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Call for the immediate release of Osman Kavala

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Ms Petra BAYR, Austria, Socialists, Democrats and Greens Group

Summary

Osman Kavala, a human rights defender and philanthropist, has been detained in Türkiye since 2017. In 2019, the European Court of Human Rights found no reasonable suspicion of criminal conduct, and established beyond reasonable doubt that his detention pursued the ulterior purpose of silencing him. It ordered his immediate release. In 2022, in exceptional infringement proceedings, the Court found a continuing violation by Türkiye of its obligation to implement the Court's judgment. Notwithstanding these judgments, the Turkish authorities have continued to detain Osman Kavala and have even convicted and sentenced him to aggravated life imprisonment on the basis of the same facts that the Court found to lack even reasonable suspicion.

The report highlights the significant challenge that Osman Kavala's detention poses; it undermines the Convention system as a whole, as well as signalling profound concerns with respect for the rule of law, human rights and independent justice in Türkiye. The report makes clear that Osman Kavala falls within the definition of political prisoner and proposes a range of measures to seek to resolve this situation for the benefit of Türkiye, victims of human rights violations, and the principles of the Council of Europe.

1. Reference to committee: Bureau decision, Reference 4760 of 9 October 2023.

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A. Draft resolution[2]

1. The Parliamentary Assembly recalls that Osman Kavala, a human rights defender and philanthropist, has been detained in Türkiye since 18 October 2017, charged with three different offences in an alternating manner which led to his continuous detention. He was initially detained on charges of having sought to overthrow the constitutional order and the government through force and violence in relation to the 2013 Gezi Park demonstrations and the 2016 attempted coup. Osman Kavala was subsequently acquitted in a domestic judgment of 18 February 2020. This did not lead to his release. Instead, the Council of Judges and Prosecutors initiated a preliminary investigation to consider taking disciplinary action against the three judges who acquitted Osman Kavala, and the prosecution appealed his acquittal. On 25 April 2022, the first instance court convicted Mr Kavala for attempting to overthrow the government by force with respect to the Gezi Park events only, and sentenced him to aggravated life imprisonment. The charges in respect of the attempted coup were not part of his conviction. He was also acquitted of additional charges relating to espionage, which had been added since his initial detention. On 28 December 2022, the Istanbul Regional Court of Appeal rejected Mr Kavala's appeal against the conviction and sentence and on 28 September 2023, the Court of Cassation rejected his further appeal, meaning that his conviction and aggravated life sentence are now final.

2. Throughout the process, the prosecution's reasoning has been based on Mr Kavala meeting with the then Council of Europe Commissioner for Human Rights, with members of the European Parliament, diplomats and journalists, assisting individuals to file applications before the European Court of Human Rights ("the Court"), knowing members of civil society in Türkiye and internationally, having peacefully participated in demonstrations, and other work to further human rights causes, such as supporting people in exercising their right to freedom of expression, association and assembly. None of these elements shows criminal conduct; indeed these are all activities that fall within the classic role of a human rights defender, and many, if not all, of [them] involve the ordinary exercise of the rights enshrined in the European Convention on Human Rights (ETS No. 5, "the Convention").

3. The Assembly further recalls that the Court found in 2019 that Osman Kavala's detention was in violation of, *inter alia*, Article 18 taken together with Article 5(1) of the Convention as it was "established beyond reasonable doubt that [his detention] pursued an ulterior purpose […] namely that of reducing the applicant to silence". In particular, the Court found that the evidence against him was not sufficient even to warrant a reasonable suspicion that he had committed these offences. Indeed, in the 2019 judgment, the Court examined the indictment in great detail and held that there was no credible evidence to plausibly conclude that there existed a reasonable suspicion in support of criminal charges, let alone such a serious charge. The Court also held that Türkiye was to take all necessary measures to put an end to Mr Kavala's detention and to secure his immediate release.

4. Judgments of the Court finding a violation of Article 18 of the Convention – essentially an intentional violation for ulterior motives – are rare in the history of the Convention, but it is of extreme concern that any such cases should exist within the Council of Europe member States. Moreover, in line with the criteria set out in Resolution 1900 (2012), the finding of a violation of Article 18 clearly indicates that Osman Kavala falls within the Assembly's definition of political prisoner.

5. The Assembly stresses that, under Article 46(1) of the Convention, member States are bound to comply with final judgments of the Court. However, in spite of a clear judgment of the Court requiring his immediate release, clear, repeated decisions and resolutions of the Committee of Ministers calling for his immediate release, as well as such calls in Assembly resolutions, the Turkish authorities have, up until now, not released Osman Kavala. Indeed, the Turkish authorities continued with his detention, prosecution and conviction even though the evidence against him in the case file was not credible even to warrant a reasonable suspicion that he had committed these offences, let alone a prosecution or a conviction.

6. This led the Committee of Ministers of the Council of Europe to refer the case to the Court under Article 46(4) of the Convention questioning whether Türkiye had fulfilled its obligation to implement the 2019 judgment thus initiating infringement proceedings. In its judgment of 11 July 2022, in the infringement proceedings under Article 46(4), the Court held that Türkiye had indeed failed to fulfil its obligation under Article 46(1) to abide by its Kavala judgment. It found that the additional charges of espionage were based on identical facts to its previous findings, thus there was still no reasonable suspicion that Mr Kavala had committed any criminal offence. It also stated that the primary obligation to release Osman Kavala, resulting from the initial judgment, continued to exist.

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2. Draft resolution adopted by the committee on 10 October 2023.

7. The Assembly notes that Article 46(4) judgments are extraordinarily rare; the Kavala judgment is only the second such judgment ever and this is the only case of a member State failing to implement a judgment even following an Article 46(4) judgment.

8. The Assembly is deeply concerned that, despite the clear obligation on Türkiye to immediately release Osman Kavala, he remains in prison. The continued refusal by the Turkish authorities to effectively execute this judgment is not only a personal tragedy for Osman Kavala and his family; it is a tragedy for the rule of law and justice in Türkiye. Domestic courts, in the various judgments relating to Osman Kavala, have not meaningfully engaged with the findings of the European Court of Human Rights when reviewing his case and have certainly not respected those judgments. Given that the Turkish Constitution gives precedence to the provisions of international treaties duly in force in the event of a conflict as to the scope of fundamental rights and freedoms between the treaty and a domestic statute, this is difficult to understand.

9. Following the recent Court of Cassation judgment, which did not even mention the Kavala judgments of the European Court of Human Rights, Mr Kavala's conviction has become final and the Turkish courts that dealt with Mr Kavala's case have proved themselves neither capable nor willing to respect Türkiye's international human rights obligations in this matter. Although Mr Kavala may now avail himself of the right to individual application to the Constitutional Court, it is questionable whether he has a real prospect of success given the Constitutional Court's decision on his previous application concerning the unlawfulness of his detention.

10. The Assembly insists that it is incumbent upon the Turkish authorities, at the highest levels, to take swift and meaningful action to comply with the Court's judgment and to release Osman Kavala immediately. Türkiye has an obligation to execute binding judgments of the Court and a refusal to do so is incompatible with its international obligations. Such a refusal casts a shadow on the commitment of Türkiye to respecting the rule of law, human rights and democratic values, which are central to all Council of Europe member States. Thus, in light of the exceptional circumstances present, the Assembly believes that the time has now arrived to take steps to initiate the complementary joint procedure foreseen in its Resolution 2319 (2020).

11. The Assembly regrets the role played by Turkish prosecutors and judges who dealt with Osman Kavala's case, in ensuring, through misuse of the law, his unlawful detention, prosecution and conviction. It is incumbent upon Türkiye to ensure that prosecutors and judges exercise the powers that have been bestowed upon them in full compliance with the rule of law, the interests of justice and human rights.

12. This truly exceptional case is undermining the basis of the Convention system as a whole. It is imperative that action is taken swiftly to secure the release of Osman Kavala and to ensure that Türkiye upholds the rule of law and human rights and implements the two Kavala judgments of the Court.

13. The Assembly therefore calls on Türkiye to:

13.1. respect its international obligations under the Statute of the Council of Europe (ETS No. 1) and under the European Convention on Human Rights;

13.2. in accordance with Article 46(1) of the Convention, comply with binding judgments of the Court, and, in particular, to immediately release the human rights defender, Osman Kavala, who remains unlawfully detained in Türkiye;

13.3. urgently improve the legal framework and conditions for respect for the rule of law, the independence of the judiciary, the protection of human rights and compliance with the Court's judgments within Türkiye, so that judges can act in accordance with their constitutional roles, with sufficient guarantees that their independence will not be interfered with, that judges and prosecutors are not enabled or do not feel encouraged to misuse the law for ulterior purposes, and to ensure that systemic failures are addressed, including through urgent reform of the Council of Judges and Prosecutors, using the relevant expertise of the Council of Europe.

14. The Assembly calls on Council of Europe member and observer States and the European Union to:

14.1. engage with the Turkish authorities at the highest levels to urge the immediate release of human rights defender, Osman Kavala;

14.2. undertake, as a matter of urgency, action to support improvements to the protection of the rule of law and of human rights in Türkiye;

14.3. to apply their “Magnitsky legislation” or other legal instruments to impose targeted sanctions against all those who, as police officers, prosecutors, judges, prison officials or other officials have contributed to the unlawful and arbitrary deprivation of liberty of Osman Kavala and other political prisoners in Türkiye.

15. This fundamental issue is also part of the dialogue between the European Union and Türkiye and, in this context, the Assembly calls on the European Union to take full account of this serious situation when determining its financial support to Türkiye so that priority is given to work that promotes pluralism in a society which respects human rights and the rule of law.

16. If Osman Kavala has not been released from prison by 1 January 2024, this Assembly recalls its ability to challenge the credentials of the Turkish delegation at its first Part Session of 2024.

17. For its part, the Assembly stands ready to work together closely with the Committee of Ministers, the Secretary General and Türkiye in ensuring the execution of the Kavala judgment and in securing the protection of the Convention system as a whole, and ultimately the credibility of the Organisation, in line also with the Reykjavík Declaration and the emphasis put on the execution of the Court judgments.

B. Draft recommendation[3]

1. The Parliamentary Assembly reiterates that the persistent refusal of a Council of Europe member State to implement a judgment of the European Court of Human Rights ("the Court") notwithstanding an Article 46(4) judgment of the Court in infringement proceedings is unprecedented. Moreover, the fact that this particular judgment, *Osman Kavala v. Turkey,* found a violation of Article 18 of the European Convention on Human Rights (ETS No. 5, "the Convention") – namely that the proceedings against him constituted a misuse of the criminal justice system, undertaken for the purpose of reducing Osman Kavala to silence, indicates a serious systemic rule of law issue.

2. The Assembly regrets that the Turkish prosecutorial, judicial and executive authorities have been so far unable or unwilling to effectively comply with the judgments of the Court, the rule of law and human rights. The Council of Europe must support Türkiye in improving its processes for respecting the rule of law and human rights and in particular for implementing the judgments of the Court.

3. The Assembly concludes that country monitoring, focusing on measures to execute judgments of the Court, should urgently be undertaken to establish a meaningful and effective process for improving these systems within Türkiye, with the full and earnest co-operation of the Turkish authorities. This measure is necessary in light of the wider rule of law concerns patently evident in the Kavala case. This mechanism should cover the execution of judgments in general and not only the Kavala judgment. It should look at the means for addressing both the general measures and individual measures necessary to execute Court judgments.

4. The Assembly is deeply concerned that the ramifications of this case go beyond Türkiye. The continued, persistent refusal by the Turkish authorities to implement the Court's judgments in this uniquely egregious case constitutes a significant risk to the credibility and mission of the Council of Europe as a whole. It is therefore incumbent upon the leaders of the Organisation to intervene to resolve this situation, including by securing the immediate release of the human rights defender, Osman Kavala.

5. Therefore, the Assembly calls on the Secretary General of the Council of Europe to take all the actions within her power to seek to secure the effective implementation of this judgment.

6. It also calls on the Committee of Ministers to:

6.1. establish country monitoring in respect of the execution of judgments of the European Court of Human Rights by Türkiye under the 1994 Declaration process. This monitoring should focus on the execution of both individual measures and general measures and should relate to all judgments against Türkiye pending implementation, with a particular focus on those indicating significant problems with the system of implementing judgments of the Court or concerns for the functioning of the justice system and the rule of law;

6.2. engage in dialogue at the highest levels, including through engagement by groups of Ministers, Ambassadors, or former high-level politicians, to secure the implementation of the Court's judgments in particular through the immediate release of Osman Kavala and to resolve the situation of any other eventual political prisoners in Türkiye.

3. Draft recommendation adopted by the committee on 10 October 2023.

C. Explanatory memorandum by Ms Petra Bayr, rapporteur

1. Introduction

1. Osman Kavala is a human rights defender and philanthropist. He has been detained in Türkiye since 18 October 2017 purportedly on suspicion of having sought to overthrow the constitutional order and the Government through force and violence. He was initially detained on allegations relating to the 2013 Gezi Park events and the 2016 attempted military coup,[4] although he was subsequently only convicted for offences in relation to the 2013 Gezi Park demonstrations. The Gezi Park events occurred over the summer of 2013, in which excessive force was used by security forces against a small number of peaceful protestors trying to stop the cutting of trees in Gezi Park in Istanbul.[5] Wider protests ensued against the excessive use of force against peaceful protestors. These protests were "marked by heavy-handed interventions by the authorities" and the Office of the Commissioner for Human Rights of the Council of Europe received "a large number of serious, consistent and credible allegations of human rights violations committed by law-enforcement officials against peaceful demonstrators or bystanders" during his five-day visit to Türkiye at the time of the Gezi Park events.[6] It is also important to note that whilst the vast majority of protesters were peaceful, violent groups joined the demonstrations and committed acts of violence. Overall, many people were injured and six people died.

2. The Turkish authorities acknowledge that the events originated in a small protest about cutting trees but then escalated leading to spontaneous protests throughout Türkiye. It is widely accepted that these further protests were in response to police brutality (and impunity due to judicial inaction against police brutality). However, notwithstanding this factual basis, the charge is based on the suspicion that these protests were all masterminded in advance by the protesters to overthrow the government by force and violence (Article 312 of the Criminal Code). The position of the President of the Republic and of the prosecution is that this is part of a global conspiracy designed to overthrow the government. They consider that George Soros, the founder of Open Society Institute, likely masterminded the protests and that, as Osman Kavala was the leader of the Foundation for an open Society in Türkiye, was an active member of Turkish civil society, and supported the demonstrations, albeit peacefully, he must also have been involved in an attempt to overthrow the government by force and violence. The Commissioner for Human Rights has stated that the idea that the "Gezi events could have been orchestrated by a single person or organisation had no credibility", that the demands of the protesters did not extend to "an unlawful and violent overthrow of the government and the constitutional order", and noted that "the overwhelming majority of protestors had demonstrated peacefully".[7] On the basis of the evidence in the possession of the prosecution and the Turkish courts, it would be very difficult to reach a conclusion of a co-ordinated plan to overthrow the government by force and violence, let alone one involving Mr Kavala.

3. More specifically, none of the information on the case file contained any specific involvement of Osman Kavala in any plans or action to overthrow the government by force and violence. Osman Kavala's conduct was that of a human rights defender in those circumstances – for example, he played an active part in demonstrations so far as they were conducted peacefully and assisted demonstrators with support such as food, tables, chairs and toilets. It is telling that the prosecution case does not allege that he was involved in

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4. The attempted military coup of 15 July 2016 involved members of the Turkish armed forces attempting to carry out a military coup aimed at overthrowing the parliament, government and President of Türkiye. In relation to the charge of seeking to overthrow the constitutional order by force and violence, the main prosecution case was that Osman Kavala knew an American academic who the Turkish authorities suspect of being an instigator of the coup and that at one point Osman Kavala's mobile phone was in the same large district of central Istanbul – a district in which many hotels and offices are located – as the mobile phone of this individual. There was no evidence from the tapping of Osman Kavala's phone by the Turkish authorities to suggest such contact or any proof of Osman Kavala's involvement in, or awareness of, any plans for a military coup. The Turkish authorities also assert that Osman Kavala had also met on a previous occasion another person(s) who they suspect might have links to the FETÖ organisation – again without any proof that there was any discussion relating to any planned or attempted coup. Based on this 'evidence', it is difficult to imagine any prosecutor or judge concluding that there was sufficiency of evidence to bring charges.

5. Commissioner for Human Rights, information submitted to the European Court of Human Rights, *Kavala v. Turkey* judgment, paragraph 21.

6. *Ibid*, at paragraph 22. The Commissioner also remarked that "the overwhelming majority of these allegations had not been effectively investigated by the Turkish judiciary on account of the long-standing pattern of impunity for the security forces in Turkey". See also the Commissioner's statement after his visit to Türkiye.

7. *Ibid*, paragraph 121-122. The Commissioner also noted the criminal proceedings brought against people for peaceful protest during the Gezi demonstrations, including fines on TV stations, dismissal of journalists, investigations of health workers, and other decisions of the judicial and administrative authorities such as criminal proceedings to restrict the freedom of peaceful demonstration.

committing acts of violence and there is no evidence in the case file that he had used force or violence or had instigated or led others to commit violent acts. It is also noteworthy that it was not until four years after the Gezi Park events that the Turkish authorities arrested Osman Kavala.

4. The reasoning of the prosecutor's office against Osman Kavala includes the fact that he had meetings and contacts with diplomats, journalists and international organisations (including individuals working for the Commissioner for Human rights of the Council of Europe, the European Union, the European Commission, members of the European Parliament, members of the German and Dutch consulates, the US Deputy Minister of Foreign Affairs, journalists, and that he attended press conferences); that he assisted individuals in filing applications before the European Court of Human Rights; that he organised exhibitions and supported art and film productions; that his organisation supported and funded a number of NGOs working in the fields of art, human rights and minorities and received financial support in this work from the Council of Europe; that he knew people active in civil society in Türkiye and internationally; that he provided support to protesters including food, milk, tables, toilets and chairs; and that he raised human rights concerns, including with international organisations, diplomats and journalists about the respect for the rule of law and human rights in Türkiye.[8] These are all activities that clearly fall into ordinary work as a human rights defender. The evidence against him is also that in private telephone conversations he said that the then Prime Minister, Mr Recep Tayyip Erdoğan, was a populist who defended the theory of an international conspiracy and that the excessive violence against peaceful protesters was beyond authoritarian action. As the European Court of Human Rights summarised, the prosecutor's office listed acts which they consider have been intended to put Türkiye in an awkward position at the international level including organising an exhibition in Brussels about the Gezi events; preparing a report about the Gezi events for the European Parliament; supporting individual applications to the European Court of Human Rights concerning the use of tear gas during demonstrations; and telephone conversations about co-operation with Council of Europe bodies and the Commissioner for Human Rights.[9] Whilst these actions can be characterised as lawful exercise of the right to freedom of expression and freedom of association, it is very difficult to understand how one could reach a conclusion that these actions constitute a criminal offence of seeking to overthrow the government by force and violence.

5. No evidence presented during either his pre-trial detention or his prosecution and conviction is sufficient to support the accusations that Osman Kavala has ever sought to overthrow the constitutional order or the Government by force and violence. The evidence on which his conviction rests is not sufficient to even warrant a reasonable suspicion that he has committed these offences and is certainly not sufficient for a prosecution or a conviction. Nevertheless he was convicted and sentenced to aggravated life imprisonment.

2. The judgments of the European Court of Human Rights in the cases of Kavala v. Turkey and the supervision of the execution of these judgments

2.1. The Kavala v. Turkey (Article 46(1)) judgment of 10 December 2019

6. Osman Kavala made an application to the European Court of Human Rights on 8 June 2018. The Court handed down its judgment on 10 December 2019 and this became final on 11 May 2020. The Court found that the grounds for Osman Kavala's detention, based on the charges against him, did not give rise to a reasonable suspicion that he had committed an offence such as to justify his pre-trial detention (violation of the right to liberty under Article 5(1) of the European Convention on Human Rights (ETS No. 5)). It further found that there had been a misuse of the criminal law to violate his right to liberty, in a way designed to silence him and to dissuade human rights defenders (violation of Article 18 of the Convention taken in conjunction with Article 5(1)). The Court also found a violation of Article 5(4) of the Convention due to the length of time it took for the Constitutional Court to review the legality of Osman Kavala's detention.

7. Under these circumstances, the Court concluded that "in the absence of facts, information or evidence showing that [Osman Kavala] had been involved in criminal activity […] the applicant could not reasonably be suspected of having committed the offence of attempting to overthrow the Government". In particular, the

8. *Kavala v. Turkey* judgment, paragraphs 49 – 56 and in particular see paragraph 51. See also the recent Court of Cassation judgment of 28 September 2023 confirming his conviction.

9. *Ibid*, paragraph 53.

Court concluded that the facts in the case file were “not sufficient to raise suspicions that the applicant had sought to organise and fund an insurrection against the Government by force and violence, which form the constituent element of the offence set out in article 312 of the Criminal Code”. It stated:

> *“In view of the nature of the charges against him, the Court observes that the authorities are unable to demonstrate that the applicant’s initial and continued pre-trail detention were justified by reasonable suspicions based on an objective assessment of the acts in question. It further notes that the measures were essentially based not only on facts that cannot be reasonably considered as behaviour criminalised under domestic law, but also on facts which were largely related to the exercise of Convention rights. The very fact that such acts were included in the bill of indictment as the constituent elements of an offence in itself diminishes the reasonableness of the suspicions in question.”*[10]

8. The Court noted that “the prosecution documents refer to multiple and complementary lawful acts that were related to the exercise of a Convention right and were carried out in cooperation with the Council of Europe bodies or international institutions […] They also refer to ordinary and legitimate activities on the part of a human rights defender and the leader of an NGO, such as conducting a campaign to prohibit the sale of tear gas to Turkey or support individual applications.”[11] The Court found that “the prosecution’s attitude could be considered such as to confirm the applicant’s assertion that the measures taken against him pursued an ulterior purpose, namely to reduce him to silence as an NGO activist and human-rights defender, to dissuade other persons from engaging in such activities and to paralyse civil society in the country”.[12]

9. The Court further noted the significant lapse of time between the events and Osman Kavala’s arrest despite no new pertinent information becoming available to the prosecutors in this time period. It also noted that public accusations by the President of Türkiye against Osman Kavala preceded the charging of Mr Kavala, considering that the various factual elements, “taken together with the speeches by the country’s highest-ranking official […] could corroborate the applicant’s argument that his initial and continued detention pursued an ulterior purpose, namely to reduce him to silence as a human-rights defender”.[13] According to information submitted to the Court by interveners, these actions were done in the context of a wider campaign of repression of human rights defenders in Türkiye.[14] The conclusions of the Court in finding a violation of Article 18 of the Convention was that:

> *“The Court considers it to have been established beyond reasonable doubt that the measures complained of in the present case pursued an ulterior purpose, contrary to Article 18 of the Convention, namely that of reducing the applicant to silence. Further, in view of the charges that were brought against the applicant, it considers that the contested measures were likely to have a dissuasive effect on the work of human-rights defenders.”*

10. The Court concluded, under Article 46, that in light of the particular circumstances of the case, ‘the Government must take every measure to put an end to the applicant’s detention and to secure his immediate release”.[15] This indication was repeated in the operative part of the judgment.

11. It is noteworthy that a finding by the Court of a violation of Article 18 of the Convention is very rare. It is a massive red flag indicating that something fundamentally wrong is happening within a State. In particular, Article 18 findings are clear indicators that the rule of law is not being respected and that the justice system is not working in the interests of justice. The recent Parliamentary Assembly report on the implementation of judgments of the European Court of Human Rights noted that “violations of Article 18 of the Convention deny *par excellence* the very gist of democracy and are regarded as particularly serious given that they relate to the purposive misuse of power.”[16] Recalling a hearing held in the course of that work, the report noted:

> *“The clear jurisprudence applied by the ECtHR in relation to Article 18 cases relates to (1) a significant time gap between the sets of events (for example many years between the alleged facts and the acts of the prosecution); (2) the quality of the totality of evidence (for example if lawful activities were criminalised); (3) the conduct of the applicant in the criminal process; and (4) temporal inferences*

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10. *Kavala v. Turkey* judgment, paragraph 157, see also paragraph 220 “the measures taken against the applicant were not justified by reasonable suspicions based on an objective assessment of the alleged acts, but were essentially based not only on facts that cannot be reasonable considered as behaviour criminalised under domestic law, but also on facts which were largely related to the exercise of Convention rights”.
11. *Kavala v. Turkey* judgment, paragraph 223.
12. *Kavala v. Turkey* judgment, paragraph 224.
13. *Kavala v. Turkey* judgment, paragraph 230.
14. *Kavala v. Turkey* judgment, paragraph 230.
15. *Kavala v. Turkey* judgment, paragraph 240.

> *between how politicians approached the framing of a case and the framing of the indictment. This hearing highlighted the significance of Article 18 judgments in relation to the misuse of power and ulterior motives for human rights abuses; such judgments are a red flag."*[17]

12. At this juncture, it is worth noting that there are other judgments of the Court finding violations of Article 18 of the Convention by Türkiye, including some of the cases in the *Demirtaş* Group. The *Selahattin Demirtaş v. Turkey (No. 2)* case concerns the politically motivated arrest and detention of Selahattin Demirtaş, who was, between 2007 and 2018, one of the leaders of the Peoples' Democratic Party (HDP), a pro-Kurdish opposition party, and a member of the Turkish National Assembly. In October 2014, violent protests took place in 36 provinces in eastern Türkiye, followed by further violence in 2015 in the wake of the breakdown of negotiations aimed at resolving the "Kurdish question". On 20 May 2016, the Turkish Constitution was amended, lifting inviolability from prosecution for certain members of parliament. Mr Demirtaş was one of the 154 parliamentarians (including 55 HDP members) who lost parliamentary inviolability following the constitutional amendment.[18] Mr Demirtaş was arrested on 4 November 2016 and placed in pre-trial detention, charged with offences under various provisions of the Criminal Code, the Prevention of Terrorism Act, and the Meetings and Demonstrations Act, including membership of an armed organisation (Article 314 of the Criminal Code) and public incitement to commit an offence (Article 214 of the Criminal Code). At the same time eight other democratically elected HDP members of parliament, were also arrested, as was the former HDP co-chair Figen Yüksekdağ Şenoğlu.

13. The Court found that the domestic courts had failed to indicate specific facts or information that could give rise to a reasonable suspicion that the applicant had committed the offences in question and justify his arrest and pre-trial detention (violations of Article 5(1) and (3)). It further held that the way in which his parliamentary inviolability was removed and the reasoning of the courts in imposing pre-trial detention on him violated his rights to freedom of expression (violation of Article 10) and the fact that it had been effectively impossible for him to take part in the activities of the National Assembly on account of his pre-trial detention, constituted an unjustified interference with the free expression of opinion of the people and with his own right to be elected and to sit in parliament (violation of Article 3 of Protocol No.1 to the Convention (ETS No. 9)). Finally, the Court found that the applicant's detention pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate (violation of Article 18 in conjunction with Article 5). The Court indicated, under Article 46, that the nature of the violation found under Article 18 taken together with Article 5 left no real choice as to the measures required to remedy it, and that any continuation of the applicant's pre-trial detention on grounds pertaining to the same factual context would entail a prolongation of the violation of his rights as well as a breach of the obligation on the respondent State to abide by the Court's judgment in accordance with Article 46(1) of the Convention. It therefore held that Türkiye had to take all necessary measures to secure the applicant's immediate release. The applicant is still in detention; therefore the European Court judgment has not been complied with. The Committee of Ministers has been strongly urging the Turkish authorities to ensure his immediate release, for example by exploring alternative measures to detention pending the completion of the proceedings he initiated before the Constitutional Court.

14. The Yüksekdağ Şenoğlu and Others case in the Demirtaş group of cases also concerns the lifting of the parliamentary inviolability of the applicants by the Constitutional amendment of 20 May 2016, namely 13 HDP members of Parliament, including the other HDP co-leader at the material time, Figen Yüksekdağ Şenoğlu. The Court found the same violations of the Convention as in the Selahattin Demirtaş (No. 2) judgment (Articles 10, 5(1) and (3), Article 3 of Protocol No. 1, and Article 18 in conjunction with Article 5) on similar grounds. In addition it found, for some of the applicants, a violation of the right to a speedy decision on the lawfulness of detention on account of lack of access to the investigation file (Article 5(4)). Finally the Court included the same indication under Article 46 as in the Selahattin Demirtaş (No. 2) case and held that, as regards the applicants still deprived of their liberty, Türkiye had to take all necessary measures to secure their immediate release. Twelve of the thirteen applicants in this case have been released. Ms Yüksekdağ Şenoğlu has been held in pre-trial detention since 20 September 2019 and stands trial in the same criminal proceedings as Mr Demirtaş. The Committee of Ministers has also been strongly urging the Turkish authorities to ensure her immediate release.

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16. Report on the Implementation of Judgments of the European Court of Human Rights, (Doc. 15742), paragraph 44.
17. *Ibid*, paragraph 45.
18. Other related cases also concern the lifting of parliamentary inviolability of parliamentarians, including the recent case *Yüksekdağ Şenoğlu and Others v. Turkey*, (Application No 14332/17), which also concerns a number of violations of Article 18, 5, 10 of the Convention and Article 3 of Protocol No.1, following the detention of 12 parliamentarians.

2.2. Supervision by the Committee of Ministers following the Kavala v. Turkey Article 46(1) judgment

15. During its supervision of the execution of the case, the Committee of Ministers has issued fifteen decisions and three interim resolutions, over a period of four years. The first decision was issued on 3 September 2020.[19] Over the course of the next year, the Committee of Ministers repeatedly called for Mr Kavala's release, noting that his detention constituted an ongoing breach of the judgment of the Court.[20] The case raised particular concerns given the attitude of the Turkish authorities in the face of the seriousness of the case and the egregious nature of the violation, given that he continued to be detained on the basis of proceedings which constituted a misuse of the criminal justice system, undertaken for the purpose of reducing him to silence, and thus constituted a flagrant breach of Türkiye's obligation under Article 46(1) of the Convention to abide by the Court's judgment. The Committee of Ministers considered this to be unacceptable in a State subject to the rule of law.

16. On 16 September 2021, the Committee of Ministers expressed its resolve to serve formal notice on Türkiye of its intention to commence proceedings under Article 46(4) of the Convention.[21] On 2 December 2021, the Committee of Ministers served formal notice on Türkiye of its intention to refer the case to the Court in accordance with Article 46(4) of the Convention on 2 February 2022, if Mr Kavala had not been released by then.[22] On 2 February 2022, the Committee of Ministers duly initiated infringement proceedings under Article 46(4).[23]

2.3. The Kavala v. Türkiye (Article 46(4)) judgment of 11 July 2022

17. There is a mechanism under Article 46(4) of the Convention for the Committee of Ministers to refer to the Court the question as to whether a State has failed to fulfil its obligation to abide by the final judgment of the Court, and thus refuses to implement that judgment. This mechanism has only been used twice in the history of the Convention – in relation to the case of *Ilgar Mammadov v. Azerbaijan*, and more recently the case of *Osman Kavala v. Türkiye*. In the first case, Ilgar Mammadov was released even before the Article 46(4) judgment was handed down. Sadly, in the second case, Osman Kavala remains arbitrarily detained in Türkiye contrary to the clear judgment of the Court. This is therefore the only case of a member State continuing to refuse to implement a Court judgment following an Article 46(4) judgment and this is an exceptional situation which poses an overt challenge to the very foundations of the Convention system.

18. By an interim resolution of 2 February 2022 (CM/ResDH(2022)21), the Committee of Ministers referred to the Court, in accordance with Article 46(4) of the Convention, the question whether Türkiye had failed to fulfil its obligation under Article 46(1) of the Convention to abide by the Court's Chamber judgment of 10 December 2019, in the case of *Kavala v. Turkey*.

19. By the time of the Article 46(4) judgment of the Court, the prosecutorial authorities had added a new charge of military or political espionage, albeit based on the same facts of NGO work previously examined by the Court in its Article 46(1) judgment. The Court observed that the bill of indictment of 28 September 2020 indicated that the suspicion of espionage had also been based on the activities carried out by Mr Kavala in the context of his NGOs. Although Mr Kavala had been formally charged with having committed a new offence, different from that which had been used to justify his previous detention, the facts listed in the bill of indictment were essentially identical to those already examined by the Court in the Chamber judgment upon which it had found a violation of Article 5(1), read separately and in conjunction with Article 18. The Court thus reiterated the considerations of that judgment, to the effect that the fact of referring to "ordinary and legitimate activities on the part of a human-rights defender and the leader of an NGO" undermined the credibility of the accusation and that, clearly, there cannot be a "reasonable suspicion" if the acts or facts held against a detained person did not constitute a crime at the time when they occurred.

20. The Court concluded that the investigating authorities had once again referred to numerous acts which were carried out entirely lawfully to justify Mr Kavala's continued pre-trial detention, ignoring the constitutional guarantees against arbitrary deprivation of liberty. The Court noted that Türkiye had presented several action plans. It noted, however, that on the date on which the Committee of Ministers had referred the matter to it, and in spite of three decisions ordering his release on bail and one acquittal judgment, Mr Kavala had still

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19. CM/Del/Dec(2020)1377bis/H46-38.
20. CM/ResDH(2020)361, CM/Del/Dec(2021)1398/H46-33, CM/Del/Dec(2021)1401/H46-1, CM/Del/Dec(2021)1406/H46-31.
21. CM/Del/Dec(2021)1411/H46-37.
22. CM/ResDH(2021)432.
23. CM/ResDH(2022)21.

been held in pre-trial detention for more than four years, three months and fourteen days. The Court considered that the measures indicated by Türkiye did not permit it to conclude that the State Party had acted in good faith, in a manner compatible with the conclusions and spirit of the initial *Kavala* judgment, or in a way that would have made practical and effective the protection of the Convention rights which the Court had found to have been violated in that judgment. In response to the question referred to it by the Committee of Ministers, the Court concluded that Türkiye had failed to fulfil its obligation under Article 46(1) to comply with the *Kavala v. Türkiye* judgment of 10 December 2019.

2.4. Supervision by the Committee of Ministers following the Kavala Article 46(4) judgment

21. Following the judgment of the Grand Chamber of the Court under Article 46(4) on 11 July 2022, the Committee of Ministers urged the authorities to ensure Mr Kavala's immediate release in seven different decisions, issued between July 2022 and September 2023. During this period, the Committee of Ministers called for meetings between the Chair of the Committee of Ministers and the Minister of Foreign Affairs of Türkiye; called upon all member States, the Secretary General as well as other relevant Council of Europe bodies and Observer States to intensify their high-level contacts with Türkiye to raise this case; and appointed a Liaison Group of Ambassadors to assist the Chair in engaging with the Turkish authorities.[24]

2.5. Positions of the Assembly on the release of Osman Kavala

22. The Assembly has repeatedly called for the immediate release of Osman Kavala, including in Resolution 2347 (2020), Resolution 2357 (2021), Resolution 2459 (2022), and Resolution 2483 (2023).[25] His case has also been highlighted in information notes by the General rapporteur on Human Rights Defenders as well as numerous statements by members of the Assembly.[26] In January 2023, the Assembly co-rapporteurs for the monitoring of Türkiye had a meeting with Mr Osman Kavala. In Resolution 2494 (2023), the Assembly called on member States to "take immediate action to implement any judgments of the European Court of Human Rights in respect of which a violation of Article 46, paragraph 1, has been found by the Court under infringement proceedings under Article 46, paragraph 4, and in this light [called] on Türkiye to release immediately the philanthropist Osman Kavala".[27]

23. In its Resolution 1900 (2012) "The Definition of Political Prisoner", the Assembly set out the criteria that it would apply for the definition of "political prisoner" as:

"A person deprived of his or her personal liberty is to be regarded as a 'political prisoner':

a. if the detention has been imposed in violation of one of the fundamental guarantees set out in the European Convention on Human Rights and its Protocols (ECHR), in particular freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association;

b. if the detention has been imposed for purely political reasons without connection to any offence;

c. if, for political motives, the length of the detention or its conditions are clearly out of proportion to the offence the person has been found guilty of or is suspected of;

d. if, for political motives, he or she is detained in a discriminatory manner as compared to other persons; or,

e. if the detention is the result of proceedings which were clearly unfair and this appears to be connected with political motives of the authorities."

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24. CM/Del/Dec(2022)1440/H46-1, CM/Del/Dec(2022)1443/H46-30, CM/Del/Dec(2022)1446/H46-1, CM/Del/Dec(2022)1451/H46-40, CM/Del/Dec(2023)1459/H46-27, CM/Del/Dec(2023)1468/H46-35, CM/Del/Dec(2023)1475/H46-39. Moreover, on 11 July 2022, the Chair of the Committee of Ministers, the President of the Parliamentary Assembly, and the Secretary General made a joint statement, urging Türkiye, as a Party to the Convention, to take all necessary steps to implement the judgment.

25. "New crackdown on political opposition and civil dissent in Turkey: urgent need to safeguard Council of Europe standards", Resolution 2347 (2020); "Progress of the Assembly's monitoring procedure (January-December 2020)", Resolution 2357 (2021); "The honouring of obligations and commitments by Türkiye", Resolution 2459 (2022); "The progress of the Assembly's monitoring procedure (January-December 2022)", Resolution 2483 (2023).

26. March 2021, AS/Jur (2021) 03 Rev, Ms Alexandra Louis, France, ALDE; February 2022, AS/Jur (2022) 01 Rev, Ms Alexandra Louis, France, ALDE.

27. Resolution 2494 (2023), The Implementation of Judgments of the European Court of Human Rights, at paragraph 7.16.

24. From the clear findings of the European Court of Human Rights, as well as the content of the judgments of the Turkish Courts, one can consider that Osman Kavala clearly falls within the Assembly's definition of political prisoner.

3. The failure of the Turkish Courts to respect the judgments of the European Court of Human Rights

25. Since the initial 2019 judgment of the Court in *Kavala v. Turkey*, the Turkish courts have considered Mr Kavala's case numerous times and issued many rulings. Mr Kavala has even been acquitted in one judgment, which was appealed by the prosecution and did not lead to his release. This did, however, lead to three judges who acquitted Mr Kavala being subject to preliminary investigations. The Turkish authorities informed the Committee of Ministers in 2021: "There is no new information on the preliminary investigation conducted by the Council of Judges and Prosecutors on whether to launch a disciplinary investigation against the three judges who acquitted Mr Kavala on the charges related to the Gezi Park events." This indicates the extent of the pressure placed on judges in Türkiye to come to a particular result if they wish to retain their judicial positions, including, specifically in the case of Mr Kavala.

26. The Turkish prosecutions and courts have proceeded to prosecute and convict Mr Kavala. On 25 April 2022, the Istanbul 13th Assize Court convicted Mr Kavala for attempting to overthrow the government by force (Article 312 of the Turkish Criminal Code) with respect to the Gezi events only, and sentenced him to aggravated life imprisonment. The charges in respect of Article 309 with respect to the attempted coup were therefore not part of his conviction. There is also no mention of the coup attempt in the judgments of either the Regional Appeal Court or the Court of Cassation. He was also acquitted of the charges relating to espionage. On 28 December 2022, the Istanbul Regional Court of Appeal rejected Mr Kavala's appeal against the conviction and sentence.

27. Notwithstanding the clear judgment of the European Court of Human Rights concluding that there were no reasonable grounds for suspicion that Osman Kavala had committed the offences with which he was charged, let alone grounds for conviction, and calling for his immediate release, and despite numerous opportunities for domestic courts to take into consideration the two *Kavala* judgments of the European Court of Human Rights, they have not done so. Indeed, the Turkish courts have not meaningfully engaged with the judgments of the European Court of Human Rights on this topic when reviewing his case and have certainly not respected those judgments. Given that the Turkish Constitution gives precedence to the provisions of international treaties duly in force in the event of a conflict as to the scope of fundamental rights and freedoms between the treaty and a domestic statute, this is difficult to understand.

28. The recent judgment of the Court of Cassation of 28 September 2023 – the final ordinary appellate opportunity to review Osman Kavala's conviction – did not mention either of the judgments of the European Court of Human Rights relevant to the case of Osman Kavala, displaying the extent to which the judicial authorities have disregarded the obligation upon them to abide by final binding judgments of the European Court of Human Rights. Moreover, the Court of Cassation upheld Mr Kavala's conviction for attempting to overthrow the government by force and violence on essentially the same evidential basis already considered by the European Court of Human Rights as insufficient even for a reasonable suspicion; evidence that demonstrated no criminal conduct at all. The Court of Cassation justified his conviction relying on elements such as the fact that he had meetings and contacts with diplomats, journalists and international organisations (including individuals working for the European Court of Human Rights, the Office of the Commissioner for Human rights of the Council of Europe, the European Union, the European Commission, and members of the European Parliament, members of the German and Dutch consulates, the US Deputy Minister of Foreign Affairs, journalists), and that he attended press conferences; that he organised exhibitions and supported art and film productions; that his organisation supported and funded a number of NGOs working in the fields of art, human rights and minorities; that he knew people active in civil society in Türkiye and internationally; that he provided support to protesters including food, milk, tables, chairs and access to toilets; and that he raised human rights concerns, including with international organisations, diplomats and journalists about the respect for the rule of law and human rights in Türkiye. Yet again, as these actions can be characterised as a lawful exercise of the right to freedom of expression and freedom of association, it is very difficult to understand how one could reach a conclusion that these actions constitute a criminal offence of seeking to overthrow the government by force and violence. It is very hard to see that any such a judgment can comply with the rule of law or the basic elements of justice.

29. Although Mr Kavala may now avail himself of the right to individual application to the Constitutional Court, it is questionable whether he has a real prospect of success given the Constitutional Court's decision on his previous application concerning the unlawfulness of his detention.

30. The fact that such elementary errors and disregard for the rule of law systematically persisted throughout the lengthy proceedings in this case, and through many different Turkish courts, raises questions as to the credibility of the entire Turkish justice system and any hope for upholding the rule of law in Türkiye.

31. However, when viewed within the broader context of the generalised failures of the Turkish judiciary to respect the rule of law or to act in the interests of justice, this result is perhaps unsurprising. As the then Commissioner for Human Rights concluded "the response of the Turkish judiciary to the Gezi events displayed, on the whole, a lack of adherence to international standards, in particular to the Convention and the case law of the Court, both in terms of the impunity shown towards the security forces and a lack of respect for the right to peaceful demonstration."[28] In relation to respect by Turkish Courts for the judgments of the Turkish Constitutional Court, the Commissioner further commented "Turkish courts continued deliberatively to ignore and disregard the spirit of the judgments and the case law of the Constitutional Court in pre-trial cases, which raised a problem with regard to the fundamental principles of the rule of law and legal certainty", expressing concerns that the lower courts were encouraged to convict people based on insufficient evidence "by a consistent discourse at the highest political level".[29] It is also noteworthy that the previous Commissioner for Human Rights concluded that "the heightened level of judicial harassment targeting, *inter alia*, human-rights defenders [including Osman Kavala] as a result of measures taken by the Government, posed a severe threat to democracy in Turkey".[30]

32. These failures on the part of the Turkish courts can perhaps be seen in a wider context of repression against a high number of judges within the scope of investigations into the potential association of members of the judiciary with FETÖ/PDY in which thousands of judges and prosecutors have been investigated, with many having been detained, suspended or dismissed from their judicial roles, whilst others have fled Türkiye.[31] This includes reports of several cases in which judges and prosecutors have been subject to criminal proceedings despite the absence of any evidence establishing criminal wrong-doing.[32] This has led to a situation where at least 45% of Türkiye's roughly 21 000 judges and prosecutors now have little experience or less and have been appointed in the current political environment which has made them more susceptible to pressure.[33] There are significant concerns that some judges and prosecutors have been appointed without adequate training,[34] and that "the future of the hundreds of people who are arrested by the Erdoğan regime now depends on inexperienced people with direct links to the government".[35] Moreover, this problem is not simply prevalent in the lower courts, as upper courts have been affected too, with the appointment of judges with less than five years' experience to the Supreme Court of Appeal, which creates risks for the right to a fair trial.[36]

33. Laws enabling targeted sanctions against individuals who have committed human rights abuses or been involved in significant corruption exist in many Council of Europe member States, often referred to as "Magnitsky legislation" after the 2012 legislation in the United States of America following the torture and death of Sergei Magnitsky in Russia in 2009. Since then similar legislation has been adopted in the European Union and in many countries including Council of Europe member and observer States, such as the United Kingdom and Canada.

34. The Assembly has previously called on member and observer States of the Council of Europe to impose such targeted "Magnitsky" sanctions in the case of those responsible for the politically motivated prosecutions and convictions of Alexei Navalny and Aleksey Pichugin, including police officers, prosecutors, judges, prison officials or other officials.[37] The Assembly is also currently working on a report listing judges

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28. Commissioner for Human Rights, information submitted to the Court, *Kavala v. Turkey* judgment, paragraph 123.
29. *Ibid*, paragraphs 172 and 173.
30. *Kavala v. Turkey* judgment, paragraph 203.
31. Decision of the Constitutional Court, dated 26 July 2017, by Selçuk Özdemir (Application No. 2016/49158[1]), paragraphs 18 and 19; Statement by Vice President Fuat Oktay on 14 July 2021 which cited 3 968 judges as having been dismissed as of July 2021; Amnesty International.
32. Human Rights Watch, "Turkey judges, prosecutors unfairly jailed".
33. Reuters, "Special Report, Turkey – Judges", citing Ministry of Justice data; New York Times; "Turkey and the lack of impartiality in the judicial system".
34. Reuters, "Special Report, Turkey – Judges".
35. "Turkey and the lack of impartiality in the judicial system", quoting Reuters.
36. *Ibid*.
37. In Assembly Resolution 2446 (2022), "Reported cases of political prisoners in the Russian Federation" Assembly called on all member States and observer States of the Council of Europe to "use their "Magnitsky laws" or other legal instruments to impose targeted sanctions against all those who, as police officers, prosecutors, judges, prison officials or other officials, have contributed to the unlawful and arbitrary deprivation of liberty of political prisoners and their ill-treatment in detention", paragraphs 20.3 and 22.

and prosecutors responsible for the misuse of the criminal law in order to unlawfully detain, prosecute and convict Vladimir Kara-Murza, to enable the responsible individuals, including judges, prosecutors, investigators, police officers, intelligence operatives, private experts and senior prison officials to be subject to targeted Magnitsky sanctions.[38]

35. The role played by Turkish prosecutors and judges in maintaining through misuse of the law the unlawful detention, prosecution and conviction of Osman Kavala is deplorable. The level of misuse of power of the Turkish prosecution and judiciary in the case of Osman Kavala may well have reached a level comparable to other cases where the Assembly has called for the imposition of "Magnitsky sanctions" against those responsible for such human rights abuses.

4. The continued unlawful detention of Osman Kavala

36. The continued refusal of Türkiye to release Mr Kavala, as ordered by the European Court of Human Rights, presents a clear risk to the rule of law and the Convention system and is therefore a grave concern to all actors within the Council of Europe system. This will necessarily continue to be a stark focus and area of concern to the credibility of the Council of Europe and the Convention system for so long as Mr Kavala continues to be arbitrarily detained by Türkiye.

37. In Recommendation 2252 (2023), the Assembly recommended that the Committee of Ministers, "having regard to Recommendation 2245 (2023) "The Reykjavik Summit of the Council of Europe – United around values in the face of extraordinary challenges", develop further the options available to the Committee of Ministers and, indeed, the Council of Europe as a whole, following a judgment of the Court under Article 46, paragraph 4, of the Convention, with the aim of ensuring respect for the rule of law and the Convention system; such work should include careful consideration of the potential role for the Assembly within such mechanisms, such as through the complementary joint procedure".[39]

38. The principal tools available to the Committee of Ministers, in carrying out its role of supervising the execution of judgments under Article 46(2) and (5) of the Convention are diplomatic tools such as dialogue, the adoption of decisions or resolutions, regular discussion of the case at its meetings, as well as asking States and other actors such as the Secretary General of the Council of Europe to raise the case regularly with the State concerned. Other measures relating to potential sanctions in respect of participation rights, or steps towards the eventual use of Articles 3 (obligation on member States to respect the rule of law, human rights and to cooperate sincerely) and 8 (suspension, withdrawal, or expulsion in case of serious violation of Article 3) of the Statute are available but are less well developed.

39. The Committee of Ministers can also undertake country monitoring under the 1994 Declaration by the Committee of Ministers of compliance with commitments accepted by members States of the Council of Europe. Paragraph 1 of the Declaration authorises member States, the Secretary General or, on the basis of a recommendation, the Parliamentary Assembly to refer matters to the Committee of Ministers regarding "questions of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any member State". Such monitoring could therefore apply within the context of a failure to implement an Article 46(1) and (4) judgments, where that resistance is undermining the credibility of the Convention system and Council of Europe values. Given the significant challenges that the Kavala case raises for the Independence of the judiciary and the rule of law in Türkiye, particularly with regard to the implementation of general measures, it would seem prudent for this work to focus on these wider challenges, which have a significant impact within Türkiye, as well as, specifically, the individual measures required for the *Kavala* case (such as his immediate release).

40. The Assembly's role in respect of the implementation of judgments principally relates to its ability to organise hearings, debates and work on reports, such as the report on the implementation of the judgments of the European Court of Human Rights currently underway as well as the work of the Sub-Committee on the Implementation of Judgments of the European Court of Human Rights. The Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) has a

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38. Sanctions of persons on the Kara-Murza list, Introductory Memorandum. See especially paragraph 19: "without such obedient servants willingly fulfilling the expectations of their superiors, the repressive machinery would come to a grinding halt. As they all chose to deliver what was expected from them, in return for a nice career and a comfortable life provided by the regime, they should also all be sent the same signal – that they are not welcome in our countries, that we will not allow them to enjoy the fruits of their actions".
39. Recommendation 2252 (2023) "Implementation of Judgments of the European Court of Human Rights", paragraph 2.8.

particular role in monitoring the respect by Türkiye of its international commitments. Indeed, the co-rapporteurs for Türkiye met Mr Kavala in prison earlier this year, and continue to raise concerns about his continued detention as part of their work on the report on Türkiye. The President of the Assembly has a specific function, including by raising concerns with the relevant State as part of high-level dialogue. Where a situation is particularly grave, the Assembly also has a role in initiating the complementary joint procedure, in considering the credentials of national delegations to the Assembly, and in inviting the Committee of Ministers to act under Article 8 of the Statute (without recourse to the complementary joint procedure). As regards the possibility to challenge the delegation's credentials, as a tool in respect of States that are not complying with the principles of the rule of law, democracy and human rights, it is to be noted that the credentials would have to be challenged for the delegation as a whole, including the representatives of the opposition. The loss of critical Turkish voices in the Assembly would be highly regrettable.

41. The complementary joint procedure can be initiated by the Committee of Ministers, the Assembly or the Secretary General and effectively establishes a procedure for actions to be taken in circumstances where Article 8 of the Statute could be engaged, but where the aim is "to return, through constructive dialogue and co-operation, to a situation in which the member State concerned respects the obligations and principles of the Organisation". Article 8 of the Statute provides that "any member of the Council of Europe which has seriously violated Article 3 [namely respect for the principles of the rule of law and the application of human rights], may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7" of the Statute. The Assembly would have a role in relation to a potential use of the complementary joint procedure, set out in Resolution 2319 (2020). Given the intransigence of the Turkish authorities in complying with the judgments of the Court requiring the immediate release of Osman Kavala, it is now time to consider starting the complementary joint procedure. This will require a motion for recommendation signed by at least one fifth of the component members (representatives and substitutes) of the Assembly, followed by a report of the Committee on Political Affairs and Democracy and a vote, by a two-thirds majority, in the plenary Assembly. At the earliest, this could be done during the January 2024 session.

5. Conclusions

42. The obligation on Türkiye to comply with the judgments of the European Court of Human Rights and to release Osman Kavala is unambiguous. The actions of the Turkish courts in his case lack credibility and merely diminish confidence in Türkiye's ability to respect the rule of law, human rights and justice. The obligation to execute a judgment is binding of all authorities of a State – executive, legislative and judicial. The Turkish authorities, and in particular the judiciary and the executive, have an obligation to take swift, effective action to respect the judgment of the European Court and to release Mr Kavala.

43. Continued refusal by the Turkish authorities to take such action, only casts doubt as to the true commitment of Türkiye to respecting the rule of law, human rights and democratic values; values that are central to membership of this Organisation. In light of the exceptional circumstances present, the threshold for initiating the complementary joint procedure can be considered to be met. Members may therefore consider that the time has therefore now arrived to take steps to initiate the complementary joint procedure foreseen in Resolution 2319 (2020).

44. The role played by Turkish prosecutors and judges in maintaining through misuse of the law the unlawful detention, prosecution and conviction of Osman Kavala is deplorable. The level of misuse of power by the Turkish prosecution and judiciary in the case of Osman Kavala may well have reached a level comparable to other cases where the Assembly has called for the imposition of "Magnitsky sanctions" against those responsible for such human rights abuses – namely where States could impose targeted sanctions against those members of the judiciary and prosecution responsible for such overt misuse of their power. Further consideration might be given to encouraging States to take such action.

45. Urgent changes are also required to improve the rule of law, the independence of the judiciary and the state of the justice system in Türkiye. This goes beyond training; this is about true independence of prosecutors and judges to apply the law in the way they know that they should, but are sadly currently not doing. Judges that are misusing their power to misapply the law have no place in the judiciary. The government (including through Councils of Prosecutors and Judges) should not seek to put pressure on the judiciary to bend the law to come to untenable and obviously disingenuous conclusions in a particular case. The judiciary should not allow themselves to be susceptible to such pressure and the government should not seek to corrupt the judiciary in this manner. It can be hoped that improved protections for the independence and rigour of the judiciary can reverse the current trends and concerns. The instigation of the 1994 Declaration country monitoring process to focus specifically on these concerns could assist in this work.

Appendix – Dissenting Opinion[40] by Ms Zeynep YILDIZ (Türkiye, NR) member of the Committee on Legal Affairs and Human Rights

I strongly oppose this report on multiple grounds.

1. Firstly, this report gives the false impression that Turkish Courts willingly and systematically ignore the decisions of the Strasbourg Court. Official figures suggest otherwise. Türkiye's ratio for execution of the judgments of the European Court of Human Rights stands at 89%, which is well above the average of all the Council of Europe members, which is 79%. These figures clearly demonstrate Türkiye's firm commitment and ability to fulfill its statutory obligations. Indeed, the European Court of Human Rights has been playing a crucial role in the democratisation process of Türkiye, as it has taken them into consideration while undertaking substantial reforms

2. Furthermore, there are other Court rulings that have not been implemented by some member States such as Bekir Ousta ruling. Turning a blind eye to the European Court of Human Rights rulings that are not implemented by other member States casts a shadow on the credibility and objectivity of the Council of Europe.

3. Secondly, the report calls for the initiation of the complementary joint procedure for Türkiye. Türkiye adheres to the principle of democracy, human rights and rule of law with due respect to independence and impartiality of judiciary. Turkish members of the Parliamentary Assembly and Turkish authorities keep an open and transparent dialogue with the co-rapporteurs of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). This report goes well beyond the proportionality and equitability in addressing the case of Kavala and implementation of judgments by Türkiye. No one could cast a shadow on the commitment of Türkiye to these principles by singling out a case.

4. Thirdly, the report has been amended in the Committee with the insertion of calls for challenging the credentials of Turkish delegation and establishing a deadline. We strongly oppose this, which is not in line with working methods of this Assembly. Moreover, calls for challenging credentials give the impression of threat and intimidation and could risk the effective participation of entire Turkish delegation.

5. Fourthly, the report calls the European Union to take into account the Kavala case while directing its financial contribution to Türkiye. This is not a constructive approach. Türkiye has always prioritised its relations with the European Union and the Council of Europe. This call to the European Union is just discouraging and unfair considering the fact that Türkiye has undertaken series of reforms over the years and has developed its relations with the European Union.

6. Fifthly, a new paragraph with reference to Magnitsky Act has been inserted to the report in the committee. This is totally unacceptable. This is a direct threat to the officials of Turkish government and Türkiye's independent judiciary.

7. Lastly, in the draft recommendation, the Assembly calls on the Committee of Ministers to establish country monitoring in respect of the execution of judgments of the European Court of Human Rights by Türkiye. If there is going to be a country monitoring procedure, it should be limited to Kavala case, which is the core of this report.

For all the reasons presented above, I strongly oppose this report.

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40. Rule 50.4 of the Assembly's Rules of Procedure: "The report of a committee shall also contain an explanatory memorandum by the rapporteur. The committee shall take note of it. Any dissenting opinions expressed in the committee shall be included therein at the request of their authors, preferably in the body of the explanatory memorandum, but otherwise in an appendix or footnote."