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Communication from an NGO (İfade Özgürlüğü Derneği (İFÖD)) (18/06/2020) in the case of Kavala v. Turkey (Application No. 28749/18) (Mergen and Others group).

Information made available under 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.

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Réunion : 1377bis réunion (1-3 septembre 2020) (DH)

Communication d'une ONG (İfade Özgürlüğü Derneği (İFÖD)) (18/06/2020) relative à l'affaire Kavala c. Turquie (requête n° 28749/18) (groupe Mergen et autres) ***[anglais uniquement]***

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

RULE 9.2 COMMUNICATION

in the Case of Kavala v. Turkey (Application No. 28749/18)

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

18 June, 2020

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DGI Directorate General of Human Rights and Rule of Law
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18.06.2020

Rule 9.2 Communication from Freedom of Expression Association (İFÖD) (in the Case of Kavala v. Turkey (Application No. 28749/18)

1. The submission is prepared by **İfade Özgürlüğü Derneği** (İFÖD – Freedom of Expression Association), a non-profit and non-governmental organization aims to protect and foster the right to freedom of opinion and expression in Turkey. The aim of this submission is to update the Committee of Ministers concerning the persistent failure of Turkish authorities in full and effective implementation of both individual and general measures in the case of **Osman Kavala v. Turkey** with respect to developments after the European Court of Human Rights' decision of 10.12.2019. In **Part I**, this submission will summarise the developments concerning **individual measures** following the Court's judgment in the Kavala case. The submission maintains that continuation of Mr. Kavala's detention **does not rely on new evidence or acts** not covered by the judgment of the Court. Therefore, it is considered that the scope of the judgment of the ECtHR is not merely about the initial detention of Mr. Kavala but also covers Mr. Kavala's current detention which started on 20.03.2020 and is still continuing. In **Part II**, this submission will address **general measures** required by the Kavala judgment. In Kavala, the Court concluded that Mr. Kavala's detention had not relied on reasonable suspicion as stipulated under Article 5(1) of the Convention. This finding is mainly due to structural problems with regards to the independence of the judiciary in Turkey and the broad interpretation of articles 309-312 of the Turkish Criminal Code, which renders these provisions totally unforeseeable. It is considered that Mr. Kavala's case is not exceptional and this practice stems from the wording of the relevant articles and structural problems concerning rule of law in Turkey.

Part I: Individual Measures

Turkish Authorities failure to implement individual measures established in the case of Osman Kavala v. Turkey

2. In the words of the European Court in its Kavala decision, it is quite clear that no specific facts or information giving rise to a suspicion justifying the applicant's initial and continued pre-trial detention under articles 309 and 312 of the Turkish Criminal Code (TCC) (§143 and §§152-155). Moreover, a suspicion of attempting to overthrow the constitutional order by force and violence must be supported by tangible and verifiable facts or evidence given the nature of the offence in article 309 of the TCC (§ 155). However, there was no such evidence in the initial detention order or in the subsequent

detention orders extending Osman Kavala's detention. The Court basically perceived no link between the suspicions against the applicant and the elements presented as "evidence" in the investigation dossier leading to Kavala's detention. In fact, the Court regarded majority of the evidence against Kavala as irrelevant. Furthermore, the Court stated that the initial and continued pre-trial detention measures "were essentially based not only on facts that could not be reasonably considered as behaviour criminalized under domestic law, but also on facts which were largely related to the exercise of Convention rights" (§157).

3. Based on these conclusions, the Court held that there had been a violation of Article 5(1) and 5(3) of the European Convention of Human Rights. The Court stated that Mr. Kavala was arrested on 18.10.2017 and that the indictment in respect of some of the charges against him was filed only on 19.02.2019 and therefore for sixteen months after he had been placed in detention, Mr. Kavala was held without having been charged by the prosecutor's office. The Court concluded that "the time-period in question is extremely long and could not be described as "speedy" within the meaning of Article 5(4) of the Convention" (§194). The Court also established that extended detention of a human rights defender was pursued with the ulterior purpose of reducing him to silence and held that there had been a violation of Article 18 of the Convention (see §224, 226, 228 and §§230-232).
4. The European Court, issued an "individual measure" as the nature of the violation found is such as to leave no real choice as to the measures required to remedy it. Therefore, the Court considered that any continuation of Osman Kavala's pre-trial detention will entail a prolongation of the violation of Article 5(1) and of Article 18 in conjunction with Article 5(1), as well as a breach of the obligations on respondent States to abide by the Court's judgment in accordance with Article 46(1) of the Convention. The Court explicitly stated that "the Government must take every measure to put an end to the applicant's detention and to secure his immediate release" (§ 240).
5. The European Court issued its Kavala decision on 10.12.2019. However, the trial court, the Istanbul 30th Assize Court denied Osman Kavala's request for release in the subsequent two court hearings dated 24.12.2019 and 28.01.2020.
6. In the first hearing, the Assize Court held that the judgment had not been translated into Turkish and that the decision was not final. When the judgment was translated and submitted to the Assize Court before the second hearing held on 28.01.2020, the Court once again denied the release of Mr. Kavala on the grounds that the ECtHR's judgment was not final. In both occasions the Assize Court ignored the lawyers' request to apply Article 90 of the Turkish Constitution which states that "international agreements duly put into effect have the force of law." and "in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."
7. In less than three weeks, on 18.02.2020, the Istanbul 30th Assize Court reached its final verdict and acquitted all the defendants (decision no 2019/74 E. 2020/34 K.). Considering that no new evidence was submitted to the case dossier after the hearing held on 28.01.2020, it is difficult to understand what changed the position of the Assize Court in the final hearing.
8. As stated in the ECtHR's judgment, Mr. Kavala's initial detention was based on two charges; namely "attempting through force to overthrow the government" (**article 312 of**

the TCC) for his responsibility concerning Gezi events and "attempting through force and violence to overthrow the constitutional order" (**article 309 of the TCC**) for his role in coup attempt. However, Mr. Kavala was released from the latter charge on 11.10.2019 by the Prosecutor's ex officio decision on the basis that "the available evidence […] supports the view that pre-trial detention is no longer a proportionate measure."[1] No further measure had been taken since his initial detention under this charge until he was released on 11.10.2019.

9. On the same day of the acquittal decision and the release order, the Istanbul Chief Public Prosecutor's Office submitted a petition of appeal against the acquittal decision and issued an arrest warrant for Mr. Kavala with regards to the same investigation (2017/96115) which he was released on 11.10.2019. Considering that the reason for the release in October 2019 was that the pre-trial detention was not a proportionate measure on that date, it is not clear what did change between 11.10.2019 and 18.02.2020 to require Mr. Kavala's re-detention for the same charges. Subject to this new warrant, Mr. Kavala was arrested once again before he was released from the Silivri prison.
10. On 19.02.2020, President Erdoğan criticized the decision of the İstanbul 30th Assize Court publicly in a speech at a parliamentary group meeting of the Justice and Development Party. In his speech, the President blamed US philanthropist Soros for stirring up trouble behind the scenes to make some countries rise up. He also implied that Mr. Kavala was a branch of Soros in Turkey. The president also claimed that there was a maneuver to release Mr. Kavala, but this was prevented .[2]
11. Following Erdoğan's statements and Mr. Kavala's acquittal in the Gezi trial, as noted above he was once again detained by the Istanbul 8th Criminal Judgeship of Peace subject to the very same investigation he had been previously released on 11.10.2019.
12. Mr. Kavala's initial detention started on 01.11.2017 and he had been in detention for 710 days when he was released for the charges relating to his role in the attempted coup on 11.10.2019. Although the prosecutor filed an indictment for charges relating to organisation of Gezi events, Mr. Kavala was not indicted for his role in relation to the on-going investigation into his alleged role in the July 2016 failed coup attempt through his alleged connections with Henri J. Barkey, a US academic yet. Furthermore, no additional evidence concerning this accusation has been submitted to the case file since then.
13. In addition to all these, Osman Kavala's detention subject to article 309 was a matter addressed in the ECtHR's judgment (§ 154) and the Court held that the evidence for this charge did not constitute reasonable suspicion to detain him. The public prosecutor's office also held on 11.10.2019 that his detention was disproportionate. However, the public prosecutor's office changed its position with regards to this second investigation on the date Mr. Kavala was acquitted at the Gezi Trial. As there was no new evidence available in the investigation dossier, the **second detention order relied on the evidence**

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1 "Verdict reveals Kavala previously released in case where he was recently arrested," Bianet news website, 20 February, 2020: https://bianet.org/5/97/220317-verdict-reveals-kavala-previously-released-in-case-where-he-was-recently-arrested

2 Bianet, "**President Erdoğan on Gezi Trial: They Attempt to Acquit Him with a Maneuver",** http://bianet.org/english/politics/220275-president-erdogan-on-gezi-trial-they-attempt-to-acquit-him-with-a-maneuver, 19.02.2020; Deutsche Welle, "**Turkey investigates judges involved in Gezi Park trial acquittals**", https://www.dw.com/en/turkey-investigates-judges-involved-in-gezi-park-trial-acquittals/a-52435248, 19.02.2020; Duvar English, "**Erdoğan deems Kavala acquittal as 'an attempt,' slams Gezi protests**", https://www.duvarenglish.com/politics/2020/02/19/erdogan-deems-kavala-acquittal-as-an-attempt-slams-gezi-protests/, 19.02.2020.

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already examined by the ECtHR. Therefore, Kavala's several communications (surveillance and interception) with Henri J. Barkey, meetings with other human rights defenders at different regions of Turkey and high suspicion of escape due to the release order of the Istanbul 30th Assize Court were used as the justification for the new arrest warrant. Basically, all the evidence relied upon for Kavala's re-arrest was previously existing evidence used for Kavala's initial arrest which according to the European Court violated Articles 5(1), 5(4) and article 18 taken in conjunction with Article 5(1) of the Convention.

14. Mr. Kavala was kept in custody for 710 days for this charge without an indictment. According to article 102/4 of the Criminal Procedural Law, amended by Law No. 7188 on 24.10.2019, maximum detention duration in the investigation phase for suspects accused subject to articles 302-339 of TCC became two years. When Mr. Kavala was arrested again, subject to article 309 of TCC on 19.02.2020, there were only 20 days remained for the expiration of the maximum period of two years for his pre-trial detention brought subject to article 309. The Istanbul 3rd Criminal Judgeship of Peace ordered Mr. Kavala's release in respect of this offence on the ground that the maximum term of pre-trial detention had expired.
15. As it became clear that Mr. Kavala's detention subject to article 309 could not continue due to procedural restrictions, the Istanbul Public Prosecutor's Office decided to charge him with yet another new crime, this time with political or military espionage subject to article 328 of the TCC, but still relying on the same facts and evidence. Subject to article 328, "a person who secures information that, due to its nature, must be kept confidential for reasons relating to the security or domestic or foreign political interests of the State, for the purpose of political or military espionage, shall be sentenced to a penalty of imprisonment for a term of fifteen to twenty years."
16. Upon request of the public prosecutor, the Istanbul 10th Criminal Judgeship of Peace ordered Kavala's detention on 20.03.2020 subject to article 328 of the TCC. Although the detention order was based on a different provision of the TCC, the facts on which the order was based remained the same. In its communication to the Committee of Ministers dated 29.05.2020,[3] the government claimed that the Istanbul Public Prosecutor's Office collected and retrieved new evidence for this new investigation. The government, in this communication, submitted that the offence and the relevant evidence included in the present detention order in respect of the applicant differs from the offence and evidence in the detention order mentioned in the European Court's judgment. Therefore, according to the Government, the current detention of the applicant began with the detention order dated 09.03.2020 (see 19-31§ of the government's communication). However, unlike what the government claims, the reasoning for the Prosecutor's Office's request and Istanbul 10th Criminal Judgeship of Peace detention order were based on Kavala's several communications and meetings with Henri J. Barkey. As it can be seen in the ECtHR's decision, Mr. Kavala was already questioned in the first case about his alleged contacts with Henri J. Barkey, reports from base transceiver stations indicating that on 18.07.2016 the applicant's mobile telephone and that of Henri J. Barkey. had emitted signals from the same station (see § 36, 37).

[3] DH-DD(2020)477- 1377th meeting (June 2020) (DH) - Rule 8.2a Communication from the authorities (29/05/2020) in the case of Kavala v. Turkey (Application No. 28749/18) (Mergen and others group).

17. This evidence was already examined by the ECtHR and the Court concluded that **it did not constitute reasonable suspicion that the applicant had committed a crime**. Therefore, the new detention order should be deemed within the scope of the ECtHR ruling. However, if the government view is deemed acceptable, then the member states of the Council of Europe can keep applicants such as Osman Kavala indefinitely in prison merely by changing the legal basis for detention each time the legal basis is refuted regardless of ECtHR violation decisions as well as acquittal decisions by the local courts. There's no doubt that this would be against the spirit of the Convention. In its *Ilgar Mamadov v. Azerbaijan*[4] judgment the Court stated that the first judgment and the corresponding obligation of *restituto in integrum* initially obliged the State to lift or annul the charges criticised by the Court as abusive, and to end Mr. Mammadov's pre-trial detention. Failure of the responded state to annul charges but to convict him on the same grounds did not constitute *restituto in integrum*. Therefore, the fact that applicant was later detained based on a conviction (rather than detained in pre-denial detention) did not put him back in the position he would have been in, had the requirements of the Convention not been disregarded (§ 192). As in the *Ilgar Mamadov* judgment Kavala's detention under article 328 of the TCC does not affect the government's responsibility to release Mr. Kavala and drop all charges against him relying on the same set of events and evidence. The primary obligation of *restitutio in integrum* therefore still requires annulment of all charges based on the evidence already examined by the Court and Kavala's immediate release from prison.
18. The ECtHR held that the measures that were taken against Mr. Kavala were essentially based on facts which were largely related to the exercise of Convention rights (§ 157, 220). Therefore, Mr. Kavala's concerned acts are related to mere exercise of rights guaranteed by the Convention or normal activism on the part of a human-rights defender. As a result of this, in the operative part of the judgment, the Court ordered that Turkey had to take all the necessary measures to put an end to Mr. Kavala's detention and to secure his immediate release (§ 240). However, as observed and detailed in this submission, three sequential detention orders were organised in a way to prevent the release of Mr. Kavala.
19. Furthermore, as noted by the European Court, these orders coincided always with the speeches of the President of Turkey on the alleged involvement of Mr. Kavala on the various crimes that he allegedly committed. This constitutes the core argument of the judgment. In light of statements set out above, it is not possible to say that Turkish authorities acted in "good faith", in a manner compatible with the "conclusions and sprit" of the Court's judgment or in a way that would make practical and effective the protection of the Convention rights which the Court found to have been violated in its judgment (*Ilgar Mamadov v. Azerbaijan* § 217).
20. As these developments clearly demonstrate, the government failed to implement the ECtHR's judgment. On the contrary, in addition to the observations of the Court in the Kavala judgment, the government's new actions following the judgment prove that **the ulterior purpose to silence Mr. Kavala continues**. It follows that the only measure that can rectify the government's failure would be lifting of all the charges and the immediate release of Mr. Kavala.

[4] *Ilgar Mamadov v. Azerbaijan*, no: 15172/13, 29.05.2019.

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Part II: General Measures

21. The Court ruled in its Kavala decision that there had been a violation of Article 18 in conjunction with Article 5(1) of the Convention. While reaching this conclusion, the Court found that the charges against the applicant were **not based on a "reasonable suspicion"** within the meaning of Article 5(1)(c) of the Convention and national authorities **pursued an ulterior purpose**, namely that of reducing the applicant to silence as a human rights defender, while bringing charges against the applicant and taking measures against him (§§ 215-232).
22. The Court also emphasized that the measures taken against the applicant were essentially based on facts which were largely related to the exercise of Convention rights (§ 220). The Court took note of the submissions by the Commissioner for Human Rights and the third-party interveners including that of İFÖD, which considered that the applicant's detention is part of a wider campaign of repression of human-rights defenders in Turkey.
23. While reaching the conclusion that the detention of the applicant pursued an ulterior purpose, the Court attributed great importance to the correlation between the speeches given by the President of Turkey and the charges brought against the applicant (§ 229). The Court also referred to the indictment which mentioned activities of NGOs and their financing by legal means, without indicating in what way this was relevant to the accusations it was bringing. The Court stated that persecution of the applicant as a human rights defender would have affected not merely the applicant alone, or human-rights defenders and NGO activists, but the very essence of democracy as a means of organising society, in which individual freedom may only be limited in the general interest, that is, in the name of a "higher freedom"(§ 231).
24. These findings of the Court imply that the prosecution service acted under the influence of the executive when drawing up accusations against the applicant. They also imply that the judicial authorities, especially the criminal peace judgeships, are influenced by the executive when dealing with criminal cases. It should also be noted that the provisions of the TCC seems to be prone to broad interpretations to allow such abuse by judicial authorities.
25. İFÖD is of the opinion that **these problems are not specific to the Kavala case** but they are systemic problems effecting also others. Therefore, in order to execute the ECtHR judgment faithfully and to prevent similar violations in the future, general measures such as clarification of the relevant provisions of the TCC and a comprehensive constitutional reform in order to guarantee the independence and impartiality of the prosecution service and the judiciary should be recommended to the Turkish authorities. The Committee of Ministers should therefore urge the government of Turkey to adopt legislative amendments to clarify Articles 309 and 312 of the TCC and also to adopt constitutional amendments to secure the independence and impartiality of prosecution service and the judiciary to stop and prevent the repetition of similar violations.
26. The Committee of Ministers considered similar general measures in respect of pending supervision of cases to avoid violations of Article 18 in conjunction with Article 5. In the cases of **Tymoshenko**[5] and **Lutsenko**[6] the Committee considered reform of the prosecution service in Ukraine and the constitutional reform aimed at strengthening the

[5] *Tymoshenko v. Ukraine*, no. 49872/11, 30.04.2013
[6] *Lutsenko v. Ukraine*, no. 6492/11, 03.07.2012

independence of the judiciary as relevant general measures. These measures included the reform of the judiciary to strengthen the judiciary against political or other unjustified influence[7] and the reform of the prosecution service to strengthen independence of the General Prosecutor's Office. Amendments made to the Constitution in 2016 abolished the wide general supervisory authority of the prosecutors and the adoption on 14 October 2014 of a new Law of Ukraine "On the Prosecutor's Office aimed to reduce abuse and corruption.

27. In the case of **Gusinskiy**,[8] the Committee considered that the violation was intricately linked to the vagueness of the Russian law at the time and examined whether legislative amendments eliminated the impugned vagueness. Article 90 of the Code of Criminal Procedure (CCP) 1960, which permitted unclear grounds for detention on remand prior to the decision to formally bring charges, was lifted by the CCP of 2001 which now requires specific grounds for such detention. Moreover, effective judicial review of such detention has been introduced. The Committee welcomed the efforts made by the Russian authorities aimed at aligning Russian legislation and practice with the Convention requirements under Article 5 of the Convention. The Committee decided at 1362nd CM-DH meeting[9] that as to the case of Gusinskiy, the general measures adopted mean that the type of abuse of power that led to the Article 18 violation would be proscribed by a clear legislative framework and subject to effective judicial review and therefore, this case could be closed.
28. İFÖD observes that the Turkish authorities have not proposed any general measure in their recent Rule 8.2a communication dated 29.05.2020 in the case of Kavala v. Turkey.[10] İFÖD would therefore like to bring to the attention of the Committee that unjustified detention and prosecution of Osman Kavala for political purposes was not specific to the Kavala case but imply structural problems in Turkey. **Firstly**, judicial independence and impartiality has been deteriorated significantly in Turkey and political influence over the judicial process became apparent in recent years. **Secondly**, criminal law is systematically interpreted and applied broadly so as to crack down dissent. Combination of these two factors resulted in the deterioration of rule of law in Turkey. These issues will be assessed further below.

Independence of the Judiciary

29. The European Court attributed a special importance to the correlation between the speeches of the President and the tone of the charges against the applicant when reaching the conclusion that measures taken against the applicant pursued an ulterior purpose, namely to silence him as a human rights defender and civil society activist. Such a correlation implies that prosecution service and judicial authorities are influenced by the executive. Recent developments relating to the situation of Mr. Kavala affirms this executive impact on the judicial procedures.
30. As explained above Mr. Kavala was acquitted from the charges related to Gezi events (attempting to overthrow the Government - article 312 of the TCC) and he was due to be released on 18.02.2020 when he was taken into custody by the order of Istanbul Chief

7 See for details DH-DD(2017) 82 setting out progress made.
8 *Gusinskiy v. Russia*, no. 70276/01, 18.05.2004
9 03-05 December 2019.
10 Mergen and others group, DH-DD(2020)477, 29.05.2020.

Public Prosecutor's Office within the scope of an on-going investigation for the offence of "attempting to overthrow the constitutional order through force and violence" (article 309(1) of the TCC) due to his alleged acts related to the failed coup attempt on 15.07.2016, even though he was released from this charge in 2019 by an order of the same Istanbul Chief Public Prosecutor's Office. The European Court had already examined the evidence relating to these charges and determined that accusations were based on insufficient evidence. Regardless of the considerations of the European Court, Mr. Kavala was detained by an order of the Istanbul 8th Criminal Judgeship of Peace on 19.02.2020. Immediately prior to Mr. Kavala's re-detention, the President of Turkey made a speech targeting him once again. Some international observers[11] argued that political whim of the President influenced the judicial process related to Mr. Kavala. On the same day, the Council of Judges and Prosecutors announced that an investigation was commenced into the panel of judges which acquitted Mr. Kavala and other suspects in the Gezi trial.

31. As summarized in the part concerning individual measures Mr. Kavala **has been in continuous detention subject to three different investigations based on the same evidence**. This sequence of events is not surprising for those who are familiar with Turkish judicial practice in recent years as there has been a constant effort of the executive to take control of the judiciary. Within the last ten years, two major constitutional amendments and numerous legislative amendments have been adopted in order to redesign the structure and functioning of the Judicial Council, the Constitutional Court and other top appeal courts including the Court of Cassation and the Council of State.
32. The constitutional amendments in 2010 and 2017 restructured the judicial council (Council of Judges and Prosecutors -HSK) and changed its functioning which effectively put the Council under control of the executive (the President) and 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. The amendments of 2017 have been severely criticized by international observers because they imperilled judicial independence.[12]
33. Between 2011 and 2017, the structure and functioning as well as the number of members of the Court of Cassation and the Council of State completely changed four times by various laws adopted by the parliament.[13] It can clearly be seen that no excuse can justify

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[11] Human Rights Watch's executive director Kenneth Roth argued that Kavala's re-arrest in these circumstances showed how "Turkey's criminal justice system is politically manipulated, with detention and prosecutions pursued at the political whim of the president." Human Rights Watch, "Turkey: Prominent Civic Leader Rearrested after Acquittal," 20 February 2010: https://www.hrw.org/news/2020/02/20/turkey-prominent-civic-leader-rearrested-after-acquittal.

[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; 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; Country Report of the Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, Following Her Visit to Turkey from 1 to 5 July 2019, 19 February 2020, CommDH(2020)1, para. 14.

[13] In 2011 by the Law no 6110, in 2014 by the Law no 6572, in 2016 by the Law no 6723, and in 2017 by the Decree Law no 696. For details of these amendments and their purpose see Third Party Intervention by

four structural reform in the form and functioning of the high courts within six years apart from the ruling party's eager to take control of these courts. Dismissal of high number of judges and prosecutors (more than 4.250) and recruitment of more than 10.000 new ones after the failed coup attempt completely changed the structure of the whole judiciary and as noted by the Council of Europe's Commissioner for Human Rights this situation created "*an atmosphere of fear among the remaining judges and prosecutors.*"[14] The European Commission also stressed that "[t]*hese dismissals had a chilling effect on the judiciary as a whole and risk widespread self-censorship among judges and prosecutors. No measures were taken to restore legal guarantees ensuring the independence of the judiciary.*"[15] Nevertheless, Turkish authorities extended the emergency powers underpinning these dismissals for a further three years by adopting Law No. 7145 in July 2018 and HSK dismissed at least 23 judges and prosecutors pursuant to this new law after the state of emergency came to an end.[16] This means that one of the most basic guarantees of judicial independence is effectively suspended until at least July 2021.

34. Another factor which intensifies the political influence and imperil judicial independence is the recruitment system of judges and prosecutors. Judge and prosecutor candidates are elected by a board majority of members composed of Ministry of Justice bureaucrats. More than 10.000 new judges and prosecutors had been recruited after the declaration of the state of emergency. This means that more than two thirds of the existing judges and prosecutors are inexperienced and affiliated with the ruling party. The Council of Europe's Commissioner for Human Rights raised her concern by stating that "*consistent reports that loyalty to the ruling coalition appears to have become a key criterion for selection in this context. It is also noteworthy that induction ceremonies for new judges and prosecutors and the opening of the judicial year are now held in the Presidential Palace, which reinforces the public's perception of politicisation of the judiciary and of the control exerted on it by the executive.*"[17]

35. Needless to say, there are numerous independent monitoring reports that **show how the Turkish judiciary has been under the political influence in recent years**[18].

İFÖD in the Kavala case, https://ifade.org.tr/reports/IFOD_ECtHR_Osman_Kavala_Third_Party_Intervention.pdf.

14 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

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

16 See https://www.resmigazete.gov.tr/eskiler/2019/10/20191015-1.pdf, https://www.resmigazete.gov.tr/eskiler/2019/01/20190111-1.pdf

17 Country Report of the Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, Following Her Visit to Turkey from 1 to 5 July 2019, 19 February 2020, CommDH(2020)1, para. 23.

18 Among many, these can be mentioned: 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; 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 Turkey Progress Report, Doc. No. SWD(2018) 153 final, 17 April 2018, p. 6; the World Justice Project's the Rule of Law Index 2020, in which Turkey ranks 107 among 128 countries with the lowest score in sub-category of criminal system is free of improper government influence which is 0.13 out of 1 (global rank 124/128) https://www.worldjusticeproject.org/rule-of-law-index/country/2020/Turkey/Criminal%20Justice/; two different reports of the International Commission of Jurists (ICJ), "The Judicial System in Peril" http://www.ipcs.org/article/military-and-defence/post-coup-turkey-implications-for-judicial-independence-5103.html and "Justice Suspended: Access to Justice and State of Emergency in Turkey"

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Social Media Trolling and Smear Campaigns

36. A significant instrument of executive to influence and direct the judicial process is to resort to social media trolls and smear campaigns in the pro-government media against critical voices. Firstly, it has come to light recently that Twitter detected a network of 7.340 accounts which was used to amplify political narratives favourable to the AKP and demonstrated strong support for President Erdoğan. Technical signals point to the network being associated with the youth wing of the party and a centralized network that maintained a significant number of compromised accounts. A report assessing these accounts by the Stanford Internet Observatory reported that since 2013, AKP recruited more than 6.000 people to shape public opinion and counter government critics on social media platforms.[19] The group, called AK trolls, has systematically harassed journalists, politicians, and government critics, and compromised their social media accounts.[20]
37. The Council of Europe's Commissioner for Human Rights also raised her concern that smear campaigns may have a strong influence on the attitude of prosecutors and the outcome of legal proceedings. The Commissioner also pointed out that confidential information from case files appears to be deliberately leaked to the pro-government media, even where the accused have no access to their file themselves yet.[21]
38. A recent example clearly demonstrates how social media trolls and pro-government media are resorted by the executive to distort judicial process. In a case related to accusations of membership to or aiding terrorist organisation (FETO) including 29 journalists among whom Murat Aksoy and Atilla Taş as defendants, İstanbul 25th Assize Court decided to release 21 detained defendants on 31.03.2017. Shortly after the release order, lots of tweets were posted calling the release order to be withdrawn immediately and calling that Ministry of Justice and High Council of Judges and Prosecutors to take action against the court panel (as well as the public prosecutor) who decided to release some of the defendants.
39. Following the smear campaign, even before the release order had been executed, a new and previously non-existent criminal investigation was initiated by the Istanbul Public Prosecutor's Office based on the same evidence the to be released journalists were charged with, but this time involving the offences of attempting to overthrow the constitutional order through force and violence (articles 309 of the TCC) and attempting to overthrow the Government (article 312 of the TCC). As in the Kavala case, the reason

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https://www.icj.org/wp-content/uploads/2018/07/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf; The Institute of Peace and Conflict Studies has evaluated the dismissals in the judiciary after the failed coup attempt in its report; and finally, GRECO's fourth compliance report 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).

19 Stanford Internet Observatory, Political Retweet Rings and Compromised Accounts: A Twitter Influence Operation Linked to the Youth Wing of Turkey's Ruling Party, 11.06.2020, at https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/20200611_turkey_report.pdf

20 See further The Guardian, Turkish journalists face abuse and threats online as trolls step up attacks, 01.11.2016, at https://www.theguardian.com/world/2016/nov/01/turkish-journalists-face-abuse-threats-online-trolls-attacks

21 Country Report of the Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, Following Her Visit to Turkey from 1 to 5 July 2019, 19 February 2020, Comm DH (2020)1, para. 29

behind this new investigation was to stop the release of the defendants including Atilla Taş and Murat Aksoy. They were therefore never released, detained at the Silivri prison, arrested again and faced new charges under a new and additional indictment. They were all acquitted on the articles 309 and 312 charges almost over a year later.

40. Moreover, on 03.04.2017, the HYSK suspended all the three Judges of the Istanbul 25th Assize Court as well as the trial prosecutor for 3 months pending further investigations. HSYK initiated an investigation into all four of them and the HYSK explained the suspension and investigation by stating that "the release decision is intentional, contrary to the law, and don't comply with the facts."
41. On 14.05.2020, Abdurrahman Uzun who is known to be a pro government troll and who is paid to create content in favour of the government clearly explained on a TV broadcast the background of the Twitter based smear campaign with such hashtags as #kriptohakimler (#criptojudges) and #vatanınısevendefansagelsin (#whoeverlovestheircountrycometodefence) on the night of 31.03.2017 which triggered a new non-existent investigation which led to the re-arrest of Atilla Taş and other journalists.[22]
42. Although these statements were widely covered on the media and social media, neither the Presidency or the Ministry of Justice nor the Council of Judges and Prosecutors have made any correction or explanation. These statements clearly demonstrate how the executive manipulated the judicial process resorting to social media trolls and how judges and prosecutors were vulnerable to interference of the executive. These kind of instances also show that Council of Judges and Prosecutors, Chief Prosecutors' Office and the judges of the criminal courts are easily influenced and controlled by the executive.
43. The Council of Europe's Commissioner for Human Rights' observations also affirms political influence over the judiciary. The Commissioner noted that "*numerous signs that the Turkish judiciary is influenced by the political conjuncture. In addition to many examples illustrating this problem in the context of detentions, her attention was drawn to a number of criminal cases which stand out in that they specifically target opposition politicians, such as members of parliament and elected mayors of HDP, or the President of the Istanbul branch of CHP, and which exhibit clear signs of political motives in their timing, co-ordination in prosecutorial actions, affectation to specific judges, as well as defiance of legal precedents"*[23] concluding that "*judiciary appears to be giving increasingly uniform and partisan judgments strongly implying a political motivation*".[24]

Broad and extensive interpretation of Articles 309 and 312 of the TCC

44. A systemic problem in Turkish legal system which led to the ECtHR's finding that Article 18 of the Convention was violated in the Kavala case is extensive and overbroad interpretation of criminal provisions by judicial authorities which destroys the foreseeability and legality and allows to penalize conduct protected under the ECHR. Such an extensive application of criminal provisions are the result of a combination of vagueness of the wordings of the provisions and the attitude of judicial organs to give

22 See among others Tele1, "Ak trol Abdurrahman Uzun'dan tarihi 'yargı' itirafı!" 15.05.2020, https://tele1.com.tr/ak-trol-uzundan-tarihi-yargi-itirafi-tahliyelere-boyle-mudahale-etmisler-164458/

23 Country Report of the Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, Following Her Visit to Turkey from 1 to 5 July 2019, 19 February 2020, CommDH (2020) 1, para. 30.

24 *Ibid*, para.32

precedence to the protection of perceived interests of the state over individuals' human rights. The erosion of the independence of the judiciary in recent years also exacerbates existing tendency to punish persons who are perceived to be against the government, because of the climate of fear boosting conformism within the Turkish judiciary.

45. Especially after the coup attempt of 15.7.2016, articles 309 and 312 of the TCC have been more frequently resorted by judicial authorities in order to harass journalists, lawyers, human rights defenders, civil society activists, opposition politicians and other critics of the government without depending on any concrete evidence showing that accused persons could have committed impugned crimes. Although the offences of attempting to overthrow constitutional order or government by violence and force are serious crimes which requires aggravated life imprisonment, so many people have been accused of such offences by public prosecutors without depending on any concrete evidence and judicial organs ordered detention of accused people solely depending on the seriousness of the crime charged. In most cases, accusations have been changed constantly by the prosecution authorities or judicial organs without collecting new evidence.
46. As explained above, while Mr. Kavala was charged with the offences stipulated in articles 309 and 312 of the TCC, after the files were separated and he was acquitted from the charges of articles 312 and 309 subsequently, this time he was accused of espionage subject to article 328 of the TCC based on the very same evidence which appeared in three separate investigation/prosecution dossiers.
47. Moreover, **there are striking examples showing how different provisions of TCC are used by judicial organs interchangeably to harass critical voices**. For example, journalist and singer Atilla Taş was arrested and detained in the context of an investigation against the media structure of alleged FETÖ. Firstly, he was accused of membership to terrorist organisation (FETÖ - **article 314** of the TCC) based on his Twitter messages and newspaper articles he authored critical of the policies of the ruling party and its leader and published several years before the coup attempt. He was then accused of aiding a terrorist organisation in de indictment (**article 220/7** of the TCC). As explained above, after the trial court ordered his release on 31.03.2017, a new investigation was commenced against him involving **articles 309 and 312** of the TCC and he was detained based on these charges. He was acquitted from the accusations related to articles 309 and 312 of the TCC but convicted and sentenced to imprisonment from the charges related to aiding a terrorist organisation. However, the Court of Cassation quashed the verdict of local court upon appeal stating that he should be charged with defaming the president of Turkey (**article 299** of the TCC) and with denigrating state organs (**article 301** of the TCC) with regards to some tweets and articles he authored which were all in the initial criminal investigation dossier. In fact, no new evidence was generated against Atilla Taş while his trial by ordeal changed from articles 314 to 220/7, 309 and 312 to 299 and 301 of the TCC. The case is still pending before the local court. This example clearly shows that criminal provisions are interpreted so arbitrarily by the judicial organs that legal certainty and foreseeability vanished in detriment of the defendant. In the same case, 12 other journalists including Murat Aksoy were also accused of attempting to overthrow constitutional order and the government by violence and force (articles 309 and 312 of the TCC) because of journalistic activities.
48. Similarly, journalists Ahmet Hüsrev Altan, Mehmet Altan and Nazlı Ilıcak were also accused of attempting to overthrown constitutional order and the government by violence

and force (articles 309 and 312 of the TCC) because of journalism related activities. They were all detained in remand and convicted and sentenced to life imprisonment by local court from these charges. However, the Court of Cassation quashed the verdict of local court, and in the retrial Mehmet Altan was acquitted Ahmet Altan and Nazlı Ilıcak were convicted for aiding a terrorist organisation and sentenced to ten years and six months, and eight years nine months imprisonments respectively. The case is pending before the Court of Cassation and Ahmet Altan is in detention even though he was briefly released.

49. Likewise, ten journalists including Ali Bulaç, Ahmet Turan Alkan, İhsan Duran Dağı, Lalezar Sarıibrahimoğlu, Mehmet Özdemir, Mustafa Ünal, Mümtazer Türköne, Nuriye Ural, Orhan Kemal Cengiz and Şahin Alpay were also accused of attempting to overthrown constitutional order and the government by violence and force (articles 309 and 312 of the TCC) because of journalism related activities. Most of them were also detained in remand. At the end all of them were acquitted from those charges but some of them were convicted for being member of a terrorist organisation. Within this context, it is important to note that, lawyer, journalist and human rights defender Orhan Kemal Cengiz was accused of attempting to overthrown constitutional order and the government by violence and force (articles 309 and 312 of the TCC) and the public prosecutor demanded for him to be sentenced to three life imprisonment sentences just because he represented the Zaman newspaper as a lawyer before the Constitutional Court although he was not a writer of the Zaman newspaper.
50. There are numerous other cases related to articles 309 and 312 of the TCC for which people were detained in remand without depending on any concrete evidence indicating that those people actually resorted to violence and force. It should be noted that Ministry of Justice does no longer provide detailed statistics about investigations and prosecutions conducted pursuant to articles 309 and 312 of the TCC Therefore, it is not possible to present accurate numbers for articles 309 and 312 for further assessment. These examples show that a clarification in the wording of articles 309 and 312 of the Turkish Criminal Code is needed to prevent accusation of people from these articles since they exercise their rights protected by the Convention. Other measures should also be taken in order to prevent extensive interpretation of criminal provisions.
51. The Council of Europe's Commissioner for Human Rights made a worrying general observation on the state of criminal justice in Turkey. She concluded that "*while many of the long-standing concerns regarding the application of criminal law provisions continue to apply, the situation significantly deteriorated in recent years. ...Disregard within the judiciary of the most basic principles of law necessary to have a system of rule of law, such as presumption of innocence, non-retroactivity of offences, not being judged for the same facts twice, as well as legal certainty and foreseeability of criminal acts, has reached such a level that it* ***has become virtually impossible to assess objectively and in good faith whether a legitimate act of dissent or criticism of political authority will be re-interpreted as criminal activity by Turkish prosecutors and courts***."[25]
52. This observation of the Commissioner vindicates that a substantial judicial reform is needed in Turkey in order to prevent reoccurrence of similar violations found by the Court in the Kavala Case.

İFÖD's Recommendations with Regards to Individual Measures

[25] *Ibid*, para. 50

In order to implement the European Court's findings of violations in relation to Article 5 and 18 of the Convention, İFÖD kindly invites the Committee of Ministers to request from Turkey to address following recommendations:

I. Call for the immediate release of Osman Kavala as required by the ECtHR judgment, emphasizing that no new evidence has been submitted by the government to justify the continuation of Mr. Kavala's detention under different charges, that all the evidence shown by the government has already been addressed in its judgment,
II. Request the Government to drop all charges under which he has been investigated and detained as required by the ECtHR's finding relating to Article 18 of the Convention.

İFÖD's Recommendations with Regards to General Measures

In order to implement the European Court's findings of violations in relation to Article 5 and 18 of the Convention, İFÖD kindly invites the Committee of Ministers to request from Turkey to address following recommendations in its action plan:

I. Amend the Constitution to reform once again the Council of Judges and Prosecutors to ensure that it becomes an independent and pluralistic body which is accountable to the Parliament and whose decisions are open to full judicial review,
II. Take measures to uphold the independence and impartiality of the judiciary by introducing constitutional guarantees of tenure and introducing an independent disciplinary board, revoke the emergency powers enabling the continuing dismissal of judges and prosecutors (provided for in Law No. 7145).
III. Take measures to reorganize the prosecution service independent of the executive,
IV. Take measures to guarantee a meritocratic and non-discriminatory recruitment system in the judiciary,
V. Take measures to establish an independent and expert judicial academy,
VI. Take measures to prevent direct and indirect executive interference with judicial process,
VII. To amend broad and vaguely worded articles of the Turkish Criminal Code and Anti-Terror Law (Law No. 3713) to clarify concepts such as "attempted overthrow of the government by force and violence," "attempted overthrow of the constitutional order" and other offenses categorized as "crimes against the state" to meet the requirements legality and foreseeability,
VIII. Ensure that criminal law is applied in a manner respecting the basic principles of law such as presumption of innocence, non-retroactivity of offences, not being judged for the same facts twice, as well as legal certainty and foreseeability of criminal acts,
IX. Ensure that enjoyment of Convention rights such as freedoms of expression, association and assembly not being arbitrarily used as grounds for prosecutions and lengthy and punitive pretrial detention,
X. Finally, the Committee of Ministers should ask the government to provide detailed statistical data (not just percentages) involving articles 309 and 312 of the TCC with regards to criminal investigations, criminal prosecutions and the outcome of such prosecutions (guilty, not guilty, suspended sentences) as well as detailed information about the length of criminal sentences.

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