

DGI - Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the ECHR
F-67075 Strasbourg Cedex France
E-mail: dgi-execution@coe.int

Sent by e-mail

1 September 2022

Submission by Turkey Human Rights Litigation Support Project, Human Rights Watch and the International Commission of Jurists pursuant to Rule 9.2 of the Committee of Ministers' Rules for the Supervision of the Execution of the Judgments, Additional Observations on the Implementation of the case of *Kavala v. Turkey* (Application no. 28749/18) and *Proceedings under Article 46 (4) in the case of Kavala v. Türkiye [GC]* (Application no. 28749/18)

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, the Turkey Human Rights Litigation Support Project, Human Rights Watch and the International Commission of Jurists ("the NGOs") hereby present a communication regarding the execution of the European Court of Human Rights ("the Court" or "the ECtHR") judgments in the case of *Kavala v. Turkey* (Application no. 28749/18) and the *Proceedings under Article 46 (4) in the case of Kavala v. Türkiye [GC]* (Application no. 28749/18).
2. On 11 July 2022, the Grand Chamber of the ECtHR issued a historic judgment in the infringement proceedings against Türkiye under Article 46(4) of the Convention for the state's failure to implement the Court's *Kavala v. Turkey* 2019 judgment. The Court condemned Türkiye's failure to fulfil its obligation to abide by its ruling in the case, in particular by refusing to release Osman Kavala. Despite this significant finding, in its submission to the Committee of Ministers dated 19 July 2022,¹ the Turkish government continues to defy the Court's order to release Mr Kavala and purports to justify his continued detention, this time on the basis of his latest conviction by the Istanbul 13th Assize Court. In a widely criticised judgment delivered on 25 April 2022, the Turkish court sentenced Mr Kavala to aggravated life imprisonment on charges of attempting to overthrow the government (under Article 312 of the Criminal Code) for his alleged role in the 2013 Gezi Park protests.²
3. The Committee will determine during its 1443rd Human Rights meeting in September 2022 the next steps in its supervision of the execution of the Kavala judgment. The NGOs

¹ [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)763E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)763E)

² *Proceedings under Article 46 (4) in the case of Kavala v. Türkiye [GC]* (Application no. 28749/18) para. 11. See also, Human Rights Watch, 'Turkey: Life Sentence for Rights Defender Osman Kavala: Kavala, 7 Co-Defendants Convicted; Outrageous Miscarriage of Justice' (26 April 2022), <https://www.hrw.org/news/2022/04/26/turkey-life-sentence-rights-defender-osman-kavala>.

underscore the key role that this supervision will play in ensuring Türkiye's compliance with the judgment, and international oversight and accountability so far as it continues to fail to meet its Convention obligations. In the present submission, to inform the Committee's determination of the arguments before it, the NGOs will provide brief views on the following four issues that will be at the centre of the current state of proceedings:

- The government's claim that the ongoing detention of Mr Kavala does not fall within the scope of the 10 December 2019 and 11 July 2022 judgments of the ECtHR, which is profoundly misleading and in direct defiance of the Court's rulings.
- The government's false argument that the Grand Chamber did not address the April 2022 conviction of the applicant in its July 2022 judgment.
- The imperative that Mr. Kavala be released immediately as part of the appropriate and urgent response to the Grand Chamber judgment.
- The necessity of the Committee increasing its efforts to secure the release of Mr Kavala by effectively using all designated legal, political, diplomatic, and financial tools in hand while continuing to firmly condemn Türkiye's refusal to implement the judgment.

Mr Kavala's ongoing detention falls within the scope of the ECtHR's 10 December 2019 and 11 July 2022 judgments:

4. The Committee is reminded that, since the beginning of the supervision process, Türkiye has consistently sought to reframe charges against Mr. Kavala to justify his continued detention on the same grounds as those found to constitute a violation in the Court's 2019 judgment. As detailed in the NGOs' previous communications dated 18 August 2021³, 7 February 2021,⁴ 2 November 2020,⁵ and 29 May 2020⁶, Türkiye has prolonged and deepened the violation of Mr Kavala's rights by arbitrarily extending his detention on the putative basis of 'new' charges that manipulate the domestic proceedings to keep him in detention.⁷
5. This has been confirmed by the Committee in previous decisions during different phases of the judgment implementation supervision process.⁸ It was also made clear by the Grand Chamber in its 11 July 2022 judgment which rejected in clear terms the government's attempts to repackage charges in relation to substantially the same sets of facts as the basis for ongoing detention. The Court's assessment on this issue reads:

"in the absence of other relevant and sufficient circumstances, a mere reclassification of the same facts cannot in principle modify the basis for those conclusions, since such

³ [https://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)836E](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)836E)

⁴ [https://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)186E](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)186E)

⁵ [https://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)1007E](https://hudoc.exec.coe.int/eng?i=DH-DD(2020)1007E)

⁶ [https://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)501E](https://hudoc.exec.coe.int/eng?i=DH-DD(2020)501E)

⁷ Communication from NGOs (Human Rights Watch, the International Commission of Jurists, and the Turkey Human Rights Litigation Support Project) (18/08/2021) in the case of Kavala v. Turkey (Application No. [28749/18](#)) paragraphs 2-18, [https://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)836E](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)836E)

⁸ See e.g. the Committee's decision following the 1377bis meeting of 1-3 September 2020 (DH) and interim resolution following the 1390th meeting of 1-3 December 2020 (DH).

a reclassification would only be a different assessment of facts already examined by the Court. Were it otherwise, the judicial authorities could continue to deprive individuals of their liberty simply by opening new criminal investigations in respect of the same facts. Such a situation would amount to permitting the law to be circumvented and might lead to results incompatible with the object and purpose of the Convention.” (para. 143).

6. The evaluation of the Court on the issue of ‘new’ charges is clearly relevant to the government’s persistent position that the ECtHR judgments do not cover Mr Kavala’s ongoing detention. The Grand Chamber leaves no doubt that Mr Kavala’s April 2022 conviction - based essentially on his alleged involvement in the Gezi Park events - and his ongoing detention on the ground of this conviction fall within the scope of the Court’s 2019 ruling. In the Court’s view, its 2019 findings of violation under Article 5(1) read separately and in conjunction with Article 18 “*vitiates any action resulting from the charges relating to the Gezi Park events and the attempted coup.*” Accordingly, when there are no relevant and sufficient circumstances illustrating Mr Kavala’s involvement in criminal activity, any further criminal process or detention on the same factual grounds would constitute a continuation of violation of his rights and a failure to implement the Court judgments (paras. 145 and 151).
7. The NGOs submit that there can be little doubt that the Court’s assessments referred to above cover the case before the Istanbul 13th Assize Court as well as any domestic proceedings against Mr Kavala in relation to the Gezi Park events and the July 2016 coup attempt. Any criminal proceedings against Mr Kavala concerning these events and any detention order on those grounds, including pursuant to a conviction, are continuing violations of his rights, as established by the Court’s December 2019 judgment, and confirmed by the Grand Chamber in July 2022.

The Grand Chamber’s July 2022 judgment determines the April 2022 conviction of Mr Kavala by the Istanbul 13th Assize Court:

8. The government argues in its July 2022 submission that the ECtHR ‘did not evaluate the Istanbul Assize Court’s judgment of 25 April 2022’. This is manifestly false. The Grand Chamber clearly took into account the April 2022 conviction in its determination of the facts surrounding the case. The judgment refers to Mr Kavala’s conviction in ‘the Circumstances of the Case’ part (paras. 11 and 54) and discusses the parties’, namely the Committee of Ministers’, Mr Kavala’s and the government’s, arguments in relation to the Turkish court’s conviction decision (see paras 99, 117, and 123). It provides a thorough analysis and explicitly reaches conclusions in relation to the April 2022 judgment in paragraph 172:

“... on 25 April 2022, Mr Kavala was acquitted of the charge of military or political espionage under Article 328 of the Criminal Code, but convicted of the charge under Article 312 of the Criminal Code. Mr Kavala was also sentenced to the heaviest penalty under Turkish criminal law, namely aggravated life imprisonment. It is clear from the verdict delivered on 25 April 2022 that this conviction was based on facts primarily related to the Gezi Park events, which the Court had scrutinised with particular care in

its initial judgment on account of the clear absence of reasonable suspicion. Admittedly, the Assize Court's verdict, delivered subsequent to the referral to the Court and which is not final, does not affect the Court's findings as set out above (see, mutatis mutandis, Ilgar Mammadov (infringement proceedings), cited above, § 212). The Court would, however, reiterate that its finding of a violation of Article 18 taken together with Article 5 in the Kavala judgment had vitiated any action resulting from the charges related to the Gezi Park events and the attempted coup (see paragraph 145 above). It is nonetheless clear that the domestic proceedings subsequent to the above judgment, which resulted first in an acquittal and then a conviction, have not made it possible to remedy the problems identified in the Kavala judgment."

9. This led to the finding in the following paragraph (para. 173) that the state did not act in good faith. It is therefore clear that the Court considered and condemned this conviction, which means that the issues identified in the earlier judgment had not been remedied.

Mr. Kavala must be released immediately as part of the appropriate and urgent response to the Grand Chamber judgment:

10. The Grand Chamber's reasoning in the judgment leads to the clear conclusion that the only way in which Türkiye can fulfil its obligation to implement the individual measures in the *Kavala v. Turkey* 2019 judgment, and to provide a remedy, is by urgently ensuring the release of Mr Kavala and dropping all charges against him in relation to the facts already examined by the ECtHR. In assessing the Court's order for Mr Kavala's release in the 2019 judgment, the Grand Chamber underlined that the Court's finding of manifestly unjustified detention violating Article 5(1) taken together with Article 18 did not 'leave any real choice' to remedy the violations other than the immediate release of the applicant (para. 147). The Grand Chamber refers to the Court's explicit order in the December 2019 judgment to immediately release Mr Kavala after the delivery of the judgment (para. 151) before reaching the conclusions as to non-implementation.
11. The NGOs submit that the Council of Europe leaders' joint statement following the Grand Chamber's judgment calling for the immediate release of Mr Kavala underscores the most important individual measure Türkiye must take to implement the judgment.⁹ A failure to secure that will simply prolong and deepen the violations of Article 5, Article 18 in conjunction with Article 5 of Mr Kavala, and Article 46(1) of the Convention.

Next steps by the Committee of Ministers to ensure implementation of the judgment:

12. The NGOs reiterate that the continuation of Mr Kavala's detention in prison despite the Grand Chamber's findings on 11 July 2022 and the Chamber judgment of 10 December 2019, taken together with the Committee of Minister's previous decisions urging the Government to take the necessary steps to implement the judgment and ensure the

⁹ <https://www.coe.int/en/web/portal/-/echr-judgment-in-the-case-kavala-v-turkiye-joint-statement-by-the-council-of-europe-leaders>

immediate release of Mr Kavala¹⁰, demonstrates flagrant disregard for the Convention rights and the Convention system. It is the Committee's fundamental role to ensure that this serious threat to the Convention system is treated seriously and brought to an end.

13. For this, first and foremost, the Committee must continue disregarding the false and misleading arguments made by the Turkish government, including those addressed above, and condemn firmly Türkiye's ongoing attempts to avoid executing the judgments. Second, the Committee must use all legal, political, diplomatic, and financial tools designated in the Convention system to increase the pressure on Türkiye to secure the immediate release of Mr Kavala. This includes efforts to ensure the direct and continuing engagement, through all available channels, by member states, the Secretary General, the PACE, and all other Council of Europe institutions. Finally, this case must be high on the agenda of the Council of Europe institutions and member states in any relations and talks with Türkiye and must be identified as one of the main conditions for maintaining constructive co-operation with the country.

¹⁰ See for example, Committee of Ministers, '1440th meeting, 13 July 2022, H46-1 Kavala v. Türkiye (Application No. 28749/18): situation of the applicant', [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2022\)1440/H46-1E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2022)1440/H46-1E) ;

Interim Resolution CM/ResDH(2021)432 Execution of the judgment of the European Court of Human Rights Kavala against Turkey, 2 December 2021 (1419th meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a4b3d4; 1411th meeting, 14-16 September 2021 (DH) H46-37 Kavala (Application No. 28749/18) and Mergen and Others group (Application No. 44062/09) v. Turkey, [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2021\)1411/H46-37E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2021)1411/H46-37E) .