

DGI

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SERVICE DE L'EXECUTION  
DES ARRETS DE LA CEDH

## **To the Committee of Ministers of the Council of Europe**

The European Court of Human Rights judgment of 10 December 2019 about our client Osman Kavala, which held that there was a violation of the Convention on Human Rights, has yet to be implemented by the Turkish judicial authorities. In spite of the decisions taken by the Committee of Ministers on two separate dates towards "ending the violation" after the judgment became final on 11.05.2020, Turkish judicial authorities have persistently failed to put an end to the detention which would have the impact of discontinuing the violation. All our requests to that end by use of domestic remedies have been declined and are being declined.

Our client Mr Mehmet Osman Kavala has been detained in prison for three years and five months. Despite the Committee of Ministers decisions stating that the violation of the Convention should be eliminated through the efforts and judicial actions of the Turkish Constitutional Court, the Turkish Constitutional Court, by means of the judgments it has delivered, has assumed a position that induces the continuation of the violation. Indeed, following the Committee of Ministers decision of December 2020, the Constitutional Court delivered two separate judgments. In the first one, the Plenary of the Constitutional Court postponed the discussion of the case. We think that the only aim of this postponement was to gain time and stall progress. Your Committee, in the two separate decisions it took, stated that the Turkish Constitutional Court would be effective in the elimination of the violation, and we had applied to this court months ago with detailed justifications. Despite all this, the Constitutional Court first postponing the hearing and then delivering a negative judgment was completely unlawful.

Furthermore, the examining prosecutor submitted the indictment to Istanbul 36th Assize Court on 29.09.2020, the date when the Osman Kavala application would be

deliberated at the Plenary of the Constitutional Court. Following this, the Plenary postponed the meeting until 29.12.2020, further protracting the process.

Unfortunately, the Turkish Constitutional Court, in direct opposition to the European Court of Human Rights judgment and the Committee of Ministers' two decisions on two different dates, did not find the detention of more than three years to be a human rights violation.

This last judgment by the Turkish Constitutional Court, which, in effect, went beyond its mandate and authority, and ruled on whether or not the case involved a human rights violation, is unlawful and controversial. It is unlawful because a human rights violation flagrantly exists. It is controversial because the judgment was passed eight votes to seven, with the court president and vice-president voting among the seven. In short, these judgments by the Constitutional Court are damaging to the judicial conscience.

Moreover, it is important to note that the Turkish Assize Courts and the Regional Courts of Appeal, a legal remedy court, as well as the Constitutional Court act and judge as though the European Court of Human Rights judgment and your Committee's decisions did not exist, never citing the afore-mentioned.

In this respect, there is a dualism in Turkish judiciary. Turkish courts can act as if the European Court of Human Rights judgments and your august Committee's decisions did not exist, without the slightest reference thereto, and by deciding at each stage to continue the detention, persistently act in contravention of the Convention.

A similar and saddening development is also taking place as regards the second lawsuit filed against our client Mr Mehmet Osman Kavala. The situation, as it stands, is as follows:

- 1) The 19 February 2020 ruling of İstanbul 30th Assize Court in favour of our client's acquittal was appealed and referred to the Regional Court of Appeal, which reversed the acquittal ruling on 22.01.2021. A full examination of the acquittal ruling in terms of the Procedural Law and Criminal Law rules was not conducted in the reversal judgment; only some lawsuits were mentioned, and it was stated that the first court (Istanbul 30th Assize

Court) needed to examine those cases. Specifically, the Regional Court of Appeal asked for the examination of a second lawsuit filed against our client and a court ruling regarding an incident that took place months ago in İstanbul that is called "Çarşı Events" (*Çarşı Olayları*). Hence, the Regional Court of Appeal asked the first court that ruled in favour of acquittal to decide again after it examined these two separate cases.

2) As the ruling regarding the first lawsuit filed against our client Mr Mehmet Osman Kavala was brought before the Regional Court of Appeal, a second lawsuit was filed against him on 28.09.2020. The first hearing for this second lawsuit took place on 18 December 2020 and it was decided there that the second hearing would take place on 5 February 2021.

A short time before 5 February 2021, the reversal judgment of the Regional Court of Appeal was submitted to İstanbul 30th Assize Court.

At that time, a very important development took place as regards Turkish judicial authorities. The situation is as follows:

A İstanbul 36th Assize Court asked for consent from the 30th Assize Court for the lawsuit no. 2020/298, which it was looking into, to be referred to the 30th Assize Court.

B) İstanbul 30th Assize Court concurred that the lawsuit coming from the Regional Court of Appeal should be joined.

C Both judgments by both assize courts are unlawful, the reason being that in accordance with article 16/2 of the Turkish Code of Criminal Procedure, before any such action, the consent of the public prosecutor is necessary, and that consent was not obtained.

The article reads as follows: "If the connected lawsuits have already commenced in different courts, with the condition that there is an accordance of the motions of the public prosecutors, upon an agreement between the courts, all or some of the lawsuits may be joined in one of these courts."

D) Furthermore, in accordance with Turkish legal practice, both courts must begin trials before the agreement to join cases and must collect the statements of the defence and the prosecution, which also did not transpire.

E) Despite this, İstanbul 36th Assize Court decided to join the cases and referred the file to the 30th Assize Court.

F) This decision is also erroneous in terms of trial economics. This is because as it appeared that the 36th Assize Court was about to reveal that the actions of our client, Mr Mehmet Osman Kavala, were not unlawful, and in essence, as it appeared the ruling of the court would be in favour of Mr Kavala, the court plunged Mr Kavala once again into a very complicated, multi-sided, and expansive judicial process by sending the case file to the 30th Assize Court.

G) Indeed, none of the witnesses, close to ten in total, heard at the 36th Assize Court, gave any testimony that was to the detriment of Mr Kavala.

H) The judgment delivered is so against Mr Kavala that following the referral of the file to the 30th Assize Court, the detention period of our client was extended until 21 May 2021. This is because the 30th Assize Court decided that the hearing would take place on 21 May 2021 after the file was sent thereto by the Court of Appeal.

I) This means that the detention period of our client has reached 3 years and 8 months, which clearly constitutes a flagrant and grave violation of human rights.

Another important matter that we would like to communicate is the statements made by the Minister of the Interior in a news programme shortly before the trial although the European Court of Human Rights had stated in its judgment on Kavala v. Turkey that article 18 of the ECHR had been violated. The Minister of the Interior said the following concerning our client: *"Do you know what Daesh serves? I know it. How did they manage to get all these resources, including for the Gezi events? It is obvious what the system Kavala set up does."*

Furthermore, as the hearing was taking place on 05.02.2021 at İstanbul 36th Assize Court, Turkish President said the following about the Boğaziçi University student protests: *"In the same way, with the same mentality, the wife of the person called Osman Kavala, who is virtually the representative of Soros in this country, is also a woman that is among the provocateurs at Boğaziçi University. Are we to give up and say, "okay, stir up trouble in our*

*country, in one of our most important universities"? We cannot allow that".* The President made these statements against our client Mr Osman Kavala and his spouse Prof. Ayşe Buğra Kavala, violating, in so doing, article 18 of the ECHR, insofar as his statements about Osman Kavala are concerned.

J) Where we are now in the Osman Kavala case and the persistence in not implementing the ECtHR judgment is part of Turkey's democracy and rule of law problem. The judiciary is inventing new lawsuits so as not to enforce the judgment and release Kavala and is creating a maze that is impossible to get out of. The below conclusion that the ECtHR arrived at in *Atilla Taş v. Turkey* (27/17 19.01.2021), a similar case, is also valid for the Kavala case:

“ Accepter que la détention provisoire du requérant ait pris fin par cette décision sans qu'une remise en liberté de l'intéressé fut possible équivaldrait a permettre un contournement du droit. En effet, en pareil cas, les autorités judiciaires pourraient continuer a priver les personnes de leur liberté simplement en déclenchant de nouvelles enquêtes penales pour les memes faits.” (Paragraph 77)

**As Osman Kavala's defence counsels, we hold that the restriction of a person's rights and liberties for almost 4 years and his detention of 3 years and 8 months is a complete violation of the law. The fact that the ECtHR holds that article 18 was violated is an important point to consider as regards the implementation of the judgment. We, therefore, respectfully request that the Committee of Ministers take the necessary actions so that the judgment is implemented, and our client attains his freedom.**

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