Third Party Intervention

In the Case of Selahattin DEMİRTAŞ v. TURKEY (App. No. 13609/20)
by

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An independent non-governmental organization specialized in defending and promoting freedom of expression

I. Introduction

1. İFÖD will address in its intervention in the case of Selahattin Demirtaş v. Turkey **(App. No. 13609/20)** the issue of freedom of expression of opposition politicians in Turkey. It is understood from the case file that the applicant is the former co-chairman of the People's Democratic Party ("HDP"), a pro-Kurdish leftist political party. On 04.11.2016 the applicant was arrested and taken into police custody. On the same day, he was brought before the Diyarbakır 2nd Criminal Judgeship of Peace, who ordered the detention on remand. On 11.01.2017, the public prosecutor of Diyarbakır filed an indictment against the applicant in the Diyarbakır Assize Court and requested that he be sentenced to a term of imprisonment of between 43 and 142 years. The public prosecutor brought, among other things, an accusation that the applicant had provoked the acts of violence which took place from 6 to 8 October 2014. Following the filing of the indictment, the case was transferred to the Ankara 19th Criminal Assize Court in order to avoid disturbances to public security. On 02.09.2019, in view of the fact that the applicant had finished presenting his defence, the Ankara Criminal Assize Court decided to end his pre-trial detention and release him on condition that he was not detained or convicted in other proceedings. However, the applicant was not released as he was serving a four-year and eight-months prison sentence handed down by the Istanbul Criminal Assize Court, which had convicted the applicant for propaganda in favour of a terrorist organization because of a speech he gave on 17.03.2013, during a rally in Istanbul. Criminal proceedings are pending before the Ankara 19th Criminal Assize Court. The applicant lodged an individual application with the Court concerning his detention in the context of these criminal proceedings, and the Grand Chamber delivered its judgment on 22.12.2020.[1]

2. Following the Ankara 19th Criminal Assize Court's decision to release the applicant, the applicant's lawyers applied to the Istanbul Criminal Assize Court with a request that the days that he had been remanded in custody as part of the criminal proceedings before the Ankara Criminal Assize Court were deducted from the final sentence pronounced at the end of the criminal proceedings before the Istanbul Criminal Assize Court. On 20.09.2019, the Istanbul 26th Criminal Assize Court granted this request. On the same day, notwithstanding the criminal proceedings pending before the Ankara Criminal Assize Court, the Ankara Chief Public Prosecutor asked the Ankara Criminal Judgeship of Peace to place the applicant and Ms. Figen Yüksekdağ (the former HDP co-chair) in pre-trial detention, as part of another criminal investigation initiated in 2014 into the events of 6-8 October 2014, for the following offences: (i) undermining the unity and territorial integrity of the State; (ii) incitement to murder in order to conceal a crime or evidence of another crime or to avoid arrest; (iii) inciting, with more than one person, to steal with violence during the night in order to help a criminal organization; (iv) incitement to deprive a person of his liberty by threats, violence and cunning; and (v) incitement to attempted murder in order to conceal a crime or evidence of another crime or to avoid arrest. Also on 20.09.2019, the Ankara 1st Criminal Judgeship of Peace ordered the

[1] *Selahattin Demirtaş v. Turkey* (no. 2) [GC], no. 14305/17, 22.12.2020.

provisional detention of the applicant and Ms. Figen Yüksekdağ, having regard to the nature of the offenses with which they were charged; the existence of evidence leading to a strong suspicion of the persons concerned of having committed the offenses in question; the severity of the penalties provided for by law for the offenses concerned; the existence of the conditions for placing the persons concerned in pre-trial detention under Article 19 of the Constitution and Article 5 of the Convention; and the fact that alternatives to detention appeared to be insufficient.

3. Following the remand in custody of the applicant, on 24.10.2019, Law No. 7188 amending certain provisions of the Code of Criminal Procedure ("CCP") was published in the Official Gazette. In its article 29, it provided for a right of appeal at the cassation for several offenses related to freedom of expression, including propaganda in favour of a terrorist organization as punishable by article 7 of the Anti Terror Law No. 3713. With regard to convictions that were already final, the law provided for the possibility of lodging an appeal within fifteen days of the entry into force of the latter. On 31.10.2019, following the applicant's request, the Istanbul Criminal Assize Court stayed the execution of the sentence of four years and eight months which had been handed down and ordered the release of the interested on condition that he was not detained in any other procedure. However, the applicant remained in prison due to the pre-trial detention ordered on 20.09.2019.

4. On 07.11.2019, the applicant lodged an individual application with the Constitutional Court concerning this detention. On 09.06.2020, the Constitutional Court issued a judgment concerning five individual applications lodged by the applicant. However, it did not rule on the individual application concerning his "current" pre-trial detention. Consequently, this judgment had no influence on the applicant's deprivation of liberty (see the judgment of the Constitutional Court, no 2017/38610, § 238). The constitutional complaint of 07.11.2019 is currently pending before the Constitutional Court.

5. The **present application** mainly concerns the applicant's pre-trial detention order of 20.09.2019. Although the Court asked several questions in relation to the applicant's detention involving his pre-trial detention with regards to Articles 5, 10 and 18 of the Convention, **İFÖD's submission** will involve the Court's question on whether the applicant's freedom of expression was violated and the application of Article 18 of the Convention in conjunction with Article 10. The İFÖD's intervention will mainly focus on foreseeability of the interpretation and application of criminal law by national judicial authorities.

6. İFÖD's submission will be divided into three parts. In the **first part**, the submission will discuss the impact of recent findings of the Court concerning the parliamentary immunity of deputies in Turkey. As the applicant is prosecuted for his speeches and acts that fall within a period that he benefited from parliamentary immunity, it is considered that the findings of the Court in other cases should shed light on the legality problems of the present case. Another common feature in detention cases lodged against Turkey that raises an issue in terms of foreseeability is the vagueness of the language of the anti-terror law

and its implementation by the judicial authorities. In the **second part** of the submission, the jurisprudence of the Court on this issue and the government's response to the findings of the Court will be discussed. Finally, in the **third part**, the submission will focus on the developments about the implementation of the two recent judgments of the Court where the respondent government was found in violation of Article 18 of the Convention.

II. Parliamentary Immunity

7. On 20.05.2016, the National Assembly passed a constitutional amendment entailing the insertion of a provisional article in the 1982 Constitution. Pursuant to the amendment, parliamentary immunity, as provided for in the second paragraph of Article 83 of the Constitution, was lifted in all cases where requests for the lifting of immunity had been transmitted to the National Assembly prior to the date of adoption of the amendment in question. Provisional Article 20 of the Constitution, as adopted by the National Assembly on 20.05.2016, reads as follows:

> "On the date when this Article is adopted by the Grand National Assembly of Turkey, the provision of the first sentence of the second paragraph of Article 83 of the Constitution shall not be applied to members who are the subject of requests for the lifting of immunity which have been submitted by the authorities with the power to investigate or grant leave for an investigation or prosecution, the public prosecutor's office or the courts to the Ministry of Justice, to the Prime Minister's Office, to the Office of the President of the Grand National Assembly of Turkey and to the chair of the Joint Committee comprising the members of the Constitutional Committee and the Justice Committee.
>
> Within fifteen days of the entry into force of this Article, any files with the chair of the Joint Committee comprising the members of the Constitutional Committee and the Justice Committee, the Office of the President of the Grand National Assembly of Turkey, the Prime Minister's Office and the Ministry of Justice concerning the lifting of parliamentary immunity shall be returned to the competent authority so that it can take the necessary action."

8. In its report, the Venice Commission underscored the *ad hominem* nature of the amendment:

> "The Amendment under examination can be characterized as a piece of *ad hominem* constitutional legislation. While the Amendment is drafted in general terms, in reality it concerned 139 individually identifiable deputies. This constitutes a misuse of the constitutional amendment procedure: its substance amounts to a sum of decisions on the lifting of immunity of identifiable parliamentarians; decisions which, according to the suspended Article 83, should have been taken individually and subject to specific guarantees". The Venice Commission also added that "As all ad hominem legislation, the Amendment is also problematic from the point of view of the principle of equality. The distinction between the 139 deputies on the one hand, and all earlier cases as well as the cases which arose since adoption of the Amendment on the other hand, cannot be justified with the work-load of the Assembly. The Amendment violates therefore the principle of equality".[2]

[2] European Commission for Democracy Through Law (Venice Commission), Opinion on the Sus-pension of the Second Paragraph of Article 83 of the Turkish Constitution (Parliamentary Inviolability), adopted by the

9. The Grand Chamber of the European Court, in *Selahattin Demirtaş (2) v. Turkey*,[3] examined the foreseeability of this Constitutional amendment in details. The Grand Chamber, firstly observed that like many other member states, there were two types of parliamentary immunity on members of parliament in Turkey: non-liability and inviolability.[4] It is necessary, therefore, to examine the Court's observations on the effects of the Constitutional Amendment on two different types of immunities separately.

10. As to the first category, the Court observed that parliamentary non-liability is absolute, permits of no exception, does not allow any investigative measures. The Court also stated that "As both parties also stated at the hearing, **it is clear that repeating a political speech outside the National Assembly cannot be construed as being limited to repeating the same words that were used in Parliament**".[5] Provisional Article 20 of the Constitution did not amend the first paragraph of Article 83 of the Constitution.

11. After closely examining the arguments of the parties, the Grand Chamber found that despite the fact that the applicant argued plausibly that, **in terms of their content,** the speeches referred to by the Government **were similar to speeches he had given in proceedings of the National Assembly** and notwithstanding the safeguard enshrined in the first paragraph of Article 83 of the Constitution, **the judicial authorities placed him in pre-trial detention and prosecuted him mainly on account of his political speeches,** without any assessment of whether his statements were protected by parliamentary non-liability.[6] The Court's findings seems to be also related to the current application.

12. On the other hand, as to the inviolability rule, stipulated in paragraph 2 of Article 83 of the Constitution, the Court opined in line with the Venice Commission. The Court held that even assuming that the impugned speeches had not been covered by the protection afforded under the first paragraph of Article 83 of the Constitution, the constitutional amendment of 20.05.2016 in itself raises an issue in terms of foreseeability. The Court considered that "as a result of the amendment, the National Assembly was no longer required to perform an individual assessment of the situation of each of the members of parliament concerned, to the detriment of their rights as secured under the Constitution. In the Court's view, the amendment created a situation that was not foreseeable for the members of parliament concerned".[7]

13. For the Court, a constitutional amendment that explicitly targets certain individuals could only be labelled as a one-off *ad homines* amendment. Therefore, the Court subscribed to the Venice Commission's clear finding that this was a "misuse of the constitutional amendment procedure." With regard to inviolability principle the Court stated that:

Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016) Opinion No. 858 / 2016 CDL-AD(2016)027, § 75.

3 *Selahattin Demirtaş (No.2) v. Turkey*, no. 140305/17, 22.12.2020.

4 *Ibid*, § 257.

5 *Ibid*, § 259.

6 *Ibid*, § 263.

7 *Ibid*, § 268.

> "The Court's case-law indicates that the foreseeability requirement is satisfied where the individual can know from the wording of the relevant legislation, and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see, among other authorities, Güler and Uğur, § 50, and Kudrevičius and Others, § 108).[8] In the present case, having regard to the wording of the first two paragraphs of Article 83 of the Constitution and the interpretation, or rather lack thereof, of that provision by the national courts, the Court considers that the interference with the exercise of the applicant's freedom of expression was not "prescribed by law" in that it did not satisfy the requirement of foreseeability, since in defending a political viewpoint, the applicant could legitimately expect to enjoy the benefit of the constitutional legal framework in place, affording the protection of immunity for political speech and constitutional procedural safeguards (see, mutatis mutandis, *Lykourezos v. Greece*, no. 33554/03, §§ 54-56, ECHR 2006-VIII)."[9]

14. In *Kerestecioğlu Demir v. Turkey*,[10] the Second Chamber of the Court, drawing attention to the principles of its case-law concerning the freedom of expression of parliamentarians, as set out in *Selahattin Demirtaş (no. 2)* **confirmed** that the aim of the constitutional amendment had been to limit the political speech of the members of parliament in question. The Court had also found in that case that the combination of various measures, including the withdrawal of the applicant's parliamentary immunity by the constitutional amendment of 20.05.2016, had constituted an interference with the exercise of his right to freedom of expression under Article 10 of the Convention. In the light of that case-law, the Court took the view that the withdrawal of the present applicant's parliamentary immunity through the constitutional amendment had in itself constituted an interference with her right under Article 10 of the Convention.

15. İFÖD had a chance to examine the effects of the constitutional amendment that lifted the immunity of deputies, in its third party opinion submitted in the case of *Encu and 39 others v. Turkey*.[11] *Encu and 39 Others v. Turkey* application dossier included 549 preliminary investigation files against 40 applicants whose individual application forms were sent to İFÖD by the Court. In other words, parliamentary immunities of those 40 MPs were lifted for 549 preliminary investigations by provisional article 20 of the Turkish Constitution.

16. An assessment of the application dossiers seems to suggest that the prosecutors and the criminal courts never examined **whether the impugned speeches constituted political speech covered by absolute parliamentary immunity.** Therefore, it is difficult to argue that the provisional constitutional amendment did not affect the non-liability of the MPs.

17. İFÖD is of the opinion that the unprecedented, one-off and retroactive constitutional amendment, introduced after the applicants made their speeches over a span of

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8 *Güler and Uğur v. Turkey*, nos. 31706/10 and 33088/10, 02.12.2014; *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, ECHR 2015.

9 *Demirtaş (2)*, § 270.

10 *Kerestecioğlu Demir v. Turkey*, no. 68136/16, 04.05.2021, §§ 69-72.

11 See İFÖD Third Party Intervention in the Case of Encu v. Turkey (no. 56543/16) and other 39 applications, at https://ifade.org.tr/reports/IFOD_ECtHR_Ferhat_Encu_Third_Party_Intervention.pdf

approximately ten years as members of the Parliament, was not foreseeable as the Grand Chamber concluded in the Demirtaş (2) judgment.

18. The position of the **Turkish judicial authorities has not been changed since the Grand Chamber's judgment** *in Selahattin Demirtaş v. Turkey* (No. 2). As noted above there are more than 500 criminal charges at the very least and numerous criminal cases pending before different criminal courts against former and current HDP MPs. In none of these ongoing prosecutions, **criminal courts ended detention or dropped charges against defendants** taking into account the Court's observations about the unforeseeability of the constitutional amendment.

19. In order to implement the finding of the Court, IFÖD considers that two questions needs to be answered in cases where the immunity of deputies is at stake: **(i).** First, whether the statements made out of the Parliament can also be covered by absolute parliamentary immunity, as observed by the Grand Chamber in *Selahattin Demirtaş* (2); **(ii).** If not, whether the detention is based on judicial activities that took place whilst the immunity of the MP was continuing. İFÖD is of the view that all judicial decisions taken before former MPs term in Parliament terminated should be held void. As a consequence, if an MP's immunity is continuing due to his/her re-election in 2018 elections, criminal prosecution against that individual cannot continue. If, however, an MP's status terminated in 2018 with the end of previous parliamentary session, only judicial decisions that were taken after the elections could be seen as valid. Therefore, courts should examine these different alternatives about defendants before taking any criminal action.

20. İFÖD kindly invites the Court to **evaluate** whether the statements of the applicant on which he has been accused and detained **constitutes** political speech protected by non-liability and also to **evaluate** whether the applicant's detention has been based on investigations during the applicant had parliamentary inviolability.

III. Unforeseeable and Expansive Interpretation and Application of Anti-Terror Legislation

21. It is already established by many international observers that anti-terror legislation is interpreted and applied by the Turkish judicial authorities in an unforeseeable and expansive way. The Venice Commission examined in 2016 several articles of the Turkish Criminal Code.[12] In its opinion, the Venice Commission came to the conclusion that, despite some positive changes in the wording of these articles and attempts by the Court of Cassation to limit their application, progress had been clearly insufficient and that all these articles continued to allow for excessive sanctions and had been applied too widely, penalising conduct protected under the European Convention and the International Covenant on Civil and Political Rights. The Venice Commission underlined, in particular, that "prosecution of individuals and convictions in particular by lower-courts, which have a chilling effect on the freedom of expression, must cease. This is not sufficient if

[12] Articles 216, 220, 299, 301 and 314 most of which are considered as terror crimes in the meaning of Law No. 3713 and Law No. 6415

individuals are in some cases finally acquitted by the Court of Cassation after having been subject of criminal prosecution for several years."[13]

22. Nevertheless, after the Venice Commission adopted its aforementioned opinion on the Criminal Code, the situation in Turkey deteriorated following the coup attempt in July 2016. Considerable number of journalists or dissidents like the applicant were prosecuted and detained on terrorism related charges. The Venice Commission re-examined the issue in the context of Emergency Decrees. The Commission adopted its Opinion "**On the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media**" at its 110th Meeting in March 2017.[14] The Commission reiterated its findings about the Criminal Code pointing out that provisions of the Code which deal with "verbal act offences" are dangerously vague "which may raise an issue under Article 7 of the European Convention". The Commission also suggested that

> "in the current context the first step to improve the situation with the journalistic freedom would be to construct the notion of "membership" very narrowly. Radical dissidents and fierce critics of the regime may be sanctioned for exceeding the limits of permissible speech, notwithstanding the little scope under Article 10 § 2 of the Convention for restrictions on political debate, but at least they should not be placed on the same footing with the members of terrorists groups. The Venice Commission thus considers that the "membership" concept (and alike) should not be applied to the journalists, where the only act imputed to them is the content of their publications."[15]

23. The **Human Rights Commissioner of the Council of Europe** also emphasized that an overbroad interpretation by the Turkish judiciary of what constitutes terrorism or membership of an armed criminal organisation despite all the changes over the years is still a matter of concern.[16] She made a worrying general observation on the state of criminal justice in Turkey. She concluded that

> "while many of the long-standing concerns regarding the application of criminal law provisions continue to apply, the situation significantly deteriorated in recent years. … Disregard within the judiciary of the most basic principles of law necessary to have a system of rule of law, such as presumption of innocence, non-retroactivity of offences, not being judged for the same facts twice, as well as legal certainty and foreseeability of criminal acts, has reached such a level that it has become virtually impossible to assess objectively and in good faith whether a legitimate act of dissent or criticism of political authority will be re-interpreted as criminal activity by Turkish prosecutors and courts."[17]

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13 Venice Commission, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002, 11-12 March 2016, §§ 123-124.

14 Venice Commission, Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media, CDL-AD(2017)007, 10-11 March 2017.

15 *Ibid*., § 72.

16 Dunja Mijatovic, Commissioner for Human Rights of the CoE, Report Following her Visit to Turkey from 1 to 5 July 2019, § 36, at https://rm.coe.int/report-on-the-visit-to-turkey-by-dunja-mijatovic-council-of-europe-com/168099823e

17 *Ibid*., § 50.

24. It should be noted that one of the reasons of lack of foreseeability in relation to prosecution of journalists stem from the extending the scope offences such as membership to a terrorist organisation or aiding and/or abetting to a terrorist or terrorist organisation to acts which were not criminal offences when they were conducted. However, such an application contradicts with **Article 7 of the Convention**. According to the established case law of the European Court, Article 7 § 1 of the Convention goes beyond prohibition of the retrospective application of criminal law to the detriment of the accused. It also sets out, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). **While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences**, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where an individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him or her criminally liable.[18]

25. The Court indicated that the legitimacy of the fight against terrorism "does not mean that the fundamental safeguards enshrined in Article 7 of the Convention, which include reasonable limits on novel or expansive judicial interpretations in the area of criminal law, stop applying when it comes to prosecution and punishment of terrorist offences."[19]

26. The European Court has also found overwide interpretation and application of the Turkish Anti-Terrorism legislation by the judiciary unforeseeable. The Court found application of articles of 220 § 6, 220 § 7 and 314 of the Criminal Code in a number of cases unforeseeable and decided violation of several articles of the Convention. In the *Işıkırık* case,[20] the Court found that the domestic courts have interpreted the notion of "membership" of an illegal organisation under article 220 § 6 of the Criminal Code in extensive terms. The applicant was convicted of membership of an armed organisation merely on account of his attendance at two public meetings, which, according to the first-instance court, were held in line with the instructions by the PKK, and his acts therein, that is to say, walking close to coffins and making a "V" sign during the funeral and applauding during the demonstration. Hence, the Court ruled that when applied in connection with article 220 § 6, the criteria for a conviction under article 314 § 2 of the Criminal Code were extensively applied to the detriment of the applicant. The Court concluded that article 220 § 6 of the Criminal Code was not "foreseeable" in its application since it did not afford the applicant the legal protection against arbitrary interference with his right under Article 11 of the Convention.[21] The Court reached similar

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18 *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28.06.2018, § 242.
19 *Parmak and Bakır v. Turkey*, no. 22429/07 25195/07, 03.12.2019, § 77.
20 *Işıkırık v.Turkey*, no. 41226/09, 14.11.2017.
21 *Ibid*., §§ 63-68.

conclusions in a number of cases in terms of articles 220§ 6 and 220 § 7 of the Criminal Code.[22]

27. The Grand Chamber in its *Demirtaş* (2) decision[23] found that the national judicial authorities, including the public prosecutors who conducted the criminal investigation and charged the applicant, the magistrates who ordered his initial and/or continued pre-trial detention, the assize court judges who decided to extend his pre-trial detention, and lastly the Constitutional Court judges, adopted a broad interpretation of the offences provided for in article 314 §§ 1 and 2 of the Criminal Code. The Court stated that the political statements in which the applicant expressed his opposition to certain government policies or merely mentioned that he had taken part in the Democratic Society Congress – a lawful organisation – were held to be sufficient to constitute acts capable of establishing an active link between the applicant and an armed organisation.[24] The Court concluded that the range of acts that may have justified the applicant's pre-trial detention in connection with serious offences punishable under article 314 of the Criminal Code is so broad that the content of that article, coupled with its interpretation by the domestic courts, does not afford adequate protection against arbitrary interference by the national authorities. In the Court's view, such a broad interpretation of a provision of criminal law cannot be justified where it entails equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link.[25] The Court found violation of Article 10 of the Convention on the basis that interferences with the applicant's freedom of expression did not comply with the requirement of the quality of law on account of the interpretation and application in the applicant's case of the provisions governing terrorism-related offences.

28. Finally, the European Commission recommended in its Turkey Report 2020 that Turkey should align criminal and anti-terror legislation and their interpretation with European standards, the Convention and the Court's case-law and Venice Commission recommendations.[26]

29. Considering that the applicant and 107 defendants in the criminal case that is the subject of present application are facing very wide list of charges once again only for expressing their opinions, it is necessary to question the legal basis of interference with Article 10 of the Convention. Considering all above findings, İFÖD is in the opinion that the applicant's case should be evaluated against this broad background.

IV. Article 18 in Conjunction with Article 10

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22 *Bakır and Others v. Turkey*, no. 46713/10, 10.7.2018; *İmret v. Turkey* (no 2), no. 57316/10, 10.7.2018; *Zülküf Murat Kahraman v. Turkey*, no. 65808/10, 16.7.2019; *Daş v. Turkey*, no. 36909/07, 2.7.2019.

23 *Selahattin Demirtaş v. Turkey* (no.2) [GC], no. 14305/17, 22.12.2020.

24 *Ibid*. § 278.

25 *Ibid*., § 280.

26 The European Commission, Turkey Report 2020, p. 28, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/turkey_report_2020.pdf

30. In *Selahattin Demirtaş (2) v. Turkey*, in finding a violation of Article 18 in conjunction with Article 5, the Court identified **six factors**, which taken together constituted evidence beyond reasonable doubt that Mr. Demirtaş' detention had "pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society". Despite the European Court's clear findings and request for his immediate release, Selahattin Demirtaş remains in pre-trial detention in Edirne F-Type Prison as of the date of this submission.

31. Turkey's **President Recep Tayyip Erdoğan** responded to the Court's judgment on the day of its delivery at a meeting of the central executive committee of his Justice and Development Party. He reportedly said, "[a] decision has not yet come out of our courts. They took this decision without domestic remedies being exhausted. They act against Turkey. They protect their own men. This decision does not bind us."[27] The President publicly repeated similar comments one day later in an address to members of the AKP parliamentary group, accusing the European Court of seeking the release of a "terrorist" whom the President held responsible for the "murder of 39 people" in violent protests that mainly occurred in Turkey's southeast on 6-8 October 2014.[28]

32. On 24.12.2020, **Interior Minister** Süleyman Soylu in a meeting with provincial police chiefs, stated: "Demirtaş is a terrorist. The European Court of Human Rights ruling, whatever the reason, is meaningless." [29] On the same day, the **leader of the Nationalist Action Party** (MHP), the coalition partner of President Erdogan's AKP, stated: "We do not accept, and we reject the European Court's decision that denies our national will and our courts."[30]

33. On 28.12.2020, Mehmet Uçum, a senior advisor to President Erdoğan and the deputy director of the Presidential Law and Policy Board argued at length in a media interview that Turkey did not have to implement the Demirtaş judgment. Indicating the present case, he claimed that domestic remedies had not been exhausted in the case; and that the judgment was a political attack on Turkey.

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[27] See Hürriyet, "Erdoğan'dan Demirtaş açıklaması: 'Bu karar bizi bağlamaz," at https://www.hurriyet.com.tr/gundem/erdogandan-demirtas-aciklamasi-bu-karar-bizi-baglamaz-41695902; Gazete Duvar, "Turkish President Recep Tayyip Erdoğan dismisses European Court of Human Rights' Selahattin Demirtaş ruling, says it doesn't bind Turkey," at https://www.duvarenglish.com/turkish-president-recep-tayyip-erdogan-dismisses-european-court-of-human-rights-selahattin-demirtas-ruling-says-it-doesnt-bind-turkey-news-55586.

[28] Reuters, "Erdoğan: European court ruling on jailed Kurdish politician 'hypocritical'," at https://www.reuters.com/article/turkey-security-demirtas-int/erdogan-european-court-ruling-on-jailed-kurdish-politician-hypocritical-idUSKBN28X160; Bianet, "Erdoğan slams ECtHR over Demirtaş verdict, says it can't replace Turkey's courts," at https://bianet.org/english/politics/236482-erdogan-slams-ecthr-over-demirtas-verdict-says-it-can-t-replace-turkey-s-courts

[29] Anatolian Agency, "ECHR ruling on 'terrorist' HDP leader 'meaningless'," 24.12.2020, at https://www.aa.com.tr/en/turkey/echr-ruling-on-terrorist-hdp-leader-is-meaningless/2087175

[30] Hürriyet Daily News, MHP leader, interior minister slam ECHR's ruling on Demirtaş," at https://www.hurriyetdailynews.com/mhp-leader-interior-minister-slam-echrs-ruling-on-demirtas-161118

34. İFÖD considers that it should be a matter of grave concern to the Court that Turkey's President, interior minister and the leader of the political party in coalition with the government, as well as a senior advisor on legal matters to the president, openly questioned the European Court's authority which they committed to respect when signing up to the Convention by stating that this Grand Chamber judgment, in particular, and European Court judgments in general, are not binding on Turkey.

35. The Committee of Ministers on its decision concerning the implementation of the Selahattin Demirtaş (2) judgment, noted that "while taking note of the authorities' submissions that the applicant's current detention falls outside the scope of the Grand Chamber judgment in which the Court examined the applicant's detention between 4 November 2016 and 7 December 2018 and also that the events and charges for his current detention differ from those concerning his initial detention, considered that these arguments have been already examined and rejected by the Court".

Conclusion

36. İFÖD is of the opinion that present case cannot be isolated from the general problems concerning parliamentary immunity and systematic persecution of the members of an opposition party, HDP, in Turkey. The Grand Chamber in *Selahattin Demirtaş* (2) meticulously examined some of the legal issues that is also the subject of the present case. However, as observed by the Committee of Ministers, since that judgment the Turkish authorities failed to implement the findings of the Court. It is considered that the Court should follow the principles developed by the Grand Chamber in *Selahattin Demirtaş v. Turkey* (2), in resolving applicant's complaints concerning Article 10 and 18.

11.05.2021

İfade Özgürlüğü Derneği – İFÖD (Turkey)

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İfade Özgürlüğü Derneği (İFÖD) has been set up formally in August 2017 protect and foster the right to freedom of opinion and expression. The new Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.