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Meeting: 1377bis meeting (1-3 September 2020) (DH)

Reply from the Turkish authorities (16/07/2020) to a communication of Ifade Özgürlüğü Derneği (IFOD) in the case of Kavala v. Turkey (Application No. 28749/18)

Information made available under Rule 9.6 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)

Réponse des autorités turques (16/07/2020) suite à une communication de Ifade Özgürlüğü Derneği (IFOD) relative à l'affaire Kavala c. Turquie (requête n° 28749/18)

[anglais uniquement]

Informations mises à disposition en vertu de la Règle 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

DGI

16 JUIL. 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Ankara, July 2020

**THE TURKISH GOVERNMENT'S SUBMISSION
IN RESPONSE TO THE RULE 9.2 COMMUNICATION OF
İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)
Kavala v. Turkey (no. 28749/18)**

1. The Turkish authorities would like to make the following explanations in response to the submission of *İfade Özgürlüğü Derneği* (“İFÖD”) with respect to the case of *Kavala v. Turkey* (no. 28749/18).

2. At the outset, the Communication of the Turkish Government to the Committee of Ministers (“CM”) submitted on 29 May 2020 in respect of the *Kavala* case comprises Turkey’s actions regarding the issues raised in the communication of *İFÖD*. The Turkish authorities would like to reiterate their submissions in this regard.

3. In this submission, the authorities would like to clarify the following issues raised in the communication of *İFÖD*.

A. Legal Grounds for the Applicant Mehmet Osman Kavala’s Current Detention

4. On 29 May 2020 the detailed information about the decisions to place the applicant, Mehmet Osman Kavala, into custody and detention (see §§ 12-18 of the Communication to the CM dated 29 May 2020), as well as the current situation of his detention (see §§ 19-40 of the Communication to the CM dated 29 May 2020) were submitted in the Communication to the CM. For this reason, the Turkish authorities reiterate these explanations as regards the allegations raised in the communication sent by *İFÖD*.

5. Under the investigation (no. 2017/96115) initiated by the Istanbul Chief Public Prosecutor’s Office, on 1 November 2017 the applicant was placed in pre-trial detention by the Istanbul 1st Magistrate Judgeship in Criminal Matters pursuant to Article 100 § 3 of the Code of Criminal Procedure (“CCP”) for “*attempting to overthrow the constitutional order of the Republic of Turkey through force and violence*” (Article 309 of the Turkish Criminal Code) as regards his role in the July 15 coup attempt and for “*attempting, by the use of force and violence, to abolish the government of the Republic of Turkey or to prevent it, in part or in full, from fulfilling its duties*” (Article 312 of the Turkish Criminal Code) as regards his role in the Gezi events (for detailed information please see §§ 5-6 of the Communication to the CM dated 29 May 2020). As stated in the Communication to the CM dated 29 May 2020,

on 5 February 2019 the Istanbul Chief Public Prosecutor's Office decided to disjoin the investigations on the ground that there is no *de jure* and *de facto* connection between the imputed offences with a view to conduct the investigation in a more effective way. Accordingly, it was decided to disjoin the investigation (no. 2017/96115) into the accusation under Article 309 of the Turkish Criminal Code (*attempting to overthrow the constitutional order*) as regards the applicant's role in the July 15 coup attempt from the investigation (no. 2018/210299) into the accusation under Article 312 of the Turkish Criminal Code (*attempting to overthrow the Government*) as regards the applicant's role in the Gezi events.

6. The investigation conducted on the file no. 2018/210299 due to the applicant's acts as to the Gezi events was completed and a bill of indictment was drafted by the Istanbul Chief Public Prosecutor's Office. On 4 March 2019, the Istanbul 30th Assize Court accepted the indictment and, accordingly the criminal proceedings were initiated (for detailed information please see § 8 of the Communication to the CM dated 29 May 2020).

7. The Istanbul 30th Assize Court conducted the trial in respect of the applicant, and on 18 February 2020, the Assize Court ruled on the acquittal and release of the applicant. The appeal against this decision is pending before the Istanbul Regional Court of Appeal (for detailed information please see §§ 9-10 of the Communication to the CM dated 29 May 2020).

8. By the Istanbul 30th Assize Court's decision ordering the applicant's acquittal, the detention order which is the subject matter of the Court's judgment finding violation was lifted on 18 February 2020, and the applicant was released in this respect.

9. On the other hand, the applicant was taken under police custody on 18 February 2020 on account of the on-going investigation with respect to the offence of "*attempting to overthrow the constitutional order of the Republic of Turkey through force and violence*" (Article 309 § 1 of the TCC) due to his acts related to the coup attempt on 15 July 2016. Upon the request of the Istanbul Chief Public Prosecutor's Office, on 19 February 2020 the Istanbul 8th Magistrate Judgeship ordered the applicant's detention (for detailed information please see §§ 12-13 of the Communication to the CM dated 29 May 2020).

10. On 20 March 2020 the Istanbul 3th Magistrate Judgeship ordered the applicant's release in respect of the said offence on the ground that the term of pre-trial detention at the investigation stage shall not exceed two years according to the provision introduced by the

Law no. 7188¹ on Article 102 § 4 of the CCP (for detailed information please see §§ 15-16 of the Communication to the CM dated 29 May 2020).

11. Consequently, the applicant's detention for the offence of *attempting to overthrow the Government* in the detention order dated 1 November 2017 was ended on 18 February 2020, and his detention started on 19 February 2020 for the offence of *attempting to overthrow the constitutional order* was ended on 20 March 2020.

12. The Istanbul Chief Public Prosecutor's Office detected and collected new evidence during the later stages of the on-going investigation as regards the July 15 coup attempt. The Istanbul Chief Public Prosecutor's Office found evidence indicating that the applicant had committed the offence of *obtaining information which is classified on the grounds of national security concerns or foreign political interests with the intention of spying on political and military affairs* and on 9 March 2020 the Chief Public Prosecutor's Office requested the applicant's detention. On the same date (9 March 2020), the Istanbul 10th Magistrate Judgeship ordered the detention of the applicant (for detailed information please see §§ 19-24 of the Communication to the CM dated 29 May 2020).

13. The Government would also like to reiterate that on 4 May 2020 the applicant's lawyer lodged an individual application with the Constitutional Court upon the rejection of the objection filed against the detention order. The individual application in question is pending before the Constitutional Court (for detailed information please see §§ 36-38 of the Communication to the CM dated 29 May 2020).

14. The applicant is currently held in detention for the offence of "**Political or Military Espionage**" (Article 328 § 1 of the TCC). As a result, the Government would like to note that the process initiated on 9 March 2020 against the applicant due to another offence is not related to the violations found in the judgment of the Court dated 10 December 2019. Therefore, the Government would like to draw the Committee of Ministers' attention to the fact that the process in question does not fall within the scope of the execution process of the Court's judgment.

15. As regards the allegation of *İFÖD* that new facts have not been collected in the investigation being conducted against the applicant, the Turkish authorities note that the investigation against the applicant is still on-going. Since the investigation against the

¹ Promulgated in the Official Gazette on 24 October 2019.

applicant is on-going, the final situation concerning the evidence collected within the scope of the investigation file will become clearer in the future. Therefore, *İFÖD*'s allegation that no new facts have been collected in the investigation against the applicant is considered to be speculative.

16. The judicial authorities will reach a conclusion pursuant to the Constitution and the relevant provisions of law on the basis of evidence obtained in the course of the on-going investigation against the applicant. Objections, legal remedies, an individual application to the Constitutional Court and an application to the ECtHR can be resorted to against conclusions to be reached by the judicial authorities.

17. *İFÖD* asserts as if the Court described the applicant's trial as persecution (see § 23 of the submission of *İFÖD*). Nonetheless, in § 231 of its judgment dated 10 December 2019, the Court merely cited the applicant's own expression with the words "*Indeed, at the core of the applicant's Article 18 complaint is his alleged persecution, ...*". Thus, this use of wording by *İFÖD* seems misleading.

18. *İFÖD* also alleges that the authorities have not proposed any general measures in the Communication dated 29 May 2020 (see § 28 of the submission of *İFÖD*). The Communication of the authorities to the CM dated 29 May 2020 has been submitted at the request of the Department for the Execution of Judgments of the European Court of Human Rights in respect of the *Kavala* case. The authorities responded specific questions raised by the Department for the Execution. Thus, the Communication in question is not an action plan or an action report. However, the authorities would like to note that it will continue to inform the CM about the current developments in relation to general and individual measures within the framework of the execution of the *Kavala v. Turkey* judgment.

19. With respect to *İFÖD*'s statement (see § 30 of the submission of *İFÖD*) on the preliminary examination initiated by the Council of Judges and Prosecutors ("CJP"), the Turkish authorities would like to note that independence and impartiality of courts is one of the fundamental principles of the legal system and it is guaranteed by the Constitution. One of the indispensable requirements of an independent and impartial judiciary is to make sure that members of the judiciary are not under any influence. In the present case, the CJP, an independent body, has given permission for a preliminary examination in order to determine if there is sufficient evidence to launch a disciplinary investigation against the judges concerned.

20. The Government would like to reiterate that the investigation and prosecution proceedings in the Republic of Turkey, one of the founding members of the Council of Europe, are conducted by independent and impartial public prosecutors and courts.

B. As to Other Allegations of İFÖD

21. In the communication, İFÖD speculated some criminal proceedings and other judgments of the Court in respect of other member States that are not related to the *Kavala* judgment.

22. The Turkish authorities would like to state that the execution process of the *Kavala* case concerns only the Court's *Kavala* judgment. For this reason, the authorities would not like to comment on the proceedings which are not related to the *Kavala* case.

23. İFÖD alleges that dismissal of a high number of judges and prosecutors changed the structure of the whole judiciary and affected adversely the judicial independence. The said measure was applied to prevent these judges and prosecutors, who are strongly suspected to have affiliation/connection with the FETÖ terrorist organisation and against whom the evidence had been established, from disrupting the constitutional order. Suspension from the profession is a measure that requires to be implemented as soon as possible by its very nature.

24. As regards the allegations of İFÖD concerning the independence and impartiality of the Turkish judiciary, as set out under Article 138 of the Constitution, judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming to the law. Furthermore, no organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.

25. Duties and competences of the CJP are defined in the Constitution. According to Article 159 of the Constitution, the CJP shall be established and shall exercise its functions in accordance with the principles of the independence of courts and the security of tenure of judges. Constitutional amendments adopted in the referendum of 16 April 2017 did not affect its independence. The changes concern the number of the CJP members, the method of election and work of the CJP.

26. The Turkish legal system embraces the universal values of human rights and the rule of law. Accordingly, the CJP published the Declaration of Judicial Ethics in Turkey on 6 March 2019. Emphasising the importance of respect for human dignity, the Declaration

defines the code of conduct for judges and prosecutors. The Declaration draws attention both to the importance of independence and impartiality and to the importance of being regarded as such. The CJP monitors and ensures that the code of conduct is respected by judges and prosecutors. The CJP is the guarantor that judges and prosecutors can deliver judgments impartially and independently according to their conscience.

27. For this reason, the speculative allegations of *İFÖD* that are not related to the *Kavala* case are unacceptable.

CONCLUSION

28. The Turkish authorities kindly invite the Committee of Ministers to take into consideration the above-mentioned explanations within the scope of the execution of the *Kavala* case.

29. Furthermore, the Turkish authorities would not like to speculate on the claims raised in the communication that are not subject to any current application or judgment finding a violation.