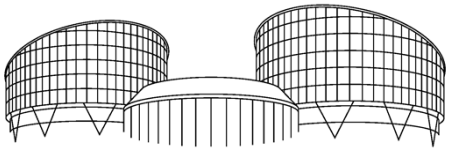

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

PROCEEDINGS UNDER ARTICLE 46 § 4, IN THE CASE OF KAVALA v. TÜRKİYE

(Application no. 28749/18)

JUDGMENT

Art 46 § 4 • Infringement proceedings against Türkiye for failure to abide by Court's final judgment explicitly indicating applicant's immediate release • Continued detention on insufficient grounds pertaining to exactly the same factual context • Finding of a violation of Art 5 § 1, taken alone and with Art 18, in the final judgment vitiating any measure resulting from the impugned charges • Mere reclassification of same facts incapable of modifying the basis for conclusions of final judgment in the absence of other relevant and sufficient circumstances

This version was rectified on 1 September 2022 under Rule 81 of the Rules of Court.

STRASBOURG

11 July 2022

This judgment is final but it may be subject to editorial revision.

In proceedings under Article 46 § 4 of the Convention in the case of Kavala v. Türkiye,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano, *President,*
Jon Fridrik Kjølbro,
Síofra O'Leary,
Georges Ravarani,
Marko Bošnjak,
Egidijus Kūris,
Yonko Grozev,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Pauliine Koskelo,
Jolien Schukking,
Arnfinn Bårdsen,
Raffaele Sabato,
Saadet Yüksel,
Peeter Roosma,
Kateřina Šimáčková,
Davor Derenčinović, *judges,*

and Abel Campos, *Deputy Registrar,*

Having deliberated in private on 8 April, 4 May and 9 June 2022,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. Under the terms of Article 46 § 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), the Committee of Ministers referred to the Court, on 2 February 2022, the question whether the Republic of Türkiye had failed to fulfil its obligation under Article 46 § 1 of the Convention to abide by the Court's judgment in the case of *Kavala v. Turkey* (no. 28749/18, 10 December 2019).

2. In the *Kavala* judgment (cited above), the Court found violations of Articles 5 §§ 1 and 4, and Article 18 taken in conjunction with Article 5 § 1 of the Convention, with regard to the criminal charges brought against Mr Kavala in October 2017 and his subsequent and continued pre-trial detention. That judgment became final on 11 May 2020, at which point it was transmitted to the Committee of Ministers under Article 46 § 2 of the Convention for supervision of its execution. The Committee of Ministers repeatedly examined the case at its Human Rights and ordinary meetings between September 2020 and February 2022 (see paragraphs 70-81 below). At its 1423rd Human Rights meeting (2 February 2022), exercising its powers

under Article 46 § 4 of the Convention and Rule 11 of its Rules for the supervision of the execution of judgments and of the terms of friendly settlements, the Committee adopted an Interim Resolution by which it decided to refer its question to the Court under Article 46 § 4 (CM/ResDH(2022)21 – see Annex).

3. On 21 February 2022 the referral was filed with the Registrar by the Committee of Ministers in accordance with Rule 100 of the Rules of Court and subsequently allocated to the Grand Chamber of the Court, in accordance with Rule 101.

4. The composition of the Grand Chamber was determined in accordance with Article 31 (b) of the Convention and Rule 24 of the Rules of Court.

5. The Committee of Ministers, the Turkish Government ("the Government") and Mr Kavala each submitted written comments (Rules 102 and 103 § 1).

6. The Commissioner for Human Rights of the Council of Europe ("the Human Rights Commissioner") submitted written comments (Rule 99 *in fine*, read together with Rule 44).

7. Having deliberated in private on 8 April 2022, the Grand Chamber decided to dispense with a hearing (Rule 103 § 2). The Government and Mr Kavala each submitted further written comments in response to the first round of written comments.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Mehmet Osman Kavala and the events leading up to his pre-trial detention

1. General overview

8. Mr Kavala, a businessman, is a human-rights defender in Türkiye. He has been involved in setting up numerous non-governmental organisations ("NGOs") and civil-society movements which are active in the areas of human rights, culture, social studies, historical reconciliation and environmental protection (see *Kavala*, cited above, § 12).

9. Mr Kavala was deprived of his liberty, without interruption, between 18 October 2017 and – at the least – 2 February 2022, the date on which the Committee of Ministers decided to refer the matter to the Court under Article 46 § 4 of the Convention. On the latter date, his pre-trial detention had lasted four years, three months and fourteen days. During the investigations and criminal proceedings instituted against him, orders for placement in pre-trial detention were issued in respect of Mr Kavala on three occasions (1 October 2017, 19 February 2020 and 9 March 2020) and three orders were

made for his release on bail (11 October 2019, 18 February 2020 and 20 March 2020).

10. Mr Kavala was initially suspected of having committed two offences: attempting to overthrow the Government through force and violence (Article 312 of the Criminal Code) and attempting to overthrow the constitutional order in the context of the failed coup attempt of 15 July 2016 (Article 309 of the Criminal Code).

The first charge, under Article 312 of the Criminal Code, was related to the Gezi Park events. These events occurred between May and September 2013 and were marked by a series of demonstrations triggered by an urban development project which included the construction of a shopping centre on the site of Gezi Park. The protest movements were initially led by ecologists and local residents objecting to the destruction of the park. On 31 May 2013, however, the police intervened violently to remove the persons occupying the park. There were confrontations between the police and the demonstrators. The protest movement escalated in June and July and spread to several towns and cities in Türkiye, taking the form of meetings and demonstrations which sometimes led to violent clashes. Violent groups joined the demonstrators and committed acts of violence. Four civilians and two police officers were killed, and thousands of people were wounded (for further information about these events, see *Kavala*, cited above, §§ 15-22).

The second charge, under Article 309 of the Criminal Code, was related to the violent attempted coup of 15 July 2016, which led to the declaration of a state of emergency in Türkiye from 20 July 2016 to 18 July 2018 (for further information about these events, see *Kavala*, cited above, §§ 24-28).

On 18 February 2020 Mr Kavala was acquitted of the charge related to the Gezi events. The decision to release him on bail, delivered on the same date, did not lead to his actual release. He was placed in police custody on the same date, and on the following day he was placed in pre-trial detention in relation to the attempted coup; his release was ordered on 20 March 2020. Since 9 March 2020, Mr Kavala has been held in pre-trial detention for military or political espionage, an offence listed in Article 328 of the Criminal Code. When the Committee of Ministers referred the question to the Court, Mr Kavala's pre-trial detention was based on this charge.

11. On 4 March 2022, after the Committee of Ministers had referred the question to the Court under Article 46 § 4 of the Convention, the prosecutor's office made submissions to the Istanbul 13th Assize Court, requesting that Mr Kavala be convicted of attempting to overthrow the Government through force and violence (Article 312 of the Criminal Code), primarily in the context of the Gezi Park events. On 25 April 2022 the Istanbul 13th Assize Court found Mr Kavala guilty of the charge under Article 312 of the Criminal Code and sentenced him to aggravated life imprisonment pursuant to that provision. In addition, it ordered that he continue to be held in pre-trial detention on that charge. It also decided to acquit him of the charge of military

or political espionage (Article 328 of the Criminal Code) and ordered his release in connection with that particular charge. The criminal proceedings are still pending before the domestic courts.

The relevant facts may be summarised as follows.

2. Mr Kavala's arrest and placement in pre-trial detention until the first charges were brought against him on 19 February 2019

12. Following his arrest on 18 October 2017, under Articles 312 and 309 of the Criminal Code, Mr Kavala was questioned by the Istanbul police on 31 October 2017 about the Gezi Park events (see *Kavala*, cited above, § 29), his relations with journalists, academics, numerous human-rights defenders and members or heads of NGOs, and his alleged contacts with Professor H.J.B., a former director of the Wilson Center in the United States, suspected, in particular, of being one of the instigators of the attempted coup of 15 July 2016, and against whom a criminal investigation was pending in that connection.

13. On 1 November 2017 the public prosecutor's office called for Mr Kavala to be placed in pre-trial detention on the charges under Articles 309 and 312 of the Criminal Code. To justify the suspicions against him with regard to the Gezi Park events, it argued that Mr Kavala had led and organised those events, which it described as an insurrection aimed at overthrowing the Government and preventing it, through force and violence, from exercising its functions. It stated that numerous terrorist organisations had played an active part in these events. To substantiate the charges against Mr Kavala concerning the attempted coup, it relied on evidence from the case file which, in its opinion, showed that Mr Kavala had had intensive and unusual contacts with foreign nationals and especially with H.J.B., whom the prosecutor's office suspected of having been one of the instigators of the attempted coup and of having stayed at a hotel on Büyükada (Istanbul) on 15 July 2016. The prosecution's argument was based, in particular, on reports from base transceiver stations indicating that on 18 July 2016 Mr Kavala's mobile telephone and that of H.J.B. had emitted signals from the same station.

14. On 1 November 2017 the Istanbul Magistrate's Court ordered that Mr Kavala be placed in pre-trial detention (see *Kavala*, cited above, § 38).

15. On 13 November 2017 the 2nd Istanbul Magistrate's Court dismissed an objection lodged before it, on the grounds that the contested decision had been compatible with the procedure and the law (ibid., §§ 39-40).

16. From 1 November 2017, date of Mr Kavala's initial placement in detention, to 4 March 2019, when the bill of indictment of 19 February 2019 based on Article 312 of the Criminal Code was accepted by the assize court (ibid., §§ 41-46), the magistrate's courts examined the issue of the extension of Mr Kavala's pre-trial detention on numerous occasions. In their decisions, they referred not only to the evidence relied on in the decision of 1 November

2017, but also to a report by the Financial Crimes Investigation Committee ("MASAK").

17. On 21 November and 3 December 2018, that is, before the bill of indictment of 19 February 2019 was lodged, the President of the Republic made two statements about the charges directed against Mr Kavala (these statements are reproduced in the above-cited *Kavala* judgment, § 61).

3. The criminal proceedings against Mr Kavala

(a) The initial phase of the criminal proceedings before the Istanbul 30th Assize Court, until the delivery of the *Kavala* judgment

18. On 5 February 2019 the Istanbul prosecutor's office decided to sever the criminal investigation into the charge under Article 309 of the Criminal Code from the investigation into the charge under Article 312 of the Criminal Code (investigation no. 2018/210299), and to investigate separately the first of these offences (investigation no. 2017/196115).

19. On 19 February 2019 the Istanbul public prosecutor filed a bill of indictment in respect of Mr Kavala and 15 other suspects, including actors, NGO leaders and journalists. It accused them, in particular, of having attempted to overthrow the government by force and violence within the meaning of Article 312 of the Criminal Code, and of having committed numerous breaches of public order – damaging public property, profanation of places of worship and of cemeteries, unlawful possession of dangerous substances, looting, etc. (for more information on the content of the bill of indictment, see *Kavala*, cited above, §§ 47-55). These charges concerned the Gezi Park events.

20. On 4 March 2019, the 30th Assize Court accepted the bill of indictment and agreed to Mr Kavala's committal for trial. The trial process thus began.

21. On 11 October 2019 the Istanbul public prosecutor's office ordered, of its own motion, that Mr Kavala was to be released on bail in the context of the criminal investigation into the charge under Article 309 of the Criminal Code (no. 2017/196115). It noted that Mr Kavala had been placed in pre-trial detention in relation to the investigation into the Gezi Park events and that to extend his detention for an offence defined in Article 309 would be disproportionate in view of the state of the evidence. However, that decision had no effect, on account of the decision of 1 November 2017 placing Mr Kavala in pre-trial detention in relation to the offence under Article 312 of the Criminal Code (see paragraph 14 above).

22. On 10 December 2019 the Court delivered its judgment in the *Kavala* case, finding that there had been a violation of Article 5 §§ 1 and 4 of the Convention, and of Article 18 taken together with Article 5 § 1, and instructed that Mr Kavala's "immediate release" was to be secured (see *Kavala*, cited above, § 240).

23. On 24 December 2019 and 28 January 2020, the Istanbul 30th Assize Court ordered, by a majority, that Mr Kavala's pre-trial detention be maintained.

(b) The subsequent phase of the criminal proceedings, following delivery of the *Kavala* judgment

(i) Acquittal and release on bail

24. By a judgment dated 18 February 2020, the Istanbul 30th Assize Court acquitted Mr Kavala on the charge of attempting to overthrow the government (Article 312 of the Criminal Code) and ordered that he be released on bail. In its reasoning, it noted, firstly, that the transcripts of telephone conversations that had been added to the case file were not legally valid evidence ("*hukuka uygun delil*"), and, secondly, that there was no evidence to establish that Mr Kavala had financed the Gezi Park events and that the materials he had provided had been used for violent purposes. In this connection, it noted, firstly, that the prosecution witness (see *Kavala*, cited above, §§ 36, 62, 147 and 148) had not referred to any concrete facts, secondly, that none of the other witnesses heard during the proceedings had made incriminatory statements and, thirdly, that the MASAK report (see paragraph 16 above; ibid., §§ 44 and 227) had not brought to light any activity capable of substantiating the charge that the defendant had provided financial support to the demonstrators. It found, in particular, that there was no legal, concrete and conclusive evidence to indicate that Mr Kavala had committed the alleged offence, within the meaning of Article 312 of the Criminal Code. It concluded that there was insufficient evidence to establish Mr Kavala's guilt.

(ii) Return to pre-trial detention

25. Still on 18 February 2020, following the decision to release Mr Kavala on bail, the Istanbul public prosecutor issued an arrest warrant and requested that Mr Kavala be returned to pre-trial detention in the context of investigation no. 2017/196115 (attempt to overthrow the constitutional order, Article 309 of the Criminal Code), which had been severed from the initial investigation (see paragraph 18 above). He therefore asked the Istanbul Magistrate's Court to order that Mr Kavala be placed in pre-trial detention.

In support of his request, he argued that H.J.B., who was under criminal investigation for the attempted coup and against whom an arrest warrant had been issued, had, firstly, been a member in the United States of the management board of the Rumi Foundation, whose honorary president was Fetullah Gülen, leader of the FETÖ/PDY (an organisation described by the Turkish authorities as FETÖ/PDY - "Fetullahist Terror Organisation/Parallel State Structure"-), and, secondly, had conducted lobbying activities in favour of the same Fetullah Gülen. According to the prosecutor's office, H.J.B. had

arrived in Istanbul on the morning of 15 July 2016 and had stayed in a hotel in the Büyükada district. On 18 July 2016 he had supposedly met Mr Kavala in a restaurant in the Karaköy district of Istanbul and had then left the country that same day. In addition, communications analysis showed that Mr Kavala and H.J.B. had been in very frequent contact before and after 15 July 2016, that they had met on 27 June 2016 in Mr Kavala's office in Şişli (Istanbul), and that on 30 June 2016, in Diyarbakır, they had met persons who had a link with the PKK (Workers' Party of Kurdistan, an armed terrorist organisation). These elements had justified the charge, brought against Mr Kavala, of participation in the decision-making process which led to the attempted coup.

26. Still on 18 February 2020, although his release on bail had just been ordered by the 30th Istanbul Assize Court (see paragraph 24 above), Mr Kavala was arrested and placed in police custody in the premises of the Istanbul police.

27. On 19 February 2020 the Istanbul 8th Magistrate's Court heard Mr Kavala. He submitted that the prosecutor's request was based on charges which had already been examined by the Court, which, in its judgment of 10 December 2019, had concluded that there were no reasonable grounds to suspect that Mr Kavala had committed the offences with which he had been charged. He also argued that there was no evidence suggesting that he had had numerous contacts with H.J.B. Lastly, he noted that the maximum duration of pre-trial detention during the criminal investigation phase, set at two years under Article 102 § 4 of the Code of Criminal Procedure, as amended on 17 October 2019, had already been exceeded.

28. On 19 February 2020 the Istanbul 8th Magistrate's Court ordered that Mr Kavala be returned to pre-trial detention under Article 309 of the Criminal Code, although the prosecutor's office had already ordered, on 11 October 2019, that he be released on bail (see paragraph 21 above). Relying on the evidence cited by the public prosecutor in his request for placement in pre-trial detention (see paragraph 25 above), it noted that there existed concrete evidence suggesting that Mr Kavala had committed the offence of which he was accused. It also considered that there existed a risk that he would abscond, given the seriousness of the charges and the fact that the alleged offence was among the so-called "catalogue" offences. It concluded that a judicial supervision measure would be insufficient.

29. Still on 19 February 2020, according to the information transmitted by the Committee of Ministers, the Council of Judges and Prosecutors began a preliminary examination to determine whether there were grounds for opening disciplinary investigations in respect of the three judges of the Istanbul 30th Assize Court who had delivered the acquittal judgment concerning the charges under Article 312 of the Criminal Code. The case file contains no information about the outcome of that examination.

30. On 25 February 2020 Mr Kavala's objection was dismissed.

31. On 9 March 2020 the Istanbul public prosecutor's office requested that Mr Kavala be placed in pre-trial detention on charges of military or political espionage (Article 328 of the Criminal Code). In support of its request, it argued that additional research conducted in respect of H.J.B. had uncovered evidence suggesting that he was carrying out espionage activities for foreign States. In this connection, it noted, as in the request for the initial pre-trial detention of 18 February 2019 (see paragraph 25 above), that H.J.B., firstly, had been a member in the United States of the management board of the Rumi Foundation, whose honorary president was Fetullah Gülen, and, secondly, had conducted lobbying activities in support of the latter individual. According to the prosecutor's office, H.J.B had arrived in Istanbul on the morning of 15 July 2016 and stayed in a hotel in Büyükada, Istanbul, using the pretext of his participation in an international meeting to dissimulate the true purpose of his visit. Participants in this meeting, which purportedly concerned the problems then facing the Middle East, had stated that H.J.B. was present and that the attempted coup had begun that day, during the meeting. A member of the hotel staff, questioned as a witness, had stated that H.J.B. was abnormally tense and anxious. This evidence showed that H.J.B.'s participation at the meeting in question had been a means of hiding his links to the perpetrators of the attempted coup. Furthermore, this witness stated that H.J.B. had talked with him and confided that, each time that he came to Türkiye, extraordinary events took place. During that conversation, the hotel employee had also asked H.J.B. about the attempted coup, and the latter had attempted to hide his participation by replying "it's a game, a false coup, I don't think that such a thing is happening". Moreover, the communications analysis report had revealed the existence of a link between H.J.B. and Mr Kavala, and it had been established that H.J.B and Mr Kavala had used telephone numbers registered in their respective names when contacting each other. Their respective mobile telephones had emitted signals from the same base transceiver station on 29 November 2014, as well as on 1, 3 and 5 June 2015 and on 7 and 9 March, 28 and 29 June and 18 July 2016, which showed that they also met in person for discussions. Mr Kavala's statements indicated that he and H.J.B. had met in a restaurant on 18 July 2016, that is, after the attempted coup. In addition, the witness statement and the communications data proved that a relationship existed between H.J.B and Mr Kavala. Investigations into this relationship were still ongoing. For these reasons, the prosecutor's office concluded that there was evidence to suggest that Mr Kavala was guilty of military or political espionage.

32. On the same date the magistrate's court heard Mr Kavala. He stated, among other points, that the base receiver station in question covered a large central zone in which numerous hotels and his office were located, and that it was completely normal that his mobile telephone, and that of H.J.B., had emitted signals from the same station. He further stated that he had not taken part in the meeting held on 15 July 2016, while specifying that it had been a

legal meeting in which certain civil servants had also participated. He considered it abnormal that, two years after his placement in pre-trial detention on charges of attempting to overthrow the constitutional order, he was being accused of espionage on the basis of the same facts. Lastly, he submitted that there was no prima facie evidence against him concerning the offence in question, and that the purpose of the request was to circumvent the Court's judgment.

33. Again on 9 March 2020, the 10th Magistrate's Court ordered that Mr Kavala be returned to pre-trial detention in relation to the offence of military or political espionage. In support of its decision, it referred to the evidence mentioned in the prosecution request (see paragraph 31 above). It considered that there was concrete evidence which could justify the suspicions against Mr Kavala. It also held that the detention measure was proportionate, having regard to the seriousness of the offence and the severity of the possible sentence.

34. On 20 March 2020 the magistrate's court ordered that Mr Kavala be released on bail in the context of investigation no. 2017/196115 (Article 309 of the Criminal Code), on the grounds that he had been held in pre-trial detention for more than two years without having been charged in that respect. The relevant parts of the investigating judge's decision read as follows:

> "Having regard to the existing reports, the statements made by the suspect and witnesses, the relevant reports and the case file as a whole, certain evidence gives rise to strong suspicion against [Mr Kavala] of attempting to overthrow the constitutional order. However, the suspect has been detained for more than two years in connection with this offence. For this type of offence, Article 102 § 4 of the CCP lays down that the maximum length of detention on remand during the criminal investigation phase is two years. Given that the suspect is in detention in relation to another offence, and that the evidence has been collected, in the absence of a risk that the suspect will tamper with the evidence and in view of the time that he has spent in detention, it is considered that a measure of pre-trial detention would be severe. In consequence, it has been decided to accept the opinion from the Istanbul general prosecutor's office regarding the suspect's release on bail in relation to the offence of attempting to overthrow the constitutional order, and to instruct, with immediate effect, that [Mr Kavala] be released on bail, unless he has been detained or convicted in connection with another offence..."

However, this decision had no effect, on account of the decision of 9 March 2020 placing Mr Kavala in pre-trial detention in relation to the charge of military or political espionage (see paragraph 33 above).

35. The magistrate's courts re-examined Mr Kavala's pre-trial detention on 27 March, 1 April, 7 April, 13 April, 6 May, 4 June, 29 July and 17 August 2020, either of their own motion or at his request, and on each occasion they ordered his continued detention. In support of their decision, they referred on each occasion to the existence of concrete evidence, the nature of the offence of which he was accused and the state of the evidence. They also referred to

the likelihood that he would abscond and concluded that judicial supervision measures would be insufficient.

(iii) The criminal proceedings before the Istanbul 36th Assize Court

(α) The indictment of 28 September 2020

36. On 28 September 2020 the Istanbul prosecutor's office issued an indictment against Mr Kavala in respect of charges of attempting to overthrow the constitutional order (Article 309 of the Criminal Code) and military or political espionage (Article 328 of the Criminal Code).

In this indictment, the prosecutor's office set out the charges against Mr Kavala. It argued that on 8 October 2016[1] Mr Kavala had had telephone conversations with H.J.B., the content of which was unknown. Their respective mobile telephones had allegedly emitted signals from the same base receiver station. In addition, Mr Kavala and H.J.B. had dined together in a restaurant on 18 July 2016, after the attempted coup. Mr Kavala had also carried out multiple visits abroad, at a more frequent pace than in the preceding years. He had founded and provided financial support to NGOs, under the guise of lawfulness but for illegal purposes, with a view to taking the pulse of society. During the Gezi Park events, Mr Kavala and H.J.B. had attempted to provide the left-wing terrorist organisations with an environment that was conducive to violence, by mobilising cells infiltrated into the NGOs. In Türkiye, Mr Kavala had collaborated with H.J.B., who had maintained an organic link with foreign intelligence services.

With regard to the offence of espionage, the prosecutor's office also submitted that the spying activities were not limited to gathering and analysing confidential information, but that they also consisted in exploiting, with the help of the security services of numerous States, civil society actors, with a view to exercising economic, cultural, ideological and military pressure on these States and bringing about social engineering through activities conducted by NGOs in receipt of foreign funding. It alleged that in many countries retired officials from the intelligence services participated in think tanks and carried out social, cultural and political research which was subsequently submitted to the secret services.

The prosecutor's office pointed out that Mr Kavala was the representative of the Open Society Institute, an entity set up by G.S., an American businessman who was also one of the founders of the Foundation for an Open Society in Türkiye. It submitted that in 2002 Mr Kavala had founded *Anadolu Kültür*, a non-profit-making association, in order to control his illegal activities in Türkiye. It concluded from a report, prepared on 16 October 2018 by the Directorate General for Foundations, that Mr Kavala conducted projects through funds provided by the Foundation for an Open Society. In addition to analysing, for the purpose of espionage, the social and cultural

[1] Rectified on 1 September 2022: the text was "on various dates".

features of Turkish society, the projects in question were intended to incite Turkish citizens to hatred and hostility on the grounds of a distinction based on their connection with a language, race, relation, sect or region. It considered that the aim of the Foundation for an Open Society was to overthrow the government by encouraging division within society. The prosecutor's office also argued that the non-profit association and the other NGOs founded or led by Mr Kavala had carried out extensive research on the characteristics of the Turkish people, and that the aim of this research was to foster division, influence governments and make contact with the authorities of foreign States and international organisations.

Again according to the prosecution, these activities, on the pretext of protecting freedoms, were in fact intended, under the supervision of the secret services, to overthrow the legitimate government. In this context, Mr Kavala had wished to create pockets of resistance in society, by conducting activities with the proclaimed aims of upholding women's rights, protecting children from abuse, combatting violence against women, integrating minorities, and promoting freedom of expression and environmental protection. In so doing, he was attempting to group independent entities around these projects, with the aim of encouraging them, when the time came, to take part in mass demonstrations against the government.

The prosecutor's office argued that Mr Kavala had also funded, through his association *Anadolu Kültür*, many projects and documentary films on the origins of Turkish citizens, with the aim, firstly, of disseminating the belief that the Turkish State was assassinating citizens of Kurdish origin or subjecting them to serious human-rights violations, and, secondly, of provoking sympathy with regard to the PKK and its allies. In this connection, it referred to a series of reports and documentaries on the women's section of the PKK, the situation of children in the south-east of Türkiye, the burning of villages and forced migration of populations, commemoration of the events in 1915 which had strongly affected the Armenian population, and the allegations of human-rights violations after the attempted coup, asserting that these reports and documentaries had been funded or supported by Mr Kavala or that they had been found on his smartphone or on the digital media found in his office.

The prosecutor's office also argued that during his visits to Germany Mr Kavala had met C.D., a journalist who lived in that country and had been convicted in Türkiye of disclosing classified documents (espionage), and that they had communicated with each other on numerous occasions *via* WhatsApp.

It also argued that Mr Kavala had played an active role at the preparatory stage of the attempted coup. In support of that allegation, it cited the evidence set out below and concluded that H.J.B.'s activities coincided with the preparations for the attempted coup to an extent that was not "consistent with the normal course of life". It mentioned various trips that H.J.B. had made to

Türkiye or different towns in Türkiye, and that Mr Kavala had made to foreign countries before the attempted coup. It also argued that H.J.B. had stayed in Istanbul from 7 to 9 March 2016 and that, during this period, his mobile telephone and that of Mr Kavala had on numerous occasions emitted signals from the same base receiver station. It claimed that on 8 October 2016 H.J.B had had three telephone conversations with Mr Kavala, which had lasted 28 seconds, 36 seconds and 193 seconds respectively. H.J.B. had travelled twice to Türkiye and during his stays, his and Mr Kavala's mobile telephones had emitted signals from the same base receiver station, in two districts of Istanbul – Şişli, where Mr Kavala's office is located, and Fatih. In 2015 and 2016 the two men's mobile telephones had also emitted signals from the same base receiver station, located in Şişli, on numerous occasions. Mr Kavala and H.J.B had allegedly met on 18 July 2016 in a restaurant. In addition, Mr Kavala had allegedly travelled to Germany from 11 to 14 November 2015. A.Ö., who was accused of being one of the instigators of the attempted coup and of having acted on instructions from Fetullah Gülen, had travelled to the United States on 14 November 2015.

The prosecutor's office also argued that Mr Kavala had used another mobile telephone for two and a half months in 2015, that is, the year in which elections were held and the PKK had declared autonomy in the south-east of Türkiye. However, it noted that it had proved impossible to find this telephone and that Mr Kavala had used other telephone numbers in Germany.

The prosecution further submitted that Mr Kavala had exchanged emails with A.V., the content of which had not been recovered. It claimed that A.V., who had participated in the meeting on Büyükada on 15 July 2016, was a member of a Brussels-based think tank founded by, among others, G.S. and a former ambassador, and that the latter[1] had facilitated Fetullah Gülen in obtaining a residence permit in the United States.

The prosecutor's office concluded from this evidence that Mr Kavala and H.J.B. had been informed in advance about the attempted coup and had established, in Türkiye and abroad, a network of contacts with the aim of creating the infrastructure for the attempted coup. It also considered that although it had been possible to bring to light only a limited number of direct exchanges between H.J.B and Mr Kavala, this was because H.J.B. was highly skilled in the tactics and procedures used by the secret services.

The prosecution also argued that on 6 November 2015 G.S. had come to Türkiye and had met Mr Kavala, who had taken a photograph of him with I.A. According to the prosecutor's office, I.A., a businessman, was close to Mr Kavala, and was a representative of the Open Society Foundation in Türkiye and co-founder of the Foundation for an Open Society; he too had allegedly assisted Fetullah Gülen in obtaining his residence permit.

[1] Rectified on 1 September 2022: the text was "he".

Relying on the evidence set out above, the prosecutor's office concluded that Mr Kavala and H.J.B. had committed the offences set out in Articles 309 and 328 of the Criminal Code.

37. On 8 October 2020 the 36th assize court granted the indictment. It dismissed the request for Mr Kavala's release on bail and ordered that he remain in custody.

(β) Mr Kavala's continued pre-trial detention

38. On 6 November 2020 the 36th Assize Court dismissed the request for Mr Kavala's release on bail and ordered that he remain in custody.

39. At the hearing of 18 December 2020, it heard Mr Kavala speak in his defence and questioned certain witnesses. It ordered that his pre-trial detention be extended, on the grounds that there was concrete evidence that could justify his detention. It also stated that not all the evidence had been gathered and that other witnesses had yet to be questioned. Lastly, it held that there was a risk of tampering with evidence and absconding, and that judicial supervision measures would be insufficient.

40. On several occasions the Istanbul 36th Assize Court ordered that Mr Kavala be kept in pre-trial detention, essentially reproducing the grounds on which its previous decisions had been based.

(iv) The quashing of the acquittal judgment

41. On 22 January 2021, as the prosecutor's office had lodged an objection to the acquittal judgment delivered on 18 February 2020 with regard to the charge under Article 312 of the Criminal Code (see paragraph 24 above), the 3rd Regional Court of Appeal quashed the judgment in question and remitted the case to the Istanbul 30th Assize Court.

(v) The proceedings before the 36th Assize Court and the closure of the proceedings before it

42. On 5 February 2021 the Istanbul 36th Assize Court held a hearing, at the close of which it ordered that Mr Kavala's pre-trial detention be extended. It also took note of the regional court of appeal's judgment setting aside the assize court's acquittal judgment and decided to join the criminal proceedings pending before it to the proceedings which were pending before the Istanbul 30th Assize Court, and to send the case file to that court. Thus, the criminal proceedings before the Istanbul 36th Assize Court were closed.

(vi) The quashing of an acquittal judgment in the Çarşı *proceedings*

43. On 28 April 2021 the Court of Cassation set aside an acquittal judgment delivered by the Istanbul 13th Assize Court on 29 December 2015 in proceedings referred to as the "*Çarşı* proceedings" ("the *Çarşı* proceedings"), with reference to a group of supporters of the Beşiktaş football

team. In those proceedings, which had been opened on 11 September 2014, thirty-five persons (Mr Kavala was not one of their number) were accused, among other charges, of attempting to overthrow the government by force and violence in the context of the Gezi Park events (Article 312 of the Criminal Code). All had been acquitted on 29 December 2015. Also on 28 April 2021, the Court of Cassation requested that those proceedings be joined to those opened before the 30th Assize Court.

(vii) The proceedings before the Istanbul 30th Assize Court and the closure of the proceedings before it

44. On 5 March 2021 the Istanbul 30th Assize Court ordered, by a majority, that Mr Kavala's pre-trial detention was to be extended, relying on the same grounds as those it had used in its previous decisions.

45. At a hearing on 29 April 2021, it again ordered, by a majority, that Mr Kavala was to remain in pre-trial detention.

46. On 21 May 2021, after its judgment had been set aside by the regional court of appeal, a hearing was held, at the close of which it ordered, by two votes to one, an extension of Mr Kavala's pre-trial detention in relation to the charge of political or military espionage. In reaching this decision, it began by scrutinising the judgment delivered by the Court in the *Kavala* case, noting that the violation found by the Court resulted from Mr Kavala's detention in connection with the charges under Articles 309 and 312 of the Criminal Code. It noted that the measure in question had ended on 18 February and 20 March 2020 respectively. It also noted that Mr Kavala was in pre-trial detention in relation to a new charge, namely political or military espionage within the meaning of Article 328 of the Criminal Code, which had not been examined by the Court. In addition, it decided to obtain the file of the *Çarşı* proceedings (see paragraph 43 above), which was pending before the Istanbul 13th Assize Court, in order to assess whether it was appropriate to join the two sets of proceedings, in line with the request from the Court of Cassation.

47. On 2 August 2021 the Istanbul 30th Assize Court held an audience and decided, by a majority, to join the proceedings before it to those which were pending before the Istanbul 13th Assize Court (the *Çarşı* proceedings). Thus, the proceedings before the Istanbul 30th Assize Court were closed.

48. During the criminal proceedings before it, the Istanbul 30th Assize Court ordered on several occasions that Mr Kavala's pre-trial detention was to be extended, relying on the same grounds as those set out in its previous decisions.

(viii) The criminal proceedings before the Istanbul 13th Assize Court

49. On 8 October 2021, at the first hearing following the joinder of the proceedings with regard to the charges under Articles 309, 312 and 328 of the Criminal Code, the Istanbul 13th Assize Court ordered, by a majority, that

Mr Kavala was to remain in pre-trial detention. An objection lodged by Mr Kavala against that decision was dismissed on 26 October 2021.

50. On 5 November 2021 the Istanbul 13th Assize Court ordered the continuation of Mr Kavala's pre-trial detention. It stated as follows:

> "Having regard to the nature of the crime with which the defendant is charged, the progress in the procedure to date and the examination of the HTS ("Historical Traffic Search") recordings and data from the base station contained in the case file, the reports prepared following assessment of the digital material, the existence of concrete evidence giving rise to strong suspicion, the MASAK report, and the maximum penalty prescribed by law for the offences in question, it has been decided that judicial supervision measures would be inadequate."

51. On many occasions during the proceedings before it the Istanbul 13th Assize Court, on the same grounds as those relied on its previous decisions, ordered by a majority that Mr Kavala was to remain in pre-trial detention.

52. At a hearing on 21 February 2022 the Istanbul 13th Assize Court decided to sever the *Çarşı* proceedings from those pending before it. On 4 March 2022 the prosecutor's office also submitted its final submissions, at the close of which it sought Mr Kavala's conviction for attempting to overthrow the government by force and violence (Article 312 of the Criminal Code) and his placement in pre-trial detention in this connection. Among other points, the prosecutor's office noted in its submissions that, taken as a whole, the acts for which Mr Kavala had been charged in the indictments submitted on 19 February 2019 with regard to the Gezi Park events (see *Kavala*, cited above, §§ 47-55) and on 28 September 2020 (see paragraph 36 above) were continuous acts, punishable under Article 312 of the Criminal Code.

53. At a hearing on 21 March 2022, the Istanbul 13th Assize Court ordered, by a majority, that Mr Kavala's pre-trial detention be extended.

54. On 25 April 2022 the 13th Istanbul Assize Court acquitted Mr Kavala of the charge of military or political espionage under Article 328 of the Criminal Code but convicted him of the charge related to Article 312 of the Criminal Code. It sentenced him to aggravated life imprisonment (see paragraph 11 above) and ordered that his pre-trial detention under the latter charge be extended.

55. The criminal proceedings are still pending before the national courts.

4. Other information submitted by Mr Kavala

56. Mr Kavala submitted to the Court numerous speeches by senior State officials, similar to those brought to the Court's attention in the context of the initial judgment (see *Kavala*, cited above, § 61), concerning the criminal proceedings brought against him and the procedure before the Committee of Ministers. In particular, in a speech of 19 February 2020, the President of the Republic had criticised the acquittal judgment.

B. Proceedings before the Constitutional Court

1. Mr Kavala's first individual application to the Constitutional Court

57. On 29 December 2017 Mr Kavala lodged an individual application with the Turkish Constitutional Court. He complained about his pre-trial detention on charges related to the Gezi Park events and the attempted coup of 15 July 2016.

58. In a judgment of 28 June 2019, the Constitutional Court held, by ten votes to five, that there had been no violation of Mr Kavala's right to liberty (for a summary of this judgment, see *Kavala,* cited above, §§ 59-60).

2. Mr Kavala's second individual application to the Constitutional Court

59. On 4 May 2020 Mr Kavala lodged a second individual application with the Turkish Constitutional Court complaining about his detention, following the *Kavala* judgment, in relation to the charge of military or political espionage (Article 328 of the Criminal Code).

60. On 29 December 2020, after an initial ruling on 16 July 2020 about certain complaints submitted to it by Mr Kavala, the Constitutional Court adopted its judgment; it was published in the Official Gazette on 23 March 2021.

In its judgment, the Turkish Constitutional Court concluded, by eight votes to seven, that there had been no violation of Mr Kavala's right to liberty with regard to his complaints concerning the lawfulness and length of his detention in respect of the offence defined in Article 328 of the Criminal Code. In its reasoning, it referred to the request presented by the Istanbul prosecutor's office on 9 March 2020 (see paragraph 31 above), the decision issued on the same date by the 10th Magistrate's Court, ordering Mr Kavala's placement in pre-trial detention in relation to military or political espionage (see paragraph 34 above), and the indictment of 28 September 2020 (see paragraph 36 above). It noted that additional research conducted by the prosecution service with regard to H.J.B. had resulted in evidence being gathered which suggested that he had conducted espionage activities for foreign States. With regard to Mr Kavala, it stated, among other points, that reference had been made to communications interception reports and the existence of links between H.J.B. and Mr Kavala. With regard to the indictment, it noted that the prosecutor's office had relied on the following elements concerning the offence defined in Article 328 of the Criminal Code: the alleged contacts between Mr Kavala and H.J.B., the activities conducted by Mr Kavala through entities and organisations that were owned or managed by him, the flash drive seized from Mr Kavala and the recordings found on his mobile telephone. It also noted that, according to the investigative authorities, H.J.B. had conducted espionage against Türkiye and had sat on the management board of a foundation which had the head of the FETÖ/PDY

as its honorary president. It added that H.J.B. had arrived in Türkiye on the day of the attempted coup (15 July 2016) with a view to providing logistical support to this operation.

After summarising the evidence set out by the prosecution in the relevant indictment and its case-law in this area, the Constitutional Court concluded that the contested pre-trial detention was rendered necessary by Article 328 of the Criminal Code in relation to the offence in question and that it was justified from the standpoint of Article 19 of the Constitution. In this connection, it stated:

> "91. ... information and documents which constitute State secrets are in essence the subject of the offence defined in Article 328 (1) of the Criminal Code, and the fact of obtaining such information and documents for the purposes of political or military espionage is the constituent element of this offence. In consequence, it can be stated that one of the main characteristics of the given offence is confidentiality.
>
> 92. It must be borne in mind that, given the secrecy dimension which characterises espionage cases, the investigative authorities are in a more difficult position than in respect of other offences when uncovering such cases, gathering evidence and establishing the facts. Moreover, the facts that the constituent acts of such offences are often carried out in cooperation with the intelligence services of other countries and that the perpetrators of these offences are more skilled at hiding their actions than other suspects might necessitate the adoption of comparatively different standards with regard to the type and level of proof required, at least at the beginning of the investigation or when selecting preventive measures such as pre-trial detention."

The Constitutional Court considered, by a majority, that the evidence gathered by the investigative authorities and accepted by the magistrate's court which had ordered Mr Kavala's placement in pre-trial detention (see paragraphs 31-34 above) were sufficient to give rise to a strong suspicion with regard to the offence defined in Article 328 of the Criminal Code.

61. In his dissenting opinion, the President of the Constitutional Court stated that he had not found any evidence capable of justifying the suspicions against Mr Kavala, and that the latter's pre-trial detention in relation to the offence of espionage was therefore, in his view, unlawful. He noted, firstly, that the suspicions of espionage were based on the links existing between Mr Kavala and H.J.B. However, the investigative authorities had been unable to provide any tangible evidence capable of rebutting Mr Kavala's statements about his relations with H.J.B. In particular, certain abstract allegations, based on hypotheses, had been presented in the detention order and the indictment as established facts. In addition, even assuming that the alleged telephone conversations had taken place, no information about their content had been disclosed. He also considered that, given the constituent elements of the offence in question, it was problematic to accept as prosecution evidence the data about telephone conversations between Mr Kavala and H.J.B., who had been born in Istanbul and followed university courses in Turkish studies. In the president's opinion, there was no evidence capable of supporting either a

strong suspicion, or even a mere suspicion, with regard to the charges in question.

The President of the Constitutional Court also stated that the constituent elements of this offence had not been established in the decisions concerning Mr Kavala's pre-trial detention. He added that Mr Kavala was accused of having obtained information through the NGOs that he had created and supported, and that he had used this information against Türkiye and for the benefit of foreign States. In this connection, he emphasised that the NGOs' central task was to conduct research and analysis, to prepare reports and to issue recommendations on the socio-economic and political problems facing the country. While he accepted that an NGO could indeed be used for the purpose of espionage, the allegation that an NGO was carrying out activities that could be described as espionage ought, in his opinion, to be substantiated by information, documents and tangible evidence, and not by abstract and general hypotheses. However, such evidence was absent in the present case.

In his dissenting opinion, the President of the Constitutional Court also addressed the question of whether Mr Kavala had already been detained on the basis of the same evidence, and, if so, whether the second period of detention was linked to the previous charges. He found that it was. In his reasoning, he stated that the initial suspicions had been based on the ties that Mr Kavala was accused of having maintained with H.J.B. in 2013 and 2016. In his view, however, the investigative authorities had possessed this information from the outset of their work. This meant that the information accepted as evidence on 9 March 2020 had existed in general terms in the investigation file for more than three years. During this period, it had not proved possible to obtain any new information with regard to the nature of the presumed links which could justify placement in pre-trial detention on the charge of espionage. The President noted that the investigative authorities had been unable to explain why it had been necessary to order that Mr Kavala be placed in pre-trial detention more than three years after the existence of a link to H.J.B. had been established. For three years, on the basis of essentially the same evidence, the competent courts had ordered that Mr Kavala be placed in detention and his release on bail on three occasions and had acquitted him once. He observed that the existence of links between Mr Kavala and H.J.B. had been mentioned in all of the detention orders, from the very outset, and this element had been accepted as evidence from the first detention order referring to the existence of a strong suspicion of involvement in the attempted coup. He noted that the suspicion in question had been lifted, but that Mr Kavala had nonetheless been detained a second time, for the same offence, after he had been acquitted and his release on bail had been ordered in the context of the Gezi Park proceedings. Equally, the argument that there were ties between Mr Kavala and H.J.B. had also been used in the second detention order to justify the existence of a strong suspicion concerning another offence (Article 309 of the Criminal Code). Lastly, he noted that the

third order for pre-trial detention on the charge relating to the offence set out in Article 328 of the Criminal Code, issued shortly after the second order for pre-trial detention, was again justified by this evidence.

62. In his dissenting opinion, the Deputy President of the Constitutional Court also criticised the lack of information about the content of the alleged contacts between Mr Kavala and H.J.B. He further stated that the other evidence referred to by the prosecutor's office, namely, the documentary films found on the flash drive and Mr Kavala's mobile telephone, were unrelated to the offence of espionage, since it had not been alleged that they contained confidential information. After commenting on the constituent elements of the offence defined in Article 328 of the Criminal Code, he specified that the subject matter of this offence was a "State secret", that is, information that was classified as confidential and unknown to the public. In his view, information that had been obtained from open sources and was thus, by definition, available to the public, could not be considered as a "State secret", and the prosecutor's office ought therefore to have clarified the constituent elements of the offence in question, by replying to the following question: "what secret information, held by which State body, is at stake?" In his view, however, the prosecutor's office had based its arguments solely on abstract assessments, which could not be considered as constituent elements, for the purposes of criminal law, of the offence identified in Article 328 of the Criminal Code. He concluded, firstly, that there was nothing in the materials submitted to the case file concerning Mr Kavala's detention that could justify the suspicion in question, and, secondly, that this detention had no legal basis. He also criticised the proportionality of placing Mr Kavala in detention three years after having obtained the evidence referred to in the relevant decisions.

63. For his part, the third dissenting judge concluded that there was no fact, information or evidence capable of establishing that Mr Kavala had taken part in a criminal activity for the purposes of Article 328 of the Criminal Code. He essentially repeated the arguments already set out by the other dissenting judges, expressing also his concerns as to the conduct of Mr Kavala's pre-trial detention. He stated that to accuse a person of espionage on the sole basis of evidence relating to the signals emitted by his telephone, and without any tangible evidence, could lead to worrying situations from the perspective of human rights. Referring to the relevant paragraph in the *Kavala* judgment (cited above, § 154), he argued that the prosecutor's office had been unable to provide any element capable of showing that Mr Kavala's meetings with H.J.B. had been particularly frequent, and that its argument had created an irrebuttable presumption in respect of the suspect. With regard to the statement by one of the witnesses, which, in his view, could be considered as a new element subsequent to the Court's judgment, he noted that this individual's statements had not concerned Mr Kavala. With regard to the other activities conducted by

Mr Kavala in the context of his NGOs, this judge considered that these were legal activities. In his view, the prosecution's approach was likely to lead to the criminalisation of activities conducted lawfully by NGOs. Lastly, he too held that the contested measure had been disproportionate.

64. In their joint dissenting opinion, the fourth and fifth dissenting judges began by reviewing the Constitutional Court's relevant case-law, stating from the outset their view that the majority's conclusion was not compatible with it. They considered, having regard to the criteria set out in that case-law, that the case disclosed serious flaws. The constituent elements of the offence defined in Article 328 of the Criminal Code (information or documents belonging to the State and falling by their nature under "State secrets", and the fact or obtaining or disclosing such documents or information) had not been set out in the documents concerning Mr Kavala's detention. In particular, they criticised the criterion developed in paragraph 92 of the Constitutional Court's judgment (see paragraph 60 above). Were this approach to be followed, the detention measures applicable to certain types of offences would not be protected by the safeguards set out in the Constitution. They also argued that certain actions, which clearly did not constitute an offence, had been accepted as evidence with regard to the offence of espionage. They concluded that the case file did not contain any evidence of this offence and that the return to pre-trial detention of Mr Kavala, which moreover had not been based on any relevant and sufficient reason, had been disproportionate.

65. The sixth and seventh dissenting judges also considered, for reasons similar to those argued by the other dissenting judges, that there was no factual evidence capable of justifying Mr Kavala's return to pre-trial detention.

C. The *Kavala* judgment

66. In the *Kavala* judgment, which was delivered on 10 December 2019 and became final on 11 May 2020, the Court concluded, unanimously, that there had been a violation of Articles 5 §§ 1 and 4 of the Convention, and, by six votes to one, a violation of Article 18 taken together with Article 5 § 1, with regard to the suspicions raised against Mr Kavala in October 2017 concerning the Gezi Park events and the attempted coup of 15 July 2016, and his subsequent pre-trial detention. In the absence of a duly submitted claim, it decided not to make any award to the applicant under Article 41 of the Convention. Under Article 46 of the Convention, it considered that the Government was to take all necessary measures to put an end to Mr Kavala's detention and to secure his immediate release.

67. In its judgment, the Court considered that Mr Kavala's detention had taken place in the absence of any reasonable suspicion that he had committed an offence and therefore constituted a violation of Article 5 § 1 (see *Kavala*,

cited above, §§ 156-157 and 159). Under Article 15 of the Convention, it also considered that "the suspicion against him [had] not reach[ed] the required minimum level of reasonableness. Although imposed under judicial supervision, the contested measures were thus based on a mere suspicion". It further held that the measures in question "[could] not be said to have been strictly required by the exigencies of the situation" (ibid., §§ 157-158). The Court held as follows in paragraph 157:

> "In particular, 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-trial 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."

68. The Court also held that, having regard to the total duration of the Constitutional Court's review of legality in the context of the first individual application (namely, one year, five months and twenty-nine days) and to what was at stake for Mr Kavala (ibid., §§ 192-193), the proceedings by which the Turkish Constitutional Court had ruled on the lawfulness of his pre-trial detention could not be considered compatible with the "speediness" requirement of Article 5 § 4.

69. Reiterating its conclusion under Article 5 § 1, namely that the charges brought against Mr Kavala were not based on reasonable suspicion, the Court further found that the actual purpose of the impugned measures had been to silence him. In addition, in view of the nature of the charges brought against the applicant, it held that the contested measures were likely to have a dissuasive effect on the work of human-rights defenders (ibid., §§ 230-232). In consequence, it found a violation of Article 18 taken together with Article 5 § 1 (ibid., § 144). Finally, it stated that "the Government must take every measure to put an end to the applicant's detention and to secure his immediate release" (ibid., § 240).

D. The supervision of the execution of the *Kavala* judgment by the Committee of Ministers

1. The Committee of Ministers' ordinary and Human Rights meetings

70. Once the *Kavala* judgment became final on 11 May 2020 it was transmitted to the Committee of Ministers, in order for the Committee to supervise its execution in accordance with Article 46 § 2.

71. At its 1377th meeting on 4 June 2020, the Committee of Ministers classified the case in the "enhanced procedure" on the basis that it required "urgent individual measures" and disclosed a "complex problem". It began

examining the *Kavala* case at its 1377bis Human Rights meeting (1-3 September 2020). At its 1398th Human Rights meeting, in March 2021, it decided to examine Mr Kavala's situation at each ordinary and Human Rights meeting of the Committee until such time as he was released. Prior to referring the case to the Court under Article 46 § 4, the Committee of Ministers adopted ten decisions and three interim resolutions, at either its ordinary or Human Rights meetings.

72. The Committee of Ministers examined the case at the 1377bis Human Rights meeting. It was advised by its Secretariat as follows:

> "... the information available relating to the applicant's current detention, taken together with the detailed findings of the Court, raise a strong presumption that his present situation is not compatible with the conclusions and spirit of the Court's judgment. ... The four factors which lead the Secretariat to this conclusion are set out below.
>
> First, although the legal qualification of the offence under the Criminal Code is now "obtaining information which is classified on the grounds of national security concerns or foreign political interests with the intention of spying on political and military affairs" contrary to Article 328, it appears from the information available to the Committee that the allegations against the applicant have not substantially changed.
>
> Secondly, the Court, in its assessment under Article 18, found it crucial that several years had elapsed between the events forming the basis for the applicant's detention and the court decisions to detain him, with no plausible explanation given by the government for this lapse of time (§§ 225-228 of the judgment). Similarly, the accusations which form the basis of the present detention order, issued on 9 March 2020, relate to events prior to July 2016.
>
> Thirdly, again in reaching its conclusion under Article 18 that the criminal proceedings against the applicant pursued the ulterior purpose of reducing him to silence and dissuading other civil society activists, the Court found a link between the acts of the prosecutors and the timing and content of two speeches made by the President of the Republic of Turkey in which he named the applicant. It cannot but be observed that on the day the applicant was re-arrested, the President made another, similar speech, in which he also criticised the applicant's acquittal, is, as the Commissioner of Human Rights commented, 'a strong indication that the same dynamics are in operation'.
>
> Finally, the fact that the prosecutor decided to appeal against the acquittal, and that the Council of Public Prosecutors and Judges initiated an examination to verify the need for whether a disciplinary investigation against the three judges who delivered the acquittal judgment should be initiated, indicates that the authorities have not accepted the European Court's findings. In this respect it is recalled that the execution of the Court's judgments should involve good faith on the part of the respondent State and the importance of the good faith obligation is paramount where the Court has found a violation of Article 18..."

During this meeting, having examined the judgment, the information communicated by the Government and the advice of its Secretariat, the Committee of Ministers adopted the following decision:

> "The Deputies

...

As regards individual measures

...

3. while taking note of the authorities' submissions that since 9 March 2020 the applicant has been detained under a new detention order not examined by the European Court, considered that the information available to the Committee raises a strong presumption that his current detention is a continuation of the violations found by the Court;

4. welcomed, therefore, the information provided at the meeting that the Constitutional Court has promptly started to examine the applicant's application and urged the authorities to take all necessary measures to ensure that it is examined within the shortest possible timeframe and with full regard to the European Court's findings in this case; urged them further, pending the Constitutional Court's decision, to ensure the applicant's immediate release;

As regards general measures

5. recalling that it examined the legislative framework for police custody and pre-trial detention in the Demirel group of cases, noted with interest the reforms of October 2019 reducing the length of pre-trial detention for certain offences;

6. noting further that, since the deadline for submission of an action plan in the Kavala case has not yet expired, it is premature to examine the general measures required in response to that judgment; encouraged the authorities, in view of the Court's findings in particular under Article 18 in conjunction with Article 5, to provide in their forthcoming action plan information on measures envisaged to strengthen the Turkish judiciary against any interference and ensure its full independence, by drawing on the relevant Council of Europe standards;

..."

73. Following the adoption of that first decision, the Committee of Ministers continued to call for Mr Kavala's release "without delay", and closely followed the developments of the domestic criminal proceedings during the supervision process. At its second examination of the case, on 29 September and 1 October 2020 (1383rd meeting), the Committee of Ministers, expressing deep concern that Mr Kavala had still not been released despite the Committee's clear indication to that effect, reiterated the request made in its previous decision (CM/Del/Dec(2020)1383/H46-22). At its next meeting (on 1-3 December 2020), it adopted an interim resolution (CM/ResDH(2020)361) and noted that "the information which has become available to [it] since its last examination does not refute" the presumption it had expressed previously, and again urged "the applicant's immediate release".

74. Following delivery of the Constitutional Court's judgment of 29 December 2020 finding that there had been no violation of Mr Kavala's right to liberty (albeit this judgment was not published on that date, see paragraphs 60-65 above), the Committee of Ministers examined the case for the fourth time (1398th meeting, 9-11 March 2021), at the close of which it

noted: "the applicant's continuing pre-trial detention and the pending proceedings with respect to the charges regarding both the Gezi Park events and the coup attempt, despite the Court's conclusion that both charges were not based on a 'reasonable suspicion' within the meaning of Article 5 § 1(c) of the Convention, reinforce the conclusion that the national authorities, including the courts, are failing to take into account the European Court's findings and the obligation of *restitutio in integrum* under Article 46 of the Convention." It also reiterated its "call for the applicant's immediate release", inviting "the Chair of the Committee of Ministers to write a letter to the Minister of Foreign Affairs of the Republic of Turkey conveying the Committee's deep concern about the applicant's continuing detention" (CM/Del/Dec(2021)1398/H46-33). It further noted that "the Court's findings in this case ... reveal[ed] pervasive problems regarding the independence and impartiality of the Turkish judiciary" and it invited "the authorities to take adequate legislative and other measures to protect the judiciary and ensure that it is robust enough to resist any undue influence, including from the executive branch". It also took note of the adoption of the new Human Rights Action Plan.

75. On 16 March 2021, the letter signed by the Chair of the Committee of Ministers, "convey[ing] the Committee's deep concern about the applicant's continuing detention and express[ing] the strong expectation that Turkey [would] take all necessary steps to ensure Mr Kavala's release" was sent to the Turkish Minster for Foreign Affairs. At the ordinary meetings of 17 and 31 March 2021, the Committee of Ministers also examined the case. In the meantime, in a telephone conversation of 18 March 2021, the Secretary General raised with the Turkish Minister for Foreign Affairs the decisions concerning this case adopted by the Committee of Ministers a short time previously, stressing the binding nature of the Court's judgments and the need to find a solution which fully respected the Court's conclusions.

76. After the publication, on 23 March 2021, of the Turkish Constitutional Court's reasoned judgment on Mr Kavala's second individual application, the Committee of Ministers examined the situation for a seventh time at its 1401st ordinary meeting (14-15 April 2021). At the end of this examination, the deputies noted that "the Constitutional Court's reasoned ruling finding the applicant's current detention lawful [was] based on the same evidence examined or referred to by the European Court, and concluded that the Constitutional Court's reasoning [did] not contain any indication to refute the above presumption of a continuing violation", and reiterated "their utmost concern that the applicant's continuing pre-trial detention and the pending proceedings brought against him reinforce[d] the conclusion that the national authorities, including the courts, fail[ed] to take into account the European Court's findings and the obligation of *restitutio in integrum* under Article 46 of the Convention." They also expressed "the strong expectation that Turkey

[would] take all necessary steps to ensure Mr Kavala's release" (CM/Del/Dec(2021)1401/H46-1).

77. The Committee of Ministers re-examined the case at its 1402nd and 1403rd ordinary meetings. On the tenth occasion, at its 1404th ordinary meeting (12 May 2021), it repeated its previous concerns and "urged, again, the authorities to take all steps in their power to assure the applicant's immediate release" (CM/Del/Dec(2021)1404/H46-1).

78. Between 12 May 2021 and 12 January 2022, the Committee of Ministers re-examined Mr Kavala's situation on sixteen occasions, in the course of its ordinary meetings. At its Human Rights meeting of 7 to 9 June 2021, it again repeated its previously expressed concerns, urging "the authorities to ensure [Mr Kavala's] immediate release. It also underlined that "the continuing arbitrary detention of the applicant, on the basis of proceedings which constitute[d] a misuse of the criminal justice system, undertaken for the purpose of reducing him to silence, constitute[d] a flagrant breach of Turkey's obligation under Article 46 § 1 of the Convention to abide by the Court's judgment and [was] unacceptable in a State subject to the rule of law". It affirmed its determination, "if the applicant [was] not released, to ensure the implementation of the judgment through all the means at the disposal of the Organisation, including, if necessary, infringement proceedings under Article 46 § 4 of the Convention" (CM/Del/Dec(2021)1406/H46-31).

79. At its 1411th Human Rights meeting (14-16 September 2021), the Committee of Ministers noted its previous repeated findings and concerns, then decided that "it [was] necessary, in order to ensure the implementation of the judgment, to make use of proceedings under Article 46 § 4 of the Convention, and expressed their resolve to serve formal notice on Turkey of their intention to commence these proceedings in accordance with Article 46 § 4 of the Convention at their 1419th meeting (30 November – 2 December 2021) (DH), in the event that the applicant [was] not released before then."

80. At its 1419th Human Rights meeting (30 November – 2 December 2021), the Committee of Ministers considered that "by failing to ensure Mr Kavala's immediate release, Turkey [was] refusing to abide by the final judgment of the Court in the present case. It therefore "serve[d] formal notice on Turkey of its intention, at its 1423rd meeting on 2 February 2022, to refer to the Court, in accordance with Article 46, paragraph 4, of the Convention, the question whether Turkey has failed to fulfil its obligation under Article 46, paragraph 1, of the Convention with particular regard to the Court's indication under Article 46 and the individual measures required ..."

81. Lastly, the Committee of Ministers adopted at its 1423rd ordinary meeting (2 February 2022) its third interim resolution (CM/ResDH(2022)21), by which it triggered proceedings under Article 46 § 4 (see paragraph 94 below).

2. The information transmitted to the Committee of Ministers

82. From June 2020 to February 2022, Mr Kavala sent to the Committee of Ministers nineteen communications, in which he referred to the individual measures which had been required in his case. He complained about his continued detention, stating, firstly, that he had never been released and, secondly, that he had been kept in detention on the basis of facts which had been reclassified as offences set out in other provisions of the Criminal Code. He submitted that the Court's judgment had not been executed and that in the period following the acquittal judgment delivered on 18 February 2020 the national courts had not taken account of the Court's conclusions.

83. Mr Kavala also transmitted to the Committee of Ministers numerous statements made by the President of the Republic and the Ministers of the Interior and of Foreign Affairs with regard to his case (see paragraph 56 above).

84. For their part, the Government communicated to the Committee of Ministers information about the procedure which followed the Court's judgment and described the measures that had been adopted for the purpose of executing that judgment. With regard to the individual measures, they argued that the Istanbul 30th Assize Court had pronounced Mr Kavala's acquittal on 18 February 2020 and ordered his release on bail on the same date, and that the judgment of 10 December 2019 had therefore been executed. In essence, they argued that Mr Kavala's release on bail had been ordered in the context of the proceedings opened in relation to the charge of attempting to overthrow the Government (Article 312 of the Criminal Code), and that the placement in pre-trial detention imposed in the context of the investigation into the charge relating to an attempted coup (Article 309 of the Criminal Code) had ended when Mr Kavala was released *ex officio* on 20 March 2020. They claimed that since that date Mr Kavala had not been detained on the basis of either of the charges that the Court had been called upon to examine. They also stated that, since 9 March 2020, Mr Kavala's detention had been based on a different charge, namely military or political espionage within the meaning of Article 328 of the Criminal Code.

85. On 19 January 2021 the Government took its first procedural step in the execution process, which was to submit an Action Plan to the Committee of Ministers (document DH-DD(2021)81).

86. In this Action Plan they informed the Committee of Ministers about the state of the domestic criminal proceedings. With regard to Mr Kavala's detention since 9 March 2020, they explained that he had been kept in pre-trial detention because the Istanbul prosecutor's office, which had extended and intensified its investigation, had found fresh evidence suggesting that Mr Kavala could be guilty of military or political espionage, an offence punishable under Article 328 of the Criminal Code. They added that Mr Kavala had been detained since 9 March 2020 in relation to this offence. They also submitted information on the review of Mr Kavala's

pre-trial detention, indicating that this was carried out, either of the courts' own motion or at Mr Kavala's request, by the magistrate's courts then by the assize courts before which the criminal proceedings in question were pending.

87. In its communication of 30 March 2021, the Government explained that the Action Plan submitted previously had been supplemented, listing the new measures that had allegedly been taken with a view, in particular, to strengthening the independence of the judiciary. On 12 April 2021 they submitted a translation of the full judgment adopted by the Constitutional Court on 29 December 2020. In their subsequent communications, they gave updated information on the state of the domestic proceedings and transmitted information about the Human Rights Action Plan announced by the President of the Republic on 2 March 2021, setting out the measures which had been taken in this context. They further described the measures that had been taken for the purpose of complying with the requirement that the Constitutional Court carry out its judicial review of detention measures "speedily".

3. Decisions and Interim Resolutions adopted by the Committee of Ministers

88. The Committee of Ministers examined the case at the twenty-nine meetings that it held up to and including 2 February 2022. In this context, it adopted three interim resolutions and ten decisions, in each of which it noted that the information available to it "create[d] a strong presumption that the applicant's current detention [was] a continuation of the violations found by the Court" and insisted on Mr Kavala's immediate release. The language used by the Committee reflected its growing concerns about the fact that Mr Kavala remained in detention, notwithstanding its repeated calls for his release.

89. The Committee of Ministers addressed its concerns first to the authorities of Türkiye in general, then to the country's highest authorities. Equally, it called on the Council of Europe as a whole and member States acting individually to use all means available to ensure Türkiye's compliance with its obligations arising from the Court's judgment.

90. The Committee also indicated that it would use all the means at the disposal of the Organisation, including under Article 46 § 4 of the Convention.

91. In particular, it adopted the following decision at its 1401st meeting (14-15 April 2021), subsequent to the publication of the Constitutional Court's judgment:

> "The Deputies
>
> 1. recalled their previous decisions and interim resolution in which they considered that the information available to them raised a strong presumption that the applicant's current detention is a continuation of the violations found by the Court and urged the authorities to ensure his immediate release;

2. noted that the Constitutional Court's reasoned ruling finding the applicant's current detention lawful is based on the same evidence examined or referred to by the European Court, and concluded that the Constitutional Court's reasoning does not contain any indication to refute the above presumption of a continuing violation;

3. reiterated their utmost concern that the applicant's continuing pre-trial detention and the pending proceedings brought against him reinforce the conclusion that the national authorities, including the courts, fail to take into account the European Court's findings and the obligation of *restitutio in integrum* under Article 46 of the Convention;

4. while noting that an action plan and additional information were submitted by the authorities, as well as the reply given to the letter from the Chair of the Committee of Ministers and expressing the strong expectation that Turkey will take all necessary steps to ensure Mr Kavala's release, stressed the importance of maintaining dialogue and affirmed their readiness to ensure the implementation of the judgment by actively considering using all the means at the disposal of the Organisation, if necessary."

92. Equally, the Committee of Ministers adopted the following decision (CM/Notes/1406/H46-31) at its 1406th meeting (7-9 June 2021):

"The Deputies

...

As regards individual measures

2. recalled the Committee's previous five decisions and interim resolution in which it considered that the information available to it raises a strong presumption that the applicant's current detention is a continuation of the violations found by the Court and urged the authorities to ensure his immediate release;

3. expressed profound regret that the applicant has been detained continuously since 18 October 2017 and remains in detention as a consequence of the failure of the domestic courts to take into account the European Court's findings and the obligation of *restitutio in integrum* under Article 46 of the Convention, and that he is still pursued in criminal proceedings for charges which have been criticised by the European Court or are based on evidence found insufficient by that Court to justify his detention;

4. underlined that the continuing arbitrary detention of the applicant, on the basis of proceedings which constitute a misuse of the criminal justice system, undertaken for the purpose of reducing him to silence, constitutes a flagrant breach of Turkey's obligation under Article 46 § 1 of the Convention to abide by the Court's judgment and is unacceptable in a State subject to the rule of law;

5. affirmed their determination, if the applicant is not released, to ensure the implementation of the judgment through all the means at the disposal of the Organisation, including if necessary infringement proceedings under Article 46 § 4 of the Convention;

6. invited the Turkish authorities to further enhance the dialogue with the Committee and the Secretariat with a view to finding Convention compliant solutions in respect of the individual measures required in this case;

As regards general measures

7. recalled that the Court's findings in this case, in particular that the applicant's detention pursued an ulterior purpose in violation of Article 18 of the Convention, together with the subsequent events which give rise to the above-mentioned strong

presumption that this violation is continuing, point to a failure at many levels of the judiciary to act independently and in accordance with the Convention;

8. noted with interest the objectives envisaged in the Turkish Human Rights Action Plan aimed to strengthen independence of the judiciary; stressed however that while these objectives could have a positive impact in general, they appear to fall short of addressing the core issues identified by the Court as regards protecting the judiciary from undue influence from the executive branch; invited therefore the authorities to take concrete legislative and other measures, taking inspiration from the relevant Council of Europe standards, in particular as regards the structural independence of the Council of Judges and Prosecutors;

9. invited the authorities to consider setting an indicative time limit for cases concerning judicial review complaints lodged with the Constitutional Court."

93. The relevant parts of the second interim resolution, adopted by the Committee of Ministers at its 1419th Human Rights meeting (30 November-2 December 2021, CM/ResDH(2021)432) read as follows (emphasis added):

"The Committee of Ministers, under the terms of Article 46, paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), which provides that the Committee supervises the execution of final judgments of the European Court of Human Rights ("the Court"),

Recalling the Court's findings in the present case ...;

Recalling the respondent's State's obligation under Article 46, paragraph 1, of the Convention, ...*;*

Recalling also the Court's indication in the present case under Article 46 of the Convention that any continuation of the applicant's pre-trial detention would entail a prolongation of the violations of Article 5, paragraph 1, and of Article 18, as well as a breach of the obligations on respondent States to abide by the Court's judgment in accordance with Article 46, paragraph 1, of the Convention, and that in consequence Turkey was required to take all necessary measures to put an end to the applicant's detention and to secure his immediate release;

Recalling the Committee's eight decisions and interim resolution strongly urging the authorities to, on the one hand, ensure the applicant's immediate release and, on the other, ensure the conclusion, on the basis of the European Court's findings and without delay, of the criminal proceedings against him which have been criticised by the European Court or are based on evidence found insufficient by that Court to justify his detention;

Considers that by failing to ensure the applicant's immediate release, Turkey is refusing to abide by the final judgment of the Court in the present case;

Therefore, serves formal notice on Turkey of its intention, at its 1423rd meeting on 2 February 2022, to refer to the Court, in accordance with Article 46, paragraph 4, of the Convention, the question whether Turkey has failed to fulfil its obligation under Article 46, paragraph 1, of the Convention with particular regard to the Court's indication under Article 46 and the individual measures required, and invites Turkey to submit in concise form its view on this question by 19 January 2022 at the latest."

94. Lastly, at its 1423rd ordinary meeting (2 February 2022), the Committee of Ministers adopted its third interim resolution

(CM/ResDH(2022)21), triggering proceedings under Article 46 § 4. The relevant parts of this Resolution read as follows:

> "Recalling anew
>
> a. that in its above-mentioned judgment, the Court found that ...;
>
> b. the Court's indication under Article 46, made with regard to the particular circumstances of the case and the grounds on which it based its findings of a violation, that the government must take every measure to put an end to the applicant's detention and to secure his immediate release (§ 240 of the judgment);
>
> c. the respondent State's obligation, under Article 46, paragraph 1, of the Convention;
>
> d. the Committee's subsequent decisions and interim resolution (CM/ResDH(2020)361) strongly urging the authorities to ensure the applicant's immediate release;
>
> e. that, since 11 May 2020, when the Court's judgment became final, the applicant has remained in detention on the basis of proceedings criticised by the European Court or based on evidence which it found insufficient to justify his detention;
>
> Considers that, in these circumstances, by not having ensured the applicant's immediate release, Turkey refuses to abide by the final judgment of the Court;
>
> Decides to refer to the Court, in accordance with Article 46, paragraph 4, of the Convention, the question whether Turkey has failed to fulfil its obligation under Article 46, paragraph 1, of the Convention, with particular regard to the Court's indication under Article 46 and the individual measures required.
>
> ..."

95. In accordance with the Committee of Ministers' Rules (see *Ilgar Mammadov* (infringement proceedings), cited above, § 94), the views of the Republic of Türkiye were included in an Appendix to the resolution (see Annex). There, the Government set out the measures adopted to execute the judgment. With regard to the individual measures, they repeated the explanations provided previously with regard to Mr Kavala's continued detention (see paragraph 86 above) and submitted that the judgment of 10 December 2019 had been executed through the decisions to release Mr Kavala on bail, taken on 18 February and 20 March 2020. They submitted that, since then, Mr Kavala had not been detained on the basis of any of the charges which had been examined by the Court. They stated that the detention measure under which Mr Kavala had been detained since 9 March 2020 was based on another charge, namely political or military espionage within the meaning of Article 328 of the Criminal Code, and that this charge had never been examined by the Court in its judgment.

96. Equally, the Government submitted that the Committee of Ministers could only refer a matter to the Court under Article 46 § 4 if two conditions – refusal by a High Contracting Party to abide by a final judgment and the existence of exceptional circumstances – had been met. In their view, however, these conditions had not been met in this case.

97. With regard to the general measures, the Government referred to the fourth Judicial Reform Package, which had been adopted on 8 July 2021 in line with the Action Plan, introduced in order to strengthen human-rights protection. They submitted that this Judicial Reform Package had led to important changes with regard to the procedures for objecting to orders for pre-trial detention orders and release on bail. They added that immediate measures had been taken with a view to reducing the Constitutional Court's workload, and that the High Council of Judges and Prosecutors had also taken significant measures to strength the independence of the judiciary and ensure execution of the Court's judgments. Lastly, they argued that, in spite of the difficulties caused by the COVID-19 pandemic, the Justice Academy continued to provide intensive training sessions to further judges' education. They stated that, of all the member States, the highest number of users of the HELP learning platform was in Türkiye.

98. The Government therefore concluded that they had taken the necessary measures to comply with the Court's judgment.

99. On 11 May 2022, that is, after the Committee of Ministers had referred the matter to the Court under Article 46 § 4 of the Convention, the Government wrote to the Committee of Ministers informing it of the judgment delivered by the Istanbul 13th Assize Court on 25 April 2022 (see paragraph 11 above). They explained that Mr Kavala was henceforth detained as a convicted person and that the regional court of appeal would examine *ex officio* this non-final judgment on appeal. They also requested that, in the light of these developments, the Committee of Ministers withdraw the case brought before the Court under Article 46 § 4. The Committee of Ministers examined this request at its 1436th ordinary meeting on 8-10 June 2022 and concluded that, given the circumstances of the case, there were no grounds to justify such withdrawal.

II. RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Relevant domestic law

100. The relevant Articles of the Constitution and of the Code of Criminal Procedure are set out in paragraphs 68 to 72 of the *Kavala* judgment, cited above.

101. The relevant provisions of the Criminal Code read as follows:

Article 309 § 1

"Anyone who attempts to overthrow by force and violence the constitutional order provided for by the Constitution of the Republic of Türkiye or to establish a different order in its place, or *de facto* to prevent its implementation, whether fully or in part, shall be sentenced to aggravated life imprisonment."

Article 312 § 1

"Anyone who attempts to overthrow the Government of the Republic of Türkiye by force and violence or to prevent it, whether fully or in part, from discharging its duties shall be sentenced to life imprisonment."

Article 328 § 1

"Anyone who obtains, for the purposes of political or military espionage, information which, by its nature, must remain confidential for reasons linked to the State's security or domestic or foreign policy interests, shall be liable to a sentence of fifteen to twenty years' imprisonment."

B. Relevant international law and practice

102. The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts are quoted in paragraphs 81 to 88 of the above-cited judgment in *Ilgar Mammadov* (infringement proceedings). The Rules of the Committee of Ministers for the supervision of the execution of the Court's judgments and the Committee of Ministers' procedure and recent practice in this area are set out in paragraphs 89 to 114 of the same judgment.

103. Rule 11 sets out the procedure in infringement proceedings under Article 46 § 4 of the Convention. It reads as follows:

"Rule 11- Infringement proceedings

1. When in accordance with Article 46, paragraph 4, of the Convention the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation.

2. Infringement proceedings should be brought only in exceptional circumstances. They shall not be initiated unless formal notice of the Committee's intention to bring such proceedings has been given to the High Contracting Party concerned. Such formal notice shall be given ultimately six months before the lodging of proceedings, unless the Committee decides otherwise, and shall take the form of an interim resolution. This Resolution shall be adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee.

3. The referral decision of the matter to the Court shall take the form of an interim resolution. It shall be reasoned and concisely reflect the views of the High Contracting Party concerned.

4. The Committee of Ministers shall be represented before the Court by its Chair unless the Committee decides upon another form of representation. This decision shall be taken by a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee."

104. The Explanatory Report to Protocol No. 14 states:

"Article 46 – Binding force and execution of judgments

...

98. Rapid and full execution of the Court's judgments is vital. It is even more important in cases concerning structural problems, so as to ensure that the Court is not swamped with repetitive applications. For this reason, ever since the Rome ministerial conference of 3 and 4 November 2000 (Resolution I), it has been considered essential to strengthen the means given in this context to the Committee of Ministers. The Parties to the Convention have a collective duty to preserve the Court's authority – and thus the Convention system's credibility and effectiveness – whenever the Committee of Ministers considers that one of the High Contracting Parties refuses, expressly or through its conduct, to comply with the Court's final judgment in a case to which it is party.

99. Paragraphs 4 and 5 of Article 46 accordingly empower the Committee of Ministers to bring infringement proceedings in the Court (which shall sit as a Grand Chamber – see new Article 31, paragraph b), having first served the state concerned with notice to comply. The Committee of Ministers' decision to do so requires a qualified majority of two thirds of the representatives entitled to sit on the Committee. This infringement procedure does not aim to reopen the question of violation, already decided in the Court's first judgment. Nor does it provide for payment of a financial penalty by a High Contracting Party found in violation of Article 46, paragraph 1. It is felt that the political pressure exerted by proceedings for noncompliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the state concerned.

100. The Committee of Ministers should bring infringement proceedings only in exceptional circumstances. None the less, it appeared necessary to give the Committee of Ministers, as the competent organ for supervising execution of the Court's judgments, a wider range of means of pressure to secure execution of judgments. Currently the ultimate measure available to the Committee of Ministers is recourse to Article 8 of the Council of Europe's Statute (suspension of voting rights in the Committee of Ministers, or even expulsion from the Organisation). This is an extreme measure, which would prove counter-productive in most cases; indeed the High Contracting Party which finds itself in the situation foreseen in paragraph 4 of Article 46 continues to need, far more than others, the discipline of the Council of Europe. The new Article 46 therefore adds further possibilities of bringing pressure to bear to the existing ones. The procedure's mere existence, and the threat of using it, should act as an effective new incentive to execute the Court's judgments. It is foreseen that the outcome of infringement proceedings would be expressed in a judgment of the Court."

LAW

ALLEGED FAILURE TO FULFIL THE OBLIGATION UNDER ARTICLE 46 § 1

105. By an interim resolution of 2 February 2022, 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 judgment of 10 December 2019 in the *Kavala* case (no. 28749/18).

The relevant parts of Article 46 of the Convention read as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
>
> ...
>
> 4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
>
> 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

A. Observations

1. The Committee of Ministers

106. In its observations, referring to the Court's case-law, the Committee of Ministers recalled that the Court's finding of a violation is in principle declaratory. It set out the general principles underpinning the execution process, explaining that where the Court has found a breach of the Convention or its Protocols the respondent State has a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court.

107. The Committee of Ministers then drew attention to the circumstances surrounding the *Kavala* judgment, summarising the factual developments that occurred in the supervision process, and the content of its decisions and interim resolutions. At its first examination of the case, at its 1377bis Human Rights meeting (1-3 September 2020), it had relied on four factors identified by its Secretariat to reach the finding that the information communicated by Türkiye "... raise[d] a strong presumption that his current detention [was] a continuation of the violations found by the Court" (see paragraphs 71-72 above). For that reason, it had urged the authorities to "ensure the applicant's immediate release". In the context of its examinations with regard to this case at the twenty-nine meetings it had held up to and including 2 February 2022, it had repeated this same finding and called for Mr Kavala's "immediate release".

108. The Committee of Ministers further noted that it had carried out its seventh examination of the case after the Constitutional Court, in its judgment of 29 December 2020 (published on 23 March 2021), had found no violation

of Mr Kavala's right to liberty. After this examination, the Deputies had noted that "the Constitutional Court's reasoned ruling finding the applicant's current detention lawful [was] based on the same evidence examined or referred to by the European Court"; they concluded that "the Constitutional Court's reasoning [did] not contain any indication to refute the above presumption of a continuing violation", and reiterated "their utmost concern that the applicant's continuing pre-trial detention and the pending proceedings brought against him reinforce[d] the conclusion that the national authorities, including the courts, [had] fail[ed] to take into account the European Court's findings and the obligation of *restitutio in integrum* under Article 46 of the Convention."

109. The Committee of Ministers also pointed out that, at its examination of the case at its meeting of 7 to 9 June 2021, it had noted that "the continuing arbitrary detention of the applicant, on the basis of proceedings which constitute[d] a misuse of the criminal justice system, undertaken for the purpose of reducing him to silence, constitute[d] a flagrant breach of Turkey's obligation under Article 46 § 1 of the Convention to abide by the Court's judgment and [was] unacceptable in a State subject to the rule of law" (see paragraph 78 above). It also emphasised that, at its examination on 30 November to 2 December 2021, having recalled its "eight decisions and interim resolution strongly urging the authorities to, on the one hand, ensure the applicant's immediate release and, on the other, ensure the conclusion, on the basis of the European Court's findings and without delay, of the criminal proceedings against him which have been criticised by the European Court or are based on evidence found insufficient by that Court to justify his detention", it had considered that "Turkey [was] refusing to abide by the final judgment of the Court in the present case".

110. The Committee of Ministers concluded by stating that at no point since the judgment became final had the national authorities shown any sign of having drawn the consequences of the violations found by the Court, in particular under Article 18 taken in conjunction with Article 5 § 1, nor any intention of taking the necessary action. It considered that this position could no longer be characterised as a delay in execution but instead had to be recognised as a refusal to execute.

2. The Government

111. In their observations, the Government referred to the opinion they had attached to the Committee of Ministers' third Interim Resolution (see the Annex to the present judgment and paragraphs 95-98 above).

112. In summary, with regard to the individual measures stipulated by the Court in respect of Mr Kavala, they repeated the explanations previously provided concerning his continued detention (see paragraph 84 above), and submitted that the judgment of 10 December 2019 had been executed following the orders for Mr Kavala's release on 18 February and 20 March

2020. They argued that, since then, Mr Kavala was no longer detained on the basis of any of the charges which had been submitted for the Court's examination. His current detention, which had begun on 9 March 2020, was, in their view, based on another charge, namely political or military espionage within the meaning of Article 328 of the Criminal Code, a charge which had not been examined in the Court's judgment. The Government argued also that the starting point for the Court's examination of infringement proceedings ought not be the date on which a question was referred to it under Article 46 § 4 of the Convention, and that any developments subsequent to the referral must also be taken into account.

113. The Government argued that Mr Kavala ought to have lodged another application with the Court following the Constitutional Court's judgment. Noting that no new application had been communicated to them, they surmised that Mr Kavala had not lodged an application with the Court within a six-month period after having exhausted the domestic remedies, in order to complain about his subsequent detention. Instead, Mr Kavala had chosen to raise his complaints in the context of supervision of the execution of the judgment by the Committee of Ministers. According to the Government, this approach was contradictory and incompatible with the protection system contemplated by the Convention.

114. Equally, the Government argued that the Committee of Ministers could only refer the matter to the Court under Article 46 § 4 if two conditions – refusal by a High Contracting Party to abide by a final judgment and the existence of exceptional circumstances – had been met. In their view, however, these conditions had not been met in this case. They argued that Türkiye had complied with the Court's judgment, and that no exceptional circumstances existed in the present case that could justify the referral in question. In this connection, they argued that the Committee's decisions had been based on the assertion that "the information available to the Committee raise[d] a strong presumption that Mr Kavala's current detention [was] a continuation of the violations found by the Court", and that the Committee of Ministers had ruled on judicial proceedings which could only be assessed by the Court. However the Government considered that the Committee of Ministers had neither authority nor mandate to evaluate the evidence produced in the context of a case that was pending before the domestic courts, and that by embarking on the procedure set out in Article 46 § 4, the Committee of Ministers had not only interfered in the ongoing domestic proceedings, but it had also taken a position on a matter that might be brought before the Court in the context of a separate application. They concluded that, in the circumstances of the case, the fact of instituting proceedings under Article 46 § 4 amounted to a breach of the Convention system, which was based on the principles of subsidiarity and the margin of appreciation, as set out in Protocol No. 15.

115. With regard to the general measures, the Government repeated its observations regarding the measures which, in their submission, had been taken to strengthen judicial independence and expedite proceedings before the Constitutional Court (see paragraph 97 above).

116. In conclusion, they submitted that they had complied with the Court's judgment and that the conditions necessary to trigger proceedings under Article 46 § 4 had not been met.

117. In further comments, the Government pointed out that Mr Kavala's legal status had changed after his conviction on 25 April 2022 by the Istanbul 13th Assize Court (see paragraph 11 above), in so far as he was detained as a convicted person. In their view, there was no need for further examination of the question under Article 46 § 4 of the Convention by the Court. With regard to the speeches made by the country's high-ranking officials, they pointed out that many political figures had made statements on account of the high-profile nature of the Kavala case. With regard to Mr Kavala's claims under Article 41, the Government referred to the specific features of infringement proceedings, referring in particular to the explanatory report to Protocol No. 14 (see paragraph 104 above), and therefore argued that that provision was not applicable to those proceedings. They also argued that Mr Kavala had the possibility of bringing an action for compensation before the national courts with regard to his pre-trial detention. In their view, therefore, all those claims ought to be rejected.

3. Mr Kavala

118. Referring to the indication given by the Court in its judgment concerning him – "the Government must take every measure to put an end to the applicant's detention and to secure his immediate release" (*Kavala*, cited above, § 240) –, Mr Kavala considered that only his immediate release and the termination of the criminal proceedings brought against him would constitute proper execution of the judgment.

119. In his view, however, the authorities had taken no account of either the Court's judgment of 10 December 2019, or of the acquittal judgment and the – unexecuted – decision ordering his release of 18 February 2020, and they had kept him in pre-trial detention on the basis of the same facts, simply by changing the provisions of the Criminal Code under which the charges against him were based. He explained that on the evening of 18 February 2020, although his acquittal and release on bail had just been pronounced, he had been taken directly from prison to the Istanbul police headquarters, where he was held in conditions that he described as difficult and disagreeable until being brought before the magistrate's court on the following day.

120. Mr Kavala submitted that his return to pre-trial detention on 19 February 2020 had been totally unlawful, since the maximum duration of detention without charge, as laid down in Article 102 of the Code of Criminal Procedure, was two years. In his view, this unlawful situation had persisted

after that date. He argued that on 9 March 2020 the Istanbul magistrate's court had ordered that he be returned to pre-trial detention on the basis of Article 328 of the Criminal Code, without however adducing the slightest concrete evidence that the constituent elements of the alleged offence existed. He alleged, in particular, that the court had again based its decision on the Gezi Park events and his presumed relations with H.J.B. He considered that the facts which had been held against him in relation to the Gezi Park events had been transformed, with no justification and in the absence of tangible evidence, into an espionage case. He alleged that this amounted to a flagrant violation of the principle of the rule of law, of domestic law and of the Convention. He also considered that his pre-trial detention had been extended on the basis of espionage charges although he had already been held in pre-trial detention for more than two years and four months for the same facts, and that this extension was thus illegal. Concerning his presumed contacts with H.J.B., he referred to paragraphs 154 and 155 and the reasoning of the *Kavala* judgment, noting the finding of violations of Article 5 § 1 and Article 18 of the Convention expressed therein. He also argued that it had proved impossible to accuse him of any facts related to the offence of espionage during the criminal proceedings, whether in the bill of indictment or in the decisions delivered in the proceedings.

121. Referring to the statements made by the country's high-ranking officials in connection with the criminal proceedings brought against him (see paragraph 56 above), Mr Kavala also considered that the principle of the presumption of innocence had not been applied in his case, which had aggravated the initial finding of a violation of Articles 18 and 5 § 1 of the Convention.

122. Mr Kavala also argued that his immediate release had been clearly and explicitly indicated in the Court's judgment, and that nonetheless, the entire procedure, since his initial placement in pre-trial detention, amounted to a flagrant denial of justice. He considered that only unconditional release would constitute proper execution and that other types of release would be at odds with the conclusions of the above-cited judgment. He also considered that the criminal proceedings against him were fundamentally flawed.

123. In further comments, Mr Kavala submitted that his conviction on 25 April 2022 (see paragraph 11 above) clearly attested to a manifest breach of the Court's judgment of 10 December 2019. He argued that the question whether there was a reasonable suspicion of having committed an offence under Articles 312 and 309 of the Criminal Code had been at the heart of that judgment. Having had the opportunity to examine all the evidence on which these two charges were based, the Court had clearly found that there was no evidence capable of reaching the threshold required by Article 5 § 1 of the Convention. In addition, the Court also found that the very exercise of his rights guaranteed by the Convention formed the basis of these charges and that his detention pursued an ulterior purpose of reducing him to silence. He

considered that the decision ordering his release and acquittal of 25 April 2022 demonstrated that the charges under Article 328 of the Criminal Code had been manifestly unfounded, instrumentalised to keep him in detention until a new pre-trial detention order and a new conviction were obtained under Article 312 of the Criminal Code. In his view, this was a flagrant violation of Article 46 § 1 of the Convention, with due regard to the findings of the 2019 judgment.

124. Lastly, Mr Kavala asked the Court not only to conclude that there had been a violation of Article 46 § 1 of the Convention, but to find that, since 10 December 2019, there has been a continued violation of Article 5 § 1 of the Convention, and of Article 18 taken together with Article 5 § 1; that the Turkish national authorities, including the domestic courts, have not taken account of the Court's conclusions and of the obligation of *restitutio in integrum*; and that the courts, which had kept him in detention, had systematically failed to protect him from arbitrary arrest, without affording him genuine judicial review. Moreover, he invited the Court to reiterate its initial indication that the Government was to take all necessary measures to put an end to his detention and to secure his immediate release. Equally, Mr Kavala considered that new indications were necessary in the present case, so that he could resume his activities in the area of human-rights protection and so that he and other human-rights defenders were no longer troubled by the abusive use of the criminal law on account of their activities in this field, given the dissuasive effect of his arbitrary detention on other human-rights defenders. Finally, he expressed his wish to obtain financial compensation for the non-pecuniary damage he considered he had sustained through the violations of the Convention and reimbursement of his costs and expenses[1].

4. The Commissioner for Human Rights

125. The Commissioner for Human Rights stated that she had been closely monitoring Mr Kavala's situation as an emblematic illustration of the serious challenges facing human-rights defenders in Türkiye in general. She had already stated in her observations in the supervision process that the evidence used to substantiate the charges related to espionage could not be considered as new. In her view, the authorities had taken steps to circumvent Mr Kavala's right to liberty, with the aim of keeping him in detention, and they had therefore not acted in good faith and in a manner compatible with the "conclusions and spirit" of the *Kavala* judgment. In her view, Mr Kavala's continued pre-trial detention, on grounds pertaining to the same factual context as that examined by the Court in the above-cited judgment, would

[1] Rectified on 1 September 2022: the text was "Finally, he expressed his wish to obtain financial compensation for the damage he considered he had sustained through the violations of the Convention and reimbursement of his costs and expenses."

entail a prolongation of the violation of his rights and a breach of the respondent State's obligation under Article 46 § 1 of the Convention to abide by the Court's judgment.

126. The Commissioner for Human Rights submitted, in particular, that the constituent elements of the offence set out in Article 328 of the Criminal Code had not been made out in the decisions on Mr Kavala's pre-trial detention. Referring to the Court's relevant-case-law concerning the concept of "reasonable suspicion" and the dissenting opinions by the Constitutional Court judges (see paragraphs 61-65 above), she submitted that during the subsequent phase the prosecutor's office had been unable to provide any evidence to justify even a simple suspicion concerning the charge of espionage. She also indicated that, in its submissions of 4 March 2022, the prosecutor's office had called for Mr Kavala to be convicted only for the offence set out in Article 312 of the Criminal Code, in respect of the Gezi Park events (see paragraph 11 above), which, in her view, corroborated the conclusion that the charge of espionage was introduced solely with the aim of keeping Mr Kavala in detention. She also argued that the criminal proceedings brought against Mr Kavala and his detention were symptomatic of a wide range of serious problems affecting the Turkish justice system. Lastly, she stated that this measure had further intimidated civil society activists and human-rights defenders in Türkiye, compounding the chilling effect observed by the Court in its 2019 judgment.

B. The Court's assessment

1. Preliminary question

127. The Court notes that, according to the Government, two conditions had to be met before the Committee of Ministers could refer a case to the Court under Article 46 § 4: refusal by a High Contracting Party to abide by a final judgment and the existence of exceptional circumstances. However, the Government submitted that Türkiye had complied with the Court's judgment and that there were no exceptional circumstances which justified the present referral. They considered that the Committee of Ministers had neither authority nor mandate to evaluate the evidence produced in the context of a case pending before the domestic courts, and that by embarking on the procedure set out in Article 46 § 4, the Committee of Ministers had not only interfered in the ongoing domestic proceedings, but it had also taken a position on a matter that might be brought before the Court in the context of a separate application. In consequence, they considered that, in the circumstances of the case, the fact of instituting proceedings under Article 46 § 4 amounted to a breach of the Convention system, which was based on the principles of subsidiarity and the margin of appreciation, as set out in Protocol No. 15.

128. The Court reiterates that, according to its settled case-law, the ultimate choice of the measures to be taken to execute a judgment remains with the States under the supervision of the Committee of Ministers, provided the measures are compatible with the "conclusions and spirit" set out in the Court's judgment (see *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, § 182, 29 May 2019, with further references). The Rules for the supervision of the execution of judgments also define the procedure to be followed with regard to the infringement proceedings provided for in Article 46 § 4 of the Convention (for the text of these Rules, see ibid., §§ 90-96). Accordingly, the supervision mechanism now established under Article 46 of the Convention provides a comprehensive framework for the execution of the Court's judgments, reinforced by the Committee of Ministers' practice (ibid., § 163).

129. With more specific regard to infringement proceedings, paragraphs 4 and 5 of Article 46 empower the Committee of Ministers to trigger infringement proceedings where it considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party. This procedure does not aim to reopen the question of violation, already decided in the Court's first judgment. When introducing this procedure, it was felt that the political pressure exerted by proceedings for non-compliance before the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the State concerned (see point no. 99 of the Explanatory Report to Protocol No. 14, paragraph 104 above). Indeed, infringement proceedings should be brought only in "exceptional circumstances", as provided for by Rule No. 11 and the Explanatory Report to Protocol No. 14 (see paragraphs 103-104 above). This criterion is intended to indicate that the Committee of Ministers should apply a high threshold before launching this procedure. Infringement proceedings should therefore be viewed as a measure of last resort, where the Committee of Ministers considers that the other means to secure the execution of a judgment have ultimately proved unsuccessful and are no longer adapted to the situation. Moreover, infringement proceedings are not intended to upset the fundamental institutional balance between the Court and the Committee of Ministers (ibid., § 166). The right to initiate a referral is a procedural prerogative which comes within the responsibility of the Committee of Ministers (see, *mutatis mutandis,* ibid., § 144). In consequence, where this procedure has been duly initiated, it is not the Court's task to express a view on the desirability of such a decision by the Committee of Ministers.

130. In the present case, the Court considers that, having regard to the circumstances before it, the Committee of Ministers' "procedural prerogative", and the principles set out below (see paragraphs 131-135), the Government's argument is closely linked to the substance of the question raised by the Committee of Ministers, which means that the Court must therefore examine this question. For the same reason, and in so far as the

Government's argument that Mr Kavala had not lodged an application with the Court within a six-month period after having exhausted the domestic remedies can be understood as seeking to raise a plea of inadmissibility (see paragraph 113 above), the Court reiterates that such pleas are not relevant in the context of infringement proceedings brought before the Court by the Committee of Ministers under Article 46 § 4 of the Convention.

Where a question under Article 46 § 4 of the Convention is referred to it, the Court must therefore, in a final ruling, decide whether a judgment has been executed in good faith and in a manner compatible with the "conclusions and spirit" of the judgment, with a view to determining whether the respondent State has complied with its obligations under Article 46 § 1, notwithstanding the conviction handed down on 25 April 2022 (see paragraphs 11 and 117 above; see also, *mutatis mutandis*, ibid., §§ 146 and 216).

The Court must therefore examine the question asked by the Committee of Ministers.

2. General principles

131. The Court refers, first and foremost, to the general principles set out in the *Ilgar Mammadov* judgment (cited above, §§ 147-171) relating to the execution of its judgments under Article 46 §§ 1 and 2 of the Convention and to the nature of the Court's task in infringement proceedings under Article 46 § 4.

132. An infringement procedure does not aim to reopen the question of violation, already decided in the Court's initial judgment or to provide for payment of a financial penalty; it seeks to add pressure in order to secure execution of the Court's initial judgment (ibid., § 159). It was introduced in order to increase the efficiency of the supervision proceedings – to improve and accelerate them (ibid., § 160).

133. The Committee of Ministers, the entity responsible for supervision of the execution of the Court's judgments, fulfils a particular task, which consists of applying the relevant legal rules. A Contracting Party's obligations under Article 46 § 1 of the Convention are based on the principles of international law relating to cessation, non-repetition and reparation (ibid., § 162). The supervision mechanism now established under Article 46 of the Convention provides a comprehensive framework for the execution of the Court's judgments, reinforced by the Committee of Ministers' practice (ibid., §§ 162-163). In infringement proceedings the Court is required to make a definitive legal assessment of the question of compliance. In so doing, the Court will take into consideration all aspects of the procedure before the Committee of Ministers, including the measures indicated by that Committee.

134. The Court has emphasised the competence of the Committee of Ministers to assess the specific measures to be taken by a State to ensure the maximum possible reparation for the violations found. It has also found that

the question of compliance by the High Contracting Parties with its judgments falls outside its jurisdiction if it is not raised in the context of the infringement procedure provided for in Article 46 §§ 4 and 5 of the Convention (ibid., § 167, with further references).

135. As to the time-frame relevant to its assessment of a State's alleged failure to fulfil its obligation to abide by a judgment, the Court observes that the date on which the Committee of Ministers refers a question to the Court under Article 46 § 4 is the date by which it has deemed that the State in question has refused to abide by a final judgment within the meaning of Article 46 § 4 (ibid., § 170). Accordingly, and having regard to the Committee of Ministers' decision, the Court considers that the starting point for its examination should be the date on which the question under Article 46 § 4 of the Convention is referred to it, and thus, in the present case, 2 February 2022 (ibid., § 171).

3. Application of the above-mentioned principles to the present case

136. In the *Kavala* judgment, the Court held that there had been a violation of Article 5 §§ 1 and 4, and of Article 18 combined with Article 5 § 1 of the Convention, with regard to the charges against Mr Kavala under Articles 309 and 312 of the Criminal Code in October 2017 that had given rise to his placement in pre-trial detention. Under Article 18 combined with Article 5 § 1, the Court held that the charges brought against Mr Kavala were not based on reasonable suspicions and the actual purpose of the impugned measures was to silence him and to dissuade other human-rights defenders.

137. In its Interim Resolution of 2 February 2022, the Committee of Ministers, on the basis of Article 46 § 4 of the Convention, referred to the Court the question whether Türkiye had failed to fulfil its obligation under Article 46 § 1 of the Convention to comply with that judgment (see paragraph 94 above, and the Annex). It also drew attention to the numerous decisions and interim resolution that it had already adopted in the context of the supervision procedure, in which it had, firstly, stressed the fundamental shortcomings in the criminal proceedings, as revealed in the Court's conclusions under Article 18 combined with Article 5 § 1 of the Convention and, secondly, called for Mr Kavala's immediate release. In this Interim Resolution, the Committee of Ministers stated that "by not having ensured the applicant's immediate release, Turkey refuses to abide by the final judgment of the Court" (see paragraph 94 above).

138. It is evident, in the Court's view, that the Committee of Ministers considered the core issue in the present infringement proceedings to be the failure by Türkiye to adopt individual measures which respond to the violation of Article 5 § 1, taken individually and in conjunction with Article 18. With this in mind, it considers that the essential question in this case is whether or not there has been a failure by Türkiye to adopt the individual measures required to abide by the Court's judgment and remedy

the violation of Article 5 § 1, taken individually and in conjunction with Article 18.

139. Given the wording of Article 46 § 4, it is evident that the remaining elements, namely the violation of Article 5 § 4 of the Convention, just satisfaction, and the general measures relating to the execution of the *Kavala* judgment, fall within the scope of the infringement proceedings. However, in the present case they do not require detailed examination. Firstly, no question arises concerning the payment of just satisfaction, in so far as the Court decided not to award Mr Kavala any amount in this respect, since no duly submitted claim had been made by the applicant (see *Kavala*, cited above, § 237). As to the general measures, which also concern the violation under Article 5 § 4, the Court notes the Committee of Ministers' statement that certain general measures had been taken in this case, particularly with regard to strengthening the independence of the judiciary and compliance with the requirement of "speedy" judicial review of the lawfulness of detention measures. Moreover, it must not be overlooked that, where structural problems are concerned, rapid and adequate execution has, of course, an effect on the influx of new cases. In the present case, however, it appears from the referral by the Committee of Ministers that the emphasis is clearly placed on the individual measures required. In consequence, the Court considers that it is not necessary to dwell further on these other aspects of the execution procedure.

(a) The scope of the *Kavala* judgment

140. As regards the violation of Article 5 § 1 of the Convention (see *Kavala*, cited above, § 159), the Court reiterates that it has examined in detail the reasonableness of the suspicions against Mr Kavala in relation to the offences set out in Articles 312 (ibid., §§ 139-153) and 309 of the Criminal Code (ibid., §§ 154-155). With regard to the first charge, related to the Gezi Park events (Article 312 of the Criminal Code), it found that "... in the absence of facts, information or evidence showing that he had been involved in criminal activity, ... the applicant could not reasonably be suspected of having committed the offence of attempting to overthrow the Government, within the meaning of Article 312 of the Criminal Code" (ibid., § 153).

With regard to the charges against Mr Kavala concerning the attempted coup (Article 309 of the Criminal Code), it stated as follows in paragraph 154:

> "... In the Court's view, however, the evidence in the case file is insufficient to justify this suspicion. The prosecutor's office relied on the fact that the applicant maintained relationships with foreign nationals and that his mobile telephone and that of H.J.B. had emitted signals from the same base receiver station. It also appears from the case file that the applicant and H.J.B. met in a restaurant on 18 July 2016, that is, after the attempted coup, and that they greeted each other briefly. In the Court's opinion, it cannot be established on the basis of the file that the applicant and the individual in question had intensive contacts. Further, in the absence of other relevant and sufficient circumstances, the mere fact that the applicant had had contacts with a suspected person

or with foreign nationals cannot be considered as sufficient evidence to satisfy an objective observer that he could have been involved in an attempt to overthrow the constitutional order."

141. In its overall analysis, the Court also concluded that there was no plausible reason to suspect that the applicant had committed "any criminal offence" (ibid., § 156), noting in particular 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" (ibid., § 157).

142. With regard to Article 18 of the Convention, the Court deems it necessary to recall the reasons for which it found there to have been a violation of Article 18 combined with Article 5 § 1 in the *Kavala* judgment:

"221. The Court observes that the stated aim of the measure imposed on the applicant was to carry out investigations into the Gezi events and the attempted coup, and to establish whether the applicant had indeed committed the offences of which he was accused...

222. However, it would appear that, from the outset, the investigating authorities were not primarily interested in the applicant's presumed involvement in the public disorder which occurred in the course of the Gezi events and the attempted coup. During the police interview, the applicant was asked many questions which, at first sight, had no connection with these events...

223. The Court notes that the bill of indictment does not make up for the deficiency described above. This document, 657 pages in length, does not contain a succinct statement of the facts. Nor does it specify clearly the facts or criminal actions on which the applicant's criminal liability in the Gezi events is based. It is essentially a compilation of evidence – transcripts of numerous telephone conversations, information about the applicant's contacts, lists of non-violent actions –, some of which have a limited bearing on the offence in question. ... the prosecutor's office accused the applicant of leading a criminal association and, in this context, of exploiting numerous civil-society actors and coordinating them in secret, with a view to planning and launching an insurrection against the Government. However, there is nothing in the case file to indicate that the prosecuting authorities had objective information in their possession enabling them to suspect, in good faith, the applicant at the time of the Gezi events ... In particular, the prosecution documents refer to multiple and completely lawful acts that were related to the exercise of a Convention right and were carried out in cooperation with Council of Europe bodies or international institutions (exchanges with Council of Europe bodies, helping to organise a visit by an international delegation). They also refer to ordinary and legitimate activities on the part of a human-rights defender and the leader of an NGO...

...

228. In addition, the Court considers it crucial in its assessment under Article 18 of the Convention that several years elapsed between the events forming the basis for the applicant's detention and the court decisions to detain him. No plausible explanation has been advanced by the Government for this lapse of time. Furthermore, and importantly, the bulk of the evidence relied upon by the prosecutor in support of his request for the applicant's pre-trial detention, which began on 1 November 2017, had already been collected well in advance of that date; the Government have not provided any cogent explanation for this chronology of events. Moreover, notwithstanding the

lapse of more than four years between the Gezi events and the applicant's detention, the Government have been unable to furnish any credible evidence which would allow an objective observer to plausibly conclude that there existed a reasonable suspicion in support of the accusations against the applicant...

229. It is also significant that those charges were brought following the speeches given by the President of the Republic on 21 November and 3 December 2018...

230. In the Court's opinion, the various points examined above, taken together with the speeches by the country's highest-ranking official (quoted above), 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. Moreover, the fact that the prosecutor's office referred in the bill of indictment to the activities of NGOs and their financing by legal means, without however indicating in what way this was relevant to the accusations it was bringing, is also such as to support that assertion...

231. Indeed, at the core of the applicant's Article 18 complaint is his alleged persecution, not as a private individual, but as a human-rights defender and NGO activist. As such, the restriction in question would have affected not merely the applicant alone, or human-rights defenders and NGO activists, but the very essence of democracy ... The Court considers that the ulterior purpose thus defined would attain significant gravity, especially in the light of the particular role of human-rights defenders ... and non-governmental organisations in a pluralist democracy...

232. In the light of above-mentioned elements, taken as a whole, 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. In consequence, it concludes that the restriction of the applicant's liberty was applied for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence, as prescribed by Article 5 § 1 (c) of the Convention.

In view of the foregoing, the Court concludes that there has been a violation of Article18 in conjunction with Article 5 § 1 of the Convention."

143. From its reasoning, it is clear that the Court's findings applied to the totality of the charges against Mr Kavala concerning the Gezi Park events and the attempted coup, even if, in its analysis, the national authorities' classification of the facts in terms of the provisions of the Criminal Code was inevitably a relevant factor. Consequently, in the absence of other relevant and sufficient circumstances, a mere reclassification of the same facts cannot in principle modify the basis for those conclusions, since such a reclassification would only be a different assessment of facts already examined by the Court. Were it otherwise, the judicial authorities could continue to deprive individuals of their liberty simply by opening new criminal investigations in respect of the same facts. Such a situation would amount to permitting the law to be circumvented and might lead to results incompatible with the object and purpose of the Convention (see, among many other authorities, *Korban v. Ukraine*, no. 26744/16, § 150, 4 July 2019, and *Atilla Taş v. Turkey*, no. 72/17, § 77, 19 January 2021).

144. Even more importantly, it is clear from the Court's reasoning that it did not accept "the stated aim of the measure imposed on the applicant", which had been, firstly, to carry out investigations into the Gezi Park events and the attempted coup, and secondly, to establish whether Mr Kavala had indeed committed the offences of which he was accused (see *Kavala*, cited above, § 221). Furthermore, it identified the ulterior purpose of these measures, which was to silence Mr Kavala as an NGO activist and human-rights defender (ibid., § 231). This finding is central in the light of the object and purpose of Article 18, which is to prohibit the misuse of power (see, to similar effect, *Ilgar Mammadov* (infringement proceedings), cited above, § 189, with further references).

145. It follows that the Court's finding in the *Kavala* judgment of a violation of Article 5 § 1, read separately and in conjunction with Article 18, vitiated any action resulting from the charges relating to the Gezi Park events and the attempted coup. Furthermore, in the absence of other relevant and sufficient circumstances capable of demonstrating that Mr Kavala had been involved in criminal activity, any measure, especially one depriving him of his liberty, on grounds pertaining to the same factual context, would entail a prolongation of the violation of Mr Kavala's 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.

146. Furthermore, in contrast to the *Ilgar Mammadov v. Azerbaijan* judgment (no. 15172/13, 22 May 2014), which was subsequently the subject of the first infringement procedure, the *Kavala* judgment contained, in its reasoning and operative provisions, an explicit indication as to how it was to be executed. The Court stated as follows: "the Government must take every measure to put an end to the applicant's detention and to secure his immediate release" (see *Kavala*, cited above, § 240).

147. It must be accepted, therefore, that by its very nature the violation found may not leave any real choice as to the measures required to remedy it. This is particularly true where the case concerns detention that the Court has found to be manifestly unjustified under Article 5 § 1, in that there is an urgent need to put an end to the violation in view of the importance of the fundamental right to liberty and security (see, *mutatis mutandis, Assanidze v. Georgia* [GC], no. 71503/01, §§ 202-203, ECHR 2004-II, and *Medvedyev and Others v. France* [GC], no. 3394/03, § 76, ECHR 2010). This observation is all the more valid where, as in the present case, the violation originates in detention that has also been held to be contrary to Article 18 taken together with Article 5 § 1 of the Convention.

148. In consequence, the fact of giving indications under Article 46 as in the present case firstly enables the Court to ensure, as soon as it delivers its judgment, that the protection afforded by the Convention is effective and to prevent continued violation of the rights in issue, and subsequently assists the Committee of Ministers in its supervision of the execution of the final

judgment. Such indications also enable and require the State concerned to put an end, as quickly as possible, to the violation of the Convention found by the Court.

(b) Whether Türkiye has failed to fulfil its obligation to abide by a final judgment under Article 46 § 1

149. The Court has analysed (see paragraphs 140-148 above) the scope of the finding of a violation of Article 5 § 1, read separately and in conjunction with Article 18, found by it in the *Kavala* judgment, and has identified the corresponding obligation of *restitutio in integrum* falling upon Türkiye under Article 46 § 1 as requiring that State to release Mr Kavala from detention immediately and to eliminate the negative consequences of the criminal charges found by the Court to be unjustified. Referring, *inter alia*, to the Court's indication, the Committee of Ministers considered that the appropriate measure of redress was Mr Kavala's immediate release.

150. The Government have indicated that Mr Kavala's detention, imposed on the basis of Article 309 of the Criminal Code (attempted coup), ended on 11 October 2019, then resumed on 18 February 2020 and lasted without interruption until 20 March 2020. Equally, the detention ordered on the basis of the charges concerning the Gezi Park events (Article 312 of the Criminal Code) ended on 18 February 2020, when the first-instance court pronounced Mr Kavala's acquittal and ordered that he be released (see paragraph 24 above). In the Court's view, whatever the grounds advanced by the Government to justify his subsequent detention, Mr Kavala was deprived of his liberty, without interruption, between 18 October 2017 and – at the least – 2 February 2022, the date on which the matter was referred to the Court.

151. The Court reiterates that it has already concluded that its finding of a violation of Article 5 § 1, read separately and in conjunction with Article 18, in the *Kavala* judgment vitiated any measure resulting from the charges brought in relation to the Gezi Park events and the attempted coup. In addition, the Court's explicit indication required that Mr Kavala be released immediately after the delivery of its judgment. Moreover, in the absence of other relevant and sufficient circumstances to show that Mr Kavala had been involved in criminal activity, any measure, especially one depriving him of his liberty, on grounds pertaining to exactly the same factual context, would be likely to constitute a prolongation of the violation of his rights as well as a breach of the respondent State's obligation to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention (see paragraphs 143-145 above). Accordingly, the Court must consider whether, as the Government claim, the charges against Mr Kavala have changed in substance.

(i) Whether the charges against Mr Kavala have changed in substance

152. The Committee of Ministers noted that Mr Kavala was admittedly placed in pre-trial detention on 9 March 2020 in relation to military or political espionage (Article 328 of the Criminal Code), but that the charges brought against him had not substantially changed. For their part, the Government submitted that Mr Kavala's continued detention, on the basis of a new charge, amounted to a new fact, raising a new problem, one that had not been examined by the Court. In their view, Mr Kavala ought to have lodged a new application with the Court following the Constitutional Court's judgment. They concluded that Mr Kavala's detention on the basis of these new charges could not represent a violation of their obligation to execute the Court's judgments in accordance with Article 46 § 1 of the Convention).

The Court will first examine the Government's argument that Mr Kavala should have lodged a new application with the Court about his continued pre-trial detention; it will then examine the measures taken by Türkiye following the *Kavala* judgment.

(α) Whether Mr Kavala should have lodged a new application

153. The Court takes note that Mr Kavala lodged a second individual application before the Constitutional Court to complain about the continuation of his detention after the Court's judgment (see paragraph 59 above). It further notes the Government's argument that there was nothing in theory to prevent Mr Kavala, following the Constitutional Court's judgment, from lodging a new application with the Court to complain about his continued pre-trial detention, which he has not done. It considers, however, for the reasons set out below, that the fact that Mr Kavala has not applied to the Court in respect of the same complaint that he submitted to the Constitutional Court regarding his continued detention has no fundamental bearing for the purpose of its examination of whether Türkiye has complied with its obligation under Article 46 § 1.

154. At the outset, the Court refers to the principles set out above (see paragraphs 131-135), defining its role and the competence of the Committee of Ministers during the execution phase of a judgment, and indicating that it is for the Committee of Ministers to supervise, on the basis of the information provided by the respondent State and with due regard to the applicant's evolving situation, the adoption of such measures that are feasible, timely, adequate and sufficient to ensure the maximum possible reparation for the violations found by the Court. The question of compliance by the High Contracting Parties with its judgments falls outside the Court's jurisdiction if it is not raised in the context of the "infringement procedure" provided for in Article 46 §§ 4 and 5 of the Convention.

155. It should also be noted that, where the Court considers that Article 46 of the Convention does not preclude its examination, it may find that it has

competence to entertain complaints in follow-up cases, for example where the domestic authorities carried out a fresh examination of the case by way of implementation of one of the Court's judgments, whether by reopening the proceedings (see *Emre v. Switzerland (no. 2)*, no. 5056/10, 11 October 2011, and *Hertel v. Switzerland* (dec.), no. 53440/99, ECHR 2002-I) or by initiating an entirely new set of proceedings (see *United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (no. 2)*, nos. 41561/07 and 20972/08, 18 October 2011, and *Liu v. Russia (no. 2)*, no. 29157/09, 26 July 2011). The same applies when the 'new issue' results from the continuation of the violation found in the Court's initial judgment (see, for example, *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, § 95, 15 November 2011). In consequence, the Court and the Committee of Ministers, in the context of their different duties, may be required to examine, even simultaneously, the same domestic proceedings without upsetting the fundamental institutional balance between them.

156. In the present case, it is important to note that the Committee of Ministers has not terminated its supervision of the execution of the *Kavala* judgment (see, in contrast, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 67, ECHR 2009), and that it decided to bring infringement proceedings before the Court on the ground that "since 11 May 2020, when the Court's judgment became final, the applicant ha[d] remained in detention on the basis of proceedings criticised by the ... Court or based on evidence which it [had] found insufficient to justify his detention" (see paragraph 94 above). Having received this request, the Court is required to make a definitive legal assessment of the question of compliance with the judgment in question.

(β) Measures taken by Türkiye following the *Kavala* judgment

157. The Court notes that, following the judgment concerning Mr Kavala, the domestic courts ordered that Mr Kavala be released on bail on 18 February 2020, but that on the same day he was arrested by order of the public prosecutor in relation to the attempted coup (Article 309 of the Criminal Code), then placed in pre-trial detention on the following day. It further notes that Mr Kavala was also placed in pre-trial detention in relation to the charge of espionage (Article 328 of the Criminal Code) on 9 March 2020.

158. The Court notes at the outset that the detention ordered in respect of Mr Kavala on 18 February 2020 – the date of the decision to release him on bail in respect of the Gezi Park charges – was based on charges related to the attempted coup (see paragraphs 25 and 27 above). In its judgment, the Court examined the facts which formed the basis of these charges in detail, noting in particular that they "were predominantly based on the existence of 'intensive contacts' between the applicant and H.J.B., who, according to the Government, was the subject of a criminal investigation for participation in

organising" the attempted coup of 15 July 2016 (see *Kavala*, cited above, § 154).

159. However, again in the *Kavala* judgment, the Court found with regard to these charges that "the evidence in the case file [was] insufficient to justify this suspicion" (ibid., § 154). Admittedly, this evidence, which had been in the case file since 18 October 2017, the date on which Mr Kavala was initially placed in pre-trial detention, had been supplemented by the prosecutor's office in its request of 18 February 2020 (see paragraph 25 above). However, it is clear that the information obtained subsequently (the testimony by a hotel employee, H.J.B.'s activities in the context of a foundation based in the United States or additional data on telephone signals, see in particular paragraph 25; see also paragraphs 31 and 36 above) did not contain any new fact related to the constituent elements of the alleged offence, such as evidence which might have enabled the nature of the presumed relationship to be clarified or Mr Kavala's actions to be linked to a criminal aim. The new information essentially supplemented the prior evidence relating, not to Mr Kavala, but to the activities of H.J.B. – who, from the beginning of the investigation, was suspected of being one of the instigators of the attempted coup –, and specified the frequency of the presumed contacts between Mr Kavala and H.J.B.

160. It is true, as the Government have indicated, that the measure placing Mr Kavala in pre-trial detention in respect of this charge was lifted on 20 March 2020 (see paragraph 34 above). In its decision, however, the magistrate's court had ordered that Mr Kavala be released on bail on the grounds that the legal duration of detention had been exceeded, while noting at the same time that there were strong suspicions against Mr Kavala with regard to the alleged offence. In this connection, it should be noted that, in confirming the existence of reasonable suspicions against Mr Kavala, the magistrate's court relied exclusively on his presumed contacts with H.J.B., without seeking to establish whether there existed "other relevant and sufficient circumstances". Moreover, this point was noted in the *Kavala* judgment (§ 154). However, the Court considers that it is not necessary to dwell further on this detention which, in any event, ended before the *Kavala* judgment became final on 11 May 2020.

161. Turning to the question whether the charges brought against Mr Kavala have changed in substance, the Court observes, as the Government have indicated, that the charge of military or political espionage on which Mr Kavala's pre-trial detention from 9 March 2020 until the date of referral to the Court was based is, technically speaking, a new charge which was not examined by the Court in its initial judgment. It points out that it must, however, satisfy itself that this charge was not justified by the same facts previously examined by the Court in that judgment.

162. In this respect, the Court emphasises that, in the context of infringement proceedings following a finding of a violation of Article 5 § 1,

read separately and in conjunction with Article 18 of the Convention, it cannot disregard the conclusions and indications addressed by it to the respondent State in the initial judgment on the sole grounds that a new charge has been brought against Mr Kavala under domestic law. A mere reclassification of the same facts cannot in principle modify the basis for the conclusions of the initial judgment, since such a reclassification would only be a different assessment of facts already examined by the Court (see paragraph 143 above). In its analysis, the Court must look behind appearances and investigate the realities of the situation complained of. If this were not the case, the obligation to comply with a judgment delivered by the Court would be deprived of its substance in practice. The Court's examination is of paramount importance where, as in the present case, the immediate release of a detained person had been ordered by the Court following a violation of Article 5 § 1, read separately and in conjunction with Article 18 thereof.

163. As regards this new charge of military or political espionage, it appears from the order of 9 March 2020 returning Mr Kavala to pre-trial detention and the bill of indictment of 28 September 2020 that the espionage suspicions against him were based on two facts: firstly, the alleged relations between Mr Kavala and H.J.B., and, secondly, the activities carried out by Mr Kavala in the framework of his NGOs (see paragraphs 31, 33 and 36 above). The Court notes striking similarities, or even complete duplication, between those facts and those already examined in the *Kavala* judgment.

164. As regards the first of those two elements, namely the alleged relations between Mr Kavala and H.J.B., it should be recalled, firstly, that this was the only fact alleged against Mr Kavala in the context of the charge relating to the attempted coup (see paragraph 158 above), and, secondly, that the above finding (see paragraph 159) also applies to the charge of military or political espionage. This is therefore clearly a fact previously examined by the Court in the context of its initial judgment, although it is invoked again in the context of Mr Kavala's new detention under a new criminal reclassification, without any distinctive fact in connection with the charge of espionage being provided by the investigating authorities.

165. The Court further observes that the bill of indictment of 28 September 2020 indicates that the suspicion of espionage was also based on the activities carried out by Mr Kavala in the context of his NGOs. However, it reiterates that it already examined these activities in detail in the *Kavala* judgment (ibid., §§ 147, 150, 222, 223, 224, 227, 230, 231) before finding a violation of Article 5 § 1, read separately and in conjunction with Article 18. In other words, although Mr Kavala was formally accused of a new charge, different from those which had been used to justify his previous detention, the facts listed in the bill of indictment are essentially identical to those already examined by the Court in the above-cited judgment. That being so, the Court can only reiterate 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 (ibid., §§ 223-224) 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 (ibid., § 128).

166. The Court therefore concludes that neither the decisions on Mr Kavala's detention nor the bill of indictment contain any substantially new facts relating to the constituent elements of the offence defined in Article 328 of the Criminal Code (information or documents belonging to the State and classified as "State secrets" and obtaining or disclosing such documents or information) capable of justifying this new suspicion. As during Mr Kavala's initial detention, which was examined in the judgment concerning him, the investigating authorities once again referred to numerous acts which had been carried out entirely lawfully in order to justify his continued pre-trial detention (see *Kavala*, cited above, §§ 145-146 and 223), notwithstanding the constitutional guarantees against arbitrary detention. This was also the conclusion of the dissenting judges of the Constitutional Court (see paragraphs 61-65 above).

(ii) Other relevant factors

167. Among the other relevant factors, the Committee of Ministers referred to certain facts that the Government have not challenged. As a starting point, it is not disputed that when the new charge was brought against Mr Kavala, on 9 March 2020, a considerable period of time had elapsed since the facts, all prior to July 2016, which had given rise to this new charge. The Committee of Ministers pointed out that the Court had considered it crucial, in its assessment under Article 18 of the Convention, that several years had elapsed between the events forming the basis for Mr Kavala's detention and the court decisions ordering his placement in detention (see *Kavala*, cited above, § 228). Moreover, it appears from the information submitted by Mr Kavala that the country's high-ranking officials had given many speeches on the criminal proceedings against him (see paragraph 56 above).

168. The elements cited above, taken together with the fact that the Council of Judges and Prosecutors began an examination to establish whether it was necessary to open a disciplinary investigation against the three judges who had delivered the acquittal judgment, are clearly relevant aspects for assessment of whether the national authorities complied with their obligation to act in good faith in executing a final binding judgment, particularly given the consequences of the finding of a violation of Article 18 taken together with Article 5 § 1.

(c) Final conclusion

169. The whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. That

structure includes the supervision procedure and the execution of judgments should also involve good faith and take place in a manner compatible with the "conclusions and spirit" of the judgment. Moreover, the importance of the good faith obligation is paramount where the Court has found, as in the present case, a violation of Article 18, the object and purpose of which is to prohibit the misuse of power.

170. The Court reiterates its well-established case-law to the effect that failure to implement a final, binding judicial decision would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention.

171. Following the approach set out in paragraphs 131-135 above, the Court has examined the text of the *Kavala* judgment and the corresponding obligations of State responsibility (see paragraphs 140-148 above). It has then considered the measures taken by Türkiye and the assessment of these measures by the Committee of Ministers in the execution process, and also the position of the respondent Government and Mr Kavala's submissions. It notes that Türkiye has taken some steps towards executing the above-cited judgment and has also presented several Action Plans (see paragraphs 85-87 above). It notes, however, that on the date on which the Committee of Ministers referred the matter to it, and in spite of three decisions ordering his release on bail and one acquittal judgment, Mr Kavala had still been held in pre-trial detention for more than four years, three months and fourteen days, on the basis of facts which, in its initial judgment, it had held to be insufficient to justify the suspicion that he had committed "any criminal offence" and which were "largely related to the exercise of Convention rights" (ibid., § 157).

172. These considerations are crucial in the present case, particularly since, on 25 April 2022, Mr Kavala was acquitted of the charge of military or political espionage under Article 328 of the Criminal Code, but convicted of the charge under Article 312 of the Criminal Code. Mr Kavala was also sentenced to the heaviest penalty under Turkish criminal law, namely aggravated life imprisonment. It is clear from the verdict delivered on 25 April 2022 that this conviction was based on facts primarily related to the Gezi Park events, which the Court had scrutinised with particular care in its initial judgment on account of the clear absence of reasonable suspicion. Admittedly, the Assize Court's verdict, delivered subsequent to the referral to the Court and which is not final, does not affect the Court's findings as set out above (see, *mutatis mutandis*, *Ilgar Mammadov* (infringement proceedings), cited above, § 212). The Court would, however, reiterate that its finding of a violation of Article 18 taken together with Article 5 in the *Kavala* judgment had vitiated any action resulting from the charges related to the Gezi Park events and the attempted coup (see paragraph 145 above). It is nonetheless clear that the domestic proceedings subsequent to the above

judgment, which resulted first in an acquittal and then a conviction, have not made it possible to remedy the problems identified in the *Kavala* judgment.

173. In the light of the conclusions it has set out above, the Court considers that the measures indicated by Türkiye do not permit it to conclude that the State Party acted in "good faith", in a manner compatible with the "conclusions and spirit" of the *Kavala* judgment, or in a way that would make practical and effective the protection of the Convention rights which the Court found to have been violated in that judgment.

174. In response to the question as referred to it by the Committee of Ministers, the Court concludes that Türkiye has failed to fulfil its obligation under Article 46 § 1 to abide by the *Kavala v. Turkey* judgment of 10 December 2019.

4. Other questions

175. The Court also notes that Mr Kavala has submitted certain requests in addition to the request for a finding of a violation of Article 46 of the Convention (see paragraph 124 above). However, as indicated in the Explanatory Report to Protocol No. 14 (see paragraph 104 above), the infringement procedure does not aim to reopen before the Court the question of a violation, already decided in its first judgment. Nor does it provide for payment of a financial penalty by a High Contracting Party found to be in violation of Article 46 § 1. It follows that the Court is not competent to find a further violation of Articles 5 and 18 of the Convention. In reality, the finding of a violation of Article 46 § 1 means that the primary obligation resulting from the Court's initial judgment, namely *restitutio in integrum*, with all the ensuing consequences, continues to exist, and that it is for the Committee of Ministers to continue to supervise the execution of the Court's initial judgment.

176. With regard to Mr Kavala's claims under Article 41 of the Convention (see paragraph 124 above), the Court considers that it is not competent to make an award in respect of any (pecuniary or non-pecuniary) damage sustained by the person concerned, given the nature of infringement proceedings as explained above (see paragraph 175). Given the outcome of the present infringement proceedings, the Court finds, however, that in the interest of the proper administration of justice, the costs and expenses relating to these proceedings are to be reimbursed to Mr Kavala by the Government, in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum, in accordance with the Court's established case-law. The Court notes in this regard that Mr Kavala – as a person concerned by the present proceedings – was invited by the Court to submit written observations. The preparation of these observations by his representatives, Mr Philip Leach and Ms Başak Çalı, necessarily entailed

costs for which Mr Kavala claimed reimbursement[1]. In the light of the foregoing considerations, the material in the case file and the observations submitted by the Government and Mr Kavala, as well as the above-mentioned criteria, the Court considers it reasonable to award Mr Kavala 7,500 euros (EUR) in respect of the costs and expenses relating to the proceedings before it. In this regard, it recalls that the Committee of Ministers is competent under Article 46 § 5 of the Convention to take the measures that it deems necessary to ensure compliance with the obligations arising from the Court's finding of a violation of Article 46 § 1. The Court also considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds*, by sixteen votes to one, that there has been a violation of Article 46 § 1 of the Convention;

2. *Holds*, by sixteen votes to one, that the Government of the Republic of Türkiye are to pay Mr Kavala, within three months, the sum of EUR 7,500 (seven thousand five hundred euros), plus any amount which may be due by Mr Kavala as tax, for costs and expenses and that from the expiry of that period until payment, this amount shall be increased by simple interest at a rate equal to that of the marginal lending rate of the European Central Bank applicable during that period, increased by three percentage points;

3. *Dismisses*, unanimously, the remainder of Mr Kavala's requests.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 July 2022, pursuant to Rule 77 §§ 2 and 3 and Rule 104 of the Rules of Court.

Abel Campos Deputy Registrar	Robert Spano President

[1] Rectified on 1 September 2022: the text was "The preparation of these observations by his representatives necessarily entailed costs for which Mr Kavala claimed reimbursement."

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Joint concurring opinion of Judges Bošnjak and Derenčinović;
(b) Partly dissenting opinion of Judge Yüksel.

R.S.
A.C.

JOINT CONCURRING OPINION OF JUDGES BOŠNJAK AND DERENČINOVIĆ

1. We agree with the other members of the majority in the Grand Chamber that Türkiye has failed to fulfil its obligation under Article 46 § 1 of the Convention to abide by the Court's judgment in the case of *Kavala v. Turkey* (no. 28749/18, 10 December 2019). Furthermore, we can subscribe to the principal points of the reasoning which led to the above conclusion. Nevertheless, we find it beneficial, for the sake of further reinforcement of the Court's position in the present case, as well as for the examination of any future cases brought either under Article 5 of the Convention or within the framework of infringement proceedings under Article 46 § 4 of the Convention, to outline certain principles that the Grand Chamber chose not to develop in the present judgment.

2. This is the second time that the Committee of Ministers has referred a question to the Court as to whether a High Contracting Party has fulfilled its obligations arising under Article 46 § 1 from a previous judgment delivered by the Court. What both the first (see *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) no. 15172/13, 29 May 2019) and the second infringement proceedings have in common is that (a) in the initial proceedings the Court found a violation of Article 5 § 1 (c) of the Convention as well as a violation of Article 18 of the Convention, and that (b) the respondent State subsequently failed to secure the release of the applicant.[1] This continuous failure led the Committee of Ministers to refer the case to the Court in infringement proceedings.

3. It is not surprising that the execution of judgments in which the Court found the above-mentioned combination of violations would represent a particular challenge for the respondent State. On the other hand, bearing in mind the rights and violations which are at stake in such cases, it is not unlikely that an ongoing failure to execute the initial judgment will lead the Committee of Ministers to envisage the option provided for in Article 46 § 4 of the Convention. In the future, therefore, a case might again be referred to the Court in infringement proceedings involving the same or similar factual and legal issues as in the present case. The principles and conclusions set out in the present infringement proceedings judgment may be reapplied, and they therefore carry additional weight.

4. In its initial judgment of 10 December 2019, the Court held, *inter alia*, that the respondent State was to take all necessary measures to put an end to Mr Kavala's detention and to secure his immediate release. In February 2020

[1] In contrast to the *Kavala* case, in the operative part of the initial judgment in the *Ilgar Mammadov* case the Court made no reference to a need to secure the applicant's immediate release.

the domestic court ordered Mr Kavala's release on the basis of his acquittal of one of the two charges that the Court had examined in the initial proceedings. However, Mr Kavala was not released. Instead, he was re-detained, first on the second charge that had been examined by the Court in the initial proceedings, namely the offence of attempting to overthrow the constitutional order under Article 309 of the Penal Code, and later (from 9 March 2020 onwards) on the charge of military or political espionage under Article 328 of the Penal Code.

5. In substance, the Turkish Government argue in the present infringement proceedings that they have not failed to execute the Court's judgment, as Mr Kavala has been detained since March 2020 on a fresh charge. Therefore, the crucial question in this case is whether this new charge can justify the fact that Mr Kavala's release has not been secured. As such, and given that similar situations could reoccur in future cases of this kind, we consider that a comprehensive set of general principles is necessary to provide guidance in addressing this question.

6. In any criminal justice system, there are numerous instances where a defendant's release is ordered, but he or she nevertheless remains detained. While at first glance this may appear to constitute a blatant disregard for the rule of law, there may at times exist a sound legal and factual justification for such a situation.

7. The present judgment offers one general reference which might usefully assist future compositions of the Court or national courts in adjudicating such or similar situations. In paragraph 143, the Grand Chamber states that "... in the absence of other relevant and sufficient circumstances, a mere reclassification of the same facts cannot in principle modify the basis for those conclusions..." (that is, those reached in the Court's initial judgment, namely that there did not exist reasonable suspicion for Mr Kavala's detention and that, instead, there existed an ulterior motive for it). In other parts of the judgment (especially in paragraphs 161-166), the Grand Chamber holds that the facts were the same and notes that in its initial judgment the Court found that the facts and evidence allegedly constituting the grounds of Mr Kavala's detention could not be regarded as constitutive of any crime. Unsurprisingly, the Grand Chamber concluded that Mr Kavala's continuous detention was unjustified and that there has therefore been a violation of Article 46 § 1 of the Convention.

8. We would respectfully argue that the above-mentioned general statement in paragraph 143 of the present judgment is neither clear nor sufficient. Firstly, it refers to "other relevant and sufficient circumstances" which could justify continuous detention through legal reclassification of the same facts. The judgment does not specify what such "other relevant and sufficient circumstances" could be, and the formulation largely leaves the reader guessing. Secondly, in line with the wording of paragraph 143, in the absence of such "other relevant and sufficient circumstances", a mere

reclassification of the same facts cannot "in principle" justify a refusal to release a detainee; however, this immediately begs a question about "exceptions" to the "principle". Quite apart from these two shortcomings, this general statement in paragraph 143 provides no guidance for situations where new facts are put forward by the prosecution. An inattentive reader might be tempted to believe that, *a contrario*, a charge on different facts may justify further detention. We believe that such a conclusion would oversimplify the matter.

9. Instead, we argue for a more comprehensive general approach. What follows is a tentative outline of such an approach. In this respect, we note at the outset that the decision to extend detention or issue a new detention order based on the reasonable suspicion that a different criminal offence has been committed would not *per se* be contrary to the standard principles of criminal law, nor to the constitutional or/and Convention rights of the defendant in a criminal case. Nothing in the Convention or the case-law of the Court would prevent any authority from extending detention or issuing a new detention order in the event of reasonable suspicion that a new criminal offence, not known at the time when the defendant was initially detained, has been committed.

10. However, reasonable suspicion in respect of an alleged new criminal offence must be founded on new facts, which must be substantiated by sufficient evidence. A mere reclassification of previous charges will not suffice. If the new charges are simply "reshuffled" old charges, then the new detention order would be in breach of the "reasonable suspicion" standard and, as such, contrary to the rights of the defendant as enshrined in Article 5 § 1 (c) of the Convention. Consequently, a legal reclassification of the charges without introducing new factual elements, supported by credible evidence, would run counter to the fundamental guarantees embedded in the European legal order. In other words, using facts and evidence that are the same or at least not substantially different from those invoked to justify the initial deprivation of liberty, with a view to further restricting the right to personal freedom under the Convention, must be considered as a violation of the rule that the extension of detention or the imposition of new detention in criminal proceedings against the same defendant should not be contrary to his or her rights. This is all the more true when, as in the present case, it has been previously established that the initial detention was ordered in breach of Article 5 § 1 (c) of the Convention, accompanied by a finding of a violation of Article 18 of the Convention.

11. In assessing whether the new charges against Mr Kavala were substantially different, the Court could have relied on its well-established case-law on "*idem*" under Article 4 of Protocol No. 7. While it is true that the "*ne bis in idem"* principle is not as such at stake in the present case, in the absence of specific principles concerning new charges in the context of infringement proceedings, a viable alternative would be to rely on the general

principles regarding what is to be considered as "*idem*", developed in the landmark Grand Chamber judgment *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, ECHR 2009). The most important principle established therein is, in our opinion, equally applicable to Article 4 of Protocol No. 7 cases and to the present infringement proceedings, namely that "[an] approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual" (see *Sergey Zolotukhin*, cited above, § 81).

12. The standards established in *Sergey Zolotukhin* concerned the prohibition of prosecution or trial in respect of a second "offence" in so far as the latter arises from "identical facts or facts which are substantially the same" (ibid., § 82). The Court's inquiry "should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings" (ibid., § 84).

13. Following the principles established in *Sergey Zolotukhin*, the Court in its recent case-law reiterated that "it is clear that the determination as to whether the offences in question were the same (*idem*) depends on a facts-based assessment ... rather than, for example, a formal assessment consisting in comparing the 'essential elements' of the offences" (see *Bajčić v. Croatia*, no. 67334/13, § 29, 8 October 2020).

14. In this connection, we wish to highlight that new facts do not in themselves necessarily suffice in order to find that new detention is Convention-compliant. The new detention must meet all Convention requirements in respect of deprivation of liberty. In particular, in addition to new facts, new evidence must be adduced by the prosecution service in order for the standard of reasonable suspicion to be fulfilled. In the absence of sufficient evidence supporting the newly asserted facts up to the standard of reasonable suspicion, failure to release the defendant would amount to arbitrary denial to comply with the release order.

15. Furthermore, as outlined in paragraph 9 above, the new facts and evidence allegedly justifying a defendant's new detention must not have been known during his or her initial detention. Any other approach would allow the prosecution authorities to act *mala fide* and introduce the new charges at the exact point in time when, conveniently, this would prevent the defendant's release. Preventing such an abuse of criminal-law instruments is all the more important in cases such as the present one, where the Court found a violation of Article 18 of the Convention in the initial proceedings, the existence of an ulterior motive being indicated, *inter alia*, by the fact that several years elapsed between the events forming the basis for the applicant's detention and the court decisions to detain him, no plausible explanation for this lapse of time having been advanced by the Government (see *Kavala v. Turkey*, cited above, § 228).

16. These general principles highlight the relevance of a thorough analysis of the issue of new facts and evidence. In the present case, such an analysis would be of fundamental importance, in that it would address the Government's central argument, specifically that Mr Kavala's prolonged detention was based on the new investigation and new charges, which were in turn based on new facts.

17. When considering the new charges against Mr Kavala, namely those of military or political espionage (as per the pre-trial detention order of 9 March 2020, subsequent decisions extending the detention and the bill of indictment of 28 September 2020), one observes that they were based on two sets of facts: the alleged relations between Mr Kavala and H.J.B., and the activities carried out in the framework of his NGO. The majority of the Grand Chamber concluded that there existed "striking similarities, or even compete duplication" between the facts invoked to justify Mr Kavala's continued detention on new charges (in the pre-trial detention order of 9 March 2020 and the new bill of indictment of 28 September 2020) and "those [facts] already examined in the *Kavala* judgment" (see paragraph 163 of the present judgment).

18. With regard to the first set of facts – the alleged relations between Mr Kavala and H.J.B., it has been concluded that they were "previously examined by the Court in the context of its initial judgment", and are now "invoked again in the context of his new detention under a new criminal reclassification, without any distinctive fact in connection with the charge of espionage being provided by the investigating authorities" (see paragraph 164 of the present judgment).

19. In the context of the second set of facts – the activities carried out by Mr Kavala in the context of his NGO – the majority pointed out that "he was formally accused of a new charge, different from those which had been used to justify his previous detention, but the facts listed in the bill of indictment are essentially identical to those already examined by the Court" (see paragraph 165 of the present judgment).

20. It follows from the last three paragraphs that the majority limited itself to the issue of legal reclassification on the part of the prosecution authorities, without undertaking a thorough substantive analysis of the relevant set of facts and evidence from the prosecution motion of 9 March 2020, the subsequent detention decisions and the bill of indictment of 28 September 2020, and then comparing these with the set of facts underlying the previous charges as addressed in the initial *Kavala* judgment. In our opinion, this exercise should have been conducted properly, in order to establish whether the new charges that were used as a ground for extending Mr Kavala's detention were indeed substantially new charges based on new facts or merely "reshuffled" old charges. In other words, the element that is regrettably missing from this judgment is a proper assessment of "the identical facts or facts that are substantially the same".

21. It is not our intention here to replace the meticulous analysis that should clearly emerge from a judgment adopted by the Grand Chamber. We will instead explain, in a summary manner, why, in our opinion, (a) the newly submitted material could not justify the existence of reasonable suspicion of a criminal offence which differs from those scrutinised in the initial judgment, and (b) there has therefore indeed been a violation of Article 46 § 1 of the Convention.

22. One part of the new detention decisions and supporting documents refers to alleged relations between Mr Kavala and H.J.B. While these relations were already asserted during Mr Kavala's initial detention, it appears that the Turkish authorities are relying upon further elements that do not appear to have emerged during the proceedings before the Court which resulted in the initial *Kavala* judgment. Thus, the supporting documents refer to espionage activities purportedly conducted by H.J.B. for foreign States (he allegedly maintained an organic link with foreign intelligence services) as well as his alleged lobbying for Fetullah Gülen. However, none of the documents submitted, whether the motions for Mr Kavala's detention and its extension, the indictment or the Constitutional Court's judgment, (a) refers to any specific and concrete piece of evidence[2] capable of demonstrating that H.J.B. might have indeed been engaged in any of the activities above, or (b) makes any substantiated link between H.J.B.'s alleged espionage and lobbying activities and Mr Kavala. While it is true that some of the above-mentioned documents refer to alleged meetings between H.J.B. and Mr Kavala before and after the attempted *coup d'état* in the summer of 2016 (whereas in the initial proceedings before the Court, the relevant documents referred only to contacts, rather than to meetings) and their alleged joint meetings with persons who were said to have links with the PKK, a reasonable and neutral observer could hardly find reasons thereby to believe that Mr Kavala himself was engaged in any espionage activities. In addition, we observe that it is not clear what evidence allegedly supported the above assertions regarding meetings and joint activities involving H.J.B. and Mr Kavala, and how it came about, for example, that although it was previously asserted that they briefly greeted each other in a restaurant after the attempted *coup d'état*, the prosecution subsequently claimed that they had dined there together. While, in any event, the mere fact of greeting each other or dining together cannot indicate reasonable suspicion of any offence, this unexplained amplification of their alleged contact illustrates how factual

[2] One finds, for example, general and abstract references to witness statements concerning these alleged activities by H.J.B., without any identification of those witnesses or the content of their statements. Similarly, additional research in respect of H.J.B. allegedly uncovered evidence suggesting that he was carrying out espionage activities for foreign States, without specifying the type of research, the materials on which it was conducted, the evidence that was allegedly uncovered thereby or the specific activities that H.J.B. was purportedly carrying out.

circumstances without any clear evidentiary basis or rational relation to the criminal offence in question were overblown in order to create an impression of justification for the continuous detention and failure to release Mr Kavala.

23. In their other part, the supporting documents refer to Mr Kavala's activities in the context of his NGOs. It is claimed that he was thereby gathering and analysing confidential information, which supposedly amounted to spying activities. However, specific and concrete evidence of a link between his NGO activities and alleged espionage, or any plausible explanation for such a link, is nowhere to be found. While some of those NGO activities appear to be new and different from those under scrutiny in the initial *Kavala* judgment, they are in substance similar to those examined previously, in respect of which the Court held that they cannot indicate the existence of any criminal offence. We see no reason to hold otherwise in respect of the activities that have been newly highlighted in the context of the infringement proceedings.

24. Finally, we observe that some of the submitted documents refer to certain items of evidence in respect of which it cannot be established whether they are new, or what facts could be derived from them. By way of example, the order of 5 November 2021 extending Mr Kavala's detention refers, *inter alia*, to the examination of HTS recordings and reports drawn up after assessment of the digital material. None of these elements points to any specific and concrete evidence that would articulate a connection between Mr Kavala's activities and the new charges against him.

25. Taken together, the above considerations dispense us from analysing whether any of the material submitted in support of the new criminal charge and Mr Kavala's continuing detention was already known when he was initially placed in pre-trial detention, since the material in itself does not appear sufficient to justify deprivation of liberty at any point in time. For this reason, we concur with the majority of the Grand Chamber that there has been a violation of Article 46 § 1 of the Convention in the present case.

PARTLY DISSENTING OPINION OF JUDGE YÜKSEL

I respectfully disagree with the finding of the majority as I maintain my dissenting view regarding the conclusion in the Chamber judgment that there has been a violation of Article 18 of the Convention. It is evident that Article 18 is at the heart of the subject matter being examined in these infringement proceedings, and the present judgment is decisively based on the Chamber's analysis and conclusions relating to that provision (see paragraphs 142-147 of the present judgment).

Moreover, I have serious concerns as to the manner in which this case has been referred to the Court by the Committee of Ministers under Article 46 § 4 of the Convention, particularly in the light of the fact that Mr Kavala brought proceedings before the Constitutional Court, which delivered a judgment dismissing his complaint, but he then chose not to lodge a new application with this Court under Article 5 of the Convention (see paragraphs 59-60 and 153 of the present judgment). I find it problematic to subscribe to such an approach, which has rendered it necessary for the Court to address all the arguments examined by the domestic courts and to engage in an analysis of the merits of Article 5 issues within the context of infringement proceedings.

ANNEX

Interim Resolution CM/ResDH(2022)21
Execution of the judgment of the European Court of Human Rights
Kavala against Turkey

(Adopted by the Committee of Ministers on 2 February 2022
at the 1423rd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that the Committee supervises the execution of final judgments of the European Court of Human Rights (hereinafter "the Convention" and "the Court"),

Recalling its Interim Resolution CM/ResDH(2021)432 serving formal notice on Turkey of its intention, at its 1423rd meeting on 2 February 2022, to refer to the Court, in accordance with Article 46, paragraph 4, of the Convention, the question whether Turkey has failed to fulfil its obligation under Article 46, paragraph 1, to abide by the Court's judgment of 10 December 2019 in the Kavala case, and inviting Turkey to submit in concise form its view on this question by 19 January 2022 at the latest;

Recalling anew

a. that in its above-mentioned judgment, the Court found that the applicant's arrest and pre-trial detention took place in the absence of evidence to support a reasonable suspicion he had committed an offence (violation of Article 5, paragraph 1, of the Convention) and pursued an ulterior purpose, namely to silence him and dissuade other human rights defenders (violation of Article 18 taken in conjunction with Article 5, paragraph 1); and that the one year and nearly five months taken by the Constitutional Court to review his complaint was insufficiently "speedy", given that his personal liberty was at stake (violation of Article 5, paragraph 4);

b. the Court's indication under Article 46, made with regard to the particular circumstances of the case and the grounds on which it based its findings of a violation, that the government must take every measure to put an end to the applicant's detention and to secure his immediate release (§ 240 of the judgment);

c. the respondent State's obligation, under Article 46, paragraph 1, of the Convention, to abide by all final judgments in cases to which it has been a

party and that this obligation entails, in addition to the payment of the just satisfaction awarded by the Court, the adoption by the authorities of the respondent State, where required, of individual measures to put an end to violations established and erase their consequences so as to achieve as far as possible restitutio in integrum;

d. the Committee's subsequent decisions and interim resolution (CM/ResDH(2020)361) strongly urging the authorities to ensure the applicant's immediate release;

e. that, since 11 May 2020, when the Court's judgment became final, the applicant has remained in detention on the basis of proceedings criticised by the European Court or based on evidence which it found insufficient to justify his detention;

Considers that, in these circumstances, by not having ensured the applicant's immediate release, Turkey refuses to abide by the final judgment of the Court;

Decides to refer to the Court, in accordance with Article 46, paragraph 4, of the Convention, the question whether Turkey has failed to fulfil its obligation under Article 46, paragraph 1, of the Convention, with particular regard to the Court's indication under Article 46 and the individual measures required.

The concise views of Turkey on the question raised before the Court are appended hereto.

Appendix: Views of the Republic of Turkey

VIEWS OF THE GOVERNMENT OF THE REPUBLIC OF TÜRKİYE
ON THE EXECUTION OF THE JUDGMENT OF
Kavala v. Türkiye (Appl. No. 28749/18)
Judgment of 10 December 2019, Final on 11 May 2020

1. The Committee of Ministers, at its 1419th meeting on 2 December 2021 adopted Interim Resolution CM/ResDH(2021)432, in which the Committee served formal notice on Türkiye of its intention, at its 1423rd meeting (DH) on 2 February 2022, to refer to the Court, in accordance with Article 46 § 4 of the Convention, the question whether Türkiye has failed to fulfil its obligation under Article 46 § 1 of the Convention with particular regard to the Court's indication under Article 46 and the individual measures required.

2. The Committee also invited the Government of Türkiye to submit in concise form its view on this question by 19 January 2022 at the latest.

3. The Government of Türkiye would like to submit here-below the views on the question as requested by the Committee of Ministers:

I. FACTS

The Scope of the Judgment

4. The European Court, with a judgment that became final on 11 May 2020, held that there has been a violation of Article 5 § 1 (right to liberty and security), a violation of Article 5 § 4 and a violation of Article 18 of the Convention taken in conjunction with Article 5 § 1.

5. The European Court found that the applicant could not reasonably be suspected of having committed the offences charged with (Article 5 § 1). As to the violation of Article 5 § 4, the Court highlighted the lack of a speedy judicial review by the Constitutional Court. Lastly there has been a violation of Article 18 of the Convention taken in conjunction with Article 5 § 1 on account of the fact that the restriction of the applicant's liberty was applied for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence.

6. The Court, under Article 46 of the Convention, considered that "*any continuation of the applicant's pre-trial detention* ***in the present case*** *[emphasis added] will entail a prolongation of the violation*" and further considered "*that the government must take every measure to put end to the applicant's detention and secure his immediate release*".

7. The Court's judgment relates mainly to the pre-trial detention of the applicant based on charges under Article 312 (attempting to overthrow the Government- Gezi events - "first accusation") and Article 309 (attempting to overthrow the constitutional order- coup attempt of July 15 events - "second accusation") of the Turkish Criminal Code (TCC).

Criminal Proceedings

8. Detailed information on the ongoing judicial proceedings has been provided by the government in their previous submissions to the Committee of Ministers.

9. The applicant was arrested on 18 October 2017 within the scope of a criminal investigation instituted against the applicant involving two accusations regarding Gezi events and coup attempt of 15 July. On 5 February 2019, the Istanbul Chief Public Prosecutor's Office decided to

disjoin the investigations with a view to conduct the investigation in a more effective way.

10. As regards the investigation concerning the Gezi Events, the Istanbul Chief Public Prosecutor's Office filed an indictment with the Istanbul Assize Court, charging the applicant with attempting to overthrow the government under Article 312 of the Criminal Code. The Istanbul 30th Assize Court conducted the trial in respect of the applicant, ruled on the acquittal and release of the applicant on 18/02/2020. Accordingly, the applicant was released from detention based on the charge of attempting to overthrow the government (Art. 312 of the TCC) on 18 February 2020.

11. As regards the other investigation concerning coup attempt of July 15 conducted with respect to the offence of attempting to overthrow the constitutional order (Art. 309 of the TCC), the applicant detention has also come to an end when he was released *ex officio* by the Istanbul Assize Court on 20 March 2020. Since then, the applicant has not been detained from any charge examined by the ECtHR.

12. The applicant's current detention has started on 9 March 2020 on account of a different charge that has never been examined by the European Court, notably the offence of Political or Military Espionage (Art. 328 of the TCC).

13. The proceedings concerning all accusations against the applicant are still pending before the Istanbul 13th Assize Court.

The Constitutional Court's Judgment

14. Subsequent to the ECtHR judgment, on 4 May 2020 the applicant's lawyer lodged an individual application with the Constitutional Court on the ground that his detention on account of the charge of the Political or Military Espionage is unlawful. The Constitutional Court has promptly started to examine the applicant's individual application in question.

15. On 29 December 2020, the Constitutional Court -as Grand Chamber- delivered its judgment with respect to this application. The Constitutional Court held by the majority vote (8-7) that:

- Regarding the allegation that the applicant's detention is unlawful, the right to liberty and security of the applicant guaranteed under the third paragraph of Article 19 of the Constitution is not violated,
- Regarding the allegation that the detention period of the applicant exceeded the reasonable time, the right to liberty and security of the applicant within the context of the seventh paragraph of Article 19 of the Constitution was not violated.

16. The government has not received any communication from the Strasbourg Court whether the applicant file any complaint as regards the unlawfulness of his current detention so far.

The Applicant's Current Detention

17. As mentioned above, the government would like to note that the European Court found violation of Article 5 on account of the charges stemming from the offences envisaged under Article 312 (attempting to overthrow the government) and Article 309 (attempting to overthrow the constitutional order) of the Criminal Code.

18. The applicant is currently being detained for another offence, namely "Obtaining Classified Information for Purposes of Political or Military Espionage (Article 328 of the Turkish Criminal Code)" since 9 March 2020. It has to be emphasised that this current detention has not been brought before the European Court and has not been examined by the same Court.

19. The authorities would like to note that the criminal proceedings, concerning the charges of "Obtaining Classified Information for Purposes of Political or Military Espionage (Article 328 of the Turkish Criminal Code)", "Attempting to Overthrow the Government (Article 312 of the Turkish Criminal Code)" and "Attempting to Overthrow the Constitutional Order (Article 309 of the Turkish Criminal Code), are pending before the İstanbul 13th Assize Court.

20. The Assize Court held the last hearing on 17 January 2022, deciding by a majority (2-1) that his detention be continued. It has been decided that the applicant's detention will be examined on the case file on 10 February 2022 and, the next hearing will be held on 21 February 2022.

21. In its decision, the Assize Court stressed that; "*Having regard to the fact that, in the present case, by taking into consideration the quality and nature of the offence imputed to the accused Mehmet Osman KAVALA, the current stage of the trial, the examination on HTS records and the base station data in the file, the reports drawn up as a result of the examination on digital materials, the existence of the concrete evidence demonstrating strong suspicion for the imputed offences in view of the MASAK report, the upper limit of the sentence prescribed for the imputed offences by the law, it has been understood that the judicial supervision measures will remain insufficient (...)*"

II. THE APPLICABILITY OF ARTICLE 46 § 4 PROCEEDINGS

A) Legal Framework

22. At the outset, the Turkish authorities would like to recall the legal framework outlining the conditions as to the applicability of Article 46§4 proceedings.

23. Article 46 § 4 of the Convention reads as follows:
"*If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph.*"

24. Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention:
Article 16 of the amending protocol
Article 46 – Binding force and execution of judgments
"...
"100. The Committee of Ministers should bring infringement proceedings only in exceptional circumstances."

25. Rule 11 § 2 of the "Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of The Terms of Friendly Settlements" reads as follows: "*Infringement proceedings should be brought only in exceptional circumstances...*"

B) Conditions for Article 46 § 4 Proceedings

26. The authorities would like to recall that the Article 46§4 procedure was introduced by amendments brought on with Protocol No. 14 to the Convention which entered into force in 2010. Since then, the procedure has only been used once.

27. The above provisions suggest that there are two conditions required for initiating Article 46 § 4 proceedings. These are:
1) Refusal by the High Contracting Party to abide by a final judgment
2) Existence of exceptional circumstances

28. The authorities are of the opinion that neither of these two conditions has been met.

1. Türkiye abides by the Kavala judgment

29. Türkiye has never refused to implement any judgment of the European Court of Human Rights and certainly does not refuse to abide by the Kavala judgment. Türkiye continues to fulfill its treaty-based obligations in good faith. In this scope, Türkiye has engaged in a constructive dialogue with the Committee of Ministers and provided the Committee with detailed, up-to-date information on developments in the process of executing judgments. (Rule 6 of the Committee of Ministers' Rules for the supervision of the execution of judgments and of the terms of friendly settlements). In the action plans and communications submitted to the Committee detailed information was provided on measures taken to execute the judgment at hand.

(i) Individual Measures

30. The applicant is currently detained for the offence of spying on political or military affairs under TCC 328. This detention started on 9 March 2020.

31. This is a judicial process based on a different charge that has not been brought before the European Court. It is currently being examined by the İstanbul Assize Court since 8 October 2020 when the indictment was admitted.

32. At the hearing of 21 May 2021, the Istanbul 30th Assize Court evaluated the European Court's judgment and stressed that the European Court's violation stemmed from the applicant's detention for the offense of Article 309 and 312 of the TCC and these detentions were ended (on 18 February 2020 and 20 March 2020 respectively, as mentioned above). The Court also emphasised that the present detention stemmed from the offence of spying on political and military affairs under TCC 328 and there is no European Court's judgment about this issue.

33. The Committee's decisions in this regard read that "*the information available to it raises a strong presumption that the applicant's current detention is a continuation of the violations found by the Court*". Basing its assessment upon a strong "presumption", the Committee passed judgment upon a judicial process that could only be assessed by the Strasbourg Court.

34. Accordingly, it is beyond the Committee's authority and mandate to make an assessment of evidence that is examined within the context of a pending case before the domestic courts.

35. The authorities would like to state that the Kavala judgment was translated into Turkish, published and circulated together with an explanatory note on the European Court's findings to the relevant courts. In addition to this, all the decisions of the Committee of Ministers regarding the Kavala judgment were translated and communicated to the relevant judicial authorities in due time.

36. The authorities kept the Committee informed immediately on every development. Information on the legal grounds for the applicant's current detention was presented in a timely manner.

(ii) General Measures

37. The authorities would like to reiterate that detailed explanations on general measures have been made in their previous submissions to the Committee of Ministers, however the Committee of Ministers' considerations on these measures have so far not revealed any conclusion.

38. Hereby, the Turkish authorities would like to underline that general measures taken following the judgment at hand reveals that Türkiye does not refuse to abide by the Kavala judgment.

39. In this respect, the authorities would like to indicate that significant legislative measures have been taken to prevent similar violations stemming from pre-trial detention. In particular, in line with the Human Rights Action Plan, which was introduced on 2 March 2021, the Fourth Judicial Package adopted on 8 July 2021. These amendments introduced additional safeguards for detention, including a similar requirement for more serious offences listed under Article 100 of the CCP, also referred to as "catalogue crimes". Concrete evidence justifying a strong suspicion will be required to place any individual charged with one of these offences in detention.

40. Furthermore, the 4th Judicial Package had also included significant change with regard to objection procedure to the decisions of detention and conditional bail rendered by Magistrates Judgeships. Previously, a Magistrate Judgeship's decision of detention (or conditional bail) was objected to the next Magistrate's Judgeship or other Magistrate's Judgeship. However, due to the amendment in legislation by the 4th Judicial Package, Criminal Court of First Instance was determined as objection authority for the decisions of Magistrate's Judgeships. With this amendment a vertical objection procedure was introduced. Thus, a more effective appeal mechanism was put in effect.

41. Regarding the violation of Article 5 § 4, the Turkish authorities took immediate actions to reduce the workload of the Constitutional Court. As a

result of these measures, there has been a constant decrease in the number of applications to the Constitutional Court since 2017. Moreover, the increase in the number of applications it concludes every year despite its growing workload indicates that the Constitutional Court works diligently and devotedly.

42. On 29 December 2020, the Constitutional Court delivered its judgment with respect to the applicant's concerned individual application dated 4 May 2020. When it is considered that the period before the Constitutional Court lasted less than 8 months, it can be concluded that measures taken with respect to violation at hand are capable of providing an effective redress.

43. According to the statistics published by the Constitutional Court, the number of applications submitted since 2015 and the number of applications concluded are shown in the table below:

	2015	2016	2017	2018	2019	2020	2021
Applications Submitted	20,376	80,756	40,530	38,186	42,971	40,402	66.121
Applications Decided	15,368	16,089	89,651	35,356	39,385	45,414	45.321

44. Lastly, in response to the Committee's findings concerning the violation of Article 18 in conjunction with Article 5 § 1 the authorities would like to underline that the Court highlighted certain case-specific facts with respect to this application. The European Court, in its judgment, did not point to the existence of a systemic problem.

45. The authorities would further like to highlight that the Council of Judges and Prosecutors took significant steps to achieve a more Convention compliant judicial practice. On 15 January 2020 an amendment to Article 6 entitled "Principles of Promotion" of the "Principle Decision on the Grade Promotion of Judges and Prosecutors" was promulgated in the Official Gazette. According to this amendment, in the promotion of judges and prosecutors, on the basis of the principles of independence of the judiciary and security of tenure of judges, account will be taken of whether the persons concerned caused a finding of violation by the European Court of Human Rights or the Constitutional Court, as well as the nature and gravity of the violation, and the efforts of the persons concerned to safeguard the rights enshrined in the European Convention on Human Rights and the Constitution.

46. Moreover, the Justice Academy of Türkiye maintained its intensified pre-service and in- service training activities addressing the judges and public

prosecutors, in spite of the Covid- 19 pandemic. Türkiye is in the first place among other member States in respect of the number of users in the HELP learning platform.

47. The proceedings against the applicant are carried out by independent and impartial courts and the applicant's detention is reviewed at regular intervals.

(iii) Türkiye does not refuse to execute individual and general measures

48. As a conclusion, Türkiye has not refused to abide by the Court's judgment at hand. The government have fully co-operated with the Committee of Ministers and the Secretariat of the Council of Europe to enable the execution of the judgment.

49. The Committee's findings were transmitted to the concerned judicial authorities in a timely manner. The domestic courts found that the applicant's current detention did not fall within the scope of European Court's judgment. In particular, the Assize Court in İstanbul on several occasions examined the Strasbourg Court's judgment and held that the facts of the current case are different from the ones examined by the ECtHR. On this basis, the Assize Court found that the applicant's detention is a new one based on different facts and charges that have been examined by the Court.

50. In the same vein, the Constitutional Court has also found that there was no violation of applicant's right to liberty.

51. At this junction, the government would like to highlight a controversial issue concerning the Committee's mandate of supervision.

52. A number of judges in Ilgar Mammadov judgment stressed "*the necessity of putting in place adequate safeguards ensuring that the supervisory powers of the Committee of Ministers within the execution process do not interfere with pending proceedings before the domestic courts as well as before the European Court of Human Rights*"[1]. In the same line, it is further asserted that, "the instant case shows that execution proceedings before the Committee of Ministers may interfere with cases pending before the domestic courts" and that "[t]here are insufficient guarantees protecting the independence of the domestic courts in such situations".[2]

[1] Grand Chamber Judgment of 29 May 2019, Proceedings under Article 46/4 in the Case of Ilgar Mammadov v. Azerbaijan, Application No. 15172/13, Joint Concurring-Separate Opinion of Judges Yudkivska, Pinto De Albuquerque, Wojtyczek, Dedov, Motoc, Poláčková and Hüseynov, page 59, para 22.
[2] ibid, Concurring Separate Opinion of Judge Woityczek, page 64, para 11.

53. This is a very specific point relevant to the Kavala judgment. Indeed, the Court, in its Kavala judgment, considered that any continuation of the applicant's detention in **the present case** will entail a prolongation of the violation.

54. The government have informed the Committee that the national court has already released the applicant from the charges subject to the Strasbourg Court's judgment and that he is currently detained on account of a different charge that is currently being examined by the court in İstanbul and may yet be examined by the Strasbourg Court.

55. Hence, by initiating the procedure under Article 46/4 for the Kavala case, the Committee does not only interfere with ongoing domestic proceedings, but also takes a position on a matter that could be brought before the Strasbourg Court in a separate application.

56. The Committee, with the guidance of the Secretariat, decided that "*the information available to it raises a strong presumption that the applicant's current detention is a continuation of the violations found by the Court*". Relying upon a presumption, the Committee passed judgment upon a judicial process that could only be assessed by the Strasbourg Court.

57. Accordingly, it is beyond the Committee's authority and mandate to make an assessment of evidence that is examined within the context of a pending case before the domestic courts.

58. On the other hand, it is obvious that a holistic analysis should be made as far as the refusal to abide by a final judgment is concerned. On this ground, the authorities would like to note that no conclusion has been asserted by the Committee of Ministers with regard to the general measures already taken during the supervision process. As it has been submitted above, many legislative measures have been introduced to improve the legislative framework concerning the issue of unlawful detention. The Constitutional Court has taken significant measures to prevent similar violations of Article 5§4. Likewise, the Council of Judges and Prosecutors amended its practice to reinforce the independence and impartiality of the judiciary. Under these circumstances, it cannot be concluded that Türkiye has refused to abide by the Kavala judgment.

59. All in all, the government would like to reiterate that, under the current circumstances, initiating Article 46§4 proceedings would amount to a contravention of the Convention system, which is based on the principles of subsidiarity and margin of appreciation, as affirmed by the Protocol No. 15.

60. The authorities underline that such an exceptional measure cannot be initiated on the basis of presumptions. In the absence of any consideration by the Committee whether general measures are executed or not, it is also not possible to conclude that the execution of the judgment is refused in its entirety.

2. Exceptional circumstances do not exist

61. The exceptional nature of the procedure adopted under Article 46§4 was explicitly indicated in Explanatory Report to Protocol No. 14 as well as in the Rules of the Committee. The fact that there has only been a single instance throughout its existence of more than a decade reaffirms the exceptional nature of the procedure.

62. As explained by the former Director General of Human Rights and the Rule of Law (DG- I), Philippe Boillat, "*it is considered to be an ultima ratio: it is only when you consider [that] all the means at your disposal have been ineffective...*"[3]

63. The authorities would like to mention that all available tools to the Committee of Ministers under the supervision process should have been exhausted in an effective manner before initiating Article 46§4 proceedings.

64. As a part of these efforts, the German Minister of Foreign Affairs, Heiko Mass, the then Chair of the Committee of Ministers addressed a letter to his Turkish counterpart, Minister Mevlüt Çavuşoğlu on 16 March 2021. Only two days later, on 18 March 2021 and before any reply could possibly be given to the said letter by the Turkish authorities, the Secretary General Marija Pejčinović Burić engaged in a telephone conversation with Minister Çavuşoğlu, raising the very same issue.

65. It should also be taken into consideration that no more than 26 days elapsed between the two DH meetings held in September 2020 where the Kavala case was consecutively discussed at both meetings, without leaving an appropriate period of time to national authorities.

66. The Kavala judgment was finalised on 11 May 2020. It has been only a year and half since the judgment became final. It can hardly be argued that an adequate period of time has been provided to Türkiye to react to the means used by the Committee of Ministers during the supervision process as outlined above. Hence, exceptional circumstances in the instant supervision process have not materialized.

[3] DD(2016)1321.

III. CONCLUSION

67. In light of the foregoing, it should be considered that Türkiye is taking all necessary measures, including individual measures within the scope of its duties. The authorities would like to reiterate that there is a different offense and different proceedings against the applicant and there is no judgment of the European Court regarding the applicant's current detention.

68. Moreover, the domestic courts examined this issue and have ruled along similar lines that there were two accusations against the applicant which the European Court considered and both of the detentions were ended. The current detention of the applicant is based on a different offense under a new judicial proceeding that has been initiated against him. His current detention has been neither the subject of an application before the European Court of Human Rights, nor has it been examined by the same.

69. Therefore, it cannot be considered that Türkiye is refusing to abide by the Kavala judgment. It is also not possible to consider the existence of exceptional circumstances. Hence, it cannot be accepted that conditions for initiating Article 46 § 4 proceedings have been satisfied.