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Mr Thomas Hammarberg
Mr John Howell
Rapporteurs on Turkey of the
Parliamentary Assembly of the
Council of Europe
Council of Europe
67075 Strasbourg Cedex
FRANCE

Geneva, 11 May 2020

Re: Detention of Mr Selahattin Demirtaş and Mr Osman Kavala

Dear Mr Hammarberg and Mr Howell,

I am writing to you on behalf of the International Commission of Jurists (ICJ) to request your support in calling for the release of Mr Selahattin Demirtaş and Mr Osman Kavala, both of whose detention was found in breach of article 5 and article 18 of the European Convention on Human Rights by separate Chambers of the European Court of Human Rights.¹

A. The detention of Selahattin Demirtaş

Selahattin Demirtaş, the former co-leader of People's Democratic Party, has been imprisoned for three separate sequential charges since November 2016. Mr. Demirtaş was detained for the first time on 4 November 2016 for membership of an armed terrorist organisation (Article 314 § 1 of the Criminal Code ("the CC")) On 7 September 2018, Demirtaş was sentenced to four years and eight months in prison in connection with a speech he had made at a Newroz celebration in 2013.

On 20 November 2018, the European Court of Human Rights ruled that, among other violations, Demirtaş's pre-trial detention was in violation Article 18 of the Convention in conjunction with Article 5.3. It also ruled that Demirtaş should be released.²

¹ Selahattin Demirtaş v. Turkey (No. 2), no. 14305/17, 20.11.2018; Kavala v. Turkey, no. 28749/18, 10.12.2019.

² ECtHR, Selahattin Demirtaş v. Turkey (No. 2), n.14305/17, 20/11/2018.

Despite the judgment of the European Court, Demirtaş's conviction that he received in another case on 7 September 2018 was upheld by the Appeal Court on 4 December 2018. As his pre-trial detention exceeded the time that Demirtaş should have spent in prison according to the approved sentence, his release was ordered by an assize court on 20 September 2019.

However, Demirtaş was not released. His continued detention was based on an arrest order in another investigation concerning a tweet posted by People's Democratic Party during demonstrations protesting the ISIL forces fighting against YPG in Kobane, Syria. Demirtaş was accused of incitement to commit crimes with intent to disrupt the unity of the State. The Ankara Criminal Peace Judgeship detained Demirtaş on 20 September 2019.³

In its judgment concerning Demirtaş, the European Court of Human Rights ruled that

"it has been established beyond reasonable doubt that the extensions of the applicant's detention, especially during two crucial campaigns, namely the referendum and the presidential election, pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society".⁴

On 18 March 2019, the Turkish Government and the applicant requested that the case be referred to the Grand Chamber. The request was granted and the Grand Chamber held a hearing on 18 September 2019. The case is pending before the Grand Chamber.

A. The detention of Osman Kavala

Osman Kavala, a businessperson, human rights defender and chair of a non-profit arts and culture organization was arrested on charges of espionage on 1 November 2017, based on an investigation of the Gezi Park protests of 2013.

After more than two years in pre-trial detention, on 10 December 2019, the European Court of Human Rights ruled that his detention violated Article 18 of the Convention in conjunction with Article 5§1 and that Kavala should be released.⁵ The European Court found that applicant's detention was part of a wider campaign of repression of human rights defenders in Turkey. The Court concluded that contested measures taken against the applicant were likely to have a dissuasive effect on the work of other human rights defenders.⁶

Despite the judgment of Court, Kavala was not released from pre-trial detention. On 18 February 2020, Kavala was acquitted by an assize court in Istanbul. The Istanbul Public Prosecutor Office appealed against this decision.

Furthermore, hours after his acquittal, the chief prosecutor of Istanbul demanded the re-arrest of Kavala based on another investigation, concerning the attempted coup in July 2016. On 19 February 2020, Kavala was therefore detained again.

³ "The fact that Demirtaş's statement has not been taken for five years show that he was not a suspect in this investigation." <https://www.gazeteduvar.com.tr/gundem/2019/09/26/demirtas-ve-yuksekdagin-tutuklanmasina-itiraz-bu-sorusturma-yoktu/>, last checked 16.04.2020.

⁴ ECtHR, *Selahattin Demirtaş v. Turkey* (No. 2), n.14305/17, 20/11/2018, para.273.

⁵ ECtHR, *Kavala v. Turkey*, n.28749/18, 10/12/2019.

⁶ ECtHR, *Kavala v. Turkey*, n.28749/18, 10/12/2019, para.230.

This second arrest happened only one day before the ruling of the European Court of Human Rights became final on 10 March 2020.

On 9 March 2020, Kavala was subject to another detention order by the Istanbul Criminal Peace Judgeship - for the third time - on espionage charges. On 20 March 2020, his second detention concerning coup attempt was lifted considering the time he spent in prison.

Currently, Kavala's continued detention is based solely on these espionage charges.

In its judgment concerning Kavala, the European Court of Human Rights ruled that

"the prosecution's attitude could be considered such as to confirm the applicant's assertion that the measures taken against him pursued an ulterior purpose, namely to reduce him to silence as an NGO activist and human rights defender, to dissuade other persons from engaging in such activities and to paralyse civil society in the country".⁷

The Government's request for referral to the Grand Chamber is pending.

B. The release of detainees amid the COVID-19 pandemics

On 14 April 2020, Law n.7242 concerning execution of penalties was approved by the Grand National Assembly of Turkey. Although the government was already in the process of drafting a law on the execution of penalties, this was accelerated following the spread of COVID-19, with the aim of preventing its spread among detainees. The amendment paved the way for the release of 45,000 detainees.⁸ Yet these releases excluded those detained for crimes fall within the scope of the Prevention of Terrorism Act (Law no. 3713), even if the underlying conduct had been non-violent in nature. Because of the excessively wide interpretation and use of these offences in Turkey, human rights defenders, lawyers, judges and political opponents were included in this exception.

For these reasons, the ICJ had called the Turkish Parliament to extend the planned provision of alternatives to detention in response to the COVID-19 crisis to all those imprisoned for non-violent crimes, regardless of the nature of the offences for which they have been charged.⁹

Selahattin Demirtaş and Osman Kavala remain in detention, despite the serious risk to the health of detainees during the COVID-19 pandemic, as well as the 2018 and 2019 orders of the European Court of Human Rights (ECtHR) that they should be released.

C. Lack of release and frustration of the Court's judgments

The International Commission of Jurists recalls that in both the Demirtaş and Kavala cases the European Court of Human Rights, in finding a violation of article 18 ECHR, determined that the detention of the applicants had been ordered in

⁷ ECtHR, Kavala v. Turkey, n.28749/18, 10/12/2019, para.232.

⁸ "An estimated 15 thousand people are expected to be released from closed prisons and about 30 thousand from open prisons." See, <https://www.milliyet.com.tr/galeri/son-dakika-ve-bu-sabah-basladi-90-bin-kisi-yararlanacak-6189004/10>, last checked 16.04.2020.

⁹ See, <https://www.icj.org/turkey-icj-urges-extension-of-alternatives-to-detention-for-prison-population-amid-covid-19-crisis/>, last checked 16.04.2020.

pursuance of an ulterior purpose than those allowed by article 5.1 ECHR. That purpose was silencing of human rights and other activists, stifling pluralism and limiting freedom of political debate and utilizing pre-trial detention as a method of arbitrary punishment.

The Turkish government is however not releasing the applicants on the ground that the Chamber judgments have not yet become final.

Meanwhile, the authorities have initiated new investigations against both Demirtas and Kavala, and issued new detention orders on similar though not identical charges as those reviewed in the Court's judgments, with the apparent intent not to implement the ECtHR judgments.

The ICJ considers that these developments may be seen as integral to the ulterior purpose identified by the Court in its Kavala and Demirtaş decisions. Under these conditions, both Kavala and Demirtaş may expect their arbitrary detention to be continued for an unlimited period of time through arrest orders based on fabricated investigations.

Finally, following the Covid-19 pandemic, the government enacted Law No. 7242, which led to the release of tens of thousands of people from Turkish prisons. Despite the strong concern expressed by you¹⁰ and international and Turkish human rights NGOs, those charged with terrorism offences and offences against the State were excluded from the scope of the Law. Turkey's vague and arbitrary anti-terror law provisions have been used to imprison many journalists, politicians and human rights defenders who did not invoke violence.

The ICJ reiterates the importance of enabling access to alternatives to detention for all pre-trial detainees who may be at risk because of COVID-19 if they do not pose a current threat to public safety, regardless of the nature of the offences with which they have been charged. Mr. Demirtaş and Kavala along with many politicians and human rights defenders accused of security related offences in Turkey, do not pose a threat to public safety and should be released as soon as possible.

The ICJ urges you to take all possible steps within your mandate to call on the Turkish authorities to immediately release Selhattin Demirtaş and Osman Kavala.



Róisín Pillay
Director
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International Commission of Jurists

¹⁰ <http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=7840&lang=2> .