary actions; intervention in judicial decisions through frequent public speeches by Turkey's

president and proxies designed to direct and in practice resulting in prosecutions and detentions targeting perceived government critics; and a pattern of abusive and arbitrary detentions and prosecutions against a range of perceived government critics, including human rights defenders. A pattern of criminalizing the exercise of Convention-protected rights defines many of the cases, which are often initiated following long lapses of time between events, giving further weight to the conclusion that they represent political misuse and manipulation of the judicial system.

The campaign of persecution against Kavala and the failure to release him and drop all charges have perpetuated a chilling environment for all human rights defenders in Turkey. The pattern of harassment of rights defenders within a wider trend of arbitrary detentions and abusive prosecutions of journalists, elected politicians, lawyers, and other perceived government critics has been well-documented in many reports by the Council of Europe, the EU and human rights organizations.

The NGOs request the Committee of Ministers to consider the following recommendations:

i. Call on the Government of Turkey to ensure the immediate release of Osman Kavala as required by the Court's judgment, stressing that the Court's judgement clearly applies to his ongoing detention which constitutes a part of the same persecution,

ii. Ensure that Kavala v. Turkey be placed under enhanced procedures and treated as a leading case under Article 18 of the Convention

iii. Recognize that the continuing detention of Osman Kavala violates Article 46 of the Convention concerning the binding nature of final judgments of the ECtHR, and that a failure to release Kavala may trigger an Article 46(4) procedure (infringement proceedings),

iv. Emphasize to the Government of Turkey that Osman Kavala's release is of added urgency in the context of the Covid-19 pandemic which enhances the risk to his health in detention,

v. Request the Government of Turkey to drop all charges under which Kavala has been investigated and detained to silence him, in conformity with the Court's findings that his rights have been violated and that his exercise of rights to freedom of expression, assembly and association was wrongfully used as evidence to incriminate him.

Further recommendations to Turkey focus on general measures that should be addressed in the Government's action plan to implement the ECtHR's findings of violations in relation to Articles 5 and 18 of the Convention, to prevent repetition, and in that context measures to end the judicial harassment of human rights defenders. To address structural rule of law problems, the Committee of Ministers should request the government of Turkey to adopt constitutional amendments to secure the structural independence and impartiality of the judiciary.

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 initial communication regarding the execution of the European Court of Human Rights ("the Court" or "ECtHR") judgment in the case of Kavala v. Turkey.

2. Human Rights Watch (HRW) is a non-profit, non-governmental human rights organization working in over 90 countries around the world to defend human rights. Established in 1978, HRW is known for its accurate fact-finding, impartial reporting, effective use of media, and targeted advocacy, often in partnership with local human rights groups.

3. International Commission of Jurists is (ICJ) a non-governmental organization working to advance understanding and respect for the rule of law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva, Switzerland. It is made up of some 60 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organizations.

4. The Turkey Human Rights Litigation Support Project (TLSP) provides expertise and support to bring effective legal action to address the emerging human rights issues in Turkey. Consisting of a group of human rights law experts, within Turkey and internationally, the Project provides advice and legal support in cases before the domestic courts, including the Turkish Constitutional Court, as well as the ECtHR and the United Nations (UN) bodies and procedure. It also carries out a range of other activities, including research, advocacy and capacity building in human rights.

5. In Part II on individual measures, this submission draws to the attention of the Committee of Ministers the Government of Turkey's ("the Government") failure to ensure Osman Kavala's immediate release in compliance with the ECtHR's judgment, and maintains that the scope of the Court's judgment fully covers Mr. Kavala's current detention in Silivri Prison. Moreover, it concludes that, in failing to implement the individual measures requiring Mr. Kavala's immediate release, the Government has prolonged the violation of Article 5(1) and Article 18 of the European Convention on Human Rights ("the Convention") in conjunction with Article 5(1) in relation to Mr. Kavala's individual case. In addition, it has contributed to a chilling effect on the legitimate activities of all those engaged in the defence of human rights in Turkey.

6. In Part III, the submission identifies a number of general measures derived from the Court's ruling which the Government should urgently address in an action plan to implement the judgment. This submission focuses on general measures concerning serious deficiencies in

reasons for arrest, detention and charge (violation of Article 5(1)) and manifest irregularities in the administration of justice (violation of Article 18).

7. Part IV of the submission offers concrete recommendations to the Committee of Ministers.

II. Individual Measures: Prolongation of Violations and Applicability of the ECtHR Judgment to Osman Kavala's Continuing Detention

Findings of the Court

8. The ruling of the ECtHR in the case of Kavala v. Turkey on 10 December 2019 found violations of Article 5(1) (right to liberty and security) and Article 5(4) (right to a speedy decision on the lawfulness of detention) of the Convention, and that there had been a violation of Article 18 (limitation on use of restrictions on rights) taken together with Article 5(1). The Court required the Government to "take every measure to put an end to Osman Kavala's detention and to secure his immediate release" (paragraph 240), and stated that any continuation of his detention would entail a prolongation of the violations, as well as breaching the obligation to abide by the Court's judgment in accordance with Article 46(1) of the Convention (paragraph 239). The judgment became final on 11 May 2020.

9. For the purposes of this submission, the Court's findings of violations on Article 5(1) and Article 18 are considered here in detail. The Court found a violation of Article 5(1) on the basis of a lack of reasonable suspicion that Mr. Kavala had committed crimes justifying his detention under two articles of the Turkish Penal Code: "attempting to overthrow the government or prevent its functioning by force and violence" (Article 312) and "attempting to overthrow the constitutional order by force and violence" (Article 309).[1] These accusations are based on two separate sets of events. Mr. Kavala was detained on 1 November 2017 for allegedly orchestrating the Gezi Park protests of May 2013 (Article 312) and for his alleged role in the 15 July 2016 coup attempt (Article 309) in the context of the same investigation file at the time of the detention.

10. As to the first set of events concerning the 2013 Gezi Park protests, the ECtHR pointed in particular to the lack of questions about involvement in acts of violence to Mr. Kavala in his police interviews (paragraph 143 of the judgment), the fact that the police questioned him about many other events unrelated to one another (paragraph 152), and the lack of mention of any involvement in violent acts in the initial court decision to detain him or in subsequent rulings extending his detention (paragraph 143). The Court pointed out that the acts imputed to him in the prosecutor's indictment were legal activities (paragraph 146), and largely related to the exercise of Convention rights (paragraphs 146, 158). The Court stressed that the Government

[1] 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 312 (1): Anyone who uses force and force to attempt to overthrow the government of the Republic of Turkey or partially or wholly prevent its functioning is punished with aggravated life imprisonment.

had offered no explanation of why there had been a lapse of time of over four years between the 2013 Gezi Park events and the 2017 arrest of Mr. Kavala and a further delay of a year and a half before he was indicted (paragraph 151). The Court concluded that there was an "absence of facts, information or evidence showing that he had been involved in criminal activity" in connection with the Gezi Park protests (paragraph 153).

11. Similarly, in relation to the accusation that Osman Kavala was involved in the July 2016 coup attempt, the Court found that the initial court order to detain him for attempting to overthrow the constitutional order under Turkish Penal Code Article 309, and the repeated prolongation of his detention on that charge were based on insufficient evidence to justify the suspicion. The Court pointed out that his detention rested only on his alleged contacts with a certain individual and others and was not supported by other relevant facts (paragraphs 154, 155). The Court concluded that "it has not been demonstrated in a satisfactory manner that the applicant was deprived of his liberty on the basis of a 'reasonable suspicion' that he had committed a criminal offence." (paragraph 156).

12. In finding a violation of Article 18 in conjunction with Article 5(1) ECHR, the Court pointed to the range of activities unrelated to the Gezi events or the 2016 coup attempt Mr. Kavala was asked about in his police interview (paragraph 222); the mismatch between the charge of attempting to overthrow the government and the many completely lawful activities in the exercise of rights protected by the Convention cited in the 657-page indictment (paragraph 223); the lack of an explanation for the lapse of time between the events in question and the applicant's arrest (paragraph 226) and then a further lapse of 16 months till the filing of the indictment during which no investigative acts of significance took place (paragraph 228); and public speeches made by President Recep Tayyip Erdoğan about the applicant on two occasions and a "correlation" between the President's accusations against the applicant and the wording of the charges in the indictment filed around three months after those speeches (paragraph 229). The Court concluded that on the basis of these points, the detention of the applicant "pursued an ulterior purpose, namely to reduce him to silence as a human rights defender" (paragraph 230).

Turkish authorities' failure to date to implement the judgment and Osman Kavala's ongoing pretrial detention

13. Osman Kavala remains in detention at the time of writing in clear breach of the Court's judgment of 10 December 2019. The full sequence of events is briefly outlined below to show that in the period since the Court's judgment the violations identified by the Court have been prolonged and deepened multiple times in Mr. Kavala's case.

14. After the Court's finding in December 2019, Istanbul 30th Assize Court hearing the case known as the Gezi Park trial held hearings on 24 December 2019 and 28 January 2020 (see Annex I and II for the short hearing records), but ordered the continuation of Osman Kavala's detention on the grounds that the judgment of the ECtHR was not final. On 18 February 2020, the domestic

court acquitted him and eight co-defendants on charges including "attempting through force to overthrow the government" under Article 312 of the Turkish Penal Code and ordered Mr. Kavala's release from detention.[2] Thus, the very same court that had rejected Mr. Kavala's request for release on 24 December 2019 and 28 January 2020 decided to acquit all defendants just three weeks later. Considering that there was no new evidence submitted to the case file during these three weeks, this radical reversal requires an explanation and raises concerns as to the discharge of the court's responsibility to fairly administer justice.

15. On the same day, however, the Istanbul public prosecutor prevented Mr. Kavala's release from Silivri Prison by requesting his immediate arrest and transfer to police custody in in relation to the on-going investigation into his alleged role in the July 2016 coup attempt through his alleged connections with US academic H.J.B.. The charge cited was "attempting through force and violence to overthrow the constitutional order" under Article 309 of the Turkish Penal Code. As noted, this was one of the grounds for Mr. Kavala's initial detention on 1 November 2017 and had been prolonged through court rulings for nearly two years. The Istanbul public prosecutor lifted it on 11 October 2019 on the basis that "the available evidence [...] supports the view that pre-trial detention is no longer a proportionate measure."[3] As explained above in paragraph 11, Osman Kavala's detention under Article 309 was a matter addressed in the ECtHR's judgment, which found the allegations of Mr. Kavala's connections with H.J.B. insufficient evidence to justify detention. Yet despite the ECtHR ruling and the October 2019 release order finding pretrial detention for alleged contact with H.J.B disproportionate, on 19 February 2020, Osman Kavala was brought before İstanbul 8th Criminal Judgeship of Peace which issued an order for his detention again on the same evidence and for the same charge – another radical reversal. Kavala was transferred back to Silivri Prison.[4]

16. Osman Kavala's detention on 19 February 2020 was thus ordered in disregard of the ECtHR's judgment and relied on the same vague assertions relating to contact with a US academic and

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[2] Istanbul 30th Assize Court provided the following reasoning in its decision (no. 2019/74 E. 2020/34 K. 18 February, 2020): "that the observations made in the indictment concerning the alleged offence are grounded on telephone tapping records; however, the interception warrant was not duly issued and hence the wiretapping records are considered to be unlawful and do not constitute evidence; that the witness Murat Eren did not cite any concrete fact and other witnesses did not make any statements based on witnessed and factual information; that the report by the Financial Crimes Investigation Committee (MASAK) did not establish any activity with respect to the provision of financial support."

3 "Verdict reveals Kavala previously released in case where he was recently arrested," Bianet news website, 20 February, 2020: https://bianet.org/5/97/220317-verdict-reveals-kavala-previously-released-in-case-where-he-was-recently-arrested

4 Istanbul 8th Judgeship of Peace in its 19 February, 2020 ruling (no. 2020/154) cited the grounds for Kavala's arrest as follows: "According to the analysis of communication, it was established that suspect Mehmet Osman Kavala met with the other suspect Hanrey [sic] Barkey on 27 June 2016 before the coup attempt at MENKA A.S workplace in the Sisli district belonging to Mehmet Osman Kavala and in continuation on 30 June 2016 in the Diyarbakir province and that they met with people connected to the PKK terrorist organization, also taking note of Hanrey [sic] Barkey's connections with FETO/PDY ["Fethullah Gulen terrorist organization"] and the fact that in the same period of time his and the suspect's telephones transmitted signals from the same base receiver station, and the suspicion that he may abscond because of the decision to release him in the Gezi Park trial.")

others the Court had deemed "cannot be considered as sufficient evidence to satisfy an objective observer that he could have been involved in an attempt to overthrow the constitutional order." (paragraph 154).

17. The pretrial detention of Osman Kavala again and refusal of the Turkish government to implement the ECtHR's judgment were widely condemned in statements by the Council of Europe Commissioner for Human Rights, the European Union and human rights organizations.[5]

18. Of key importance in this sequence of events is the fact that on the same day, and hours before Osman Kavala was detained on remand again on 19 February 2020, Turkey's highest public official, President Recep Tayyip Erdogan, made a speech at a parliamentary group meeting of the ruling Justice and Development Party (AKP). In his remarks, he strongly criticized the 18 February acquittal decision by the Istanbul 30th Assize Court. Insisting that the Gezi Park protests had been an attempted uprising, the President expressed his strong disapproval of the domestic court's decision with the words clearly referring to but not naming Kavala: "There are those types like [US philanthropist] Soros stirring up trouble behind the scenes to make some countries rise up. And, you know, its Turkey branch was behind bars. They attempted to acquit him with a maneuver yesterday."[6]

19. The ECtHR in its judgment paid special attention to the speeches of the President in which he referred to Mr. Kavala. The Court noted a correlation between the accusations the President made in his two earlier public speeches and the wording of the charges in the prosecutor's indictment three months later. The Court acknowledged that, alongside other information, the speeches "could corroborate the applicant's argument that his initial and continued detention pursued an ulterior purpose, namely to reduce him to silence as a human rights defender" (paragraphs 229 and 230). The President's remarks on 19 February 2020, immediately prior to Mr. Kavala's re-detention, provide a strong indication that he thought Osman Kavala should not have been released and that he had a continuing close interest in the case. They further indicate that he was ready to interfere both in the court decision to acquit and release Mr. Kavala and in

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5 "The reaction of the Council of Europe Commissioner for Human Rights to the re-arrest of Osman Kavala," statement 19 February, 2020: https://www.coe.int/en/web/commissioner/-/the-reaction-of-the-council-of-europe-commissioner-for-human-rights-to-the-re-arrest-of-osman-kavala; European External Action Service, 19 February, 2020: "Turkey: Statement by the Spokesperson on a new detention order against Mr Kavala: https://eeas.europa.eu/headquarters/headquarters-Homepage/74882/turkey-statement-spokesperson-new-detention-order-against-mr-kavala_en; ICJ, "Turkey: re-arrest of Osman Kavala immediately after his acquittal is a travesty of justice," 19 February, 2020: https://www.icj.org/turkey-re-arrest-of-osman-kavala-immediately-after-his-acquittal-is-a-travesty-of-justice/
Human Rights Watch, "Turkey: Prominent Civic Leader Rearrested after Acquittal," 20 February, 2010: https://www.hrw.org/news/2020/02/20/turkey-prominent-civic-leader-rearrested-after-acquittal

6 Original words of speech: "Bunlar ciddi manada perde arkasında Soros türü bazı ülkeleri ayaklandırmak suretiyle oraları karıştıran tipler vardır. Onun da Türkiye ayağı malum içerideydi. Bir manevrayla dün onu beraat ettirmeye kalktılar," quoted in "Erdoğan'dan Gezi Davası Yorumu: 'Bir Manevrayla Beraat Ettirmeye Kalktılar'" ("Erdogan on Gezi Trial: They attempted to acquit him with a maneuver"), Bianet Online news website, 19 February, 2020: http://bianet.org/bianet/siyaset/220266-erdogan-dan-gezi-davasi-yorumu-bir-manevrayla-beraat-ettirmeye-kalktilar . Speech also quoted in "From Prominent Philanthropist to Political Prisoner," New York Times, 19 February 2020, https://www.nytimes.com/2020/04/09/world/middleeast/osman-kavala-turkey.html

the deliberations of a second court that was about to review whether Mr. Kavala should be detained again or released in the scope of an ongoing investigation which the ECtHR had already determined was based on insufficient evidence. Human Rights Watch's executive director Kenneth Roth argued that Kavala's re-arrest in these circumstances showed how "Turkey's criminal justice system is politically manipulated, with detention and prosecutions pursued at the political whim of the president."[7]

20. In a further indication of unjustified inference in the decision of the domestic court, the Council of Judges and Prosecutors (Hakimler Savcılar Kurulu, HSK), the body responsible for administering the appointment and disciplinary matters of judges and prosecutors, announced on the same day as the President's speech on 19 February 2020 that it was permitting an investigation into the panel of judges which had made the decision.[8] The ICJ and the International Bar Association Human Rights Institute in a joint statement raised concerns that the investigation into the judges was "a direct interference in their decision-making power and will have a chilling effect on the independence of all members of the judiciary."[9] The results of that investigation are not known.[10]

21. On 9 March 2020, within weeks of the President's speech, upon a request submitted by the İstanbul public prosecutor, Istanbul 10th Criminal Judgeship of Peace ordered Mr. Kavala's detention again on a charge 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" (under Article 328 of the Turkish Penal Code). It should be underlined that in its decision ordering Osman Kavala's detention, the Istanbul 10th Criminal Judgeship of Peace 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 judge ordering his 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

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7 Human Rights Watch, "Turkey: Prominent Civic Leader Rearrested after Acquittal," 20 February 2010: https://www.hrw.org/news/2020/02/20/turkey-prominent-civic-leader-rearrested-after-acquittal

8 Reported in "Turkey investigates judges involved in Gezi Park trial acquittals," 19 February 2020, DW news website: https://www.dw.com/en/turkey-investigates-judges-involved-in-gezi-park-trial-acquittals/a-52435248

9 ICJ and International Bar Association Human Rights Institute joint statement, "ICJ and IBAHRI urge Turkey's Council of Judges and Prosecutors to cease probe into Gezi Park trial judges," 28 February 2020: https://www.icj.org/turkey-icj-and-ibahri-urge-turkeys-council-of-judges-and-prosecutors-to-cease-probe-into-gezi-park-trial-judges/

10 Days later media known for close political alignment with the government published news stories aimed at discrediting the presiding judge in the case by alleging he had links with individuals convicted of or dismissed for association with the Gülen movement which Turkey has proscribed as a terrorist organization responsible for the 15 July 2016 coup attempt. See for example, Takvim daily newspaper, 26 February 2020: https://www.takvim.com.tr/guncel/2020/02/26/son-dakika-gezi-davasi-hakimi-galip-mehmet-perk-hakkinda-flas-feto-iddiasi

investigation file.[11] In other words, the only difference between this last detention order and the previous orders is the legal qualification of the same acts. If this methodology were to be accepted, an individual might be kept in detention indefinitely by means of new detention orders issued under different provisions of the Turkish Penal Code. Ignoring the ECtHR's conclusion that evidence of mere connections with H.J.B were insufficient to establish that Mr. Kavala had committed a criminal offence (paragraphs 154 and 156), in detaining Mr. Kavala again for espionage without evidence, the domestic court prolonged the violation of Article 5(1) of the Convention and failed to duly implement the ECtHR's judgment.

22. The NGOs note here 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 had been ensured by the decision of Istanbul 10th Criminal Judgeship of Peace. This is explained in the above paragraph. As of the time of writing, Osman Kavala was still in detention on the charge of "espionage" under the same investigation file and for the same actions referred to in the ECtHR judgment (among others, in paragraphs 154-155).[12] Nearly four years after the 2016 coup attempt, there has been no indictment against Mr. Kavala formally charging him for involvement, but rather he is detained in the scope of an investigation concerning the coup attempt and contact with an individual suspected of being involved in it. **The NGOs submit that all actions taken against Mr. Kavala following the ECtHR's December 2019 judgment are a part of the same persecution targeting him on the basis of his legitimate activities as a human rights defender with the aim of reducing him to silence.** The Turkish authorities have an obligation to implement the Court's ruling and immediately ensure that Kavala is released and that all charges against him are dropped.

Conclusion

23. Taken together, the actions outlined above demonstrate that the ECHR violations determined by the Court remain ongoing and that the Court's judgment has not been implemented in terms of individual measures. Those actions include the failure to release Mr. Kavala immediately after the ECtHR's December 2019 judgment; his re-arrest after a speech by the President directly

11 Istanbul 10th Judgeship of Peace in its 9 March 2020 ruling (no. 2020/272) cited the ground for Kavala's arrest under Article 328 as "on the assessment of shared base receiver records showing links with Henri Jak Barkey who runs intelligence activities in the name of terrorist organizations and foreign states periodically on the dates 27/11/2014, 01/06/2015, 03/06/2015, 05/06/2015/ 07/03/2016, 09/03/2016, 28/06/2016, 29/06/2016. 18/07/2016 and continually between 11.2014 and 07/2016, and also that on 18/07/2016 they were seen together in a restaurant, together with the suspect's statements that he had met Henri Jak Barkey at conferences discussing problems of Turkey and the Middle East; it was assessed that there was a strong suspicion that the suspect had committed the crime he was accused of, and that in view of the quality and nature of the crime and the foreseen penalty in law, detention was proportionate on the basis of Criminal Procedure Code article 100 and subsequent articles…"

12 The release on the Turkish Penal Code Article 309 charge was initiated by the prosecutor himself and tied to the fact that under a change to the Criminal Procedure Code that came into effect in October 2019 a suspect cannot be held in excess of two years on such a charge without being formally indicted.

asserting he was guilty and condemning the domestic court for acquitting him; the internal investigation against the judges who acquitted him launched at the same time by the Council of Judges and Prosecutors - which is not institutionally independent from the executive; his subsequent detention order on the same evidence found insufficient by the ECtHR but under a renamed charge; and his resulting continuing detention. Domestic court decisions to release, then re-detain, then detain on a different charge, then release on the original charge – all on the basis of the same evidence and file – point to a situation that cannot be construed as lawful detention for a proper purpose. The sequence of court orders and the lack of objective deliberation demonstrates that decisions have been guided by political expediency and a concerted effort to prevent Mr. Kavala's release.

24. The NGOs consider that the campaign of persecution against Mr. Kavala and the failure to release him and drop all charges against him have perpetuated a chilling environment for all human rights defenders in Turkey. The treatment of Mr. Kavala is consistent with the well-documented pattern of harassment of rights defenders within a wider trend of arbitrary detentions and abusive prosecutions of journalists, elected politicians, lawyers, and other perceived government critics.[13]

25. This continuing detention and ongoing use of judicial procedures against Mr. Kavala to reduce him to silence is a clear illustration of the Government's failure to fulfill its obligation to execute the ECtHR judgment in this case. Pursuant to the Court's findings, the NGOs submit that Mr. Kavala must be released immediately, all judicial procedures targeting his legitimate activities must be dropped and appropriate measures must be taken to redress the effects of the violations of his rights. Turkey's refusal to release Osman Kavala immediately despite the Court's clear ruling in paragraph 7 of the operative provisions of the judgment may lead the Committee of Ministers to trigger infringement proceedings as prescribed under Article 46(4) of the Convention.

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13 Commissioner for Human Rights of the Council of Europe, "Report following Country Visit, 1-5 July 2019," 19 February 2020: https://rm.coe.int/report-on-the-visit-to-turkey-by-dunja-mijatovic-council-of-europe-com/168099823e, pp. 16-18, 36-39; ICJ, "Turkey: ICJ Alerts Council of Europe Institutions to Continued Arbitrary Detention in Spite of European Court Judgments," 12 May 2020: https://www.icj.org/turkey-icj-alerts-council-of-europe-institutions-to-continued-arbitrary-detention-in-spite-of-european-court-judgments/; International Press Institute, "Turkey's Journalists in the Dock," report on joint mission to Turkey, September 11-13, 2019: https://www.ecpmf.eu/archive/files/final_file__turkey_mission_report__x50_copies.pdf; Human Rights Watch, "Lawyers on Trials; Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey," April 2019: https://www.hrw.org/sites/default/files/report_pdf/turkey0419_web.pdf .; Human Rights Watch, "Turkey: Kurdish Mayors' Removal Violates Voters' Rights, 7 February 2020: https://www.hrw.org/news/2020/02/07/turkey-kurdish-mayors-removal-violates-voters-rights; Amnesty International, April 2018, "Weathering the Storm: Defending Human Rights in Turkey's Climate of Fear": https://www.amnesty.org/download/Documents/EUR4482002018ENGLISH.PDF

III: General Measures: Arbitrary Detention, Abuse of Power and Protection of Human Rights Defenders in the Context of Kavala v. Turkey

A. Violation of Article 5(1) of the Convention:

Findings of the Court

26. As explained in detail in paragraphs 9, 10 and 11 above, in its evaluation related to Article 5(1) in Kavala v. Turkey, the ECtHR found a lack of reasonable suspicion that the applicant had committed crimes justifying his detention under Articles 312 and 309 of the Turkish Penal Code. According to the Court, the judicial authorities did not formulate questions illustrating any involvement in violent acts, and the events used as a basis in the investigation files were unrelated and not relevant to the alleged acts. The Court went on to find that Mr. Kavala's activities made the subject of investigations by the judicial authorities were all legitimate activities of a human rights defender that do not constitute any crime, but rather are protected under the Convention, and that the authorities did not pursue a legitimate purpose in detaining him.

Turkey's failure to take the necessary general measures to implement Article 5(1) related findings in Kavala v. Turkey and the ongoing issue of excessive resort to criminal law against human rights defenders:

27. Under Article 5(1)(c) of the Convention, detention can be used in the context of criminal investigations only for the purpose of bringing individuals before a competent legal authority on reasonable suspicion of having committed an offence. Reasonableness of suspicion is a core safeguard to protect against arbitrary deprivation of liberty. For a detention not to be deemed arbitrary, the national law on its face and in its application and interpretation must be in accordance with the Convention standards. In cases in which there exists an element of bad faith, the purpose of the restriction will not accord with what is prescribed under Article 5(1); and where there is lack of proportionality between the reasons for detention relied upon and the effect of detention, the question of arbitrariness arises (see paragraphs 125–134 of the judgment).

28. The NGOs would underline that the law and practice in Turkey flatly fail to accord with these legal standards. Wide and arbitrary use of pretrial detention without reasonable suspicion has been a persisting issue. Despite the clear and unambiguous findings of the ECtHR in this case and the Court's caselaw setting out clear standards with regard to Article 5 of the Convention, Turkey has failed to take genuine steps to end its problematic practices. In contrast, the legitimate activities of human rights defenders, journalists, lawyers, politicians and perceived government critics have been used as a basis for initiating criminal investigations, carrying out arrests, detentions and adopting other security measures against them.[14] Peaceful

14 For recent reports documenting cases, see fn. 13.

demonstrations, press statements, social media posts, exchange of information and views with international authorities and other forms of protected expression have been used as basis for these investigations by the judiciary.[15]

29. The NGOs also submit that the use of criminal law measures such as detention against human rights defenders and others expressing criticism of the government goes against the core principles of international human rights law and criminal law inherent in a rule of law approach. The fundamental general principle of 'legality' in this context requires that the material and mental elements of alleged crimes are defined in law with sufficient precision and clarity to ensure foreseeability and, among others, meet the requirements of *nullum crimen sine lege* (no punishment without law) reflected in Article 7 of the Convention.[16] Given the implications for those involved and the wider societal chilling effect, when rights defence, political expression or debate on matters of public interest are at stake, any restrictions through criminal law placed on freedoms of expression, assembly or association require the most compelling justification of necessity and proportionality.

30. The expansive interpretation of national security laws, including anti-terrorism laws, to interfere with the exercise of expression on questions of public importance, including the stifling of dissent, in Turkey has been criticized by the ECtHR in numerous cases as contravening these principles.[17] The broad definition of 'crimes against the state', coupled with the practice of reliance on weak or no evidence, raise fundamental problems with regard to the legality and legitimacy of criminal prosecutions.[18] In 2017 alone, some 183,121 people were indicted for crimes against the constitutional order[19] and thousands were detained on this basis in Turkey.[20]

31. The vagueness of national security legislation in Turkey is closely interconnected with the pattern of "judicial harassment" of perceived opponents of the government including human rights defenders. As mounting practice shows, the ill-defined scope of relevant provisions of the Turkish Penal Code has meant that activities of human rights defenders may readily be categorised as crimes and so lead to the arrest, detention of the defenders.[21] Both principles of

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15 For a summary, see Human Rights Watch, "World Report 2020," Turkey chapter, 14 January 2020: https://www.hrw.org/world-report/2020/country-chapters/turkey

16 ECtHR, Ciulla v. Italy, App. No. 1152/84, 22 February 1989, para. 40.

17 ECtHR, Yılmaz and Kılıç v Turkey; Gül and or. v Turkey; Gülcü v Turkey, App. no. 17526/10, 19 January 2016; Işıkırık v Turkey, App. no. 41226/09, 14 November, 2017; İmret v Turkey; Bakır and Others v. Turkey, App. 46713/10, 10 July 2018.

18 ECtHR, Alparslan Altan v. Turkey, App. No. 12778/17, 16 April 2019, para.136; Şahin Alpay, App. No. 16538/17, 20 March 2018, para. 107; Mehmet Hasan Altan v. Turkey, App. No. 13237/17, 20 March 2018.

19For Official Statistics of the Ministry of Justice, see <www.adlisicil.adalet.gov.tr/istatistik_2017/istatistik2017.pdf>, p. 38.

20 154,000 people were prosecuted and 50,000 detained on remand in pending proceedings in the first ten months of the state of emergency: Bianet news, 'Number of People Detained Reached 50 Thousand under 15 July 2016 Operations', 28 May 2017, https://bianet.org/bianet/insan-haklari/186881-15-temmuz-sorusturmalarinda-tutuklu-sayisi-50-bin-136; also see AI, Weathering the Storm, Defending Human Rights in Turkey's Climate of Fear, p.10.

21 Press Release of 8 Jul. 2019 after Country Visit by Dunja Mijatović, the Commissioner for Human Rights of the Council of Europe, https://www.coe.int/en/web/commissioner/-/turkey-needs-to-put-an-end-to-arbitrariness-in-the-judiciary-and-to-protect-human-rights-defenders; UN Special Rapporteur on human rights defenders, World Report

legality and the presumption of innocence in cases similar to Osman Kavala are often violated in Turkey, as individuals are prosecuted or detained under national security charges with no adequate basis in law or fact, or prosecuted by courts unable or unwilling to assess all relevant facts and law.[22]

32. Turkey's failure to implement the ECtHR's Kavala v. Turkey judgment has been compounded by the Turkish authorities' exclusion of people detained for political reasons and pretrial detainees from a prisoner early release law passed in the context of the Covid-19 pandemic. With an amendment made to the Law on the Execution of Sentences and Security Measures on 13 April 2020, around 90,000 prisoners were granted release as a protective measure against the pandemic. Osman Kavala and a number of others detained for political reasons, however, are still in prison despite the threat the pandemic poses to their health.[23]

B. Article 18 in conjunction with Article 5(1) of the Convention

Findings of the Court

33. In the Kavala judgment, the ECtHR concluded that there had been a violation of Article 18 in conjunction with Article 5(1) of the Convention. The judgment is the very first Article 18 final judgment delivered against Turkey. The ECtHR held that it could be established to a sufficient degree of proof in view of the relevant case specific facts (paragraph 220) that the government had pursued Osman Kavala's detention and prosecution for an ulterior purpose. The NGOs consider that the Kavala case is not an isolated instance and that most of the ECtHR's findings in Kavala v. Turkey are readily applicable to any number of cases that form a general pattern of structural rule of law problems in Turkey.

34. In addition to observations about the quality of the investigation and lack of evidence, the judgment underlined two crucial points to illustrate that the authorities had pursued the ulterior purpose of reducing Kavala to silence as a human rights defender. These two points indicate very serious structural problems relevant to the independence of the judiciary in Turkey and are addressed in this submission separately.

35. First, as referred under paragraph 12 above, the Court observed that the applicant was arrested on 18 October 2017, that is, more than four years after the Gezi events and more than a year after the attempted coup, on charges related to these events (paragraph 226). The Court also considered that "it crucial in its assessment under Article 18 of the Convention that several years elapsed between the events forming the basis for the applicant's detention and the court

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on the Situation of Human Rights Defenders, Dec. 2018, p.381; Joint statement by three UN Special Rapporteurs and a Chair-Rapporteur, 14 Jul. 2017, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21875&LangID=E.

22 UN Special Rapporteur on terrorism, E/CN.4/2006/98, para. 42.

23 "Twenty-four Rights Groups Call on Turkey to Release All those Arbitrarily Detained, Now at Risk of Covid-19," April 17, 2020: https://www.hrw.org/news/2020/04/17/twenty-four-rights-groups-call-turkey-release-all-those-arbitrarily-detained-now

decisions to detain him. No plausible explanation has been advanced by the Government for this lapse of time." (paragraph 228). The Court also pointed out that after the applicant's placement in detention, he had not been officially charged until 19 February 2019, some five and a half years after the facts, and solely in relation to the Gezi events.

36. Secondly, the Court could not ignore the resemblance between the President's public speeches and the charges brought by the prosecutor (see paragraph 19 above). Indeed, in two separate speeches on 21 November and 3 December 2018, the President accused Mr Kavala of orchestrating the Gezi Park protests with the support of foreign forces, especially George Soros. Following these speeches, prosecutors prepared a long-awaited indictment. The Court could not overlook that "there is a correlation between, on the one hand, the accusations made openly against the applicant in these two public speeches and, on the other, the wording of the charges in the bill of indictment, filed about three months after the speeches in question" (paragraph 229).

37. However, neither the time frame in Osman Kavala's case nor the interference of the President and other high-level politicians in the case are exceptional. These two points are linked and have become a common feature of recent politically motivated prosecutions in Turkey. They indicate the executive's strong influence over the institutions responsible for the administration of justice, including the judiciary and the prosecutorial authorities, both institutionally and in individual cases, and, as a result, explain the systematic judicial harassment of civil society and human rights defenders engaged in activities the government views as critical of its policies.

Institutional Independence of the Turkish judiciary

38. The independence of the Turkish judiciary, already under threat before the 15 July 2016 attempted coup and strained by the dismissal of a third of its members in its aftermath, was further imperilled following the constitutional amendments approved by referendum on April 16, 2017.[24]

39. The constitutional amendment changed the structure, composition and methods of appointment of the previous judicial council and renamed it the Council of Judges and Prosecutors (HSK). Of the 13 members, four are now appointed by the President of the Republic. The Minister of Justice, who presides over the HSK, and his or her deputy are ex officio members. The remaining seven members are appointed by Turkey's parliament. All members appointed by the parliament are to be elected by a qualified majority, and the ruling AKP and the Nationalist Movement Party (MHP) presently have enough members to constitute this majority. Consequently, the appointment of all members of the HSK is, in one way or another, presently

24 ICJ, The Turkish Criminal Peace Judgeships and International Law, Briefing Paper, Geneva, 2018, p. 5.

controlled by the executive government. None of the members of the HSK are elected by judges or public prosecutors.[25]

40. In April and May 2017, the ruling AKP, in coalition with the MHP, had more than 330 deputies in parliament, amounting to over three fifths of parliamentary seats. Since the opposition parties, in protest against the new provision, did not attend the final parliamentary vote, seven members of the CJP were elected by this majority.

41. Turkey's top appeal courts (the Court of Cassation and the Council of State) have undergone four separate structural reforms to their composition and functioning between 2011 and 2017. The number of members of both the Court of Cassation and the Council of State and their structure were substantially changed in 2011, 2014, 2016 and 2017. The number of members of the Court of Cassation was increased from 250 to 516, and the number of members of the Council of State was increased from 95 to 195, by amendments in 2011 and 2014. In 2016, the number of members of the Court of Cassation was reduced to 200 and the number of members of the Council of State was reduced to 90.[26]

42. Furthermore, following the amendments to the composition of the HSK, the number of judges and prosecutors subjected to involuntary rotations increased substantially. While, in 2010, 190 judges and prosecutors had been rotated, the HSK made decisions on 9 May 2017 and 3 July 2017 to rotate 1,815 judges and prosecutors. On July 25, 2018, the HSK rotated 3,320 judges and prosecutors, and on 31 May 2019 3,722, judges and prosecutors. The rotation of judges on a mass scale against their will has negatively impacted the independence of the judiciary.[27] In its report of June 2016, the ICJ expressed concern that the practice of rotating judges between judicial positions in different regions of Turkey was being applied as a form of hidden disciplinary sanction and as a means to marginalize judges and prosecutors seen as unsupportive of government interests or objectives.[28] The European Commission echoed this view in April 2018 stating that "there is a need for legal and constitutional guarantees to prevent judges and prosecutors from being transferred against their will, except where courts are being reorganised."[29] As happened in the Gezi trial under which Mr. Kavala's initial detention was ordered, rotations are made in the course of ongoing trials without explanation. This practice sends signals to judges and prosecutors that they might be replaced anytime if they act against the will of the government.

43. Following the 2016 failed coup attempt, one third of the existing judges and prosecutors were dismissed without any individual investigation or an opportunity to have a judicial review. In order to justify the dismissal of a judge, the law only requires a mere "connection" "union" or "affiliation" with a "structure, formation or group" that Turkey's National Security Council has

25 ICJ, Turkey's Judicial Reform Strategy and Judicial Independence, Briefing Paper, Geneva, November 2019, p. 3
26 Ibid, p. 7.
27 Ibid, p. 7.
28 ICJ, Turkey: the Judicial System in Peril - A Briefing Paper, Geneva, June 2016, p.18.
29 European Commission, Turkey 2018 Report, Doc. No. SWD(2018) 153 final, 17 April 2018, p. 24.

"determined operates against the national security of the state." This vague and over-broad formulation creates a great potential for the arbitrary dismissal of judges in violation of guarantees of judicial independence. Although many dismissed judges and prosecutors challenged the dismissal decisions before the Council of State, the Council of State has to date only delivered one decision, and in that decision the Council rejected the applicant's request to be reinstated. Therefore, at time of writing, no dismissed judge has been reinstated following judicial review. While the state of emergency lapsed in July 2018, the power of the HSK to dismiss judges and prosecutors under the same criteria as under emergency legislation was maintained for a further three years under Law no. 7145 which came into force in July 2018. Since this law there have been at least 24 more dismissals of judges and prosecutors in a manner tainted by arbitrariness. In the words of the Commissioner for Human Rights of the Council of Europe, mass dismissals created "an atmosphere of fear among the remaining judges and prosecutors."[30]

44. Furthermore, the need to recruit large numbers of new judges following the mass dismissals, and the relative inexperience of many such new recruits, as well as the additional case-load generated by state of emergency measures, even after the state of emergency itself ended, has had a significant adverse impact on the overall effectiveness, competence and fairness of the justice system. More than 8,000 judges and prosecutors have been appointed since the beginning of the state of emergency and the requirements of appointment were eased in order to allow for the appointment of trainee judges before the end of their traineeship and to make it easier for lawyers to become judges.

45. The NGOs consider it important to understand that against this troubling context in which judges and prosecutors in Turkey currently discharge their professional duties, speeches by the President and ministers carry inordinate weight and may easily be perceived by judicial and prosecutorial authorities as orders. The NGOs consider, therefore, that the structural problems that led the ECtHR to find that Article 18 of the Convention has been breached in the case of Kavala v. Turkey in conjunction with Article 5(1) can only be rectified to prevent repetition by means of a wide structural reform of the judiciary and the administration of the courts to guarantee independence from the executive and impartial judicial rulings. This will require the government to make constitutional amendments, of the kind recommended by the Council of Europe Commissioner for Human Rights in her most recent report,[31] and to undertake a series of

30 Abdullah Zeydan others v. Turkey, ECtHR, Application no. 25453/17 and others, Third party intervention by the Council of Europe Commissioner for Human Rights, Doc. CommDH(2017)33, 2 November 2017, Coe Commissioner third party intervention in journalist case, para. 35.

31 Commissioner for Human Rights of the Council of Europe, Report Following Her Visit to Turkey From 1 to 5 July 2019, CommDH(2020)1, para. 116.

reforms drawing on the recommendations and guidance provided by the Venice Commission[32] and other Council of Europe bodies, as well as by the ICJ.[33]

Undue interference of the executive with the judiciary

46. President Erdoğan's and other high-level politicians' active and visible intervention in criminal processes are commonly seen in cases brought against politicians, human rights defenders, journalists and other people who express contested views on matters of public concern, especially those that may be critical of the government. Their direct intervention always has negative repercussions for the defendants. Some leading examples are summarised here.

47. The criminal cases launched against members of parliament from the Peoples' Democratic Party (HDP) after the lifting of their immunity provides a striking example of the systematic misuse of criminal law following a speech by the President. In 2016, the immunities of a group of MPs consisting mostly of members of the opposition parties were lifted by an ad hoc, "one shot" and "ad hominem" measure. Before this constitutional amendment, on 28 July 2015, President Erdoğan stated: "I don't approve of closing down political parties. However, deputies of the HDP should pay the price one by one."[34] In a speech on 2 January 2016, President Erdoğan demanded that "HDP MPs should go to prison."[35]

48. In the period between 2007-2015, prosecutors sent 182 criminal files to the Parliament against HDP MPs. In that time period, the average file number sent to the Parliament was 1.9 per month. After the President's speech, the total number of investigation files against the HDP tripled and reached 510 in four months. In the period April-May 2016, 154 new files were sent from different provinces. The monthly average of files increased from 1.9 per month to 73.[36] Considering that those files were prepared by different public prosecutors' offices around the country, the most plausible explanation for this sharp rise in the number of criminal files is that they increased because prosecutors understood that was what was expected by the President, expressed publicly in a speech calling for the HDP MPs' imprisonment.

49. The case of Selahattin Demirtaş, still pending before the Grand Chamber of the ECtHR, shows how HDP parliamentarians were individually affected. Immediately after the President's 28 July 2015 speech (referred above in paragraph 47), prosecutors opened six investigations into Mr Demirtaş. Following the 2 January 2016 speech (referred also in paragraph 47 above), an

32 Venice Commission, Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017, CDL-AD(2017)005, 13 March 2017.
33 CJ, Turkey's Judicial Reform Strategy and Judicial Independence, Briefing Paper, Geneva, November 2019.
34 "Erdoğan: Resolution Process is Improbable, We Call Everybody to Account," Bianet online news, 25 July 2015: http://m.bianet.org/bianet/politics/166374-erdogan-resolution-process-is-improbable-we-call-everybody-to-account
35 "Erdoğan: HDP Eş Başkanlarının sözleri anayasa suçu," (Erdogan: HDP co-chairs' words are constitutional crimes), 1 January 2016: https://www.bbc.com/turkce/haberler/2016/01/160102_erdogan_hdp
36 See Human Rights Watch, "Crackdown on Kurdish Opposition: MPs Jailed, Elected Mayors Removed Ahead of Referendum,"20 March 2017: https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition

additional 14 criminal files were prepared against Mr Demirtaş in 10 different cities in less than three months.

50. In July 2017, 10 human right defenders were arrested in Büyükada, Istanbul as they were taking part in a digital security and information management workshop. When he was asked about the arrests, the President said: "They gathered in a kind of meeting to continue the 15 July coup attempt. They were arrested upon intelligence information". After this speech, six of the human rights defenders were detained by the criminal peace judge on charges of membership of and/or aiding an armed organisation. Their trial continues.

51. The case of Canan Kaftancıoğlu is another striking example of the President's strong influence over the judiciary. Ms. Kaftancıoğlu became the chair of the Istanbul branch of the main opposition Republican People's Party (CHP) on 13 January 2018. On 15 January 2018, lawyers acting for the President filed a criminal complaint against Ms. Kaftancıoğlu and one day later in his speech to the ruling AKP parliamentary group, the President displayed examples of Ms. Kaftancıoğlu's social media tweets on screen and harshly criticised her.[37] Following this speech, the İstanbul Public Prosecutor's Office filed an indictment against Ms. Kaftancıoğlu for tweets she posted between 2012 and 2017. The indictment included 35 different tweets, and on 6 September 2019, just 20 months after the President's speech, the İstanbul 37th Assize Court convicted Ms Kaftancıoğlu to a prison term of 9 years 8 months on five different counts for 35 different tweets.[38]

52. Before the March 2019 local elections, President Erdoğan stated in a public speech - later repeating the same message in a second public speech - that, "If those connected to terrorism win the elections, we will immediately replace them with trustees."[39] The HDP won 65 municipalities in the local elections. In less than 14 months, 45 of the mayors have been replaced by trustees appointed by the central government, including the mayors of the three metropolitan municipalities, Diyarbakır, Mardin and Van, following criminal investigations launched against them. Twenty-one mayors are currently held in pretrial detention and several have also been convicted during this period.

53. More recently, during the Covid-19 pandemic and lock down, Eren Yıldırım, the Youth Chair of the opposition CHP in Yüreğir, in the southern province of Adana, was reported to have had a quarrel with the governor of the district. A day later, in a speech, President Erdoğan stated that there was no difference between the armed attack by the armed Kurdistan Workers' Party (PKK) that had taken place two days before the incident in the eastern province of Van and Mr.

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37 "Erdoğan blames new CHP İstanbul head for 'insulting' Turkish state," Sol online news, 16 January 2018: https://news.sol.org.tr/erdogan-blames-new-chp-istanbul-head-insulting-turkish-state-173867

38 "Canan Kaftancioglu: Turkish opposition figure faces jail for tweets," BBC online news, 6 September 2019: https://www.bbc.com/news/world-europe-49613074

39 Speech quoted in Human Rights Watch, "Kurdish Mayors' Removal Violates Voters' Rights," 7 February 2020: https://www.hrw.org/news/2020/02/07/turkey-kurdish-mayors-removal-violates-voters-rights

Yıldırım's altercation with the district governor in Yüreğir.[40] AKP party spokesperson Ömer Çelik also condemned the CHP for the incident.[41] Following these speeches, the public prosecutor challenged the decision of the criminal peace judge not to detain Mr. Yıldırım and the appeal was upheld.

54. In another recent event, an investigation was opened after the Ankara Bar Association filed a complaint against the head of Turkey's Religious Affairs Directorate, Ali Erbaş. The latter, in a sermon on 24 April 2020, had referred to Covid 19 and suggested that members of the LBGT community spread disease, urging people to "join the fight to protect people from such evil". AKP spokesperson Ömer Çelik, Minister of Justice Abdülhamit Gül and President Erdoğan all condemned the Ankara Bar Association for its action against Mr. Erbaş. The Ankara Public Prosecutor's Office initiated a criminal investigation against the Ankara Bar Association for "insulting the religious values of part of the public." A similar investigation was also launched against the Diyarbakır Bar Association on the same grounds after it too issued a statement against Mr. Erbaş's homophobic remarks.[42]

55. The President's public speech criticising the acquittal of Osman Kavala and eight other defendants in the Gezi Park case (referred to in paragraph 18 above), despite the strong criticism the ECtHR made in relation to the President's earlier speeches on the same case (see paragraph 19 above), is another example of the pattern of executive interference in the judiciary. The Istanbul Public Prosecutor's appeal against the acquittal decision (see Annex III for the appeal submission), the continuation of Mr. Kavala's detention to date, and the HSK's investigation of the judges of the court after the President's speech, show that this interference has a real impact on Turkey's criminal justice system.

Wide lapse of time between the events in question and the judicial actions

56. As noted above, the ECtHR's second observation about the time frame of criminal investigations in the Kavala judgment should be considered in the same context. Most of the cases brought against politicians, human rights defenders and journalists concern their activities protected under the right to freedom of expression, including speeches made at political rallies, social media posts and articles. Activities which had gone unnoticed by judicial authorities or had not

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40 "Erdoğan, Vefa Destek Gruplarına yönelik saldırılarla ilgili HDP ve CHP'ye yüklendi," Evrensel daily newspaper, May 16, 2020: https://www.evrensel.net/haber/404917/erdogan-vefa-destek-gruplarina-yonelik-saldirilarla-ilgili-hdp-ve-chpye-yuklendi

41 "CHP Gençlik Kolları Başkanı ve beraberindeki grup Adana'da Vefa Sosyal Destek Grubuna saldırdı," Yeni Şafak daily newspaper, 15 May, 2020: https://www.yenisafak.com/gundem/chp-genclik-kollari-baskani-ve-beraberindeki-grup-adanada-vefa-sosyal-destek-grubuna-saldirdi-3540012

42 "Prosecutors' investigation widens to include Diyarbakır Bar Association after criticism of top cleric," Duvar English online news website, April 29, 2020: https://www.duvarenglish.com/human-rights/2020/04/29/prosecutors-investigation-widens-to-include-diyarbakir-bar-association-after-criticism-of-top-cleric-comments-on-lgbt/; "Ankara Bar Investigated After Criticizing Religious Affairs President over LGBTI+ Remarks," Bianet online news, April 27, 2020: https://bianet.org/english/lgbti/223509-ankara-bar-investigated-after-criticizing-religious-affairs-president-over-lgbti-remarks

been deemed as criminal at the time they took place, subsequently became the subject of criminal investigations much later after the person concerned was publicly targeted by the executive.

57. For instance, in the case of Selahattin Demirtaş, when the President invited prosecutors to take action against HDP members of parliament, prosecutors initiated investigations concerning speeches of Mr Demirtaş that had been made 36 to 72 months before the start of an investigation. In a similar vein, when the President made his speech against Canan Kaftancıoğlu in January 2018, prosecutors identified criminal activity in her tweets dating back to 2012. When journalists were investigated for links with the Fethullah Gülen movement (proscribed as a "terrorist organization", FETÖ/PDY, by the Turkish government and courts), their articles written well before the 15 July coup attempt were used against them to prove their membership of a terrorist organisation responsible for the violent coup attempt. For instance, journalist Atilla Taş was prosecuted in late 2016 on the basis of articles he wrote in 2014.

C. Execution of Kavala v. Turkey in the context of Turkey's obligations towards human rights defenders

58. Kavala v. Turkey concerns the abuse of judicial processes to harass or persecute ("judicial harassment") a human rights defender on the basis of his legitimate activities to fulfil his role and finds a causal link between the violation of Mr Kavala's rights and the closing down of civil society space in Turkey. The ECtHR explicitly stated in its judgment that the indictment against Osman Kavala included as criminal evidence his legitimate activities as a human rights defender and a civil society activist. The Court found that inclusion of legitimate activities protected under the Convention in the indictment weakened the credibility of the prosecutor's case and supported Mr. Kavala's argument that his detention had been pursued with the ulterior purpose of reducing him to silence as a human rights defender, to deter others from taking up civil society work and to hinder NGO activities (paragraphs 223-224). The Court placed emphasis on the fact the judgment concerned human rights defenders and civil society in the country and acknowledged that persecution of rights defenders could be a matter of "significant gravity" with wider negative impact "in light of the particular role of human rights defenders and non-governmental organizations in a pluralist democracy" (paragraph 231).

59. The current situation in Turkey, as described substantially in the above sections, demonstrates that the authorities fail to follow an elaborate body of international standards (paragraphs 74-76 of the judgment) identifying states' 'particular', 'heightened' or 'reinforced' duties to protect human rights defenders.[43] The situation demonstrates that there is a need for rigorous oversight

43See TLSP and Pen International, 3rd party intervention in Osman Kavala v. Turkey, 16 January 2019, https://static1.squarespace.com/static/5b8bbe8c89c172835f9455fe/t/5c669f57104c7bd981a329ad/1550229337431/1; 6012019+Kavala+v+Turkey+Intervention+Final.pdf;

of Turkey's treatment of human rights defenders in view of their significant role in a democratic society.[44] The NGOs submit that the situation of human rights defenders in Turkey, together with other structural issues identified in the above sections, have serious implications for human rights and the rule of law in the country. The ongoing persecution of rights activists and Turkey's failure to implement Kavala v. Turkey not only prolongs violation of the rights of human rights defenders and hinders the protection of others, it also impacts on the public's perception of human rights, with an inevitable chilling effect on rights protection, democratic participation and dissent. The NGOs would therefore underline this important aspect of the judgment which led the Court to find violation of Articles 5(1), (4) and Article 18 in conjunction with Article 5(1). They invite the Committee of Ministers to consider adopting the relevant recommendations formulated below to reflect on Turkey's obligations concerning human rights defenders and to ensure execution of Kavala v. Turkey in its entirety.

IV. Recommendations to CM on individual measures and general measures and how to monitor effectively

Regarding procedural matters, the NGOs urge the Committee of Ministers to:

i. Ensure that Kavala v. Turkey be placed under enhanced procedures and treated as a leading case under Article 18 of the Convention.

Regarding individual measures, the NGOs urge the Committee of Ministers to:

ii. Call for the immediate release of Osman Kavala as required by the ECtHR judgment, stressing that the Court's judgement clearly applies to his ongoing detention which constitutes a part of the same persecution and to any future charges or detentions where the factual or legal basis is the same or similar to the basis of charges and detentions the ECtHR has already addressed in its judgment,

iii. Recognize at the earliest possible occasion 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,

iv. Emphasize to the Government of Turkey that Osman Kavala's release is of added urgency in the context of the Covid-19 pandemic due to the enhanced risk to the health of those in detention where conditions increase the likelihood of transmission of the virus,

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TLSP, HRW and ICJ in Taner Kılıç v. Turkey, 16 August 2019, https://static1.squarespace.com/static/5b8bbe8c89c172835f9455fe/t/5d5a7b5ffbeeb000019c7c09/1566210920345/16082019+Kilic+v+Turkey.pdf

[44] ECtHR, *Alajos Kiss v. Hungary*, App. no. 38832/06, 20 May 2010, para. 42; *M.S.S. v. Belgium and Greece*, App. no. 30696/09, 21 Jan. 2011.

v. Request the Government of Turkey to end the abuse of judicial proceedings to harass or persecute Osman Kavala, including by dropping all charges under which he has been investigated and detained to silence him, in conformity with the Court's finding that his rights under Article 5(1) in conjunction with Article 18 were violated and that his exercise of rights to freedom of expression, assembly and association was wrongfully used as evidence to incriminate him.

Regarding general measures to implement the ECtHR's findings of violations in relation to Article 5 and 18 of the Convention, the NGOs urge Turkey to take account of the following recommendations in its action plan and the Committee of Ministers to request that Turkey address these recommendations:

vi. Amend broad and vaguely worded articles of the Turkish Penal Code and the Law No. 3713 on Prevention of Terrorism such as "attempted overthrow of the government by force and violence," "attempted overthrow of the constitutional order" and other offenses categorized as "crimes against the state" to meet the requirements of the principle of no punishment without law, to make them precisely defined and foreseeable and, where relevant, explicitly linked to the commission of violent acts;

vii. Ensure the criminal law is strictly applied and restrictively interpreted particularly in 'crimes against state' cases,

viii. Pursue a strategy to prevent rights protected in the Convention such as freedoms of expression, association and assembly being arbitrarily used as grounds for prosecutions and lengthy and punitive pretrial detention;

ix. Ensure that restrictions placed on free expression, association or assembly through criminal law observe the most compelling justification of necessity and proportionality,

x. Monitor all court decisions ordering detention and prosecutors' request for detention to ensure that they rest on sufficient facts establishing the existence of reasonable suspicion of criminal activity and that detention is a measure of last resort not pursued for ulterior purposes;

xi. Emphasize that it is imperative that government and state officials, including those occupying high office, desist from all forms of interference in the administration of justice in order to uphold the independence of the judiciary and the impartiality of judicial decision making,

xii. Monitor the quality of indictments to ensure that they contain a clear statement of the facts being presented as evidence, resting on verifiable and testable information rather than loose assertions, capable of satisfying an objective observer that the person prosecuted may have committed the offense, and coherently linked to the commission of internationally recognizable crimes established in law,

xiii. Provide credible grounds to justify wide lapses of time between the events that give rise to the suspicion of crimes and the application of criminal charges and measures such as detention,

xiv. Take measures to uphold the independence of the judiciary by introducing constitutional amendments, reversing those passed in April 2017, to reform the Council of Judges and Prosecutors to establish it as a body structurally independent of the executive whose decisions are open to full judicial review,

xv. Revoke the emergency powers enabling the continuing dismissal of judges and prosecutors (provided for in law no. 7145, passed in July 2018 after the ending of the state of emergency).

Regarding measures to execute the ECtHR's ruling in relation to human rights defenders, the NGOs urge the Committee of Ministers to request that Turkey adopt the following recommendations in its action plan:

xvi. Stop the abuse of judicial process to harass or persecute human rights defenders by ending unwarranted legal, including criminal, and administrative proceedings or any other forms of misuse of administrative and judicial authority, to criminalize, arbitrarily arrest and detain defenders,

xvii. Refrain from undue interference, through the judiciary or other means, with human rights defenders' rights to liberty, freedoms of opinion, expression, peaceful assembly and association,

xviii. Ensure that any limitations of rights of human rights defenders are prescribed by law, pursue a legitimate aim, and are necessary and proportionate to achieve such aim and that any restriction to their rights are justified by a very high standard,

xix. Ensure the full application of the principles of legality and the presumption of innocence in criminal investigations concerning human rights defenders,

xx. Adopt a concrete policy to protect human rights defenders against any form of harassment or persecution, including through arbitrary arrest and detention, to bring an end to punitive prosecutions and misuse of criminal law against them and to create a safe and enabling environment for them to pursue their activities.