

**Mandates of the Special Rapporteur on the situation of human rights defenders; the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association**

Ref.: AL TUR 8/2022  
(Please use this reference in your reply)

21 September 2022

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights defenders; Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the rights to freedom of peaceful assembly and of association, pursuant to Human Rights Council resolutions 43/16, 42/22, 43/4 and 50/17.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the continued detention of **Mr. Osman Kavala** in light of the judgement of the European Court of Human Rights ordering his release and subsequent infringement proceedings against Türkiye in this regard.

Mr. Osman Kavala is a human rights defender who has been at the forefront of civil society activities in Türkiye since the 1990's. He is the head of the not-for-profit Anadolu Kültür, whose members are active in the fields of arts, business, and civil society to promote and defend the right to cultural diversity in Türkiye. Mr. Kavala is a member of many other civil society organisations such as the Turkish Economic and Social Studies Foundation (Türkiye Ekonomik ve Sosyal Etüdler Vakfı – TESEV), Diyarbakır Political and Social Research Institute (Diyarbakır Siyasal ve Sosyal Araştırmalar Enstitüsü – DİSA), Open Society Foundation (Açık Toplum Vakfı), History Foundation (Tarih Vakfı), and Turkish Cinema and Audiovisual Culture Foundation (Türkiye Sinema ve Audiovisuel Kültür Vakfı – TÜRSAK).

Mr. Kavala was the subject of two previous joint communications by Special Procedures' mandate holders (TUR 9/2021 and TUR 12/2017). We thank your Excellency's Government for its reply to the latter, dated 15 December 2017 and regret that the reply to the more recent communication does not address the specific allegations regarding Mr. Kavala.

According to the information received:

As previously communicated, Mr. Osman Kavala was arrested in Istanbul Ataturk Airport on 18 October 2017. During his first trial, held on 25 October 2017, no charges were pressed against him, however his detention was renewed for seven days. He was ultimately charged under articles 309 and 312 of the Turkish Penal Code regarding the use of violence to prevent the constitutional order and attempting to overthrow the Government of Türkiye. The charges relate to the prosecution's allegations that Mr. Kavala was involved the so-

called Gezi Park protests that occurred in 2013, and a failed coup d'état attempt in July 2016.

On 10 December 2019, the European Court of Human Rights ruled in the *Kavala v. Türkiye* case that the detention of Mr. Kavala was arbitrary on the basis that his detention lacked sufficient evidence and was aimed at silencing him, thus violating articles 5.1, 5.4 and 18 of the European Convention on Human Rights. The Court ordered his immediate release.

The ruling of the ECtHR which should be final and binding on Turkish courts, was dismissed by the Istanbul 30th High Criminal Court for the first time on 24 December 2019. The decision to dismiss the ECtHR ruling was subsequently upheld multiple times in Turkish courts.

On 18 February 2020, the Istanbul 30th High Criminal Court ordered Mr. Kavala's acquittal in relation to the charge of attempting to overthrow the Government, under article 312 of the Penal Code. However, the Istanbul Prosecutor's Office issued an arrest warrant against Mr. Kavala on that same day under article 309 of the Turkish Penal Code, leading to the human rights defenders' re-arrest before he could leave prison.

On 9 March 2020, a further charge of espionage, under article 328 of the Turkish Penal Code, was filed against Mr. Kavala by the Istanbul Prosecutor's Office. On 22 January 2021, his acquittal of the charge of attempting to overthrow the Government was overturned.

On 2 February 2022, the Committee of Ministers of the Council of Europe, who supervise the execution of ECtHR judgements, voted by the required two-thirds majority to refer Mr. Kavala's case back to the Court, having not been successful in repeated efforts to urge Türkiye to implement the original judgement.

On 25 April 2022, the 13<sup>th</sup> Istanbul Assize Court convicted Mr. Kavala of "attempting to overthrow the government", sentencing him to aggravated life imprisonment, without the possibility for parole. His conviction was reportedly based on the same evidence that had been deemed by the ECtHR to be insufficient to support the allegations.

On 11 July 2022, the European Court of Human Rights (ECtHR) ruled that Türkiye had failed in its obligation to abide by the previous judgement the case, thus violating article 46 paragraph 1 of the European Convention on Human Rights. This is the second time in the 63 year history of the Court that a country has faced infringement proceedings for failing to implement a binding judgement of the ECtHR. The judgement is final, took effect immediately and is binding on Türkiye and all of its courts, including the Court of Cassation which is hearing Mr. Kavala's appeal against his unlawful conviction.

Without wishing to prejudge the accuracy of the above-mentioned information, we wish to express our utmost concern regarding the apparent denial of justice for Mr. Kavala, on whose case the highest human rights court in Europe has now twice

issued legally binding judgements. We are deeply concerned that Mr. Kavala's case continued to be processed through domestic courts, and an aggravated life sentence handed down, despite the ECtHR ruling and the infringement proceedings which were underway. Such actions would be at odds with Türkiye's obligations under jurisdiction of the Court and may have far reaching consequences for human rights defenders and all those seeking justice on alleged violations of human rights in Türkiye.

The refusal of Türkiye to abide by the judgement appears to furthermore be a direct attack on the credibility of the ECtHR and the inalienable human rights which it seeks to uphold. We are consequentially concerned about the broader significance that Türkiye's failure to abide by the judgement in the context of its commitment to uphold human rights domestically and provide pathways to justice. Indeed, we are deeply concerned that this case could have a chilling effect on individuals who wish to express themselves, demonstrate peacefully, assemble and participate in public and political life in Türkiye. We urge your Excellency's Government to respect the decision and legitimacy of the European Court of Human Rights and take begin the process of securing the freedom of Mr. Kavala, who has been detained arbitrarily for almost five years.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

We are issuing this appeal in order to safeguard the rights of abovementioned individual from irreparable harm and without prejudicing any eventual legal determination.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the factual and legal basis of the charges and conviction of Mr. Kavala.
3. Please provide information on how the failure of Türkiye to abide by the ruling of the ECtHR is compatible with its obligations as a member of the Council of Europe.
4. Please provide information on the measures taken and the guarantees adopted by the authorities to enable human rights defenders to exercise their legitimate rights to freedom of expression, peaceful demonstration and association, and to carry out their legitimate work freely and in a safe and supportive environment, free from intimidation and harassment of any kind, in Türkiye.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within

60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Further, we would like to inform your Excellency's Government that after having transmitted the information contained in the present communication to the Government, the Working Group on Arbitrary Detention may also transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. The present communication in no way prejudices any opinion the Working Group may render. The Government is required to respond separately to the allegation letter and the regular procedure

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of our highest consideration.

Mary Lawlor  
Special Rapporteur on the situation of human rights defenders

Mumba Malila  
Vice-Chair of the Working Group on Arbitrary Detention

Irene Khan  
Special Rapporteur on the promotion and protection of the right to freedom of opinion  
and expression

Clement Nyaletsossi Voule  
Special Rapporteur on the rights to freedom of peaceful assembly and of association

## **Annex**

### **Reference to international human rights law**

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above. In this regard, we would like to refer your Excellency's Government to articles 9, 14 and 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Turkey on 23 December 2003, which ensures the right to liberty and security of a person, the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law, the right to freedom of expression and the right hold opinions without interference.

We would like to refer your Excellency's Government to article 9 of the ICCPR whereby everyone has the right to liberty and security of person, no one shall be subjected to arbitrary arrest or detention, and no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 9(2) provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. According to article 9(3), anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Pretrial detention is an exceptional measure and must be assessed on an individual basis.

In connection with above alleged facts and concerns, we remind your Excellency's Government of article 14 (1) of the ICCPR, which provides that under international law all individuals are equal before the law, and everyone has the right to a fair, free and public trial before an independent and impartial tribunal. We draw your attention to article 14 (2) that all persons are presumed innocent until proven guilty according to law, article 14.2 (c) that all persons shall be tried without undue delay, and (d) all persons tried must be present and permitted to defend themselves in person or through legal assistance of their own choosing.

We would like to refer your Excellency's Government to General Comment No 35 of the Human Rights Committee, which has found that arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression (article 19), freedom of assembly (article 21), freedom of association (article 22) and freedom of religion (article 18). The Human Rights Committee has further stated that arrest or detention on discriminatory grounds in violation of article 2, paragraph 1, article 3 or article 26 is in principle arbitrary. The Working Group on Arbitrary Detention has also confirmed this in its jurisprudence.

In its General Comment No. 32 (2007), the Human Rights Committee noted that the requirement of independence refers, in particular, to the procedure for the appointment of judges; the guarantees relating to their security of tenure; the conditions

governing promotion, transfer, suspension and cessation of their functions; and the actual independence of the judiciary from political interference by the executive branch and the legislature. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal (para. 19).

The principle of the independence of the judiciary has also been enshrined in a large number of United Nations legal instruments, including the Basic Principles on the Independence of the Judiciary. The Principles provide, *inter alia*, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4).

We would also like to remind your Excellency's Government of its obligation under article 19 of the ICCPR to secure the enjoyment of the right to freedom of opinion and expression, which is one of the essential foundations of a democratic society. Any restriction on the rights enshrined in article 19 (2) must be compatible with the requirements in article 19 (3). The scope of the right to freedom of expression includes even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19 (3), CCPR/C/GC/34 para. 11. However, it is not compatible with art. 19 (3), for instance, to invoke laws protecting national security or otherwise, in order to suppress or withhold from the public information of legitimate public interest that does not harm national security or use such laws to prosecute journalists or human rights defenders for having disseminated such information, *id.* para. 30. As indicated by the Human Rights Committee, under no circumstance can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest [...] be compatible with article 19", *id.* para. 23.

We would also like to emphasize that that any restriction on expression or information that a government seeks to justify on grounds of national security and counter terrorism must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest (CCPR/C/GC/34). We would like to stress that counter terrorism legislation with penal sanctions should not be misused against individuals peacefully exercising their rights to freedom of expression and freedom of peaceful association and assembly. These rights are protected under ICCPR and non-violent exercise of these rights is not a criminal offence. Counter terrorism legislation should not be used as an excuse to suppress peaceful minority groups and their members.

Furthermore, we bring to your attention the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and

realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

Finally, we would like to bring to the attention of your Excellency's Government the following provisions of the UN Declaration on Human Rights Defenders:

- article 6 point a), which provides for the right to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms;
- article 6 points b) and c), which provides for the right to freely publish, impart or disseminate information and knowledge on all human rights and fundamental freedoms, and to study, discuss and hold opinions on the observance of these rights, and;
- article 8.2 which provides that all persons, individually or in association with others, have the right to submit to government authorities criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.