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Rule 9.2 submission by the Turkey Human Rights Litigation Support Project, Human Rights Watch, the International Commission of Jurists, and the International Federation for Human Rights on the individual and general measures required for the implementation of the *Selahattin Demirtaş (no. 2) v Turkey* (Application no. 14305/17) group of cases

I. SUMMARY

Selahattin Demirtaş (no. 2) v Turkey [GC] and *Yüksekdağ Şenoğlu and others v Turkey* ("*Demirtaş (no. 2)* group") cases concern 14 former members of the Turkish Parliament belonging to the Peoples' Democratic Party ("the HDP", a pro-Kurdish and minority rights opposition party). During their mandate, the applicants were stripped of their parliamentary immunity through a constitutional amendment adopted in May 2016. The applicants, including Selahattin Demirtaş and Figen Yüksekdağ Şenoğlu, the party's co-leaders, were subsequently arrested and detained in November 2016, and charged with various terrorism-related offences based on their political expression and participation in political meetings and activities. The European Court of Human Rights ("the Court" or "ECtHR") found violations of the applicants' rights under Article 10 (freedom of expression), Article 5 (right to liberty and security), Article 18 (limitation on use of restriction on rights) in conjunction with Article 5 and Article 3 of Protocol no. 1 (right to free elections) of the Convention.

Under Article 46 of the Convention, the Court held that Türkiye should take all necessary measures to secure the immediate release of the applicants who, at the time of the judgment, were still deprived of their liberty. Despite this order, Mr. Demirtaş and Ms. Yüksekdağ Şenoğlu have remained detained. In the action plans submitted to the Committee of Ministers, the Turkish Government has argued that Mr. Demirtaş's and Ms. Yüksekdağ Şenoğlu's continuing detention falls outside the scope of the Court's judgments, as it is allegedly based on different evidence and accusations than assessed by the Court. However, in the *Demirtaş* case, the Court has already rejected the Government's arguments that the applicant was detained under different proceedings from the initial ones, and the *Yüksekdağ Şenoğlu and others* case indicates that the Court did not differentiate between the different detention orders and proceedings against Ms. Yüksekdağ Şenoğlu.

In this submission, the NGOs highlight regarding individual measures that the ongoing detention of Mr. Demirtaş and Ms. Yüksekdağ Şenoğlu has a similar or identical factual and procedural basis as previously examined by the Court (linked to "the 6-8 October 2014 events" and their political expression). The judicial authorities' persistent undermining of the ECtHR rulings in the ongoing proceedings and the Government's continued attempt to influence these proceedings blatantly indicate that the purported "new" reasons and different proceedings put forward to pursue the applicants' continuing detention constitute an attempt to avoid implementing the Court's *Demirtaş (no. 2)* group of judgments and applying domestic legal safeguards against arbitrary detention, striking at the very core of the right protected under Article 5 and Türkiye's obligation under Article 46 of the Convention. Moreover, the Turkish authorities have failed to secure *restitutio in integrum* to the fourteen applicants.

Regarding general measures, the NGOs highlight that Turkish authorities consistently circumvent parliamentary immunity for political purposes. First, the Turkish Constitution guarantees parliamentary inviolability, which entails that Members of Parliament may neither be detained nor subjected to criminal proceedings during their mandate unless

Parliament decides otherwise. In *the Demirtaş (no.2)* group, the Court found that the removal of parliamentary inviolability through the constitutional amendment of May 2016 did not constitute a sufficiently foreseeable legal basis for restricting the applicants' right to freedom of expression. The Court has also ruled in other cases that the amendment violated Article 10 of the Convention in and of itself. Yet, many of the 154 MPs targeted by the amendment continue to be subjected to criminal proceedings, detention, and convictions on this basis.

In addition, multiple Members of Parliament elected since 2018 have been arbitrarily stripped of their parliamentary inviolability by Turkish judicial authorities. The latter have developed an interpretation of the Constitution according to which alleged terrorism-related offenses are exempt from the protection of inviolability. The Constitutional Court has held that this judicial interpretation, absent any legislation on the matter, falls short of the certainty and foreseeability required for lawfully restricting Members of Parliament's electoral rights. However, lower courts - in particular the Court of Cassation - have openly refused to abide by this jurisprudence. This judicial practice has led to similar violations to those in the *Demirtaş (no.2)* group, with Members of Parliament being unforeseeably detained and prosecuted during their mandate, without an individualised decision by Parliament.

When parliamentary inviolability is not immediately set aside through unlawful judicial decisions, Members of Parliament are widely subjected to judicial authorities' abusive requests to Parliament for the lifting of their inviolability (so-called *fezleke* or summaries of proceedings), on the basis of their statements or publications. This practice has been condemned by the Parliamentary Assembly of the Council of Europe ("the PACE"), which pointed to its highly detrimental impact on the sound functioning of the Parliament in Türkiye, and its chilling effect on political debate. At the time of writing, 733 summaries of proceedings were pending before the Parliamentary Joint Committee, 512 of which concern HDP MPs.

Secondly, Türkiye's Constitution guarantees parliamentary non-liability, which protects Members of Parliament, even after the end of their term in office, from liability for the expression of political opinions within Parliament, including those repeated outside of Parliament. In the *Demirtaş (no.2)* group, the Court found that domestic courts had failed to assess whether the statements forming the main basis of the applicants' prosecution were protected by non-liability. The Government has provided, in its action plans, examples of judicial decisions allegedly showing that domestic courts respect the principle of parliamentary non-liability. However, ongoing criminal proceedings, including against HDP MPs, reveal that the domestic courts' application of non-liability is highly arbitrary, selective, and inconsistent. Several Members of Parliament have lost their parliamentary mandate as a result of convictions failing to uphold non-liability, and many others have been prevented from exercising their mandate or running for re-election as a result of criminal proceedings initiated against them in clear breach of this principle.

Another salient issue in Türkiye raised in the *Demirtaş (no.2)* group judgments is the dismantling of remedies and safeguards against the judicial harassment of elected opposition politicians. The present submission describes several ways in which the rights to liberty and fair trial of opposition politicians, and perceived dissidents more broadly, are systematically trampled. In addition, there are increasingly strong reasons to doubt the effectiveness of an individual application before the Constitutional Court against arbitrary restrictions on opposition politicians' exercise of their role or elected functions. This includes serious delays in the Constitutional Court's handling of applications related to violations of HDP politicians' rights, including in Mr. Demirtaş's and Ms. Yüksekdağ Şenoğlu's cases, and a notable departure from an approach aligned with the Convention standards and ECtHR case-law, carried out by opting for inadmissibility decisions or concluding the absence of rights violations. Moreover, domestic courts have increasingly refused to implement Constitutional Court judgments finding criminal proceedings against Members of Parliament to amount to a violation of their rights, and members of the Constitutional Court have been targeted by a threat of criminal proceedings recently for one such ruling.

Finally, the NGOs describe several other obstacles to opposition politicians' exercise of their elected mandates in a free and safe environment. These include the removal of elected mayors from office based on an alleged suspicion of "terrorism", and their replacement by unelected, government-appointed "trustees" who can indefinitely suspend the functions of local representatives in the province. This system has disproportionately affected HDP mayors and local representatives in the predominantly Kurdish south-east. The pending case for the closure of the HDP and a five-year political ban request on 451 prominent members also constitutes a significant threat for political pluralism within the Parliament and in Türkiye more broadly. Opposition parliamentarians' ability to exercise their mandate freely is also severely undermined by administrative sanctions for expressing their political opinions, their labelling as "terrorists" by the President. HDP politicians also suffer from grave and unpunished acts of violence.

The NGOs' recommendations to the Committee of Ministers in the present submission regarding **individual measures** include:

- Initiating infringement proceedings under Article 46§4 of the Convention in relation to Türkiye's continued failure to release Mr. Demirtaş and Ms. Yüksekdağ Şenoğlu from detention; and
- Requesting that Turkish authorities *ensure restitutio* in integrum to all of the applicants, by annulling criminal proceedings initiated during their term in office pursuant to the constitutional amendment of May 2016 (including in the ongoing "Kobani trial" based on the "6-8 October 2014 events", which was the subject of the Court's judgments); and annulling proceedings similarly based on the applicants' political activities, where they relate to an identical or similar factual context as examined by the Court.

Regarding **general measures**, the NGOs call on the Committee of Ministers to urge Türkiye to:

- Annul and remedy all criminal proceedings initiated during the HDP MPs' term in office based on the constitutional amendment of May 2016;
- Annul and remedy criminal proceedings relying on a decision by the judiciary to set aside parliamentary inviolability, contrary to the jurisprudence of the Constitutional Court;
- Put an end to the judicial harassment of parliamentarians, which has unduly impeded the exercise of their political mandate, by ensuring that judicial authorities refrain from submitting summaries of proceedings (*fezleke*) in connection with their exercise of their Convention rights;
- Take concrete steps to ensure that parliamentary non-liability under Article 83(2) of the Constitution is systematically and genuinely applied by prosecutorial and judicial authorities;
- Take concrete steps to ensure the ECtHR jurisprudence on freedom of expression is genuinely and effectively applied by prosecutorial and judicial authorities when applying and interpreting anti-terrorism or national security laws; and secure the implementation of the Committee of Ministers' and Venice Commission's recommendations on this issue;
- Ensure that remedies and safeguards against arbitrary interferences with the rights of elected representatives and other opposition politicians are effective in practice, including by strengthening the effectiveness of the individual application process to the Constitutional Court and protecting its independence; and
- Take specific measures to address the obstacles described in this submission to opposition politicians' exercise of their elected mandates in a free and safe environment.

II. INTRODUCTION AND CHRONOLOGICAL OVERVIEW OF DEVELOPMENTS

1. This communication is submitted jointly by the Turkey Human Rights Litigation Support Project, Human Rights Watch, the International Commission of Jurists, and the International Federation for Human Rights ("the NGOs") ahead of the CM's 1492nd meeting.

2. The NGOs herein provide the Committee of Ministers ("the CM") of the Council of Europe with information and recommendations concerning the state of implementation of individual and general measures required by the European Court of Human Rights' ("the Court" or "ECtHR") *Selahattin Demirtaş (no. 2) v Turkey* [GC] (Application no. 14305/17, Judgment of 22 December 2020) and *Yüksekdağ Şenoğlu and others v Turkey* (Application no. 14332/17, Judgment of 8 November 2022, final on 3 April 2023) judgments. The communication is made in light of action plans submitted by the Turkish Government and relevant developments in Türkiye.

3. In June 2023, the CM classified the *Yüksekdağ Şenoğlu and others* judgment as a repetitive case following from the leading case of *Selahattin Demirtaş (no. 2)*.[1] The two cases concern the arrest and pre-trial detention of, and criminal proceedings against, members of the Turkish Parliament belonging to the Peoples' Democratic Party ("HDP", a pro-Kurdish and minority rights opposition party), including the party's co-leaders Selahattin Demirtaş and Figen Yüksekdağ Şenoğlu, as well as 12 others. These actions were taken pursuant to a constitutional amendment adopted on 20 May 2016, which created a temporary and targeted exception to the constitutional principle of parliamentary inviolability –precluding the detention, interrogation, arrest, or prosecution of MPs during their term in office unless decided by Parliament– for MPs against which requests for investigation (*fezleke*) had been issued. This amendment led to the one-off lifting of the parliamentary immunity of 154 Members of Parliament ("MPs"), including the applicants. The applicants were then charged with various alleged terrorism-related offences based on their political speeches and participation in political meetings and activities.

4. In the two judgments, the Court found that the criminal proceedings against the applicants and their detention violated their right to freedom of expression under Article 10 of the Convention. It also found violations of Article 5 §§ 1 and 3 (right to liberty and security and right to trial within a reasonable time or to release pending trial) on account of the domestic courts' failure to give specific facts or information that could give rise to a reasonable suspicion that the applicants had committed the offences in question and justify their arrest and pre-trial detention. For some of the applicants in *Yüksekdağ Şenoğlu and others*, the Court also found that their lack of access to the investigation file entailed a violation of the right to a speedy decision on the lawfulness of detention (Article 5 § 4).

5. The Court held that each of the applicants' right to sit as a member of parliament (Article 3 of Protocol no. 1, ECHR) had been violated due to their arbitrary detention. Finally, it found that the applicants' detention had, in reality, been undertaken for the purpose of preventing them from carrying out their political activities rather than in furtherance of a real investigation any alleged criminal offences. It held that their detention had therefore pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, entailing a violation of Article 18 (limitation on use of restriction on rights) in conjunction with Article 5. Under Article 46, the Court held, regarding the applicants still deprived of their liberty, that Türkiye should take all necessary measures to secure their immediate release.

6. Despite the Court's clear order for their release, Selahattin Demirtaş and Figen Yüksekdağ Şenoğlu have remained detained. The continued detention and judicial harassment of these two major political opposition figures has extremely deleterious consequences on human rights, the rule of law, and democracy in Türkiye. In this submission, the NGOs reaffirm their contention in previous communications to the CM that individual measures in these

[1] See the CM Decision, 1468th meeting (DH), 5-7 June 2023 - H46-33 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), CM/Del/Dec(2023)1468/H46-33.

two cases require the immediate cessation of Mr. Demirtaş's and Ms. Yüksekdağ Şenoğlu's unlawful pre-trial detention. The domestic authorities' obligation to secure *restitutio in integrum* to all of the applicants also requires halting criminal proceedings relying on the same factual or legal basis as examined by the Court in the *Demirtaş (no. 2)* group, as well as putting an end to all restrictive measures flowing from such proceedings and reversing any convictions resulting from them. Türkiye's refusal to take these steps despite the Court's explicit order under Article 46 should lead the CM to initiate infringement proceedings, as prescribed under Article 46§4 of the Convention.

7. In terms of general measures, the Government's successive action plans assert that the current domestic framework of laws and their application sufficiently ensure the cessation of similar violations, the provision of adequate redress, and the non-recurrence of such violations. However, politically unwarranted interferences with elected representatives' freedom of expression and political debate, undertaken for political rather than legitimate criminal law purposes of the kind identified in the *Demirtaş (no. 2)* group of judgments, have persisted and recurred on a systematic basis in Türkiye.

8. The NGOs in the present communication underline that judicial authorities continue to circumvent the principle of parliamentary immunity –encompassing both inviolability during an MP's term in office and non-liability for political statements and activities inside and outside of Parliament– in criminal proceedings involving parliamentarians of opposition parties. Secondly, the communication describes the continuing abuse of anti-terrorism legislation to stifle the political expression and activities of elected representatives of opposition parties, manifesting itself in an expansive and arbitrary and unforeseeable construal of that legislation and a failure to genuinely apply the standards in the case-law of the ECtHR and -in some cases- the Constitutional Court on freedom of expression. Thirdly, the communication highlights the increasing ineffectiveness of remedies and safeguards against the judicial harassment of elected representatives and other opposition politicians. Fourthly, it describes other policies participating in the political persecution and intimidation of opposition politicians and preventing the exercise of their mandates in a free and safe environment. Finally, the communication makes a number of recommendations to the CM concerning individual and general measures in this group of cases.

III. INDIVIDUAL MEASURES

1. Non-implementation of individual measures: continuing detention of Selahattin Demirtaş and Figen Yüksekdağ Şenoğlu

9. The Court has held in clear terms that Türkiye must take all the necessary measures to secure the applicants' immediate release, affirming that their continued detention based on the same factual context would entail a prolongation of the violation of their rights as well as a breach of Türkiye's obligation to abide by the Court's judgment under Article 46 § 1

of the Convention (para. 442 of *Demirtaş (no. 2)* [GC] and para. 655 of *Yüksekdağ Şenoğlu and others*).

10. Yet, Turkish authorities have persistently refused to release Selahattin Demirtaş and Figen Yüksekdağ Şenoğlu, whose detention exceeded seven years as of November 2023. In the case of Mr. Demirtaş, more than three years have passed since the Grand Chamber's final judgment, while the CM has issued two interim resolutions, on 2 December 2021 and on 9 March 2023, urging the authorities to secure his immediate release and to ensure judicial review by the Constitutional Court of his ongoing detention.[2] In its action plans, the Turkish Government has repeatedly argued that Mr. Demirtaş's current detention falls outside the scope of the Court's judgment and is based on "new evidence" and statements by "secret witnesses".[3] Similarly, it has asserted that Ms. Yüksekdağ Şenoğlu's ongoing detention "is based on different accusations, facts and evidence that have not been examined by the European Court within the scope of the current judgment".[4]

11. The ECtHR, in determining a violation of Article 18 in conjunction with Article 5 of the Convention, considered the temporal correlation between the President's public statements and the actions of judicial authorities against the applicants, revealing an exclusively political purpose behind their detention (paras. 426, 432, and 433 of *Demirtaş (no. 2)* [GC], also cited in para. 637 of *Yüksekdağ Şenoğlu and others*). The NGOs underscored in their previous submissions that the ongoing detention and prosecution of the applicants persistently serve the same political purpose. That purpose, not demonstrated to have ceased by any information offered by the Turkish authorities, continues to be evident, among other things, in recent speeches by high-ranking government officials, including the President of Türkiye. Prior to the May 2023 presidential and parliamentary elections, for example, President Recep Tayyip Erdoğan stated publicly that "[w]hile we are on duty, Selo [Demirtaş] cannot be released".[5] After winning the elections on 28 May 2023, he addressed Mr. Demirtaş as "terrorist" while a group of people gathered in Ankara to celebrate the election results cheered and shouted "[h]ang Selo! (Selo'ya idam)".[6] The

[2] Interim Resolution CM/ResDH(2021)428, Execution of the judgment of the European Court of Human Rights Selahattin Demirtaş v. Turkey (No. 2) (Adopted by the Committee of Ministers on 2 December 2021 at the 1419th meeting of the Ministers' Deputies); Interim Resolution CM/ResDH(2023)36, Execution of the judgment of the European Court of Human Rights Selahattin Demirtaş (No. 2) against Turkey (adopted by the Committee of Ministers on 9 March 2023 at the 1459th meeting of the Ministers' Deputies).
[3] 1492nd meeting (March 2024) (DH) - Rule 8.2a - Communication from the authorities (09/01/2024) concerning the cases of Selahattin Demirtas v. Turkey (No. 2) and Yuksekdag Senoglu and Others v. Türkiye (Applications No. 14305/17, 14332/17) (Selahattin Demirtas (No. 2) group), DH-DD(2024)37, §§8-27; 1483rd meeting (December 2023) (DH) - Action plan (16/10/2023) - Communication from Türkiye concerning the case of Selahattin Demirtas v. Turkey (no. 2) (Application No. 14305/17), Yuksekdag Senoglu and Others v. Turkey (Application No. 14332/17), §§8-27.
[4] 1492nd meeting (March 2024) (DH) - Rule 8.2a - Communication from the authorities (09/01/2024) concerning the cases of Selahattin Demirtas v. Turkey (No. 2) and Yuksekdag Senoglu and Others v. Türkiye (Applications No. 14305/17, 14332/17) (Selahattin Demirtas (No. 2) group), DH-DD(2024)37, §47; 1483rd meeting (December 2023) (DH) - Action plan (16/10/2023) - Communication from Türkiye concerning the case of Selahattin Demirtas v. Turkey (no. 2) (Application No. 14305/17), Yuksekdag Senoglu and Others v. Turkey (Application No. 14332/17), DH-DD(2023)1248, §43.
[5] https://www.hurriyet.com.tr/gundem/cumhurbaskani-erdogandan-onemli-aciklamalar-42259475
[6] https://www.diken.com.tr/erdogan-balkonda-kandilin-uzantilari-bu-milleti-sevmez/#google_vignette

judicial authorities' persistent undermining of the ECtHR rulings and the Government's continued attempt to influence the criminal proceedings against Mr. Demirtaş and Ms. Yüksekdağ Şenoğlu blatantly indicate that the purported "new" reasons and different proceedings put forward for pursuing the applicants' detention are tantamount to an attempt to avoid the safeguards against arbitrary detention contained in the Turkish legal system, striking at the very core of the right protected under Article 5 of the Convention.

12. In discharging its role as the supervisory body of the judgment implementation process, the CM has repeatedly underlined Türkiye's obligation under Article 46 to secure both applicants' release.[7] It has also stressed that in the *Demirtaş* case, the Court has already rejected the Government's arguments that the applicants were detained under different proceedings from the initial ones, and that the *Yüksekdağ Şenoğlu and others* case indicates that the Court did not differentiate between the different detention orders against Ms. Yüksekdağ Şenoğlu .[8] In Ms. Yüksekdağ Şenoğlu's case, the CM requested information on "*how the acts alleged against her differ from those characterised by the Court as the lawful exercise of Convention rights by a political representative*".

13. In its latest action plan, the Government explained that the alleged "new evidence" against Ms. Yüksekdağ Şenoğlu included witness statements alleging that PKK members were involved in some of the activities of the HDP, that the HDP's tweet of 6 October had been drafted by the PKK, and that Ms. Yüksekdağ Şenoğlu had met with members of the PKK.[9] Contrary to what the Government contends, however, this contention entirely fails to address the question raised by the CM: Ms. Yüksekdağ Şenoğlu's detention, as part of the ongoing "Kobani trial", remains founded on the same factual and legal basis as examined by the Court in its judgment (her alleged responsibility in the 6-8 October events).[10]

14. As in their previous submissions, the NGOs therefore maintain that the detention of Selahattin Demirtaş and Figen Yüksekdağ Şenoğlu has a similar or identical factual and procedural basis as previously examined by the Court. The Turkish authorities had already brought forward their arguments about the witness statements, purported to be "new" evidence, as an attempt to justify the prolongation of Mr. Demirtaş's ongoing detention. The NGOs analysed these claims in light of the Court's judgment and domestic proceedings in their 24 May 2022 and 4 November 2022 submissions, drawing the Committee's attention to "the Government's established 'track record of relying on judicial tactics that have been developed to avoid releasing the applicants from detention and thereby evading the obligation to implement the ECtHR judgments' in the emblematic

[7] See 1483rd meeting (DH), December 2023 - H46-36 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), CM/Del/Dec(2023)1483/H46-36.
[8] 1483rd meeting (DH), December 2023 - H46-36 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), CM/Del/Dec(2023)1483/H46-36.
[9] 1492nd meeting (March 2024) (DH) - Rule 8.2a - Communication from the authorities (09/01/2024) concerning the cases of Selahattin Demirtas v. Turkey (No. 2) and Yuksekdag Senoglu and Others v. Türkiye (Applications No. 14305/17, 14332/17) (Selahattin Demirtas (No. 2) group), DH-DD(2024)37, §§44-46.
[10] Ibid., §39.

Demirtaş and Kavala cases."[11] The Committee consequently did find the Government's arguments credible and continued calling for the immediate release of Mr. Demirtaş.[12]

15. The NGOs reiterate, therefore, that the applicants' continued detention falls clearly within the scope of the Court's judgments and that the 'reasons' put forward by the Turkish authorities for the domestic courts' failure to order their release constitutes a deliberate attempt to circumvent the obligation to implement the Court's judgments under Article 46 of the Convention.[13] The applicants' ongoing detention thus constitutes a violation of the Court's ruling under Article 46, as well as a continuing violation of their rights under Article 5, Article 10, and Article 3 of Protocol no. 1 to the Convention.

2. The applicants' convictions and ongoing criminal proceedings against them

16. In its judgments, the Court found a violation of Article 10 of the Convention (concerning all applicants except Ayhan Bilgen) due to three distinct instances of failure to apply the safeguards in the Turkish legal system protecting MPs' freedom of expression (see para. 281 of *Demirtaş (no. 2)* and paras. 508-509 of *Yüksekdağ Şenoğlu and others*):

- The lack of foreseeability of the one-off, *ad hominem* and unprecedented retroactive removal by the constitutional amendment of May 2016 of the applicants' parliamentary immunity from criminal proceedings against them during their term in office (parliamentary inviolability);[14]
- Judicial authorities' failure to consider the application of Article 83(1) of the Constitution (parliamentary non-liability), which protects MPs, even after the end of their term in office, from liability for the expression of political opinions inside and outside of Parliament; and[15]
- Judicial authorities' interpretation and application of criminal law to prosecute and detain the applicants based on their political speeches.

17. The Court found that the applicants' detention "pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept

[11] Communications from NGOs in the case of Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), 24 May, paras. 20-32and 2022 and 4 November 2022, paras. 14-15, cited in their 23 October 2023 submission in Yüksekdağ Şenoğlu and Others v. Türkiye (Application no. 14332/17and 12 other applications), paras. 15-16.
[12] CM Decision, 1451st meeting, 6-8 December 2022 (DH) H46-39 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17); and CM NotesCM/Notes/1451/H46-39.
[13] Ibid.
[14] The constitutional amendment of May 2016 created an exception to the principle of parliamentary inviolability, which temporarily precludes proceedings against Members of Parliament, while they are in office (proceedings can run their course once the MP is no longer in office). This principle is contained in Article 83(2) of the Constitution, which provides: "*A member of parliament who is alleged to have committed a crime before or after the election cannot be detained, interrogated, arrested or tried unless the Parliament decides. Situations in flagrante delicto that require heavy punishment and cases set forth in Article 14 of the Constitution, provided that the investigation has started before the election, are excluded from this provision […]*"
[15] This rule is contained in Article 83(1) of the Constitution, which reads: "*Members of the Grand National Assembly of Turkey cannot be held responsible for their votes and words during Parliament's work, for the ideas they put forward in the Assembly, and for repeating or revealing them outside the Assembly, unless decided otherwise by the Assembly upon the proposal of the Presidency Council in that session."*

of a democratic society." (*Demirtaş (no. 2)*, paras. 436-437 and *Yüksekdağ Şenoğlu and others,* para. 638). Under Article 3 of Protocol no. 1, it highlighted that the measures against the applicants led to the revocation of the parliamentary mandate of Figen Yüksekdağ Şenoğlu, Besime Konca, Selma Irmak, Ferhat Encü, and Nursel Aydoğan following their final conviction (*Yüksekdağ Şenoğlu and others*, para. 618).

18. Yet, Ms. Yüksekdağ Şenoğlu and Mr. Demirtaş remain subject to various ongoing criminal proceedings (described in the NGOs' previous submissions) based on their political speeches as elected MPs concerning matters of public interest, including on the rights of the Kurdish people and other minority groups. They have additionally been subject to proceedings based on their defence statements, on charges such as "degrading the nation, the Republic, and the organs and institutions of the state". Several other applicants in *Yüksekdağ Şenoğlu and others* face continuing criminal proceedings or remain unable to engage in politics because of their convictions.[16]

19. Considering the findings of the Court, *restitutio in integrum* – in other words restoring the applicants as far as possible to the position they would have enjoyed had these violations not occurred – requires the following individual measures:

    i. Annulling criminal proceedings initiated during the applicants' term in office pursuant to the constitutional amendment of May 2016 lifting their parliamentary immunity (including in the ongoing "Kobani trial" against applicants Selahattin Demirtaş, Figen Yüksekdağ Şenoğlu and several other applicants based on the "6-8 October events", which was the subject of the Court's judgments[17]);

    ii. Annulling new sets of proceedings based on these proceedings (such as Figen Yüksekdağ Şenoğlu's prosecution for "degrading the Turkish nation, the Turkish Republic, and the organs and institutions of the State" based on her defence statements following her arrest in 2016); and

    iii. Annulling other proceedings based on the applicants' political activities and speeches, where they relate to the same factual or a similar context as examined by the Court.

20. Thus, the NGOs submit that "alternative measures to detention pending the completion of the proceedings before the Constitutional Court" in the case of Selahattin Demirtaş, as suggested by the CM in March 2023,[18] September 2023,[19] and December 2023,[20] cannot be considered as "compatible with the conclusions and spirit of [the Court's] judgment"

[16] For instance, in September 2023, domestic courts convicted applicant Selma Irmak of "insulting the president" and "publicly degrading the Government" for political statements made on television in 2015, while she was an MP (https://www.gazeteduvar.com.tr/kurt-siyasetci-selma-irmaka-hapis-cezasi-verildi-haber-1639679).
[17] These events are described at paras. 17-27 of the *Demirtaş (no. 2)* Grand Chamber judgment.
[18] Interim Resolution CM/ResDH(2023)36, Execution of the judgment of the European Court of Human Rights Selahattin Demirtaş (No. 2) against Turkey (adopted by the Committee of Ministers on 9 March 2023 at the 1459th meeting of the Ministers' Deputies).
[19] 1475th meeting (DH), September 2023 - H46-38 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), Decisions, CM/Del/Dec(2023)1475/H46-38, §3.
[20] 1483rd meeting (DH), December 2023 - H46-36 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), CM/Del/Dec(2023)1483/H46-36.

(see *Demirtaş (no. 2)*, para. 441). The Court's findings vitiate any ongoing proceedings against Mr. Demirtaş based on the 6-8 October events and therefore require the immediate cessation of such proceedings. The NGOs emphasise that the domestic authorities' refusal to implement these individual measures continues to create a profound chilling effect on freedom of expression and political debate and to seriously harm prospects for free and fair local elections in March 2024.

21. The NGOs further underline the blatant nature of the Turkish Government's continued refusal to abide by the Court's order for the immediate release of Mr. Demirtaş since the judgment of 22 December 2020. Despite seven decisions and two interim resolutions by the CM between March 2021 and December 2023 explicitly urging compliance,[21] the Turkish authorities have adamantly refused to respect the Court's ruling. The unjust denial of Ms. Yüksekdağ Şenoğlu's release since 3 April 2023, despite three CM decisions from June to December 2023, similarly constitutes a clear breach of Türkiye's Convention obligations. The CM's additional efforts, including calling upon the Secretary General, Council of Europe member States, and Observer States to engage in the process, have also yielded no positive outcome.

22. The NGOs submit that Türkiye's continued unlawful conduct in respect of these cases not only contravenes the Court's clear orders for the applicants' release but also violates the very essence of Article 46 of the Convention, emphasizing the binding nature of the ECtHR's final judgments. Drawing parallels to the cases of Osman Kavala[22] and Ilgar Mammadov,[23] where the CM rightfully invoked infringement proceedings, the NGOs reiterate their previous contention that Türkiye's failure in the present cases equally justifies this exceptional action by the CM, as prescribed under Article 46§4 of the Convention.

IV. GENERAL MEASURES[24]

1. Circumvention of parliamentary immunity

23. The CM has repeatedly called on the Turkish authorities to ensure that procedural safeguards protecting parliamentary speech are effective in practice.[25] However, the Notes on the Agenda for the CM's September 2023 meeting indicate that "no legislative or other measures have been taken or envisaged to strengthen the freedom of political debate,

[21] See https://hudoc.exec.coe.int/?i=004-56539, CM decisions.
[22] ECtHR, *Osman Kavala v. Türkiye* (infringement proceedings) [GC], App. no. 28749/18.
[23] ECtHR, *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], App. no. 15172/13.
[24] The monitoring of general measures in this group of cases initially included measures to strengthen the independence of the Turkish judiciary. However, the CM decided in March 2023 to continue examining these measures in the *Kavala* case (1459th meeting (DH), March 2023 - H46-26 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), CM/Del/Dec(2023)1459/H46-26, §4). Therefore, the NGOs address this issue in their submission to the CM regarding the *Kavala* case, ahead of its 1492th meeting.
[25] 1475th meeting (DH), September 2023 - H46-38 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), Decisions, CM/Del/Dec(2023)1475/H46-38, §6. See also the decisions at the CM's meetings of March 2023; September 2022; June 2022; March 2022; November-December 2021.

pluralism and the freedom of expression of elected representatives, including safeguards protecting and respecting their parliamentary immunity".

i. Inviolability

24. Parliamentary inviolability is one of the two types of parliamentary immunity under Turkish law and amounts to "special legal protection for parliamentarians accused of breaking the law, typically against arrest, detention and prosecution, without the consent of the chamber to which they belong."[26] Protected under Article 83(2) of the Turkish Constitution, inviolability is temporary in nature, meaning that justice can proceed after the end of the mandate of the MP. However, the constitutional amendment of May 2016 created a discriminatory *ad hominem* exception to inviolability for 154 MPs, based on requests for a criminal investigation to be conducted prior to May 2016.

25. The applicants' prosecution on the basis of this unforeseeable *ad hominem* exception to parliamentary inviolability by the constitutional amendment of May 2016, together with the domestic courts' failure to carry out an assessment of parliamentary non-liability under Article 83 of the Constitution, was considered by the Court as incompatible with the applicants' right to freedom of expression under Article 10 of the Convention (see para. 269 of *Demirtaş (no. 2)* [GC] and para. 509 of *Yüksekdağ Şenoğlu and others*). The Court's findings must be understood in light of *Kerestecioğlu Demir v Turkey* and *Encü and others v Turkey*, where the Court found that the lifting of the applicants' immunity by the May 2016 constitutional amendment, constituted a violation of Article 10 of the Convention in and of itself.[27] In addition, the Court also held in *Yüksekdağ Şenoğlu and others* that the constitutional amendment of May 2016, combined with the judicial authorities' lack of analysis of parliamentary non-liability, could not be considered as a sufficiently foreseeable basis for the applicants' detention for the purposes of Article 5§1 (*Yüksekdağ Şenoğlu and others,* paras. 533-534).

26. These findings unequivocally entail as a consequence that any ongoing criminal proceedings initiated during an MP's term in office based on the constitutional amendment of 2016 are not prescribed by law for the purposes of the Convention and are therefore unlawful and in breach of the Convention. As with individual measures, general measures in the *Demirtaş (no. 2)* group must therefore include halting these proceedings and eliminating any resulting convictions. Yet, in its action plans, the Turkish Government maintains that "[t]he amendment did not affect non-liability […]. No similar amendment has been adopted since then. Article 83 of the Constitution is currently in force with its full

[26] Venice Commission Opinion, Turkey – Opinion on the suspension of the second paragraph of Article 83 of the Constitution (parliamentary inviolability), para.11.
[27] ECtHR, *Kerestecioğlu Demir v Turkey,* App no. 68136/16, Judgment of 4 May 2021; *Encu and others v Turkey*, App no. 56543/16 and 39 others, Judgment of 1 February 2022.

content. As it is an isolated case, it is not possible to take a general measure specific to this violation"[28] (emphasis added).

27. The NGOs urge the Committee not to accept the Government's assertion. Indeed, many of the 154 MPs targeted by the amendment continue to be subjected to criminal proceedings, detention, and convictions on this basis. This includes several of the defendants in the ongoing "Kobani trial".[29] Besides the "Kobani trial", another example concerns former HDP MP Osman Baydemir, who lost his parliamentary mandate due to his conviction after the removal of his immunity by the constitutional amendment. Mr. Baydemir appealed against the conviction in 2019, yet his case remains pending before the Court of Cassation. These cases indicate that the Turkish authorities' failure to take the general measures required to address the unlawful effects of the May 2016 constitutional amendment has led to violations similar to those suffered by the applicants in the *Demirtaş* group to continue and to be left unremedied.

28. In stark contrast to the Government's assertion that the May 2016 constitutional amendment has remained an exception, the domestic courts themselves have unlawfully set aside parliamentary inviolability in relation to MPs elected in 2018 and 2023. Thus, several judicial decisions in recent years have held that Article 14 of the Constitution (abuse of rights to disrupt the integrity of the territory or nation or to destroy fundamental rights) must be interpreted as encompassing terrorism-related offences. This has resulted in that MPs accused of terrorism-related offences being stripped of their inviolability, as Article 83(2) of the Constitution provides that the situations set forth in Article 14 of the Constitution are excluded from the scope of inviolability (Annex 1).[30]

29. The Constitutional Court reviewed this emerging judicial practice in the cases of MPs Ömer Faruk Gergerlioğlu and Leyla Güven, in 2021 and 2022 respectively. It held that the judiciary's interpretation of Article 14 of the Constitution, absent any constitutional provision or legislation specifying the types of situations falling within the scope of this provision, failed to meet the necessary certainty and foreseeability for restricting the applicants' electoral rights under Article 67 of the Constitution.[31]

30. However, the lower domestic courts have refused to abide by this jurisprudence of the Constitutional Court. In a decision of 28 September 2023, regarding the conviction of MP

[28] 1492nd meeting (March 2024) (DH) - Rule 8.2a - Communication from the authorities (09/01/2024) concerning the cases of Selahattin Demirtaş v. Turkey (No. 2) and Yüksekdağ Şenoğlu and Others v. Türkiye (Applications No. 14305/17, 14332/17) (Selahattin Demirtaş (No. 2) group), DH-DD(2024)37, §112; 1475th meeting (September 2023) (DH) - Action plan (07/07/2023) - Communication from Türkiye concerning the cases of Selahattin Demirtaş v. Turkey (no. 2) (Application No. 14305/17) and Yüksekdağ Şenoğlu and Others v. Türkiye (Application No. 14332/17), DH-DD(2023)847, §106.

[29] An information note prepared by the defendants' lawyers the NGOs had access to indicates that while 108 defendants were indicted under this case, 72 of them absconded or were not in the country during the trial. Accordingly, the prosecutor requests the conviction of all remaining 36 defendants who have been present for the trial before the Ankara 22nd Assize Court.

[30] See for instance Court of Cassation, File no. 2023/12611, Judgment of 28 September 2023, p. 47.

[31] Constitutional Court, *Ömer Faruk Gergerlioğlu*, App. No. 2019/10634, 1 July 2021, §103. (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/10634); and Constitutional Court, *Leyla Güven*, App. No. 2018/26689, 7 April 2022, §109 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/26689).

Can Atalay (as part of the Gezi Park trial), the Court of Cassation explicitly rejected the Constitutional Court's findings in *Gergerlioğlu* and *Güven*.[32] It thus upheld the conviction of Mr. Atalay despite his election as an MP in May 2023, arguing that the crime of attempting to overthrow the Government, for which he had been convicted, fell within the scope of Article 14 of the Constitution and was therefore excluded from inviolability.[33] Thus, the judicial authorities have adopted a jurisprudence permitting the lifting of parliamentary inviolability without a decision by Parliament, in circumstances defined arbitrarily, retroactively, and unforeseeably by the judiciary based on the extremely vague notion of "abuse of rights". This practice entirely bypasses the legal safeguards protecting parliamentary speech and must be viewed as analogous to the May 2016 constitutional amendment, so far as the implementation of the *Demirtaş (no. 2)* group judgments is concerned.

31. Another frequent practice that has seriously undermined MPs' exercise of their elected mandate and freedom of political speech consists in the lifting of inviolability by Parliament based on unjustified and abusive requests for a criminal investigation against them (*fezleke* or summaries of proceedings) by prosecutors or courts. On this subject, the Parliamentary Assembly of the Council of Europe (PACE) observed that "opposition parliamentarians seem to routinely face being stripped of immunity on the basis of their statements or publications. The Assembly notes with great concern that one third of parliamentarians, including the leaders of the two main opposition parties in Parliament, are subject to such procedures. This is highly problematic and prejudices the sound functioning of a parliament. In addition, it has a chilling effect which discourages the dynamic debate essential for a properly functioning democracy."[34]

32. The PACE urged the Turkish authorities "to put an end to the judicial harassment of parliamentarians and refrain from submitting numerous summaries of proceedings seeking the undue lifting of their immunity, which gravely impedes the exercise of their political mandate."[35] Yet, at the time of writing, 733 summaries of proceedings are still pending before the Joint Committee, 512 of which concern HDP MPs.[36]

ii. Non-liability

33. In the *Demirtaş* group, the Court held that the applicants had been detained and prosecuted mainly on account of their political speeches, without any assessment of whether these statements were protected by the constitutional safeguard of parliamentary non-liability (*Demirtaş (no. 2)*, para. 263 and *Yüksekdağ Şenoğlu and others,* para. 509). It observed that under Article 83(1) of the Turkish Constitution, non-liability is "absolute, permits of no exception, does not allow any investigative measures, […] continues to protect

[32]Court of Cassation, File no. 2023/12611, Judgment of 28 September 2023, pp. 47-50.
[33] Ibid.
[34] Resolution 2376 (2021) on the functioning of democratic institutions in Turkey (22 April 2021), §13.
[35] Ibid.
[36] https://www.aa.com.tr/tr/politika/mecliste-733-dokunulmazlik-fezlekesi-bulunuyor/3077832

members of parliament even after the end of their term of office" (*Demirtaş (no. 2)* [GC], para. 259).

34. While the Government's latest action plan provides two examples of decisions in which the Turkish courts have applied non-liability,[37] judicial practice suggests that their application of the principle is arbitrary and highly selective. This is apparent once again in the "Kobani trial". The judicial authorities have thus consistently failed to engage with former MP Ayla Akat Ata's claim that the statements relied on for her continued prosecution - on the same grounds as the other defendants, including disrupting the unity and territorial integrity of the State under Article 302 of the Criminal Code - fall within the scope of her parliamentary non-liability, as she was an MP at the relevant time. Similarly, former MP Emine Ayna, another defendant in the "Kobani trial", was sentenced in a different case in November 2023, for alleged "terrorist propaganda" based on speeches delivered between 2011 and 2016, while she was an MP.

35. The NGOs stress that the authorities' failure to protect and uphold parliamentary immunity has had extremely adverse consequences for political pluralism in Türkiye. Tellingly, a total of 16 MPs' mandates were revoked between 2015 and 2023 (fifteen belonging to the HDP, one to the CHP). In comparison, only three MPs had lost their seats in the preceding 95 years of the National Assembly's history (either for absenteeism or due to a criminal conviction). The NGOs underline that a final conviction for certain offences, including alleged terrorism offences, entails a ban on membership of Parliament and on running as a candidate in local elections.[38]

36. The statistics in the above paragraph do not account for the large number of MPs whose conviction has not yet become final or was eventually overturned, but who were prevented from exercising their mandate due to the criminal proceedings against them and actual or threatened detention. Ongoing criminal proceedings, indeed, have been a factor that prevented a significant number of MPs from running for re-election in 2018 and 2023. Thus, violations of Article 3 of Protocol no. 1, similar to those identified in relation the *Demirtaş (no. 2)* group, have and are continuing to occur against many other MPs. Implementing these judgments requires putting an end to the circumvention of

[37] 1492nd meeting (March 2024) (DH) - Rule 8.2a - Communication from the authorities (09/01/2024) concerning the cases of Selahattin Demirtas v. Turkey (No. 2) and Yuksekdag Senoglu and Others v. Türkiye (Applications No. 14305/17, 14332/17) (Selahattin Demirtas (No. 2) group), DH-DD(2024)37, §§117-118.

[38] Article 76 of the Turkish Constitution states that *"Those who […] have been sentenced to a total of one year or more imprisonment and heavy imprisonment, except for negligent offenses; those who have been convicted of disgraceful crimes such as […] participation in terrorist acts and incitement and encouragement of such acts, cannot be elected as Members of Parliament even if they have been pardoned*"; Article 11 of Law no. 2839 On The Election of Members of Parliament states: "*The following persons cannot be elected as Members of Parliament: […] e) Those who have been sentenced to imprisonment for a total of one year or more or to heavy imprisonment regardless of its duration, except for negligent offenses, f) Even if they have been pardoned; […] 3. Those convicted of terrorist crimes […]*". Article 9 of Law no. 2972 on the Election of Local Administrations, Local Authorities and Local Councils reads: "*Any Turkish citizen over the age of eighteen may be elected as mayor, member of the provincial general assembly and member of the municipal council, provided that he/she does not have any of the disqualifying qualities specified in Article 11 of the Law No. 2839 on Parliamentary Elections*".

parliamentary immunity and adequately remedying breaches of this constitutional safeguard.

2. Abuse of criminal legislation against elected representatives and opposition politicians

37. In the *Demirtaş (no. 2)* group judgments, the Court found that judicial authorities' interpretation and application of criminal legislation had constituted an arbitrary interference with the applicants' right to freedom of expression under Article 10 of the Convention and that the criminal provisions relied on did not offer sufficient guarantees against such arbitrariness (*Demirtaş (no. 2)* [GC], paras. 280-281and *Yüksekdağ Şenoğlu and others*, para. 509). Furthermore, the Court found that the motives put forward for the applicants' detention – namely, suspected involvement in terrorism offences – had merely been a cover for the ulterior purpose of stifling pluralism and limiting freedom of political debate (*Demirtaş (no. 2)* [GC], paras. 423-438 and *Yüksekdağ Şenoğlu and others*, paras. 637-639).

38. In *Demirtaş (no. 2)* [GC], the legislation in question was the offence of "establishing, leading or being a member of an armed organisation" under Article 314 §§ 1 and 2 of the Criminal Code. In *Yüksekdağ Şenoğlu and others*, the applicants were prosecuted and detained in relation to a range of alleged offences, including "establishing or leading a terrorist organisation" and "membership of an armed organisation" (Article 314 of the Criminal Code), "propaganda on behalf of a terrorist organisation" (Article 7 § 2 of the Antiterrorism Law no. 3713), and "incitement to commit an offence" (Article 214 § 1 of the Criminal Code) (see paras. 10-305).

39. Judicial authorities give a broad, selective, and unforeseeable interpretation to various criminal provisions to issue politically motivated summaries of proceedings requesting the removal of opposition MPs' immunity, and to repress their political statements or non-violent political activities.[39] For instance, in September 2023, the Ankara Chief Public Prosecutor issued a request for the lifting of the immunity of opposition MP Sezgin Tanrıkulu for "provoking the public to hatred, hostility or degrading" (Article 216 TCC) and for "publicly insulting the military and security forces of the State" (Article 301 TCC), based on statements made on television in which he denounced past crimes committed by the Turkish armed forces against predominantly Kurdish civilians.[40] The same month, Selma Irmak, one of the applicants in *Yüksekdağ Şenoğlu and others*, was sentenced to four years and two months in prison for "insulting the president" and "publicly degrading the Government", based on political statements made on television as an MP in 2015.[41]

[39] See Resolution 2376 (2021) on the functioning of democratic institutions in Turkey (22 April 2021), §13. The NGOs observe that at the time of writing, approximately half of the 733 summaries of proceedings pending before the Joint Committee, are based on alleged "terrorist propaganda" (https://www.aa.com.tr/tr/politika/mecliste-733-dokunulmazlik-fezlekesi-bulunuyor/3077832)

[40] https://medyascope.tv/2023/09/18/sezgin-tanrikulu-hakkinda-hazirlanan-fezleke-cumhurbaskanligina-gonderildi/

[41] https://www.gazeteduvar.com.tr/kurt-siyasetci-selma-irmaka-hapis-cezasi-verildi-haber-1639679

40. Such interpretations and applications of criminal law are clearly irreconcilable with the ECtHR's case-law under Article 10 on the need for scrutiny of Government policies, the crucial importance of political speech on matters of public interest, and the need "to display restraint in resorting to criminal proceedings" in this respect.[42] Indeed, the judicial authorities have repeatedly disregarded ECtHR judgments finding violations of Article 10 of the Convention by Türkiye due to their unforeseeable and unreasonable application of criminal law against perceived political dissenters. For instance, the NGOs recall that in *Demirtaş (no. 2)*, the Grand Chamber ruled that criticism of government policies and participation in the Democratic Society Congress, a lawful organisation, could not be equated with evidence of an active link with an armed organisation (paras. 278-281). Nevertheless, the conviction and 22-year prison sentence of former HDP MP Leyla Güven for "membership of an armed organisation" and "terrorist propaganda", based on her participation in the activities of the Democratic Society Congress, have been maintained.[43] Additionally, Ms Güven has been sentenced to a further eleven years and seven months' imprisonment for "terrorist propaganda", based on political speeches given between 2015 and 2019.[44]

41. Reviewing the convictions of the defendants in the "Gezi Park" trial on 28 September 2023, the Court of Cassation decided to uphold the convictions of human rights defender Osman Kavala, MP Can Atalay, and three other defendants. Again, no mention was made of the ECtHR's 2019 *Kavala* judgment or the 2022 Grand Chamber infringement proceedings judgment in that case, or of any concrete acts beyond their non-violent activities within the scope of their rights under Articles 10 and 11 of the Convention. Thus, in upholding the eighteen-year prison sentence of Mr. Atalay, convicted of "assisting an attempt to overthrow the Government", the Court of Cassation relied on "activities within the scope of initiation of the planned uprising and its deepening by spreading all over the country", stating that Atalay was "one of the people who led and directed Taksim Solidarity, which caused the escalation of violent events through its posts and calls for action during the Gezi Park protests".[45]

42. These examples highlight that the prosecutorial and judicial authorities' resort to and upholding of terrorism-related offences and other grave crimes to punish political statements and activities leads to extremely heavy prison sentences, again ignoring ECtHR jurisprudence, with the aim of permanently incapacitating politically disfavoured expressions of opinion on matters of public interest like "the Kurdish issue".

43. In addition, as underlined by the Court's findings under Article 18 in the *Demirtaş (no. 2)* group, the prosecutorial and judicial authorities' abuse of criminal law has served as a basis for the arbitrary detention and thereby silencing HDP politicians at key political moments.

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[42] ECtHR, *Castells v. Spain*, Series A no. 236, Judgment of 23 April 1992, §42; Constitutional Court, *Mehmet Ali Aydin*, App. no. 2013/9343, Judgment of 4 June 2015, §84.
[43] https://www.bbc.com/turkce/haberler-dunya-55394002 . Güven was detained since 2018 based on her criticism of Turkish military operations in Syria, despite being elected that year as an MP.
[44] https://www.turkishminute.com/2022/10/17/lawmaker-gets-11-more-years-on-terrorist-propaganda-charges/
[45] Court of Cassation, File no. 2023/12611, Judgment of 28 September 2023, p. 50.

In the latest presidential elections in May 2023, the HDP pledged support to the CHP candidate running against Mr Erdoğan. Merely weeks before these elections, 128 persons, including HDP politicians and candidate MPs from opposition parties, were taken into custody across 21 cities purportedly on suspicion of terrorism-related offences.[46]

44. Over seven years ago, the Venice Commission underlined the problematic interpretation and application of Article 216 (provoking the public to hatred, hostility or degrading), Article 299 (insulting the president of the republic), Article 301 (degrading Turkish nation, State of Turkish Republic, the organs and institutions of the State), and Article 314 (membership of a terrorist organisation) of the Turkish Criminal Code (TCC).[47] It affirmed that "[a]ll four articles have to be applied in a radically different manner to bring their application fully in line with Article 10 ECHR".[48]

45. These provisions have also been under the scrutiny of the CM in its supervision of the implementation of the *Öner and Türk* group*, Işıkırık* group*, Altuğ Taner Akçam* group, and *Altun and Güvener* group, among other cases.[49] The Committee has required the Government to amend the problematic legislation and take measures to prevent their arbitrary application. Yet, the Government has failed to take such measures, while the judicial authorities have continued to interpret and apply these provisions in a manner that penalises non-violent political speech.

46. In 2019, Article 7 of the Anti-Terrorism Law (terrorist propaganda) was amended to add to this provision that "expressions of thought that do not exceed the boundaries of reporting or for the purpose of criticism shall not constitute criminal activity". In 2022, the PACE welcomed this amendment and recommended amending other anti-terrorism provisions in a similar manner.[50] However, Leyla Güven's convictions in 2020 and 2022 reveal that this legal safeguard is not applied in practice by the judicial authorities. Evidence used against Ms. Güven, who has advocated for a peaceful solution to "the Kurdish issue", includes her statement that "[as] long as the Kurdish problem is not resolved democratically, participation in the guerrilla [forces] will continue, the conflict will continue."[51]

47. Thus, in this context, legislative amendments to anti-terrorism legislation do not constitute a sufficient means of implementing the *Demirtaş (no. 2)* group of judgments: what is required is a radical change in the judicial culture in Türkiye, so that Convention standards and case law on freedom of expression are systematically, adequately, and sufficiently applied in decisions concerning criminal prosecution, detention, and conviction. It is

[46] https://bianet.org/haber/journalists-lawyers-politicians-detained-across-turkey-in-raids-targeting-pro-kurdish-groups-277727; https://bianet.org/haber/gazeteci-vekil-adaylarindan-tutuklamalara-tepki-erdogan-in-bitmeyen-ozgurluk-dusmanligi-277905
[47] Venice Commission, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey (March 2016), CDL-AD(2016)002, §123.
[48] Ibid., §§123-124.
[49] See https://hudoc.exec.coe.int/?i=004-37296
[50] Ibid.
[51] https://www.indyturk.com/node/71506/leyla-g%C3%BCven%E2%80%99-avukatlar%C4%B1-konu%C5%9Fmas%C4%B1-ba%C4%9Flam%C4%B1ndan-kopar%C4%B1l%C4%B1p-%C3%A7arp%C4%B1t%C4%B1ld%C4%B1-lince-maruz-b%C4%B1rak%C4%B1ld%C4%B1

essential that the authorities follow the ECtHR's and CM's stipulations and the Venice Commission's recommendations, not only by amending and repealing the problematic criminal law provisions mentioned above, but also by ensuring that expression on matters of public interest benefits from a very high level of protection; that it is only the subject of criminal proceedings in the rarest of circumstances and as a last resort; that the international legal standards contained in the ECHR and clarified by the ECtHR on legality, necessity and proportionality are applied adequately and in good faith; that any conviction based on political speech relies on concrete evidence of incitement to violence; and that criminal proceedings are not used for, or result in, the punishment of criticism of government policies.

48. Ultimately, the Court's exceptional Article 18 findings in this group of cases indicate the urgent need for significant reforms to restore the independence of the judiciary from the executive, in line with the recommendations of various international bodies.[52] Such reforms are essential in ensuring that the voicing of critical political opinions that do not incite violence or hatred are no longer viewed as justifying criminal prosecution.

3. Increasing ineffectiveness of remedies and safeguards against the 'judicial harassment' of elected opposition politicians

49. In *Yüksekdağ Şenoğlu and others*, the Court found a violation of Article 5§4 of the Convention on account of the applicants' lack of access to the investigation file, as the applicants had been unable to satisfactorily challenge the reasons put forward for their detention (para. 583). Under Article 153(2) of the Turkish Code of Criminal Procedure (CCP), access to the investigation file by a defendant's lawyer can be restricted "if an examination of the file would hinder the objective of the ongoing investigation". The Court found that the judicial authorities' refusal to give the applicants' lawyers access to the investigation file had been formulated in stereotypical terms that merely restated Article 153(2) of the CCP and therefore lacked sufficient reasons (para. 581). The NGOs observe in this respect that since the state of emergency of 2016, the arbitrary restriction of access to investigation files has become common in cases where individuals are under investigation for alleged terrorism offences.[53] Worryingly, alongside several other practices undermining the right to a legal defence, it has also become customary in these cases for lawyers to either be prevented from any access to, or have limited access to, their clients during police custody.[54]

50. More broadly, fair trial rights of those perceived as political opponents or dissenters are systematically trampled, as tragically illustrated by the death of human rights lawyer Ebru Timtik in 2020, after a hunger strike in prison demanding respect for her right to a fair trial

[52] The NGOs address this issue in their submission on the *Kavala* case ahead of the Committee's 1492nd meeting.
[53] Human Rights Watch, "Lawyers on Trial: Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey", 2019, pp. 19-20.
[54] Ibid., p. 20.

in relation to her conviction for "membership of a terrorist organisation".[55] A powerful reflection of the lack of core safe trial guarantees in terrorism-related cases, the ECtHR acknowledged in a recent "Bylock" case that the applicant's concerns regarding "the conduct of the criminal proceedings 'as a matter of form' only" had been "well-founded".[56] The NGOs submit that the dismantling of fair trial guarantees constitutes a significant obstacle to the cessation and non-recurrence of violations similar to those in the *Demirtaş (no. 2)* group of cases.

51. Secondly, several important considerations throw into doubt the effectiveness of the individual application process to the Constitutional Court against arbitrary restrictions on parliamentarians' and opposition politicians' exercise of their functions. These issues encompass serious delays in the Constitutional Court's handling of applications related to violations of HDP politicians' rights and a notable departure from an approach aligned with Convention standards and the ECtHR case-law on those standards.[57] On the initial issue, while in *Yüksekdağ Şenoğlu and others,* the Court considered that a maximum period of one year, five months, and three days for review of the applicants' detention by the Constitutional Court, during the state of emergency, did not violate Article 5§4 of the Convention (paras. 600-601), in *Kavala v. Turkey*, it found that lapse of more than eleven months to conclude an application after the state of emergency was lifted -in addition to a period of more than six months elapsed during the state of emergency- did not comply with 'the requirement of promptness' (para. 195).

52. The NGOs submit that the cases concerning the detention of parliamentarians have been pending for an unreasonable amount of time before the Constitutional Court. Besides the case of Selahattin Demirtaş, pending since November 2019,[58] applications lodged by other HDP parliamentarians to challenge proceedings against them restricting their ability to carry out their functions have remained pending for over three times the period considered in *Yüksekdağ Şenoğlu and others*.[59] In the absence of any publicly available information

[55] See https://www.ohchr.org/en/press-releases/2020/09/turkish-human-rights-lawyer-dies-after-hunger-strike?LangID=E&NewsID=26203; and https://iftd.org/about-us/

[56] ECtHR, *Yüksel Yalçınkaya v Türkiye* [GC], App no. 15669/20, Judgment of 26 September 2023, §341.

[57] Commissioner for Human Rights of the Council of Europe, Report Following Her Visit to Turkey From 1 to 5 July 2019, CommDH(2020)1, paras. 93-105.

[58] Despite repeated calls by the CM's for Turkish authorities to ensure a speedy decision on this issue: 1428th meeting (DH), March 2022 - H46-37 Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), CM/Del/Dec(2022)1428/H46-37; 1436th meeting (DH), June 2022 - H46-32 Selahattin Demirtaş (No. 2) v. Turkey (Application No. 14305/17), CM/Del/Dec(2022)1436/H46-32; 1443rd meeting (DH), September 2022 - H46-29 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), CM/Del/Dec(2022)1443/H46-29; 1451st meeting (DH), December 2022 - H46-39 Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), CM/Del/Dec(2022)1451/H46-39; 1468th meeting (DH), June 2023 - H46-33 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), CM/Del/Dec(2023)1468/H46-33.

[59] For instance, an application lodged to the Constitutional Court by Osman Baydemir in 2018, to challenge his conviction pursuant to the 2016 constitutional amendment and resulting in the revocation of his parliamentary mandate, remained pending until February 2023, when it was declared inadmissible (on the grounds the Court of Cassation had not yet issued a decision regarding his application from 2019) (see Constitutional Court, *Osman Baydemir (3),* App. no. 2018/10290, Judgment of 8 February 2023). Osman Baydemir, who was elected as MP for the period of 2015-2018, was thus unable to run in the June 2018 elections, as well as the May 2023 ones. Other examples include the revocation of the mandates of MPs İdris Baluken and Selma Irmak following their conviction: their applications to the Constitutional Court have been pending since 2018 and 2020 respectively.

regarding the Constitutional Court's priority criteria, the sequencing of individual application examinations remains uncertain, selective, and inconsistent. This lack of clarity enables the domestic court to avoid and delay adjudicating on challenging cases, including those where its decisions might contradict the ECtHR's rulings, as is the case in Mr. Demirtaş's and Ms. Yüksekdağ Şenoğlu's pending applications. The NGOs consider that a decision by the Constitutional Court after four years or more have elapsed does not allow the timely cessation of arbitrary restrictions on MPs' exercise of their functions as elected representatives, including through arbitrary detention and conviction, and on their ability to take part in parliamentary elections at the beginning of a new term.

53. Regarding the second issue, the NGOs observe a tendency within the Constitutional Court to either issue inadmissibility decisions, avoiding a ruling on the merits concerning restrictions on the rights of opposition politicians, or to conclude that there are no violations of their rights. Notable instances of the latter practice are evident in six recent judgments where the Constitutional Court found no violation of the rights of a group of HDP politicians. These judgments concern the arrest, detention and -in one case- a judicial control order against six applicants for their alleged role in the 6-8 October 2014 events as HDP politicians.[60] All applicants were arrested on 25 September 2020 and detained (Ms. Akat Ata, Mr. Gür, Ms. Köse, Mr. Altınörs and Mr. Barmaksız) or released pending trial under judicial control order (Mr. Önder) on 2 October 2020 in the course of the investigation by the Ankara Public Prosecutor. The Prosecutor subsequently indicted them in December 2020, together with more than 100 others, including Mr. Demirtaş and Ms. Yüksekdağ Şenoğlu, under the "Kobani case" pending before the Ankara 22nd Assize Court.

54. The NGOs emphasize that in *Demirtaş (2) and Yüksekdağ Şenoğlu and others*, the ECtHR has already addressed the allegations in the case before the Ankara 22nd Assize Court stemming from the 6-8 October 2014 events and the criminal responsibility attributed to HDP politicians by the Turkish prosecutorial and judicial authorities. A detailed examination of the Constitutional Court's aforementioned judgments reveals its open reliance on facts and grounds that the ECtHR deemed insufficient to justify interference with the applicants' rights, all without any references to the latter court's findings. This includes the Grand Chamber's deliberations that social media posts shared on the official HDP Twitter account advocating solidarity with the people of Kobani against the Daesh

[60] Ayla Akat Ata (HDP MP during the events of 6-7 October 2014), Constitutional Court, *Ayla Ata Akat (3)*, App. No. 2020/35149, 21 November 2023, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/35149;
Nazmi Gür (HDP MP during the specified events), Constitutional Court, *Nazmi Gür*, App. No. 2020/35079, 21 November 2023, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/35079;
Sırrı Süreyya Önder (HDP MP during the specified events), Constitutional Court, *Sırrı Süreyya Önder* (*2*)**,** App. No. 2020/33105, 13 December 2023, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/33105;
Berfin Özgü Köse (HDP executive board member during the specified events), Constitutional Court, *Berfin Özgü Köse*, App. No. 2020/35082, 21 November 2023, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/35082;
Alp Altınörs (HDP executive board member during the specified events), Constitutional Court, *Alp Altınörs (2)***,** App. No. 2021/131, 13 December 2023, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2021/131; and
Bülent Barmaksız (HDP executive board member during the specified events), Constitutional Court, *Bülent Barmaksız (3)*, App. No. 2021/457, 13 December 2023, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2021/457

siege, could not be construed as a call for violence (para. 327); and that, political statements expressing opposition to certain government policies or participation in the Democratic Society Congress constituted an exercise of Convention rights which must be deemed inadequate to establish a link between the applicant and alleged criminal acts (para. 278).

55. In relation to the practice of issuing problematic inadmissibility decisions, the NGOs draw attention to the case of MP Osman Baydemir, in which the Constitutional Court found the application inadmissible in February 2023 for non-exhaustion of domestic remedies, due to an application pending before the Court of Cassation since 2019.[61] Yet, this remedy was not available at the time of Mr. Baydemir's application to the Constitutional Court, as it was only introduced into the law in 2019. Moreover, the Court of Cassation failed to issue a decision in the four years since Osman Baydemir's application to that court. Thus, the Constitutional Court's interpretation of the requirement of exhaustion of domestic remedies, together with the Court of Cassation's failure to deliver a timely judgment, had the effect of blocking all legal avenues for Osman Baydemir to obtain an effective remedy for violations of his rights similar to those in the *Demirtaş (no. 2)* group, namely the arbitrary restriction of his freedom of expression and ability to carry out his electoral functions pursuant to the constitutional amendment of May 2016.

56. Furthermore, the domestic courts' increasingly plain refusal to implement Constitutional Court judgments concerning opposition parliamentarians and mounting attacks on that Court within this context have become a cause for serious concern.[62] In January 2021, the Constitutional Court found a violation of the electoral rights (Article 67 of the Constitution) and right to personal liberty and security (Article 19 of the Constitution) of MP Kadri Enis Berberoğlu. The violations arose from the judicial authorities' failure to implement a previous Constitutional Court judgment ordering the suspension of the criminal proceedings against Mr. Berberoğlu and a re-trial to remedy the violations resulting from the continuation of the proceedings. This decision was based on the lifting of his immunity by the May 2016 constitutional amendment, after his re-election in June 2018.[63] Nevertheless, the proceedings against Mr. Berberoğlu were only halted in September 2023, and the relevant court ordered the issuing of a summary of proceedings (*fezleke)* for the lifting of Mr. Berberoğlu's immunity and initiation of new proceedings against him.[64]

57. More recently, as discussed above, in deciding to uphold the conviction of MP Can Atalay in the Gezi Park trial, the Court of Cassation openly rejected the Constitutional Court's

[61] Constitutional Court, *Osman Baydemir (3)* (cited above).
[62] Already in 2016, the International Commission of Jurists observed that non-implementation of judgments of the Turkish Constitutional Court and portrayal of these decisions as biased "risk[ed] representing the independent exercise of judicial power as political conspiracy against the Government" (International Commission of Jurists, "Turkey: the Judicial System in Peril", briefing paper, 2016, p. 11) (https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf)
[63] Constitutional Court, *Kadri Enis Berberoğlu (3)* [Plenary Assembly], App. no. 2020/32949, Judgment of 21 January 2021.
[64] Istanbul 14th Assize Court, File no. 2023/60, Judgment of 13 September 2023.

Ömer Faruk Gergerlioğlu and *Leyla Güven* jurisprudence stating that the judicial authorities could not set aside parliamentary immunity on the basis of Articles 14 and 83 of the Constitution.[65] It alleged that the Constitutional Court lacked the authority to make such a finding and affirmed that Mr. Atalay's immunity should be set aside on the basis of Articles 14 and 83 of the Constitution.[66] Can Atalay challenged this decision before the Constitutional Court, which found that his continued detention after his election and inability to take an oath and exercise his role as an MP violated his right to liberty and security (Article 19 of the Constitution) and his right to be elected and conduct political activities (Article 67 of the Constitution).[67] It ordered the suspension of Mr. Atalay's sentence and his release from detention, the termination of his conviction, and suspension of proceedings against him through his retrial.[68] Although it specifically ordered the Istanbul 13th Assize Court to eliminate the consequences of the violations,[69] the latter referred the case back to the Court of Cassation.[70] On 8 November 2023, the Court of Cassation ruled that it would not implement the Constitutional Court's decision (Annex 2).[71]

58. Mr. Atalay brought a further application to the Constitutional Court following this development arguing that the ongoing failure of the lower courts to implement the former court's judgment constituted a continuing violation of his Articles 19 and 67 rights as well as his right to bring an individual application to the Constitutional Court (Article 148 of the Constitution). In its second judgment on the case, the Constitutional Court confirmed these violations and once again ordered the Istanbul 13th Assize Court to start a re-trial process for Mr. Atalay, to order a stay of execution of his sentence as well as the criminal proceeding against him pending the end of his term as an MP, and to release him from prison.[72] Yet, the Istanbul 13th Assize Court again sent the file to the Court of Cassation for a decision, with the latter court insisting on its previous decision refusing to implement the Constitutional Court's clear orders (Annex 3).[73] Aligning with the Court of Cassation, the ruling coalition of the AKP and MHP-dominated Parliament casted a vote on 30 January 2024 to strip Mr. Atalay of his MP status on the basis of this conviction, which

[65] Court of Cassation, File no. 2023/12611, Judgment of 28 September 2023, p. 47. See also https://www.birgun.net/haber/prof-dr-kaboglu-yargitay-in-can-atalay-hukmunu-degerlendirdi-anayasaya-iskence-eden-bir-karar-472974.
[66] Ibid.
[67] Constitutional Court, *Can Atalay (2)* [Plenary Assembly], App no. 2023/53898, Judgment of 25 October 2023, §§89-93 and §§107-108.
[68] Ibid., §117.
[69] Ibid., §118.
[70] https://www.bbc.com/turkce/articles/cd1jq15070xo .
[71] Court of Cassation, File no. 2023/12611, Judgment of 8 November 2023; see also https://abcnews.go.com/International/wireStory/clash-constitutional-appeals-courts-raises-concerns-rule-law-104750456
[72] Constitutional Court, *Can Atalay (3)* [Plenary Assembly], App. no. 2023/99744, 21 December 2023 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2023/99744)
[73] Court of Cassation, File no. 2023/12611, Judgment of 3 January 2024.

has been found by the Constitutional Court to be in violation of the constitutional human rights guarantees.[74]

59. The NGOs stress that the domestic court's deliberate non-implementation of Constitutional Court judgments on parliamentary immunity constitutes a manifest breach of the rule of law and principle of legality, as Article 153 of the Constitution provides that Constitutional Court judgments are binding on all state organs. In addition, the ECtHR has held that deliberate non-implementation of a final and enforceable judgment "is capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness, factors which are of the utmost importance from the point of view of the fundamental principles underlying the Convention".[75]

60. The issue of non-implementation of Constitutional Court judgments in Türkiye was in fact examined by the ECtHR in the case of *Şahin Alpay v. Turkey*.[76] The Court emphasized that challenging the powers granted to the Constitutional Court to issue final and binding judgments on individual applications contradicts fundamental principles of the rule of law and legal certainty (para. 118). Additionally, the Court expressed concerns about Mr. Alpay's prolonged pre-trial detention, persisting even after the Constitutional Court's judgment, due to decisions made by the lower domestic court which raised serious doubts about the effectiveness of the remedy of an individual application in cases related to pre-trial detention (para. 121). While in Şahin Alpay's case, the eventual release of the applicant was secured, in the case of MP Can Atalay, the lower courts' refusal to implement the Constitutional Court's human rights-compliant judgments evolved into an unprecedented attack on the Constitutional Court and the individual application mechanism as a remedy for human rights violations.[77]

61. Finally, the domestic authorities' persistent failure to implement the ECtHR's *Demirtaş (no. 2), Yüksekdağ Şenoğlu and others,* and *Kavala v Turkey* judgments by refusing to release the applicants from detention reveals that this "last resort" remedy, too, is being dismantled when it comes to human rights violations committed against opposition politicians and other critical voices.[78]

[74] https://www.reuters.com/world/middle-east/turkish-parliament-strips-status-opposition-mp-after-judicial-clash-2024-01-30/
[75] ECtHR, *Broniowski v. Poland* [GC], App. no. 31443/96, ECHR 2004-V, § 176.
[76] ECtHR, *Şahin Alpay v. Turkey*, App. no. 16538/17, 20 March 2018.
[77] This issue is addressed more in detail in the NGOs' submission on the *Kavala* case ahead of the 1492nd meeting, as part of their discussion of the issues surrounding judicial independence.
[78] In the same judgment of 28 September 2023 against Can Atalay and other Gezi Park trial defendants, the Court of Cassation upheld the life sentence of human rights defender Osman Kavala, despite the ECtHR's finding of a violation of Article 18 in conjunction with Article 5 with respect to Kavala's detention and the Grand Chamber's infringement proceedings judgment (Court of Cassation, File no. 2023/12611, Judgment of 28 September 2023.

4. Other obstacles to opposition politicians' exercise of elected mandates in a free and safe environment

62. The PACE highlighted in October 2022 that "it has become challenging for members of the political opposition to exercise their elected mandates in a free and safe environment".[79] Beyond 'judicial harassment', a range of measures and policies contribute to the political persecution of opposition politicians – particularly Kurdish politicians – and severely restrict their ability to freely carry out their essential role in a democratic society founded on human rights, pluralism, and the rule of law. The NGOs submit that the *Demirtaş (no. 2)* group judgments cannot be meaningfully implemented in the absence of measures to put an end to such policies.

63. Thus, in the predominantly Kurdish south-east of Turkey, mayors are systemically removed purportedly based on suspicion of "terrorism", pursuant to Emergency Decree Law no. 674 of 2016 (amending the Municipality Law) and have been replaced by unelected, government-appointed officials (so-called "trustees"). These "trustees" have a discretion to suspend the functions of Kurdish local representatives in the affected provinces, including their ability to designate a new mayor.[80] The "trustee" system has not been abolished despite the end of the state of emergency in 2018: of the 65 municipalities won by the HDP in the 2019 local elections, only six are not currently run by "trustees".[81]

64. Another obstacle to HDP politicians' exercise of their mandate and participation in the conduct of public affairs is the indictment filed in 2021 by the Chief Public Prosecutor of the Court of Cassation for the permanent closure of the HDP, which is currently pending before the Constitutional Court. The indictment demands a five-year political ban on 451 prominent members including its co-chairs, MPs, and members of its executive branches, and relies on accusations brought against Ms. Yüksekdağ Şenoğlu, Mr. Demirtaş, and other HDP politicians similar to those examined by the ECtHR and found to violate the Convention, such as evidence linked to the "Kobani trial". This case resulted in the HDP not taking part in the May 2023 elections under its own legal entity as the HDP, which in turn profoundly diminished its entitlement to enjoy the guarantees which the election law provides for political parties which have taken part in previous elections and which are

[79] Resolution 2459 (2022) of the Parliamentary Assembly of the Council of Europe on the honouring of obligations and commitments by Türkiye, §2.
[80] See European Commission, Türkiye 2022 Report, pp. 14-15 (https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/T%C3%BCrkiye%20Report%202022.pdf); see also https://www.bbc.com/turkce/haberler-turkiye-49446987
[81] There are several accounts of corruption and misuse of public funds by unelected trustees and officials running these regions. See, *inter alia*, https://www.indyturk.com/node/524406/t%C3%BCrki%CC%87yeden-sesler/kayy%C4%B1m-d%C3%BCzeninin-sonu%C3%A7lar%C4%B1-yayg%C4%B1n-yolsuzluk; https://www.birgun.net/haber/6-ayda-kasayi-sifirladi-2020-odenegini-bitirdi-90-milyonluk-borca-batti-306097; https://www.evrensel.net/haber/502675/rusvet-operasyonu-baglar-belediye-baskanina-yurt-disi-yasagi-yardimcisina-tutuklama; and https://bianet.org/haber/kayyim-belediyelerinin-cogunda-yillardir-sayistay-denetimi-yok-288169

already represented in Parliament.[82] The Constitutional Court's approval of this indictment would thus undermine the capacity of millions of voters to political participation by expressing views for their political representation.

65. Administrative sanctions constitute another practice that serves to undermine the ability of opposition politicians to freely engage in political debate. Such sanctions have been imposed on MPs by the National Assembly for their non-violent political statements, based on the ambiguous and unforeseeable charge of "making declarations incompatible with the administrative structure of the Republic of Türkiye as set by the Constitution in line with the principle of the indivisible integrity of the State concerning its territory and nation" (under Article 16 of the rules of the National Assembly).[83] In addition, a systematic designation of opposition politicians as "terrorists" and *ad hominem* attacks by the President – going so far as to describe one opposition MP as "terrorist scum"[84] – or members of the AKP and allied parties contribute to creating a climate of hatred and impunity. These actions belie the integrity of the Government's referral, in its action plans, to high-level political statements on the importance of human rights.[85] Perceived political opponents of the President or the ruling party are thus portrayed as "enemies of the nation", democracy, and human rights. While affirming the importance of human rights and the separation of powers in an abstract manner, the executive deliberately undermines the very essence of these values through threats, insults, and attacks on opposition politicians and others expressing politically disfavoured views, as well as interference in judicial proceedings against them.[86]

66. Finally, the practices of grave acts of violence, torture and other ill-treatment, have reportedly re-emerged in recent years against HDP politicians and their family members, whether by state authorities or private individuals.[87] These acts are encouraged by the

[82] The HDP entered the May 2023 parliamentary elections under the banner of the Green Left Party, due to the risk of closure of the HDP (https://hdp.org.tr/en/we-launched-our-election-campaign-under-the-banner-of-the-green-left-party/17273/). The Green Left Party won 8.83% of 55,836,055 votes (https://www.indyturk.com/secim2023/).

[83] See ECtHR, *Baydemir v. Türkiye*, App. no. 23445/18, Judgment of 13 June 2023.

[84] https://bianet.org/haber/erdogan-threatens-tanrikulu-we-have-a-duty-to-teach-them-the-necessary-lesson-284022

[85] See also, for instance, https://www.dw.com/tr/k%C4%B1l%C4%B1%C3%A7daro%C4%9Flundan-erdo%C4%9Fana-montaj-video-davas%C4%B1/a-65723834; and https://www.diken.com.tr/protokoldeki-kayyim-meselesi-ne-fark-var/

[86] For instance, shortly after the investigation launched against CHP MP Sezgin Tanrıkulu for "insulting the Turkish nation" and "incitement to hatred and enmity among the public" for political statements on television, Erdoğan affirmed that Tanrıkulu's "insults and slanders" would "not go unpunished," that the MP was "hand in hand" with terrorist organisations like the PKK, and that "as a state and as the judiciary, we have a duty to teach them the necessary lesson" (https://www.duvarenglish.com/erdogan-says-chp-mp-tanrikulu-will-be-punished-over-his-remarks-on-turkish-military-news-62978 ; https://bianet.org/haber/erdogan-threatens-tanrikulu-we-have-a-duty-to-teach-them-the-necessary-lesson-284022)

[87] See https://www.indyturk.com/node/448076/haber/i%CC%87smail-saymaz-garibe-gezerin-intihar%C4%B1-ba%C4%9F%C4%B1ra-%C3%A7a%C4%9F%C4%B1ra-geldi; https://bianet.org/haber/lawyers-challenge-suicide-verdict-in-suspicious-death-in-kocaeli-prison-288572; https://bianet.org/haber/beaten-son-of-hdp-deputy-they-beat-me-worse-as-they-knew-i-was-son-of-huda-kaya-180536; https://hdp.org.tr/en/a-police-officer-slaps-co-chair-of-hdps-istanbul-office-and-former-deputy-ferhat-encu/16978/; https://bianet.org/haber/hedep-deputy-

climate of hatred, discrimination, and impunity fostered by the ruling party and has an extremely strong chilling effect on free speech by politicians belonging to pro-Kurdish and minority rights parties. The NGOs recall the Government's positive obligation to create "a favourable environment for participation in public debate of all those concerned, enabling them to express their opinions and ideas without fear, even if they run counter to those defended by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking to the latter".[88] They urge the CM to request information from the authorities concerning any investigations launched on the basis of allegations of human rights abuses committed against these opposition politicians and their families.

IV. RECOMMENDATIONS

67. Developments following the *Demirtaş (no. 2)* group of judgments show not only the continuous repression of pluralism and freedom of political debate and widespread violation of ECHR protected rights, but also a deliberate "purging" of the legislative organ of the state from parliamentarians taking a critical stance towards the Government on the "Kurdish issue". It is crucial for these cases to remain high on the agenda of the Council of Europe institutions and member states in any relations with Türkiye, and their full resolution must be identified as one of the main conditions for maintaining constructive co-operation with the country.

68. Regarding **individual measures**, the NGOs urge the CM to:

i. Call for the immediate release of Selahattin Demirtaş and Figen Yüksekdağ Şenoğlu and indicate that their ongoing detention in any form under criminal proceedings remaining within the scope of the ECtHR judgments constitutes a prolongation and entrenchment of the violation of their rights under the Convention, as found by the Court;

ii. Continue to disregard the unsubstantiated and misleading arguments made by the Turkish Government, including those relating to the purported 'new' evidence, and firmly condemn Türkiye's ongoing attempts to avoid executing the judgments;

iii. Use all legal, political, and diplomatic tools designated in the Convention system to ensure their immediate release, including the initiation of infringement proceedings against Türkiye under Article 46(4) of the Convention in the event that they remain in detention, as well as efforts to ensure the direct and continuing engagement, through all available channels, by member states, the Secretary General, the PACE, and all other Council of Europe institutions; and

iv. Emphasise that *restitutio in integrum* requires:

sinan-ciftyurek-reports-armed-threat-288321; and https://stockholmcf.org/turkish-mob-boss-threatens-rights-advocate-mp-over-criticism-of-far-right-party-leader/

[88] ECtHR, *Dink v Turkey*, Apps no. 2668/07 and others, Judgment of 14 September 2010, §137.

- Annulling criminal proceedings initiated during the applicants' terms in office pursuant to the constitutional amendment of 2016 lifting their parliamentary immunity, or based on the same or a similar context as examined by the Court;
- Annulling new sets of proceedings based on these proceedings; and
- Annulling other criminal proceedings based on the applicants' political activities and speeches, where these relate to the same factual or a similar context as examined by the Court.

69. Regarding **general measures**, the NGOs call on the CM to urge the Government to:

i. Secure the annulment of criminal proceedings initiated during all other parliamentarians' terms in office based on the unforeseeable and arbitrary lifting of their parliamentary immunity by the constitutional amendment of May 2016 or by the judicial authorities;

ii. Ensure that the judicial authorities implement the jurisprudence of the Constitutional Court precluding decisions by the judiciary to set aside parliamentary inviolability;

iii. End the judicial authorities' widespread practice of issuing summaries of proceedings (*fezleke)* requesting Parliament to lift parliamentarians' inviolability based on their exercise of Convention rights;

v. Take concrete steps to ensure that the legal safeguards protecting opposition politicians' freedom of expression, particularly parliamentary non-liability under Article 83(2) of the Constitution and the ECtHR jurisprudence on freedom of expression, are genuinely and effectively applied by judicial – including prosecutorial – authorities in the application and interpretation of anti-terrorism legislation (including Articles 216, 299, 301, and 314 of the Turkish Criminal Code and Articles 6 and 7 of the Anti-Terror Law), and secure the implementation of the CM's and Venice Commission's recommendations on this issue;

vi. Ensure that remedies and safeguards against arbitrary interferences with the rights of elected representatives and other opposition politicians are effective in practice, including access to the investigation file to challenge pre-trial detention, respect for fair trial rights, implementation of Constitutional Court judgments on parliamentary immunity, and protection of the authority and legitimacy of the Constitutional Court against attacks (notably the criminal complaint against judges of that court pursuant to its *Can Atalay* judgments);

vii. Address other obstacles to opposition politicians' exercise of their elected mandates in a free and safe environment, in line with the "conclusions and spirit" of the *Demirtaş (no. 2)* group judgments, in particular:

   - Provide the CM with information on the steps envisaged to end the "trustee" system, such as repealing Article 38 of Decree Law no. 674 on the appointment of trustees,

and to allow elected local representatives to freely exercise their functions after the March 2024 local elections;

- Ensure the cessation of the proceedings seeking the closure of the HDP and a political ban on hundreds of its members, which rely on the legitimate exercise by HDP politicians of their Convention rights, on their lawful and non-violent political activities, and on evidence already examined by the ECtHR in the *Demirtaş (no. 2)* group judgments and found to be protected under the Convention;
- Amend Article 16 of the National Assembly to bring it in line with Convention obligations on freedom of expression, by ensuring that parliamentarians may not be sanctioned for their political statements unless these statements constitute incitement to hatred, violence, or intolerance, within the meaning of the ECtHR's jurisprudence;
- Refrain from *ad hominem* verbal attacks, threats, or intimidation against opposition politicians and from exercising covert or overt influence over criminal proceedings, including through public comments designating named politicians as "terrorists" who must be "punished" based on their expression of political opinion, including that consisting of criticism of state policies; and
- Conduct independent, impartial and thorough investigations any verbal or physical violence against Kurdish politicians and their families, as well as other opposition politicians, in line with the authorities' positive obligations under the Convention, and provide information to the CM on investigations, prosecutions, and convictions in this respect.

LIST OF DOCUMENTS

Annex 1: Court of Cassation, File no. 2023/12611, Decision of 28 September 2023.

Annex 2: Court of Cassation, File no. 2023/12611, Decision of 8 November 2023.

Annex 3: Court of Cassation, File no. 2023/12611, Decision of 3 January 2024.