İFADE ÖZGÜRLÜĞÜ DERNEĞİ

# Third Party Intervention

# In the Case of Osman Kavala v. Turkey (no. 28749/18)

**by**


## İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

An independent non-governmental organization specialized in defending and promoting freedom of expression

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## Introduction

1. İfade Özgürlüğü Derneği (İFÖD) is of the opinion that the Osman Kavala application cannot be evaluated and understood without considering the general political context in Turkey. In order to evaluate whether the applicant's arrest and detention was arbitrary and whether there was an effective remedy in the domestic law which should be exhausted by the applicant before lodging an individual application before the European Court of Human Rights, **the general political situation, the state of human rights and relations between the judiciary and the executive should be portrayed clearly**. Therefore, **İFÖD will confine its comments on the third question**, namely, **whether the deprivation of liberty imposed on the applicant in the present case has been applied for a purpose other than that envisaged by Article 5 of the Convention, in breach of Article 18** (Rasul Jafarov v. Turkey, no. Azerbaijan, No. 69981/14, §§ 153-163, March 17, 2016).
2. İFÖD observes that the state of human rights, the rule of law and independence of the judiciary deteriorated drastically within the last four or five years in Turkey. This has resulted with Turkey becoming one of the worst performers in the world in terms of freedom of expression and media freedom, as reflected in recent international reports. In 2016, Reporters Without Borders (RSF) ranked Turkey 151st of 180 countries in their World Press Freedom Index. In 2017, Turkey ranked 155th and 157th in 2018. Similarly, Freedom House classified Turkey as a 'partly free' country ranking it 156th in its 2016 media freedom index with a 20 point decrease in score compared to 2010. In April 2017, it was announced that Turkey had fallen to 163rd in the global index. In the most recent report published in January 2018, Turkey was ranked 154th and classified as 'not free' for the first time.
3. The crisis of freedom of expression in Turkey is evident not only in reports published by NGOs but also in reports issued by interstate oversight mechanisms. The UN Special Rapporteur on Media Freedom noted his concerns in his preliminary observations after his visit to Turkey in November 2016.[1] The Council of Europe's platform to promote the protection of journalism has also noted that Turkey has the highest number of alerts and that a large part of these involve imprisonment of journalists.[2] The Council of Europe Commissioner for Human Rights' *Memorandum on Freedom of Expression and Media Freedom in Turkey* published in February 2017, states that 'journalists have been among the most affected by the various forms of judicial harassment' and also that 'detention is the most visible and chilling form that this harassment has taken.'[3] The Memorandum also notes that 'the exceptional nature of remands in custody, and the need to provide clear legal reasoning in cases where they are necessary are not embedded in the practice of the Turkish judiciary.' It goes on to say that many Turkish judges still continue to use the list of catalogue crimes in the Code of Criminal Procedure as grounds for detention without a careful examination of the remaining conditions of detention. The Venice Commission also noted that without individualized decisions, and without the possibility of timely judicial

[1] Preliminary conclusions and observations by the UN Special Rapporteur on the right to freedom of opinion and expression to his visit to Turkey, 14-18 November 2016: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20891

[2] Of the 500 alerts, 109 involve Turkey and 59 are classified as Level 1 alerts. Platform to promote the protection of journalism and safety of journalists: http://www.coe.int/en/web/media-freedom/all-charts

[3] CommDH (2017)5, para. 79.

review, "membership" of terrorist organizations charges and arrests without relevant and sufficient reasons, instead of restoring democracy may further undermine it.[4]

4. İFÖD completely agrees with these observations and would like to emphasize that under these conditions an isolated approach to the case at hand may cause losing sight about surrounding conditions of the applicant's accusation and detention by public authorities. Therefore, İFÖD would like to make following submissions to the Court by this intervention, drawing upon its expertise as an organization specialized in defending and promoting freedom of expression:

- The broader political context in which the applicant was arrested and detained should be taken into the account when evaluating whether his detention was arbitrary, whether there exists an affective remedy in domestic law and whether the deprivation of liberty imposed on the applicant in the present case has been applied for a purpose other than that envisaged by Article 5 of the Convention, in breach of Article 18.
- The most important factor in deterioration of the rule of law and human rights is the lack of judicial independence in Turkey. Independence of the judiciary has been curtailed to a significant extent in recent years and judiciary has been brought under the control of the executive.
- Anti-terror laws are interpreted very widely and vaguely to silence dissidents and civil society.

**Why a Contextualized Approach is Needed?**

5. İFÖD invites the Court to take into account the broader political context leading up to the arrest of the applicant. **It respectfully asks the Court to adopt a contextualized approach by taking into consideration of its own case law on Article 18 of the Convention and recent political developments in Turkey**.
6. Article 18 expressly prohibits the High Contracting Parties from restricting the rights and freedoms enshrined in the Convention for purposes not prescribed by the Convention itself. The mere fact that a restriction of a Convention right or freedom does not meet all the requirements of the clause that permits it does not necessarily raise an issue under Article 18. Separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case.
7. In cases regarding with the arrest or punishment of journalists, civil society activists, human rights defenders, opposition party members and dissidents, there is always the problem of ulterior aim of public authorities to silence and punish critical voices. In most of the cases, public authorities aim to punish critical voices just because of their legitimate activities, but they accuse them of being member of a terrorist organisation, or supporting a terrorism or even being a spy acting on behalf of a foreign country or external enemies.
8. In such cases, it is always difficult for the applicants to prove that his or her detention or punishment is directly ordered by the executive. In such cases, a contextualized approach is critical to protect individual human rights, namely freedom of expression and freedom of assembly and association as well as democratic values and the rule of law that are founding principles of the Council of Europe. Especially, in countries where judiciary is effectively controlled by the executive or political organs, criminal law and criminal procedures are used as tools to silence critical voices and crackdown opposition by rulers in order to

[4] Venice Commission, CDL-AD(2017)007.

maintain their power. Therefore, a contextualized approach is necessary not only to determine whether there was other purposes that is not prescribed by the Convention, but also to evaluate whether the arrest or punishment is arbitrary and whether there exist an effective remedy in domestic law to challenge legality of detention or punishment.

**Article 18 of the Convention and Burden of Proof**

9. The Court revised its case-law regarding with Article 18 in a recent judgment (*Merabishvili v. Georgia* (GC), no. 72508/13, 28.11.2017). The Court clarified that a restriction can be compatible with the substantive Convention provision which authorizes it because it pursues an aim permissible under that provision, but still infringe Article 18 because it was chiefly meant for another purpose that is not prescribed by the Convention; in other words, if that other purpose was predominant. Conversely, if the prescribed purpose was the main one, the restriction does not run counter to Article 18 even if it also pursues another purpose (para. 305). Which purpose is predominant in a given case depends on all the circumstances. In assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law (para. 307).
10. In the *Merabishvili* judgment, the Court also clarified its position in terms of standard and burden of proof: "*But if the two points are clearly distinguished, the questions in relation to proof become simply how it can be established whether there was an ulterior purpose and whether it was the predominant one*" (para. 309). In doing this, the Court finds that it can and should adhere to its usual approach to proof rather than special rules (para. 310).
11. The first aspect of that *approach* is, first set out in *Ireland v. the United Kingdom* (para. 160-61) and more recently confirmed in *Cyprus v. Turkey* (para. 112-13 and 115) and in *Georgia v. Russia (I)* (para. 93 and 95), that, as a general rule, the burden of proof is not borne by one or the other party because the Court examines all material before it irrespective of its origin, and because it can, if necessary, obtain material of its own motion (para. 311). The second aspect of the Court's approach is that the standard of proof before it is "*beyond reasonable doubt*". That standard, however, is not co-extensive with that of the national legal systems which employ it. First, such proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. Secondly, the level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake (para. 314). The third aspect of the Court's approach is that the Court is free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it (para. 315). There is therefore no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18 of the Convention or to apply a special standard of proof to such allegations (para. 316). It must however be emphasized that circumstantial evidence in this context means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts. Reports or statements by international observers, non-governmental organizations or the media, or the decisions of other national or international courts are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court (para. 317).

12. The judgment also affirms the *well*-established case-law to the effect that there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies (para. 288).
13. The Court in recent *Selahattin Demirtaş v. Turkey* (2) case, (no. 14305/17, 20.11.2018) depended on the following observations when reaching the conclusion that Article 18 of the Convention was violated in conjunction with Article 5: Although there was reasonable suspicion leading to applicant's arrest, the courts ordering extension of his detention failed to provide grounds that can be regarded as "sufficient" to justify its duration. The Court also found that there was political motive behind continued detention of the applicant as a co-leader of the second biggest opposition party in the parliament. When reaching this conclusion, the Court resorted to contextual analysis and considered the general political and social background to the facts of the case and the sequence of events emerging from the case file. Within this context, the Court depended on observations of independent international observers like Commissioner for Human Rights, the Venice Commission, Amnesty International and the intervening third parties, that in view of the applicant's position on the Turkish political scene, the tense political climate in Turkey since 2014 and the speeches by the applicant's political opponents, among them the President of Turkey, it is understandable that an objective observer might suspect that the extension of the pre-trial detention of the applicant was politically motivated. The Court also took into account the opinion of the Commissioner for Human Rights, who stated that national laws were increasingly being used to silence dissenting voices (para 263-67).
14. Furthermore, the Court determined that **political nature of the applicant's detention was the predominant purpose underlying the repeated decisions to extend the applicant's pre-trial detention**. When reaching this conclusion, the Court made reference to the observations by the Commissioner for Human Rights, that the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency (para. 270). The Court also observed that although the investigation in respect of the applicant had not been initiated in response to the speeches by the President of Turkey, it had been at least accelerated after he had given those speeches and stated that "the deputies of that party [the HDP] must pay the price". The Court decided, having regard to in particular the fact that the national authorities have repeatedly ordered the applicant's continued detention on insufficient grounds consisting simply of a formulaic enumeration of the grounds for detention provided for by law, that it has been established beyond reasonable doubt that the extensions of the applicant's detention, especially during two crucial campaigns, namely the referendum and the presidential election, pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society (para. 272).

**15.** In the Selahattin Demirtaş case, the main point that lead the Court to find a violation of Article 18 was the pressure imposed upon the judiciary by the execution. In the light of these, İFÖD would like to provide its observations about the independence of the judiciary in Turkey as almost in all cases the Turkish Government argues that all proceedings were carried out by independent judicial bodies. With this claim the Court presuppose that all the decisions regarding arrest and detention of the journalists, civil society activists, human rights defenders, and dissident were delivered by independent and impartial authorities in good faith. Nevertheless, this supposition seems very optimistic, considering the recent developments in Turkey and leaves individual rights unprotected, and democratic values and the rule of law forlorn.

**Judicial Independence in Turkey**

16. A competent, independent and impartial judiciary is fundamental to the rule of law, particularly in respect of the fair administration of justice and for the protection of human rights. It is therefore essential that a judicial system is able to guarantee the independence and effectiveness of its courts and judges. Independence of the judiciary has always been a problem in Turkey. Nevertheless, in recent years, executive control over judiciary has been intensified enormously and structural defects became apparent.
17. Following the 2010 constitutional amendments, which changed the structure of the former judicial council (High Council of Judges and Prosecutors -HSYK) and introduced a partly election system, twice the list of candidates supported by the Ministry of Justice won the elections in 2010 and 2014. This means that majority of the members of the HSYK had the support of the executive and were prone to the demands of the executive. Not surprisingly, after each election new laws were adopted by the parliament changing the structure and increasing the number of the members of the high courts, namely the Court of Cassation and the Council of State. In 2011 the number of the members of the Council of State was increased from 95 to 156, and number of the members of the Court of Cassation from 250 to 387 by a law (Law no 6110)[5]. The basic motive behind this change was to change the composition of the members by appointing new members close to the government. Later on, it was coming to light that, most of the members elected by the new HSYK was close to Gülenists, then ally of the ruling AKP. Following the collapse of coalition between the AKP and Gülenists after 17-25 December 2013 investigations, the Ministry of Justice supported the candidates of Union in the Judiciary Platform in 2014 HSYK elections and that list won the elections. A further intervention was made to the number of the members of high courts after that elections in 2014 and the number of the members of the Court of Cassation was increased from 387 to 516 and the number of the members of the Council of State from 156 to 195 by a law (Law no 6572). Structural changes were also made in the functioning of the high courts by this law and basic motive was not different from the previous one.[6]
18. In 2016 another intervention was made to the structure of the high courts; this time number of the members was reduced.[7] The number of the members of the Court of Cassation was reduced from 516 to 300 and gradually to 200, and the members of the Council of State from 195 to 116 and gradually to 90 by a law (Law no 6723).[8] The motive was to purify high courts from unwanted members.[9]
19. In 2017, structure and name of the judicial council has been changed by a constitutional amendment (Law no 6771), which will be evaluated below. This time, following the appointment of the new members of HSK, structure and functioning of the high courts changed again by an Emergency Decree Law (Decree no 696) and 100 new members were appointed to the Court of Cassation and 16 new members to the Council of State.
20. In each of the above-mentioned interventions, government produced some excuses for the changes, but it can clearly be seen that no excuse can justify four structural reform in the

[5] http://www.hurriyet.com.tr/gundem/yargitay-ve-danistayda-daire-sayilarini-attiran-tasari-yasalasti-16982030 (accessed on 26.11.2018)

[6] http://www.aljazeera.com.tr/haber/yuksek-yargida-cemaate-fren (accessed on 26.11.2018)

[7] https://www.ntv.com.tr/turkiye/yargitay-ve-danistay-uyeleriyeni-yargi-paketini-protesto-etti,OQGgmDIUVEyiXe-AR39izQ?_ref=infinite (accessed on 26.11.2018)

[8] https://www.bloomberght.com/haberler/haber/1899437-cumhurbaskani-erdogan-yargitay-ve-danistay-kanununu-onayladi (accessed on 26.11.2018)

[9] http://www.diken.com.tr/ne-yeni-yargi-ne-de-yargiya-son-darbe/ (accessed on 26.11.2018)

form and functioning of the high courts within six years. In each of these reforms, conditions of eligibility to membership of a high court or eligibility to be elected as president or chamber president were also changed in order to appoint those people who are close to the ruling party. After each election in the HSYK almost half of the all judges appointed to another court or another city.

21. The politicization of the judiciary has increased following the failed coup attempt on 15 July, 2016. Two members of the Constitutional Court, five members of the High Council of Judges and Prosecutors, one hundred and forty members of the Court of Cassation, forty-eight members of the Council of State, 4240 judges and prosecutors, all of which were appointed under AKP governments, have been dismissed. Among the 4240 judges and prosecutors, 2250 were arrested, and many dismissed members of the higher courts mentioned here also remain in pre-trial detention. It is striking that, to date, the Council of State, whose competence to hear appeals against the Council's decision to dismiss judges and prosecutors has issued no decision. The Council of Europe's Commissioner for Human Rights found that this situation created "*an atmosphere of fear among the remaining judges and prosecutors*."[10] The European Commission also stressed that *"[t]hese dismissals had a chilling effect on the judiciary as a whole and risk widespread selfcensorship among judges and prosecutors. No measures were taken to restore legal guarantees ensuring the independence of the judiciary."*[11]
22. The final step that imperilled the judicial independence and that caused much international scrutiny and criticism is the most recent Constitutional amendments approved by referendum on 16 April 2017. Apart from establishing an unchecked presidential system, it also modified the composition and appointment of the now called the Council of Judges and Prosecutors (CJP - previously preceded by a "High"). Based on the new constitutional provision, the Council of Judges and Prosecutors has been reappointed. Of the thirteen members, six are now effectively appointed by the President of the Republic, including four ordinary members as well as the Minister of Justice (who acts as President of the Council) and the Under-Secretary of the Ministry of Justice. The remaining seven members are appointed by the National Assembly. None of the members of the Council is appointed by judges or public prosecutors. Finally, under the new constitutional regime, the President of the Republic no longer has a neutral role but may maintain political party affiliations.
23. The Venice Commission found that this "*composition of the CJP is extremely problematic. This would place the independence of the judiciary in serious jeopardy ... . Getting control over this body thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice*."[12] The Council of Europe's Commissioner for Human Rights also stated that the new composition "*did not offer adequate safeguards for the independence of the judiciary and considerably increased the risk of it being subjected to political influence.*"[13] The Office of the UN High Commissioner for Human Rights found that "*the new appointment system for the members of the Council of Judges and Prosecutors ... does not abide by international standards, such as the Basic Principles on the Independence of*

[10] 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, para. 35.

[11] European Commission, Turkey 2018 Report, Doc. No. SWD(2018) 153 final, 17 April 2018, p.23.

[12] 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 207, adopted at its plenary session, 10- 11 March 2017, Doc. CDL-AD(2017)005-e, para. 119

[13] Council of Europe Commissioner for Human Rights, Third Party Intervention, op. cit., para. 37

*the Judiciary. [Because] of the Council's key role of overseeing the appointment, promotion and dismissal of judges and public prosecutors, the President's control over it effectively extends to the whole judiciary branch."*[14]

*24.* There are numerous independent monitoring reports that show how the Turkish judiciary has been under the political influence in recent years.[15] Among many, these can be mentioned: The Council of Europe Parliamentary Assembly's report on 22 June 2016, titled "*The functioning of democratic institutions in Turkey.*"; The European Commission's, 2018 Progress Report[16]; the World Justice Project's the Rule of Law Index,[17] in which Turkey ranks 101 among 113 countries with the lowest score in sub-category of no improper government influence in criminal cases which is 0.15 out of 1; "Turkey: two different reports of the International Commission of Jurists (ICJ), "The Judicial System in Peril" and "Justice Suspended: Access to Justice and State of Emergency in Turkey";[18] The Institute of Peace and Conflict Studies has evaluated the dismissals in the judiciary after the failed coup attempt in its report;[19] and finally, GRECO's fourth compliance report.[20]

*25.* It should also be noted that the Constitutional Court is also not immune from executive and political influence considering that majority of its members are appointed by the President and two of its members were arrested and detained without decision of the Constitutional Court, although members of the Constitutional Court cannot be prosecuted without permission of the Court except *in flagrante delicto*.

26. There are too many examples showing direct interference of executive to the judicial process. Among many others, Büyük Ada case, Deniz Yücel case and Pastor Bronson case can be showed examples of cases, that the judicial authorities gave the impression that they followed statements of the executive in their decisions. The leader of the opposition party claimed that the Ministry of Justice sent a circular to the chief public prosecutors ordering not to release detained judges and prosecutors without informing the CJP.[21] The CJP was directly involved with the suspension of the judges and the prosecutor of İstanbul 25th Assize Court after the Court released 21 journalists,[22] as well as with the transfer of the

[14] Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East - January - December 2017, March 2018, para. 34.

[15] 2014 and 2015 European Commission Progress Report on Turkey, the European Parliament Report, organized by the Ministry of Foreign Affairs Turkey's 2014 Annual Report on the Implementation of Human Rights, Human Rights Watch Report

[16] European Commission, Turkey 2018 Report, Doc. No. SWD(2018) 153 final, 17 April 2018, p. 6.

[17] http://data.worldjusticeproject.org/#/groups/TUR

[18] https://www.icj.org/wp-content/uploads/2018/07/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf

[19] http://www.ipcs.org/article/military-and-defence/post-coup-turkey-implications-for-judicial-independence-5103.html

[20] GRECO, Compliance Report: Turkey on Corruption Prevention in respect of the members of the Parliament, Judges and Prosecutors on 15 March 2018. (GrecoRC4(2017)16 available at, https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680792de8 (accessed on 26 November 2018)

[21] https://www.ntv.com.tr/turkiye/adalet-bakani-gulden-kilicdarogluna-yanit,Q3UWyuR3mkaGPfat3JNRVQ (accessed on 26.11.2018)

[22] Third party intervention to the journalists cases, para. 39.

judges of İstanbul 37th Assize Court after releasing 17 lawyers[23] and the transfer of the Chief Judge of the Diyarbakır 8th Assize Court after releasing HDP MP İdris Baluken.[24]

27. Considering the jurisdiction of the criminal judgeships of peace, a special attention should be paid to this institution which was established by Law no. 6545 in 2014.[25] It replaced the previous criminal courts of peace without retaining all their prerogatives. Under the current structure, functions related to supervision of the investigation and deciding protection measures such as issuing search, arrest and detention warrants are within the jurisdiction of the criminal judges of the peace.[26] They are also entitled to judicially review the decisions of public prosecutors not to prosecute. The power of the judgeships of peace had been extended to removal of content and closing down of Internet websites[27] removal of the right for a lawyer to exercise advocacy according to Decree Law no. 667[28] and decisions on the merits on traffic offences.
28. Against decisions of those judges can only be appealed to another criminal judge of the peace of the same district. This created a closed system within the criminal procedure and make easy to control the whole pre-trial process. They are appointed by the CJP like other judges. Considering the problems related to independence of the CJP, there is worrying signs about independence and impartiality of the peace judges. The Venice Commission observes that the "*system of horizontal appeals against decisions by the criminal peace judges does not offer sufficient prospects of an impartial, meaningful examination of the appeals.*"[29] The Venice Commission also found that a political "screening" process is applied in selection of these judges and it casts doubts on the objectivity of the method of selection, and consequently calls into question their impartiality.

**Wide and Vague Interpretation of Anti-Terror Laws**

29. Another worrying problem in terms of freedom of expression and freedom of assembly and association is applying anti-terror laws to silence dissent voices and to crackdown civil society. Journalists, civil society activists, human rights defenders and opposition politicians are generally accused of being member of a terrorist organization or aiding a terrorist organization or even attempting to overthrow government and they are arrested and detained on the basis of their legitimate activities or opinions.
30. According to the ECtHR's case-law on the press, freedom of expression of journalists can only be restricted and prison sentences imposed only in exceptional circumstances when there are serious attacks on other fundamental rights, such as in the case of hate speech or incitement to violence (Cumpana and Mazare v. Romania, no. 33348/96, 17.12.2004, para. 115). The Turkish domestic law also requires the involvement of violence to punish expression related to terrorism. However, people are arrested or even sentenced to

[23] "Türkiye'nin konuştuğu kararı veren hakimler sürüldü mü", 20 September 2018, available at: https://odatv.com/turkiyenin-konustugu-karari-veren-hakimler-suruldu-mu-20091802.html.

[24] "HDP'li İdris Baluken'i tahliye eden Mahkeme Başkanı, düz hakim yapıldı", 6 April 2017, available at: http://www.cumhuriyet.com.tr/haber/turkiye/714883/HDP_li_idris_Baluken_i_tahliye_eden_Mahkeme_Baskani__duz_hakim_yapildi.html.

[25] Venice Commission: Turkey, Opinion on the duties, competences and functioning of the criminal peace judgeships, adopted by the Venice Commission at its 110th Plenary Session, Venice, 10-11 March, 2017, para.16.

[26] Ibid., para. 17.

[27] Ibid., para. 19.

[28] Ibid., para. 21.

[29] Ibid., para. 86.

imprisonment without providing any evidence showing the suspect had resort to violence or incited to violence. Judicial authorities do not distinguish between content involving legitimate criticism of the government and content serving for the aims of the alleged terrorist organization. In most of the cases a correlation is established between the aim of the alleged terrorist organization to overthrow elected government and the suspects' criticism of the government and suspects are accused of terrorism related crimes. This approach equalizes criticism of government with terrorist activity and leaves no room for democratic and critical opposition.

31. Recently, ECtHR, found unforeseeable the application of Article 220/6 and 220/7 of the Turkish Criminal Code in concrete cases and ruled violation of Article 11 of the Convention in *Işıkırık v. Turkey, Bakır and others v. Turkey* and *İmret v. Turkey* cases.
32. The Human Rights Commissioner defined this application as "judicial harassment" and said that in recent times, and especially after the failed coup attempt, various types of judicial harassment have been imposed upon different groups and sectors in Turkey.[30]
33. The Venice Commission recommended that the established criteria by the Court of Cassation in relation to crime of membership to a terrorist organisation such as "continuity, diversity and intensity", "organic relationship" to an organisation or acted knowingly and willingly within the "hierarchical structure" of the organisation, should be applied strictly. The loose application of these criteria may give rise to issues concerning in particular the principle of legality within the meaning of Article 7 ECHR. Second, the expression of an opinion in its different forms should not be the only evidence before the domestic courts to decide on the membership of the defendant in an armed organisation.[31]
34. In the current case, allegations against the applicant include his role in organising the Gezi protests. İFÖD would like to submit to the attention of the Court that Gezi protests were a reaction of environmental sensitivity of the society against demolition of a public park in the centre of İstanbul. Young environmentalists occupied the park to prevent demolition of it by the Municipality and mostly demonstrations were peaceful until the police interfering with and burning down the tents of environmentalists. Following the police intervention, demonstrations were expended to country wide demonstrations spontaneously as a reaction against cruelty of the police. Later the former Prime Minister defined those protests as a coup attempt against the government.
35. Four years after the Gezi protest the applicant was arrested and detained on the ground that he organised and sponsored the protests. There are numerous speeches of the President accusing generally the Gezi protests and specifically the applicant with financing and organizing the Gezi protests. Although more than a year elapsed since the detention of the applicant, no indictment was drawn up yet and remains unclear from the applicant's application what the exact accusation is against him. However, it is understood from the publications of the pro-government media that the applicant is mainly accused of organising and financing Gezi protests. As in many other examples, the President's constant speeches targeting an individual might most likely affect the whole process in the current case. Extension of detention of the applicant by repeated detention orders by the Criminal Judgeships of Peace should be evaluated within this context.

**Conclusion**

[30] Memorandum on freedom of expression and media freedom in Turkey, CommDH (2017) 5, 15.2.2017.
[31] Venice Commission, Opinion On Artıcles 216, 299, 301 And 314 Of The Penal Code Of Turkey, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), para. 106-107.

36. As set out above, İFÖD provides an overview of the legal principles to be applied in cases concerning the rights guaranteed under Articles 5, 10, 11 and 18 of the Convention. The proper application of these principles is critical in periods where essential components of a democratic society, such as a freedom of expression and freedom of assembly and association are under threat. Cases such as the present one represent an important opportunity for the Court to apply the strictest of scrutiny in such a context to ensure that civil society activists, journalists, and outspoken critics are not subject to charges that are politically-motivated, unjustified with reference to the exigencies of the situation and repugnant to the obligations set out under Convention.
37. Although it takes time for such practices to be examined by the ECtHR, these developments have reached a level that cannot be ignored by the ECtHR. As a measure against detention being used as a systematic and pervasive instrument to silence dissent in Turkey and other countries, the ECtHR has adopted changes to its priority policies effective as of 22 May 2017 to speed up the processing of such applications.[32] The ECtHR has thus widened the category of 'urgent' applications, which formerly comprised applications that showed risk to life or health of applicants, to include these new cases. The category of urgent applications now includes those instances where the applicant is deprived of liberty as a direct consequence of the alleged violation of his or her Convention rights. İFÖD believes that the current application of Osman Kavala falls in to this category and requires a swift decision as the applicant's current detention and repeated decisions to extend the applicant's detention as well as the continuous delays in relation to preparing his indictment is politically motivated and requires the consideration of Article 18 together with Articles 5, 10 and 11.

**03.12.2018**

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**İfade Özgürlüğü Derneği (İFÖD)** has been set up formally in August 2017 protect and foster the right to freedom of opinion and expression. The new Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.

[32] See http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf