IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 2170/24

BETWEEN:

OSMAN KAVALA (No. 2)
Applicant

- and –

TÜRKİYE
Respondent

- and -

Turkey Human Rights Litigation Support Project
Human Rights Watch
International Commission of Jurists
Interveners

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

I. Introduction

1. The Third-Party Interveners ('the Interveners') submit these comments by leave of the President of the Second Section of the Court granted on 14 August 2024 under Rule 44(3) of the Rules of Court.

2. The present case concerns the continued detention of Osman Kavala following the European Court of Human Rights' ('the Court' or 'the ECtHR') judgment of 10 December 2019 (*Kavala v. Turkey*, no. 28749/18, 10 December 2019) and the subsequent criminal proceedings which resulted in a sentence of aggravated life imprisonment. Mr. Kavala's conviction became final on 28 September 2023, despite the ECtHR's 2019 judgment and its landmark ruling of 11 July 2022 (hereinafter 'Kavala Grand Chamber Judgment') under the highly exceptional infringement proceedings which found Türkiye in violation of Article 46(1) of the European Convention on Human Rights ('the Convention').[1]

3. The proceedings against Mr. Kavala are intrinsically linked to two key issues. The first is the erosion of judicial independence and impartiality in Türkiye, which bears directly on the Court's determinations under Articles 5, 6, 7, 10, 11, 18, and 35(1) of the Convention, as well as Article 46(1). The second issue exposed by these proceedings is Türkiye's flagrant and persistent failure to implement ECtHR judgments. The practices leading to this case, including the domestic courts' conviction of Mr. Kavala, follow a well-documented pattern of conduct designed to circumvent the implementation of ECtHR's rulings in politically sensitive cases, in particular those involving perceived dissidents.

4. Drawing on expertise as organisations specialising in international human rights law and working extensively on human rights and the judicial process in Türkiye, the Interveners will address the following issues arising in this case, directly related to these broader concerns of judicial independence and persistent non-implementation of judgments: the lack of independence and impartiality of the judiciary in Türkiye particularly following the 2017 Constitutional amendments (Section II); the effectiveness of the Constitutional Court ('the TCC') in providing remedies in cases involving the detention and prosecution of human rights defenders, opposition politicians and others engaging in politically disfavoured expression (Section III); and Türkiye's practices to circumvent the implementation of the Court's judgments (Section IV).

II. The lack of independence and impartiality of the judiciary in Türkiye

5. As a general principle of law recognised by the international community, judicial independence and impartiality, enshrined in the Convention (Article 6) and in Türkiye's Constitution (Articles 9 and 138), is a part and parcel of the rule of law. It encompasses the procedure and qualifications for the appointment of judges, guarantees relating to their security of tenure, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.[2] It requires freedom from external and internal undue pressure and influence,[3] but also presenting the appearance of impartiality.[4] Judicial independence and impartiality is essential for the effective investigation, prosecution and, where appropriate, punishment of grave human rights violations,[5] and the

[1] ECtHR, *Proceedings Under Article 46 § 4, in the Case of Kavala v. Türkiye* (28749/18), paras. 143-145, 151, 161-162.
[2] Human Rights Committee, General Comment no. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19. See also checklists for judicial independence provided in Venice Commission, Rule of Law Checklist, March 2016, CDL-AD(2016)007, p. 20, 22.
[3] Bangalore Principles of Judicial Conduct, adopted by the United Nations Economic and Social Council (ECOSOC) Res. 2006/23, July 2006, Principle 1; Venice Commission, Rule of Law Checklist, March 2016, CDL-AD(2016)007, p. 20.
[4] See e.g. ECtHR, *Campbell and Fell v. the United Kingdom*, App nos 7819/77 and 7878/77, 28 June 2014, para. 78.
[5] See e.g. Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, 31 December 2003, para. 30, E/CN.4/2004/60.

protection of the full array of Convention rights.

6. The degradation of the independence and impartiality of the judiciary in Türkiye has occurred over long period, and gradually led to what has been widely identified as the "capture" of the judiciary by the ruling political coalition parties (AKP and MHP) as part of its broader assumption of effective control over State institutions over the past decade and a half.[6] This capture has been enabled by successive constitutional and legislative amendments weakening or removing key safeguards, as well as politically motivated criminal and disciplinary proceedings against, and arbitrary arrest and dismissal of, thousands of judges and prosecutors.[7]

7. The first fundamental deficiency in this respect is the composition and functioning of the Council of Judges and Prosecutors (CJP). As the main self-governing body of the judiciary, the CJP is meant to constitute "one of the most crucial guarantees of judicial independence" and a key institution, alongside the TCC, in the protection of the rule of law.[8] It should protect members of the judiciary from arbitrariness by legislative and executive powers.[9] However, amendments to the Turkish Constitution adopted by the Grand National Assembly ('Parliament') -confirmed in a 2017 referendum- radically altered the composition and selection procedure of the CJP (Article 159 of the Constitution).[10] The Minister and Deputy Minister of Justice remain *ex officio* members. At the same time, the number of CJP members was reduced from 22 to 13, with the number appointed directly by the President or filled by *ex officio* government officials rose to 6 out of 13 (compared to 4 out of 22 previously). The remaining 7 are elected by Parliament. Notably, none are now elected by the judiciary itself (previously 10 out of 22 had been), in contradiction to European standards prescribing that at least a significant portion of judicial council members to be judges elected by their peers.[11]

8. International human rights bodies have expressed serious concerns regarding these changes and their impact on the CJP's independence.[12] The CJP's composition and the election of its members in practice since 2017 provide clear indicia validating these concerns. First, the *ex officio* membership of the Deputy Minister of Justice has enabled the ruling political coalition to promote consecutively one prosecutor and one judge who had previously presided over the prosecution or conviction in key cases

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[6] International Commission of Jurist (ICJ), 'Turkey: the Judicial System in Peril: A briefing paper' (2016), https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf (p. 10). See also Transparency International, 'Examining State Capture Undue Influence on Law-Making and the Judiciary in the Western Balkans and Turkey' (Transparency International defines State capture as "efforts by private actors and public actors with private interests to redirect public policy decisions away from the public interest, using corrupt means and clustering around certain state organs and functions"), p 6, https://images.transparencycdn.org/images/2020_Report_ExaminingStateCapture_English.pdf.

[7] See criticisms in e.g. Transparency International (*supra* note 6) pp. 28-30; GRECO 4th evaluation round interim report.

[8] Consultative Council of European Judges (CCJE), Opinion no.10(2007) on the Council for the Judiciary at the service of society, para. 8; Fahri Bakırcı, 'On the Election of Members to the Council of Judges and Prosecutors and the Constitutional Court in Ensuring Independence of the Judiciary', 15 December 2021, DergiPark, p 4, https://dergipark.org.tr/en/download/article-file/2278599.

[9] ECtHR, *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022, paras. 327 and 347; see also Venice Commission, Rule of Law Checklist, March 2016, CDL-AD(2016)007, p. 20, 22.

[10] "High Council of Judges and Prosecutors" prior to 2017.

[11] Venice Commission, Report on Judicial Appointments, CDL-AD(2007)028, para. 29; Consultative Council of European Judges (CCJE), Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, CCJE(2021)11, para. 30.

[12] The European Commission of Democracy through Law ("Venice Commission") has considered this composition "extremely problematic" for the independence of the judiciary: under the new presidential system, the President is engaged in party politics, rather than a "*pouvoir neutre"*. Moreover, if his party secures a three-fifths majority in the Assembly, it can effectively fill all positions in the Council (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, No. 875/2017, 13 March 2017. para. 119). See also ECtHR, *Selahattin Demirtaş v Turkey (no.2)*, App no. 14305/17, 22 December 2020, para. 434; *Yüksekdağ Şenoğlu and others,* App no. 14332/17 and 12 others, 8 November 2022, paras. 637-638.

of perceived government critics and opposition figures to the CJP.[13] Second, President Erdoğan's direct appointments to the CJP have been instrumentalized to serve his political agenda, facilitated by the 2017 constitutional amendment that no longer requires him to relinquish ties with his political party.[14] For example, in 2017 and 2021,[15] he appointed to the CJP a prosecutor who was involved, before and during his CJP mandate, in contested and flawed, high-profile cases against government critics (one of which led to a judgment against Türkiye by the ECtHR).[16] This prosecutor was later elected as Deputy President of the CJP[17] and President of its Second Chamber, resulting in both chamber presidents now being Erdoğan-appointed members.[18]

9. In addition, the election of the remaining 7 CJP members by Parliament has done little to ensure the independence of those members from the ruling AKP/MHP coalition. In 2017, two opposition parties (CHP and HDP) refused to participate in the selection of candidates by a joint parliamentary committee,[19] which led the ruling political coalition to nominate all candidates.[20] In 2021, a "quota" agreement was made prior to voting, in which the AKP/MHP coalition determined the names for 4 CJP seats and the İYİ Party/CHP determined the remaining 3 seats, excluding the HDP from the process.[21] Two members appointed through this process previously worked for the AKP or held government positions,[22] and one had been previously appointed to the CJP by President Erdoğan himself.[23] These politically negotiated nominations bypassed the confidential, multi-round voting system laid out in Article 159 of the Constitution, which is designed to safeguard a fair selection procedure.[24] It seriously compromised the secrecy of the vote and reduced the likelihood that individual MPs would select CJP

[13] Prosecutor H.Y., who drafted the indictment alleging 'link with the coup attempt and espionage' against Mr. Kavala, was promoted to Deputy Justice Minister by a presidential decision in October 2020. Similarly since June 2022, Judge A. G., former Chair of the judicial formation responsible for convicting opposition MP Selahattin Demirtaş in one of the multiple criminal proceedings based on his political statements (Istanbul 14th Assize Court), and for refusing to implement a 2020 judgment by the TCC finding terrorism-related criminal proceedings against an opposition MP (Kadri Enis Berberoğlu) in violation of the latter's rights has also been promoted to Deputy Minister of Justice.

[14] Prior to the amendment, the office of the president was designed to be nonpartisan, and the president's resignation from any political affiliation served as a crucial safeguard against politicized appointments to the judiciary.

[15] CJP members' mandate lasts four years so there have been two rounds of appointments by the President/Parliament, one in 2017 and one in 2021. The next will take place in 2025.

[16] The prosecutor in question, M. A. E., was involved in the highly political Gezi Park "Çarşı" case (involving supporters of the Besiktas football club accused of participating in the Gezi Park protests of 2013), in which he appealed the court's decision to acquit the accused (https://www.evrensel.net/haber/269841/savci-carsinin-beraatine-karsi-cikti). He also led the investigation in the notorious "Cumhuriyet newspaper case", in which the conviction of 18 journalists was sought on alleged terrorism-related charges following their arrest in 2016 (https://www.cumhuriyet.com.tr/haber/skandal-gazeteciligi-yargiladi-koltugu-kapti-1028834); ECtHR, *Sabuncu and Others v Turkey*, App no. no. 23199/17, 10 November 2020.

[17] Giving him several important powers, including over budget, under Article 159 of the Constitution and Articles 6(6) and Article 44(2) of Law no. 6087 on the Council of Judges and Prosecutors.

[18] They are responsible for the management and representation of the chambers under Article 159 of the Constitution.

[19] The joint parliamentary committee votes to decide on three candidates per position to be filled, before a vote takes place in the general assembly between these candidates. For a discussion, see Bakırcı, (*supra* note 8), pp. 36-41.

[20] Ibid. p. 45 Bakırcı notes that in practice, 'the primary decision is made by the Joint Committee, and the decision taken in the committee is implemented in the General Assembly without much debate'. He also observes that one of the opposition parties, the İYİ Party, appears to have voted in line with the ruling coalition, implying that even if the two opposition parties had participated in the election, the 2/3rd majority required for election in the first round may in any case have been reached by the ruling coalition.

[21] See https://www.bbc.com/turkce/haberler-turkiye-57186006 ; Bakırcı, (*supra* note 8) pp. 41-44. If the method prescribed in Article 159 had been followed, a failure of the ruling bloc to secure a 2/3rd or 3/5th majority would theoretically lead to the opposition parties determining anywhere between 0 and 7 CJP members, due to the randomised drawing system envisaged. With the "quota" system this number was limited to 3 out of 7. Bakırcı argues that the intention was to minimise the number of members of the CJP that the opposition had a chance of appointing, while at the same time avoiding a risk of annulment in case associated with outright rejection of the drawing method laid out in the Constitution.

[22] https://www.hsk.gov.tr/bilal-temel ; https://www.hsk.gov.tr/havvanur-yurtsever and https://www.birgun.net/haber/hsk-nin-yeni-uyesi-havvanur-yurtsever-oldu-366938 ;

[23] https://web.archive.org/web/20150909191540/http://www.hsyk.gov.tr/uyeler/uyeler/aysel-demirel.html

[24] As evidenced by all nominees being approved in the first round of voting.

candidates based on objective, non-partisan criteria.[25]

10. The appointment procedure for the CJP itself provides clear evidence of the dismantling of the separation of powers in Türkiye. Rather than serving as a safeguard for judicial independence, the CJP appears to have become a mechanism for consolidating undue influence over the judiciary. Established standards in the Court's jurisprudence on judicial independence required decisions affecting the career of judges and prosecutors to be based on objective criteria and a transparent process.[26] However, reports suggest that the CJP's powers related to disciplinary proceedings, transfers,[27] promotions, and case and judicial formation appointments have been exercised in breach of the criteria laid out in Law no. 2802 on Judges and Prosecutors and with the purpose of furthering the interests of the ruling political coalition.[28] Striking examples include the CJP's actions in the case of Osman Kavala,[29] the measures taken against Judge Ayşe Sarısu Pehlivan,[30] the criminal proceedings involving opposition politician Ekrem Imamoğlu,[31] the Sinan Ateş murder case,[32] and the handling of a case involving a MHP local politician arrested for violent behaviour in court.[33] Combined with the mass dismissals and criminal proceedings initiated against judges and prosecutors following the 2016 coup attempt, the consolidation of power in the office of the President and through his control of the parliament in determining the composition of the CJP and the serious issues surrounding its functioning have severely undermined judicial independence in Türkiye.

11. The recruitment system for judges and prosecutors is also non-compliant with standards on judicial independence. Notably, the board conducting the interviews is composed entirely of members of the executive, including several officials from the Ministry of Justice, one representative from the Justice Academy -a state institution under the Ministry's control- and the General Secretary of the CJP, who is appointed by the Minister of Justice.[34] Rather than being based on objective criteria, these interviews lack transparency and multiple judicial actors have expressed concern that their outcome is pre-determined on the basis of whether candidates had been informally approved by the ruling

[25] Bakırcı, (*supra* note 8), p. 43.
[26] See e.g. ECtHR, *Bilgen v Türkey,* no. 1571/07, 9 March 2021, para. 63.
[27] Over the past few years, thousands of judges have been subject to forced transfer (https://www.karar.com/yazarlar/elif-cakir/hsknin-surgun-ettigi-hakim-sayisi-iki-degil-1593440).
[28] See Committee of Ministers 1492nd meeting (March 2024) (DH) - Rule 9.2 - Communication from NGOs (Turkey Human Rights Litigation Support Project, Human Rights Watch, The International Commission of Jurists) (26/01/2024) concerning the case of Kavala v. Türkiye (Application No. 28749/18) paras. 35-38. See also https://www.yargiclarsendikasi.org/post/hsknin-son-kararnamesi-ile-istek-disi-gorev-yeri-degistirilen-yargiclarimiz-icin-basin-aciklamamiz.
[29] The judge who refused to implement the ECtHR's judgment and sentenced Kavala to prison was previously appointed to his position despite failing to meet a 4-year seniority requirement (https://yetkinreport.com/en/2022/09/07/turkish-bar-associations-head-judges-and-prosecutors-are-in-fear/).
[30] Promptly after the ECtHR found a violation of her freedom of expression (Article 10) due to disciplinary measures for publicly criticising constitutional amendments of 2017 (*Sarısu Pehlivan v Türkiye,* App no. 63029/19, 6 June 2023), she was involuntarily transferred from Izmir to Adana (https://www.yargiclarsendikasi.org/post/hsknin-son-kararnamesi-ile-istek-disi-gorev-yeri-degistirilen-yargiclarimiz-icin-basin-aciklamamiz).
[31] Without providing any objective justification, the CJP terminated the permanent appointment of two of the three judges scheduled to examine the appeal against Imamoğlu's conviction and sentence (https://www.dw.com/tr/hsk-i%CC%87mamo%C4%9Flu-davas%C4%B1na-bakacak-istinaf-heyetini-de%C4%9Fi%C5%9Ftirdi/a-66628426).
[32] The prosecutor investigating the murder of former 'Grey Wolf' member Sinan Ateş, involving several suspects affiliated to the MHP, was replaced mid-investigation and transferred to a lower court (https://www.sozcu.com.tr/hsk-4-bin-9-hakim-ve-savcinin-yerini-degistirdi-dikkat-ceken-sinan-ates-detayi-p57254).
[33] The prosecutor who requested his arrest and the judge who ordered it were forcibly transferred to a different district, while the MHP mayor was released without charge (https://www.evrensel.net/haber/469813/hakim-ve-savci-suruldu-mhp-karaburun-ilce-baskani-erkan-ozen-tahliye-edildi).
[34] Law No. 2802 on Judges and Prosecutors, Article 9A.

political parties.[35] In this connection, in 2018 an opposition MP presented a list of over 100 newly recruited judges and prosecutors who had held active roles within the ruling AKP party.[36]

12. The recruitment process formally includes an oral interview following a written exam. However, between 2017 and 2018, after thousands of judges were dismissed under the state of emergency in the aftermath of the coup attempt, a presidential decree lifted the requirement to achieve a minimum score (at least 70/100) in the written exam, effectively allowing appointments to be made solely on the basis of interviews. Numerous candidates who performed well on the written exam but were not recruited, reporting interviews of no more than two or three minutes with no substantial questions.[37]

13. Finally, the consolidation of influence and even effective control over the judiciary is also evident in the continued political pressure on, and interference with, the judiciary in cases concerning perceived dissidents or others viewed as obstructing the interests of the ruling coalition. For instance, after President Erdoğan's recent reference to judges and prosecutors dismissed after the coup attempt as "flies" of "the FETÖ swamp" and criticised the Council of State's decision to reinstate 387 of them, Minister of Justice Yılmaz Tunç announced that the Council of State decision would be re-examined by the CJP.[38] In the case of imprisoned opposition MP Can Atalay convicted in the Gezi Park trial, President Erdoğan openly warned the TCC, which had found violations of Mr. Atalay's rights, "not to underestimate the steps taken by the Court of Cassation", implying potential repercussions against the TCC members.[39]

14. The current judicial system in Türkiye appears to function within a self-perpetuating cycle: the government controls and influences the recruitment of judges, some of whom are appointed to the CJP by the government and allies with political control over the Parliamentary appointments,[40] and the CJP then holds significant control over the rest of the judiciary. This enables the ruling coalition to maintain pressure on judges and prosecutors both from within and outside the judiciary. These conditions fly in the face of the safeguards required for the existence of an independent judiciary.

III. Effectiveness of the Constitutional Court as a remedy in cases involving the detention and prosecution of human rights defenders, opposition politicians and other dissenters

15. Article 13 of the ECHR guarantees the right to an effective remedy for Convention violations. According to the ECtHR's case law, for a remedy to be considered effective, "the national authority that provides the remedy in question must be independent and capable of providing redress".[41] The ECtHR assesses not only the existence of formal remedies within the legal system of the Contracting Party, but also considers the broader legal and political context in which these remedies operate, as well as the personal circumstances of the applicants.[42] Additionally, a domestic remedy cannot be considered effective if it lacks minimum guarantees of promptness[43] or if the State fails to ensure its

[35] See statements of former Istanbul Bar Association President Mehmet Durakoğlu available at https://www.gazeteduvar.com.tr/yargida-torpil-iddiasi-cok-uzun-yillardir-isliyor-haber-1508357 ; and statements by former Court of Cassation prosecutor Ömer Faruk Eminapaoğlu available at https://www.gercekgundem.com/guncel/mulakatlarda-torpil-iddiasi-akpnin-yargidaki-kadrolasmasinin-temeli-mulakatlar-402250.

[36] https://www.diken.com.tr/chpli-yarkadas-hakim-savci-atanan-akplileri-acikladi-113-kisilik-liste/

[37] Seehttps://gazetememur.com/kpss/turkiye-2ncisi-3-dakikada-elendi-mulakat-mulkun-temeli,NOZqN1Ubsk29H7qTqX_q6Q;https://www.gazeteduvar.com.tr/gundem/2019/09/05/hakim-savci-sinavinda-mulakat-tartismasi; https://www.gazeteduvar.com.tr/savci-adayi-mulakat-belgesine-ulasti-bu-kadar-rezilligi-tahmin-etmezdim-haber-1584495.

[38] https://www.ensonhaber.com/gundem/adalet-bakani-yilmaz-tunc-danistayin-fetoculere-yonelik-kararyla-ilgili-konustu

[39] See https://www.aljazeera.com/news/2023/11/10/erdogan-criticises-top-turkey-court-stoking-judicial-crisis

[40] Under Article 159 of the Constitution, 8 out of 13 members of the CJP are members of the judiciary.

[41] ECtHR, *Csüllög v. Hungary*, App no. 30042/08, 7 June 2011, para. 46.

[42] ECtHR, *Akdivar and Others v. Turkey,* App no. 21893/93, 16 September 1996, para. 69

[43] ECtHR, *Kadiķis v. Latvia (no. 2)*, App no. 62393/004, 4 May 2006, para. 62.

implementation when granted.[44] Given these criteria, several issues in Türkiye cast serious doubt on whether the individual application procedure to the TCC serves as an effective remedy in cases of detention, especially in the context of politically disfavoured activities.

16. The current method of appointment of the TCC members precludes its independence from the executive. The President has the power to appoint 12 out of the 15 members of the TCC. As the Venice Commission noted, the President's political affiliations compromise his neutrality in this context.[45] Five members currently appointed by President Erdoğan have previously held government positions: one was chief advisor to the President;[46] two are former Deputy Ministers of Justice (who were *ex officio* members of the CJP),[47] one was a former official in the Ministry of Justice,[48] and one was a former Director of Presidential Administrative Affairs.[49] Additionally, two of the three members elected by Parliament have also been affiliated with the government or the ruling party.[50]

17. The President appoints two TCC members from the Court of Cassation and two from the Council of State. Given the forementioned lack of structural independence of the CJP, which elects the members of both courts, this gives the executive added and undue influence over the TCC.[51] For instance, Mr. İ. F. , who was involved in the prosecution of several politically charged criminal cases (including Gezi Park case), was appointed to the TCC after just 20 days of tenure at the Court of Cassation.[52] Similarly, Y.A., recently appointed from the Council of State, played a role in highly political decisions such as approving Türkiye's withdrawal by presidential decree from the Istanbul Convention.[53]

18. Second, there is a clear correlation between constitutional changes affecting the structural independence of the TCC and the TCC's oversight of, and effectiveness in ensuring, human rights guarantees.[54] In particular, the close links described above between many TCC members and government have undermined the court's willingness and ability to address certain human rights law violations on the merits and provide effective remedies and reparation for violations affecting perceived dissidents and government critics. For example, despite the ECtHR's rare finding of a violation of Article 18 ECHR due to the arbitrary detention of human rights defender Osman Kavala, the TCC failed to find that his continued detention to be a violation of his rights.[55] The TCC also found the application brought by judge Alparslan Altan, detained in the aftermath of the coup attempt, inadmissible. Yet, in a judgment finding violations of Mr. Altan's rights, the ECtHR highlighted the TCC's failure to address his argument that there was no concrete evidence that could justify his pre-trial detention.[56] The TCC, in a later judgment explicitly refused to implement the ECtHR's judgments concerning the pre-trial detention of judicial officers including Mr. Altan.[57]

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[44] ECtHR, *Kenedi v. Hungary*, App no. 31475/05, 26 May 2009, § 47; *Kaić and Others v. Croatia*, App no. 22014/04, 17 July 2008, para. 40.

[45] Venice Commission Opinion No. 875/2017 (*supra* note 12), para. 94; Bakırcı (*supra* note 8) pp. 54-55.

[46] https://www.anayasa.gov.tr/tr/baskanvekilleri-ve-uyeler/uyeler/doc-dr-recai-akyel/

[47] https://www.anayasa.gov.tr/tr/baskanvekilleri-ve-uyeler/uyeler/yildiz-seferinoglu/ https://www.anayasa.gov.tr/tr/baskanvekilleri-ve-uyeler/uyeler/selahaddin-mentes/

[48] https://www.anayasa.gov.tr/tr/baskanvekilleri-ve-uyeler/baskanvekilleri/basri-bagci/

[49] https://www.anayasa.gov.tr/tr/baskanvekilleri-ve-uyeler/uyeler/doc-dr-metin-kiratli/

[50] See https://www.anayasa.gov.tr/tr/baskanvekilleri-ve-uyeler/uyeler/muhterem-ince/; https://bianet.org/haber/aym-uyesinden-yargitay-a-gonderme-karincalar-fili-cok-kiskanir-290132

[51] Venice Commission Opinion No. 875/2017 (*supra* note 12), para. 121.

[52] See Communication of 26 January 2024 by NGOs in *Kavala v. Türkiye* (*supra* note 28), para. 36.

[53] https://www.hukukihaber.net/yilmaz-akcil-anayasa-mahkemesi-uyeligine-secildi

[54] See Bakırcı (*supra* note 8) p. 61.

[55] TCC, *Mehmet Osman Kavala (2)*, App no. 2020/13893, 29 December 2020, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/13893.

[56] ECtHR, *Alparslan Altan v Turkey,* App no. 12778/17, 16 April 2019, para. 138.

[57] See below para. 27.

19. The TCC's judgments often consist of a combination of rights-compliant and non-compliant approaches, depending on the sensitivity of the issue, government policies and priorities, and the judicial formation hearing the case.[58] Cases relating to the use of the encrypted communication application ByLock provide a striking example of this selective approach to compliance with human rights standards and ECtHR case-law. In *Yalçınkaya v Türkiye,* the ECtHR found a violation of Articles 6 and 7 ECHR in relation to the use of ByLock as criminal evidence[59] and ordered that Türkiye undertake general measures under Article 46. Yet, the President of the TCC expressed disagreement, stating "ultimately, the courts in Türkiye will make the decision".[60] Since then, several TCC judgments have failed to comply with the ECtHR judgment[61] and the court has been delaying rulings on related cases, seemingly as a means to avoid implementing *Yalçınkaya*.[62] In September 2024, the local court hearing the retrial of Mr. Yalçınkaya handed down the same sentence against him, despite the ECtHR ruling that the evidence used in the initial sentencing did not comply with the Convention standards.[63]

20. Third, the TCC's lack of a transparent prioritisation policy contributes to its selectivity and facilitates interference with its independence. While some cases are concluded quickly, others, particularly those involving politically sensitive issues or government critics, face unreasonable delays, precluding an effective remedy. For instance, applications concerning the suspension of MPs' mandate were decided only after the mandate lapsed or the MP was barred from running for office due to a terrorism-related conviction.[64] In addition, an application lodged by the imprisoned opposition politician Selahattin Demirtaş, filed in November 2019, remains pending despite the ECtHR's finding of a violation of Article 18 ECHR concerning his detention, despite repeated warnings from the Committee of Ministers.[65]

21. Fourth, there is a growing and visible trend of intentional non-implementation of TCC judgments by lower courts, particularly on the rare occasions when the Court has reached timely decisions on the merits in cases not favoured by the government. Recent examples of non-implementation include a pilot judgment requiring Parliament to amend overbroad anti-terrorism legislation[66] and judgments requiring lower courts to suspend criminal proceedings against MPs with parliamentary immunity.[67]

22. Finally, the recent case of opposition MP Can Atalay, a co-defendant of Mr. Kavala, epitomises critical

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[58] Bertil Emrah Oder, 'The Resistance-Deference Paradox', 28 September 2022, https://verfassungsblog.de/the-resistance-deference-paradox/.

[59] ECtHR, *Yüksel Yalçınkaya v Türkiye* [GC], App no. 15669/20, 26 September 2023.

[60] https://www.gazeteduvar.com.tr/anayasa-mahkemesi-baskani-arslan-aihm-kararina-biz-katilmiyoruz-haber-1640350

[61] E.g. TCC, *Ali Faik Aygun,* App no. 2018/23712, 16 November 2023, para. 51 (citing the TCC's previous case law and making no reference to *Yalçınkaya v Türkiye*). See also: https://kronos37.news/aym-eski-raportoru-dr-selami-er-yazdi-anayasa-mahkemesi-hala-etkin-bir-ic-hukuk-yolu-sayilabilir-mi/ ; https://medyascope.tv/2024/07/15/rusen-cakirin-konugu-kerem-altiparmak-yuksel-yalcinkayanin-bylock-davasi-aihm-tarihinin-en-buyuk-buzdagi/

[62] https://medyascope.tv/2024/07/15/rusen-cakirin-konugu-kerem-altiparmak-yuksel-yalcinkayanin-bylock-davasi-aihm-tarihinin-en-buyuk-buzdagi/

[63] https://www.indyturk.com/node/745040/haber/yerel-mahkeme-yal%C3%A7%C4%B1nkaya-davas%C4%B1nda-ai%CC%87hm-karar%C4%B1na-uymad%C4%B1-ayn%C4%B1-ceza-verildi

[64] See ECtHR, *Selma Irmak,* App no. 2018/9763 of 15 March 2018, 2 May 2024; *Osman Baydemir (3),* App no. 2018/10290 of 16 April 2018, Inadmissibility decision of 8 February 2023.

[65] See the latest CM Decision, H46-35 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), CM/Del/Dec(2024)1501/H46-35, para. 3.

[66] TCC, *Hamit Yakut* [Plenary Assembly], App no. 2014/6548, Judgment of 10 June 2021; See https://www.gazeteduvar.com.tr/tbmm-pilot-karara-uymadi-hak-ihlali-kararlari-verilmeye-basladi-haber-1622034. While Article 220(6) was recently amended by Law No. 7499, which came into force on 2 March 2024, the revision fails to address the concerns raised by the TCC in its pilot judgment, as well as the rulings of the ECtHR regarding the same issue (see Amnesty International, Türkiye: New Judicial Package Leaves People at Continued Risk of Human Rights Violations, 29 February 2024, available at https://www.amnesty.org/en/wp-content/uploads/2024/03/EUR4477652024ENGLISH.pdf).

[67] See TCC, *Kadri Enis Berberoğlu (2),* App no. 2018/30030, 17 September 2020 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/30030); *Kadri Enis Berberoğlu (3)*, App no. 2020/32949, 21 January 2021 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/32949).

challenges to the effectiveness of the TCC. In September 2023, the Court of Cassation refused to comply with the TCC's ruling on parliamentary immunity, asserting the TCC lacked authority to decide on the issue.[68] The Court of Cassation went on to uphold the conviction and 18-year sentence of Mr. Atalay in the Gezi Park trial, despite his election as MP in May 2023. The TCC found a violation of Mr. Atalay's rights to be elected, conduct political activities and his right to liberty and security, ordering his release from detention and a retrial.[69] However, the Court of Cassation not only ignored this order but also took the unprecedented step of seeking a criminal investigation against the TCC members.[70] Notably, President Erdoğan criticised the TCC, suggesting it "made many mistakes" and proposed limiting individual applications to the TCC.[71]

23. After the non-implementation of its initial ruling, the TCC handed down a new judgment in December 2023, again finding violations of Mr. Atalay's rights and ordering his release.[72] The Court of Cassation once more refused to comply. As Mr. Atalay's conviction became final, Parliament stripped him of his mandate.[73] The TCC declared this decision "null and void" in August 2024.[74] During an extraordinary parliamentary session to address this, an MP from Mr. Atalay's party was physically attacked by a member of the presidential party.[75]

24. The examples discussed, including that of Mr. Atalay, highlight the intensifying political pressure and backlash against the TCC in cases where it has reached decisions concerning perceived dissidents. In a highly repressive political climate with severely eroded judicial independence, where dissent is often equated with 'terrorism' or 'betrayal of the nation', the ability of individuals to obtain redress for human rights violations through an individual application to the TCC is increasingly limited to those cases which favour the ruling parties.

25. Given the totality of the circumstances which raises the most serious concerns regarding the independence and effectiveness of the TCC, there appears to be a pressing need to reconsider the ECtHR's previous presumption that the TCC remains an effective remedy in cases raising politically sensitive issues.

IV. Türkiye's practices to evade Convention obligations and circumvent the implementation of the Court's judgments

26. Turkish judicial authorities' repeated abuse of criminal proceedings, including through, unreasonable construal of provisions of criminal law and concomitant disregard for core procedural rights and the ECHR reveal a persistent defiance towards the ECtHR's judgments and standards in its case-law.[76] According to the Department for the Execution of Judgments, Türkiye has a staggering 141 leading ECtHR judgments, along with 315 repetitive cases, still pending implementation.[77] This makes Türkiye

[68] See https://www.birgun.net/haber/prof-dr-kaboglu-yargitay-in-can-atalay-hukmunu-degerlendirdi-anayasaya-iskence-eden-bir-karar-472974 .

[69] TCC, *Can Atalay (2)* [Plenary Assembly], App no. 2023/53898, 25 October 2023, paras. 89-93 and 107-108 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2023/53898).

[70] See https://www.bbc.com/turkce/articles/c72q6d5d9j2o.

[71] See https://www.aljazeera.com/news/2023/11/10/erdogan-criticises-top-turkey-court-stoking-judicial-crisis.

[72] TCC, *Can Atalay (3)* [Plenary Assembly], App. no. 2023/99744, 21 December 2023 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2023/99744).

[73] https://www.reuters.com/world/middle-east/turkish-parliament-strips-status-opposition-mp-after-judicial-clash-2024-01-30/.

[74] https://bianet.org/haber/constitutional-court-declares-revocation-of-can-atalays-mp-status-null-and-void-298121.

[75] See https://edition.cnn.com/2024/08/17/middleeast/turkey-parliament-fist-fight-intl/index.html; https://www.milliyet.com.tr/gundem/mhp-lideri-bahceli-can-atalay-konusu-tamamiyla-kapandi-7173328.

[76] See Communication of 26 January 2024 by NGOs in Kavala v. Türkiye (supra no 28).

[77] See https://www.coe.int/en/web/execution/turkey .

the worst performer in implementing leading cases among the 46 Council of Europe member states.

27. The non-implementation of the ECtHR's two judgments concerning Mr. Kavala exemplifies Türkiye's ongoing failure to comply with its international obligations. Another compelling example of this resistance is the continued arbitrary detention of former HDP co-chairs and MPs, Selahattin Demirtaş and Figen Yüksekdağ Şenoğlu, despite ECtHR rulings under Article 46 of the Convention requesting their release.[78] In addition, in the *Yıldırım Turan* case,[79] the TCC rejected the ECtHR's finding in *Alparslan Altan v Turkey* and *Baş v Turkey,* contending that the ECtHR lacks the authority to determine the compatibility of detention measures with domestic law.[80]

28. The Committee of Ministers' supervision of Türkiye's systemic non-implementation of ECtHR judgments reveals recurring practices aimed at avoiding discharge of their Convention obligations, particularly in politically sensitive cases. These practices include: (i) judicial authorities' actions aimed at circumventing national or ECtHR judgments or hinder effective legal protection; (ii) actions by government authorities that, while superficially cooperative in a procedural sense, impede the proper implementation of the ECtHR judgments; and (iii) practices reflecting overt non-compliance.

29. As regards the first category, the Turkish authorities frequently initiate overlapping criminal charges and proceedings based on the same or similar factual and legal grounds. This tactic has been well-documented in *Kavala v. Turkey*, *Selahattin Demirtaş v. Turkey (no. 2),* and *Atilla Taş v. Turkey*, where judicial authorities reclassified substantially the same facts as new 'crimes' to justify ongoing detention.[81] This practice was also highlighted in the Grand Chamber judgment in *Kavala v. Türkiye*.[82] In several cases against Mr. Kavala and others, the judicial authorities issued release orders that were not executed as other arrest and detention orders were placed simultaneously.[83] This represents discreet but systematic efforts by the judicial authorities to hinder access to justice.[84] The government, meanwhile, uses these tactics to bolster its narrative against perceived dissidents and legitimise its disregard for ECtHR judgments. Such practices amount to serious violations and abuse of legal process, especially when used to bypass judicial decisions by high national courts or by the ECtHR and to prevent individuals from securing effective protection of the law and the opportunity for release.[85]

30. Regarding the practices in the second category, while the Turkish government will typically point to "dialogue" and "cooperation" with the Council of Europe, actively participating in the monitoring process and submitting statements asserting that they are taking necessary steps to comply, the

[78] ECtHR, *Selahattin Demirtaş (no. 2) v Turkey [GC]*, Application no. 14305/17, 22 December 2020, para. 442; *Yüksekdağ Şenoğlu and others v Turkey*, Application no. 14332/17, Judgment of 8 November 2022, para. 655.

[79] TCC, *Yıldırım Turan*, App no. 2017/10536, Inadmissibility decision of 4 June 2020, para. 119, (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2017/10536).

[80] ECtHR, *Alparslan Altan v Turkey*, App. No. 12778/17, 16 April 2019, para. 112; *Baş v Turkey*, App no. 66448/17, 3 March 2020, para. 153.

[81] Committee of Ministers 1398th meeting (March 2021) (DH) - Rule 9.2 - Communication from NGOs (Human Rights Watch, The International Commission of Jurists and The Turkey Human Rights Litigation Support Project) (08/02/2021) in the case of Kavala v. Turkey (Application No. 28749/18) paras. 25-26, https://hudoc.exec.coe.int/?i=DH-DD(2021)186E .

[82] ECtHR, *Proceedings Under Article 46 § 4, in the Case of Kavala v. Türkiye* (28749/18), paras 143-145, 151, 161-162.

[83] See the criminal proceedings against Mr. Kavala and Mr. Demirtaş.

[84] See also, Dilek Kurban, 'Authoritarian Resistance and Judicial Complicity: Turkey and the European Court of Human Rights', 35 The European Journal of International Law (2) 384.

[85] Committee of Ministers 398th meeting (March 2021) (DH) - Rules 9.2 and 9.6 - Communication from NGOs (ARTICLE 19, Human Rights Watch, International Commission of Jurists, International Federation for Human Rights and Turkey Human Rights Litigation Support Project) (08/02/2021) in the case of Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17) and reply from the authorities (17/02/2021) paras. 59-63, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680a1747c.

actions taken have often been superficial, symbolic and ultimately hollow.[86] There are numerous leading groups of cases against Türkiye pending implementation.[87] Although the Committee of Ministers strongly urged the authorities to consider legislative amendments on several occasions, the government authorities continued to refer to previous legislative amendments and maintained their position that there is no need for further action.[88] Moreover, legislative acts presented as 'judicial reforms' in the context of addressing systemic issues have, in reality, worsened existing deficiencies in Convention compliance rather than resolving them as civil society reports reflect.[89]

31. In the third category, there has been outright refusal to comply with ECtHR rulings by both government and judicial authorities. In those cases, the government authorities have frontally challenged the ECtHR's findings and the Committee of Ministers' decisions, denying the need for reform and the existence of systemic issues.[90] Specifically, in cases concerning perceived dissidents, both the Turkish authorities have openly defied the ECtHR's findings and questioned its authority to assess the compatibility of domestic law with the Convention, attempting to shift the narrative regarding applicants.[91] In some instances, the President and his governing coalition have publicly attacked the ECtHR rulings or those TCC judgments in line with the Convention,[92] in flagrant disregard for the Convention system and standards.

V. Conclusion

32. The analyses in this submission reveal three fundamental issues that are highly relevant for the present case. Firstly, the erosion of judicial independence in Türkiye has reached a stage where domestic courts have acted to facilitate rather than remedy Convention violations and used to silence individuals who express dissent or criticize the authorities. Moreover, due to its structural deficiencies and recent practice, the TCC can no longer be regarded as an effective remedy for violations stemming from the widespread repression of human rights defenders, opposition politicians, and others engaged in politically disfavoured expression. Lastly, Turkish authorities' recurring practices also demonstrate that, they have adopted strategies in bad faith to continue silencing perceived dissidents in Türkiye, despite the growing number of ECtHR judgments finding serious human rights violations in such cases.

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[86] E.g. for general measures, Türkiye refers to " 'the new Human Rights Action Plan' and 'the new Judicial Reform Strategy Paper' which are envisaged to address, among others, human rights issues in Türkiye" (https://hudoc.exec.coe.int/?i=DH-DD(2024)803E) before the Committee of Ministers in the *Kavala* case. However, the previous Action Plan on Human Rights adopted in 2021 is criticised by many as falling severely short of addressing Türkiye's serious issues (See e.g. Amnesty International, 'Turkey: The new action plan is a missed opportunity to reverse deep erosion of human rights' 25 March 2021, https://www.amnesty.org/en/documents/eur44/3883/2021/en/).

[87] See *Öner and Türk* group (51962/12, 31 March 2015); *Işıkırık* group; *Altuğ Taner Akçam* and *Artun and Güvener* groups; *Nedim Şener* group.

[88] See the 'case description' notes available at https://hudoc.exec.coe.int/?i=004-36806; See the Committee of Minister's decision of 12-14 March 2024 concerning H46-36 Öner and Türk group (Application No. 51962/12) and other groups. See the Turkish government's Action Plan for *Öner and Türk* groups of January 2024 submitted to the Committee of Ministers, paras. 446, 486, 505-509, https://hudoc.exec.coe.int/?i=DH-DD(2024)39E .

[89] E.g. Article 220(6) was recently amended by Law No. 7499, which came into force on 2 March 2024, see *supra* note 66.

[90] See e.g. the Turkish government's action plans submitted before the Committee of Ministers in the case of *Selahattin Demirtaş (No. 2) v. Türkiye*[GC], and *Yüksekdağ Şenoğlu and Others v. Türkiye,* https://hudoc.exec.coe.int/?i=DH-DD(2024)812E.

[91] Kurban (*supra* note 84) p. 386. TCC, *Yıldırım Turan*, App no. 2017/10536, inadmissibility decision of 4 June 2020, §119 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2017/10536) (In Yıldırım Turan, the TCC rejected the ECtHR's findings in *Baş* and *Alpaslan Altan* asserting that the ECtHR did not have the power to make a determination concerning the compatibility of a detention measure with domestic law. The TCC concluded that the detention of the applicant, a judge, based on judicial authorities' interpretation of "in flagrante delicto" could not be considered arbitrary and rejected the applicant's claim of a violation of his right to liberty and security as manifestly ill-founded).

[92] See supra note 39. See also President Erdoğan's statements against the ECtHR's *Selahattin Demirtaş (n. 2)* judgment at https://tr.euronews.com/2020/12/23/erdogan-aihm-in-demirtas-karar-tamamen-siyasidir.