

DH-DD(2021)1279: Rule 9.1 Communication from the applicant in Kavala v. Turkey.
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**TO THE CHAIR OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF
EUROPE**

(Kavala v. Turkey - Application No. 28749/18)

As the attorney of the applicant Osman Kavala, we would like to make the following comments after the last communication dated 18.11. 2021 of the government of Turkey to the Committee of Ministers of the European Council.

- 1) As we stated in our previous submission to the Committee of Ministers, the current detention of Osman Kavala on the charge of espionage (Article 328 of the TCC) is based on the same set of facts and allegations made during his 4 years long detention.

- 2) In the last hearing held in the Istanbul 13th Assize Court on 8 October 2021, the applicant was tried for violating Articles 312, 309, and 328 of the TCC which have been joined with the Çarşı trial case related to Gezi Park events, and the decision taken to continue his detention was based on the following grounds:

"... the details and nature of the charge; the current stage of the trial; the investigation conducted into the HTS records and cell tower data in the file; the reports prepared after the investigation conducted into the digital materials; the presence of concrete evidence supporting a strong suspicion of crime when the report of the Financial Crimes Investigation Committee (MASAK) is considered; the upper limit of the penalty stipulated in the Criminal Law for the crimes with which the defendant has been charged; and the concern that judicial control measures would be inadequate..."

The decision is not based on concrete evidence or facts. It is completely unlawful and flawed for the following reasons:

- a. The "current stage of the trial" cannot be a reason for dismissing the request for the release of a defendant who has been detained for 4 years on the basis of the same facts and allegations found insufficient by the ECtHR. During the hearings in the Istanbul 36th Assize Court, 12 witnesses were heard and none of them said anything which could support the allegations against Kavala. After the case file was sent to the Istanbul 30th Assize Court, only one hearing was held in 7 months, and no order was issued regarding the collection of evidence in the trial heard in the Istanbul 36th Assize Court.

b. The HTS records cannot constitute a legal ground for the dismissal of the requests for release. HTS records indicating that the mobile phones of Osman Kavala and Henri Barkey gave signals from nearby base station (within a diameter of 500 meters) do not constitute an element of crime or an evidence indicating a crime under domestic law.

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c. The justification based on the report of MASAK is not legally acceptable. The MASAK report which was asked and obtained in the context of the previous Gezi Park indictment does not include any finding regarding the elements of the crime of espionage.

- 3) The current detention of our client is based on the charge of espionage under Article 328 of the TCC. In its judgment, the ECtHR had already referred to the matters cited by the Istanbul 13th Assize Court as the grounds for the decision to continue the detention and ruled that these matters did not constitute evidence. Subsequently, the Committee of Ministers, in its several decisions and resolutions, has stated that the present detention of Kavala constitutes a continuation of the violation of his rights expressed in the ECtHR ruling. The Istanbul 13th Assize Court dismissed our request for release as if the judgment of the ECtHR and the decisions of the Committee of Ministers did not exist.
- 4) The paragraph 50 of the Government's Submission of 18.11. 2021 to the Committee of Ministers states that *"certain crimes listed as catalogue crimes suggest that a justifiable ground exists as regards detention on demand. With the most recent amendments application of this presumption has been significantly narrowed down. That is to say, mere charging with the catalogue crimes shall not be sufficient reason for detention, concrete evidence justifying the strong suspicion shall also be presented."*

This "narrowing down" of the scope of decisions for detention with reference to catalogue crimes does not eliminate the discretion of the courts and our client Osman Kavala's detention continues without "concrete evidence justifying the strong suspicion" presented.

- 5) The defamatory statements of the President and cabinet ministers on Osman Kavala during his ongoing trial, which we have presented in our previous submission to the Committee of Ministers, constitute a violation of the principle of presumption of innocence and demonstrate that the executive is exerting direct pressure on the judiciary.

In the paragraph 74 of the Government's Submission of 18.11. 2021 to the Committee of Ministers, it is stated that: "*Article 288 of the same Law entitled 'Attempt to influence a fair trial' provides that any person who makes a public oral or written declaration until the finalization of the investigation or prosecution proceeded on an incident in order to influence the judge, experts or witnesses in order for them to deliver illegal decisions, carry out illegal procedures and provide false statements shall be punished with imprisonment from six months to three years*".

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However, in the paragraph 125 of the same submission it is stated that: "*References to the high profile cases by the country's should not be construed as interference in the competence of the judiciary. The principle of the presumption of innocence is naturally respected by everyone, first and foremost by the executive. In this regard, the comments by any politicians, including the President, on certain topics cannot be characterized as an interference with the judiciary. Besides, as the Court itself has stressed in one of its judgements, there is no doubt that in a democratic society individuals are entitled to comment on and criticize the administration of justice and the officials involved in it (see Lesnik v Slovakia, no. 35640/97, 11 March 2003, 55)*"

Especially in the institutional context of the Presidential system in Turkey, and given the fact that the president of the Council of Judges and Prosecutors as the authority on the appointments and promotions of judges and prosecutors is the Minister of Justice, the defamatory statements concerning a defendant in detention made by high level politicians could hardly be considered as "comments on and criticisms of the administration of justice" by individual members of a democratic society. Such statements as the ones we have presented in our previous submission to the Committee of Ministers create the perception that our client Osman Kavala has committed a crime and put pressure on the judiciary, continuing and deepening the violation of Article 18 in conjunction with Article 5 of the European Convention of Human Rights.

- 6) In conclusion, Turkey, by prolonging Mr. Kavala's detention, refuses to abide by the judgement of the Court in spite of repeated calls of the Committee of Ministers for his immediate release. We therefore respectfully request your Committee to take urgent action under Article 46(4) of the Convention to end this continuous violation.

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