**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application Nos.: 14305/17, 14332/17, 24585/17, 25445/17, 25453/17, 25462/17, 25463/17, 25464/17, 31033/17, 36268/17, 39732/17, 41087/17**

**B E T W E E N :**

**SELAHATTIN DEMİRTAŞ**
**FIGEN YÜKSEKDAĞ ŞENOĞLU**
**İDRİS BALUKEN**
**BESIME KONCA**
**ABDULLAH ZEYDAN**
**NIHAT AKDOĞAN**
**SELMA IRMAK**
**FREHAT ENCÜ**
**GÜLSER YILDIRIM**
**NURSEL AYDOĞAN**
**ÇAĞLAR DEMİREL**
**AYHAN BİLGEN**

**Applicants**

**- v –**

**TURKEY**

**Respondent Government**

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**THIRD-PARTY INTERVENTION SUBMISSIONS ON BEHALF OF ARTICLE 19 AND HUMAN RIGHTS WATCH**

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## INTRODUCTION

1. The present applications concern the removal of parliamentary immunity and the arrest and pre-trial detention of the Applicants, each of whom are or were a serving member of the Turkish Grand National Assembly ('*the Assembly*'). By leave of the President of the Court, as set out in the letter dated 28 September 2017, this third-party intervention is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression ('*ARTICLE 19*') and Human Rights Watch ('*HRW*'), hereafter 'the Interveners'.

2. The Interveners welcome the opportunity to act as Third Parties in these applications because they consider them of importance, representing the first opportunity for the Court to examine the compatibility with the Convention of measures which were taken against opposition parliamentarians both before and after the attempted coup in 2016 in Turkey.

3. ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression and the right to freedom of information. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends, and develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression, nationally and globally.

4. HRW is a non-profit, non-governmental human rights organisation working in over 90 countries around the world to defend human rights. Established in 1978, HRW is known for its accurate fact-finding, impartial reporting, effective use of media, and targeted advocacy, often in partnership with local human rights groups.

5. In these submissions, the Interveners draw on their experience and expertise to address the following: (i) the importance of and proper approach to the right to freedom of expression for parliamentarians; (ii) the context to the lifting of parliamentary immunity in Turkey in April 2016; (iii) the arbitrary use of criminal law, including terrorism laws, to seek to silence dissenting voices over many years in Turkey and especially since July 2016.

6. In particular, the Interveners make the following submissions:
   - 6.1. Measures or actions which prevent or make it harder for elected MPs to speak or vote in parliament interfere with Article 10 and Article 3 of Protocol No. 1;
   - 6.2. Measures or actions taken against opposition MPs call for the closest scrutiny by the Court;
   - 6.3. The Constitutional Amendment of May 2016, lifting parliamentary immunity in Turkey, itself violates Articles 10, 11 and Article 3 of Protocol No. 1;
   - 6.4. The prosecutions and pre-trial detention of the Applicants engage Article 10 and Article 3 of Protocol No.1 in two ways. First, the Interveners understand that many of the prosecutions brought relate to acts of expression including those connected to the exercise of office by elected representatives. Second, the pre-trial detention of MPs prevents them from availing themselves of their parliamentary seat and consequently speaking and voting in parliament. The Interveners accordingly invite the Court to give the closest scrutiny to both aspects of each Application.

## IMPORTANCE OF AND PROPER APPROACH TO FREEDOM OF EXPRESSION OF PARLIAMENTARIANS

General principles

7. The Interveners endorse the importance the Court places on freedom of expression as one of the essential foundations of a democratic society,[1] and as a guarantee to the maintenance and promotion of a democratic system and society, which includes pluralism, tolerance and broadmindedness.[2]

8. Freedom of expression is accordingly of particular importance for members of parliament, this being "political speech *par excellence"*.[3] As the Court said in *Castells v Spain, "while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament… call for the closest scrutiny on the part of the court.*"[4] This has been reiterated in a large number of Chamber decisions,[5] as well as by the Grand Chamber.[6]

9. Similarly, the Inter-American Court of Human Rights has held that "*opposition voices are essential in a democratic society; without them it is not possible to reach agreements that satisfy the different visions that prevail in society. Hence, in a democratic society States must guarantee the effective participation of opposition individuals, groups and political parties by means of appropriate laws, regulations and practices that enable them to have real and effective access to the different deliberative mechanisms on equal terms, but also by the adoption of the required measures to guarantee its full exercise, taking into consideration the situation of vulnerability of the members of some social groups or sectors."*[7]

10. In determining the application of Article 10 of the Convention to the facts of these cases, the Interveners submit that any analysis must rest on the above foundational principles. The Interveners also recall that the Court has emphasised the inter-related and inter-dependent nature of Article 10 and the rights pertaining to standing for election, protected by Article 3 of Protocol No. 1, including the right of an elected parliamentarian to take up their office in the legislature.[8] The Interveners submit that measures or actions that interfere with elected representatives' exercise of office in parliament necessarily also engage Article 3 of Protocol No. 1.

Voting in parliament is a form of expression that should be explicitly protected by Article 10

11. The right to freedom of expression covers a wide range of expression, not just speech and written text but other less usual media that conveys opinions and ideas.[9] The Court explicitly notes that *"[a]n assessment of whether an impugned form of conduct falls within the scope of Article 10 of the Convention should not be restrictive, but inclusive*."[10]

12. In *Murat Vural v Turkey*, the Court reviewed the many and various forms of expression that fall within the scope of Article 10,[11] noting that the article protects the form in which ideas

and information are conveyed (§44) and that opinions may be expressed through conduct (§47). In assessing whether a certain act or form of conduct falls within the ambit of Article 10 "*an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the intention of the person performing the act or engaging in the conduct in question*."[12]

13. Accordingly, it is submitted that in Parliament, not only do parliamentarians' speeches themselves engage Article 10 of the Convention, but so too, *a fortiori*, does a parliamentarian's act of voting for or against or abstaining from voting in Parliament. Indeed, it is difficult to conceive of a more quintessential form of political expression than voting in parliament, save the right to vote in elections, which is included in the *lex specialis* of Article 3 of Protocol No.1. It is also submitted that, as Article 3 of Protocol No. 1 protects not just the right to stand for election to the legislature, but to exercise the office if elected,[13] the choice and act of voting in parliament is an intrinsic aspect of the exercise of that office. As far as the Interveners are aware, the Court has never had the opportunity to make either of these submissions clear in its case-law and the Interveners invite the Court to do so.

14. Further, whilst practical matters, such as timetabling, may justifiably interfere with parliamentarians' ability to speak in parliamentary debate, restrictions directly on their ability to vote, to signify their view on the topic under discussion, are, it is submitted, generally much harder to justify.

Immunities

15. In *Kart v Turkey,* the Grand Chamber conducted a comprehensive comparative survey of the scope of parliamentary immunity.[14] As the Grand Chamber held, "*the long-standing practice for States generally [is] to confer varying degrees of immunity on parliamentarians"*.[15] This "*pursues the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary. Different forms of parliamentary immunity may indeed serve to protect the effective political democracy that constitutes one of the cornerstones of the Convention system, particularly where they protect the autonomy of the legislature and the parliamentary opposition."* In relation to the principle of inviolability however, this "*is not a personal privilege for the benefit of the MP but rather a privilege linked to his or her status, which is why it cannot be waived by the beneficiary."*[16]

16. This is further explained in the Venice Commission's Report on the Scope and Lifting of Parliamentary Immunities which concludes that "*the existence of rules on parliamentary immunity is first and foremost based on the need to protect the principle of representative democracy. Such immunity can be justified to the extent that it is suitable and necessary in order to ensure that the elected representatives of the people are effectively able to fulfil their democratic functions, without fear of harassment or undue interference from the executive, the courts and political opponents. This is particularly important with regard to the parliamentary opposition and political minorities*." [17]

17. As likewise stated in the European Parliament's JURI Committee's in-depth analysis of Parliamentary immunity in a European context, *"[h]istorically, parliamentary immunity as a*

*legal institution has been introduced to shield the legislature from, in particular, the executive. This was necessary at times when the role and powers of parliaments was still frequently a matter of fierce – and sometimes violent – dispute. However, the independence of parliament also had to be asserted vis-à-vis the judiciary, which often was (and in some legal systems still is) institutionally linked to the executive, or can be instrumentalized in politically motivated legal action. While in well-functioning modern democracies the likelihood of political trials against members of parliament is significantly lower than at the various points in time at which parliamentary immunity developed in different European legal systems, there is still consensus that parliamentary immunity is an important element of the separation of powers and part of a system of checks and balances."* [18]

18. Whilst the wider the immunity conferred, particularly where it goes beyond parliamentary business, the more difficult it may be to justify,[19] in particular contexts, such as those that pertain in Turkey at present, in which the relative institutional power of the executive is very strong compared to the Assembly and there is evidence that such power is used to bring politically motivated legal action stifling opposition activity, such immunity may be justified.

19. In the context of Article 6, it has been said that, as a parliamentary matter, the regulation of parliamentary immunities enjoys a wide margin of appreciation and that the creation of exceptions on an individualised basis seriously undermines the legitimate aims pursued by such an immunity.[20] Exceptions created *de facto* or *de jure* by the executive do likewise. Specifically, they undermine the separation of powers and are likely to have a chilling effect on the free expression of those who oppose the government. The Interveners accordingly submit that the lifting of a parliamentary immunity may itself amount to an interference with Article 10 of the Convention, as well as Article 3 of Protocol No.1.

20. A possible consequence of the lifting of parliamentary immunity in respect of an individual parliamentarian is that s/he may be prosecuted. It is well established in the case law of the Court that steps taken in pursuance of a prosecution – arrest, pre-trial detention, search of property etc. – may amount to an interference with Article 10 where that is the result of the individual's exercise of expression.[21] Whilst this will be most clearly so in relation to prosecutions themselves brought because of the exercise of expression, the Interveners submit that this will also be the case where:
    20.1. the measures have, as their intention or outcome, a chilling effect on the free expression of elected representatives, in particular those who are critical of the government;[22] and
    20.2. the measure in question – most obviously pre-trial detention – denies elected parliamentarians their ability to speak and, importantly, to vote in parliament.

**PARLIAMENTARY IMMUNITY IN TURKEY**

21. Freedom of expression and association, in particular by opposition politicians, has long been a concern in Turkey. The Court's voluminous jurisprudence on this issue bears that out.[23] Indeed, as HRW has noted, "*[t]he jailing of the party leaders and members of parliament constitutes an alarming interference with the party's parliamentary work…reminiscent of the situation in 1994 when the immunity of Democracy Party (DEP) members of parliament was*

*lifted and Leyla Zana, Orhan Doğan, Hatip Dicle, and Selim Sadak were jailed days later on terrorism charges, spending a decade in jail. They were convicted of membership of an armed group in a trial the European Court of Human Rights ruled was unfair and violated their rights.*"[24]

22. The provisions of the Turkish Constitution relating to immunity and the relevant rules of procedure are set out at §§31-32 of *Kart v Turkey*.[25] In short, a request is made to the Assembly by prosecutors or the court, which is then considered up to three times. First, a sub-committee of the Joint Committee of the Assembly ('*the JCA*') considers the request and submits a report to the JCA within a month. Second, the JCA debates the report and has to conclude its own report within a month, requesting either that the investigation into the deputy be suspended until the end of the deputy's term of office, or his or her immunity be lifted. Third, the Assembly considers and votes upon the request in plenary session. Two aspects of this process are of particular note: (i) the deputy concerned has the right to be heard before a sub-committee, the JCA and the plenary; and (ii) the process and decision-making is retained entirely within the Assembly, independent of the executive.

23. On 7 June 2015, Turkey held a general election in which, *inter alia*: (i) the Peoples' Democratic Party ('*HDP*') obtained over 10% of the vote and were accordingly entitled to 80 seats in Parliament; and (ii) the ruling AKP party lost its parliamentary majority. The debate over parliamentary immunities began shortly after this election and continued after the AKP failed to regain its majority in a snap election on 1 November 2015 and in which the HDP obtained 59 seats.

24. On 12 April 2016, the AKP proposed an amendment ('*Provisional Article 20*') to the Constitution in relation to the lifting of parliamentarians' immunities.[26] The proposed amendment:
    24.1. provided for the lifting of Parliamentary immunity in respect of all alleged offences for which the Prosecutor or the courts chose to submit a file regarding the lifting of parliamentary immunity on a date then to be appointed. To that extent, the decision as to which parliamentarians' immunities were lifted was transferred by the Assembly wholly to the executive; and
    24.2. removed all procedural safeguards from the process, and in particular the right of the particular parliamentarian to be heard. The lifting of parliamentary immunity became, for those individuals concerned, automatic.

25. Provisional Article 20 entered into force on 20 May 2016 and all applicable files were sent to the prosecuting authorities for action by the Assembly on or by 4 June 2016. In January 2016, there were 22 Deputies with 330 dossiers presented against them pursuant to Article 83 of the Constitution.[27] By the time Provisional Article 20 (*or, 'the Amendment'*) was laid before Parliament on 12 April 2016, this had increased to about 560 dossiers. Between 12 April 2016 and 20 May 2016, the number of dossiers before the Assembly increased by another 38% from about 560 to 771. By the deadline for filing dossiers at the Assembly, there were 667 dossiers, of which 405 related to 50 (of 59) HDP deputies.

26. The General Preamble to the Amendment sets out that its purpose is to address public indignation about "*statements of certain deputies consisting of emotional and moral support to terrorism, the de facto support and assistance of certain deputies to terrorists and the calls for violence by certain deputies."* Its stated intent was thus expressly to enable prosecutions in respect of, *inter alia,* forms of expression. This is borne out by the types of prosecutions brought as a result of the Amendment. In respect of the two HDP leaders for example:
    26.1. Figen Yüksekdağ Şenoğlu's conviction for "spreading terrorist propaganda" was brought on the grounds that in November 2013, she attended a militant's funeral at which some crowd members shouted slogans.
    26.2. Likewise, the alleged evidence cited against Selahattin Demirtaş consists mainly of his speeches. There is also voluminous wiretap evidence of speech and conversation used to suggest an association with the Democratic Society Congress, which is alleged to be part of the PKK/KCK. As HRW notes, however, while there is reference to Demirtas' utterances, "*none of the information seems to point to anything approaching criminal activity.*"[28]

27. As far as the Interveners are aware, international commentary on Provisional Article 20 has been universally condemnatory. The Interveners would draw the Court's attention to the following by Council of Europe institutions:
    27.1. The Venice Commission's *Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution* states:

    *80. The constitutional amendment…was an* ad hoc, "*one shot"* ad hominem *measure directed against 139 individual deputies for cases that were already pending before the Assembly. Acting as the constituent power, the Grand National Assembly maintained the regime of immunity…for the future but derogated from this regime for specific cases concerning identifiable individuals while using general language. This is a misuse of the constitutional amendment procedure.*

    *81. The argument that dealing one by one with the cases against these deputies would have taken too long and would have unduly burdened the agenda of the Grand National Assembly is not convincing. Instead of simplifying the procedure of lifting immunity, the complex system was maintained but it was derogated for 139 deputies. The heavy workload of the Grand National Assembly does not justify singling out the cases relating to these deputies from all other cases brought before it before and after the adoption of the Amendment. This violates the principle of equality. In the opinion of the Commission, the system of parliamentary immunity in Turkey should not be weakened, but reinforced, in particular in order to ensure the freedom of speech of Members of Parliament.* [29]

    27.2. The Parliamentary Assembly's Resolution on *The functioning of democratic institutions in Turkey* provides:

    *10. The Assembly is in particular concerned about the stripping of the immunity of 154 members of parliament (MPs) in May 2016… It further condemns the ongoing detention of 12 parliamentarians since November 2016, and is dismayed by the requests from the Public Prosecutor's Office for respectively 142 years and 83 years of imprisonment for the People's Democratic Party (HDP) co-chairs, Selahattin Demirtaş and Figen Yüksekdağ.*

    *11. The Assembly concludes, with great concern, that such lifting of immunity has seriously undermined the democratic functioning and position of the parliament. In addition, this decision has disproportionally affected the opposition parties and in*

*particular the HDP, with 55 out of 59 (or 93%) of its members stripped of their immunity. This has had a deterrent effect and led to serious restrictions to democratic debate in the run-up to the constitutional referendum of 16 April 2017 to establish a presidential system. It also paved the way for the arrest and the current detention of 12 HDP MPs, including the two co-chairs of the party, and also the arrest of hundreds of HDP officials, which has rendered the party inoperative. The Assembly deeply regrets that its delegations were repeatedly denied access to these detained parliamentarians."*[30]

27.3. Likewise, the Commissioner for Human Rights, in his *Memorandum on Freedom of Expression and Media Freedom in Turkey* has stated that: *"In the current climate, the Commissioner considers that the lifting of the immunities of MPs and their subsequent arrest and detention not only disenfranchised millions of voters, but sent an extremely dangerous and chilling message to the entire Turkish population, and significantly reduced the scope of democratic debate, including on human rights."*[31]

28. The Interveners submit that Provisional Article 20 itself violates the rights to freedom of expression and association for the following reasons, and the Court should take this into account in determining whether the applicants' detention amounts to an unjustified interference with Article 10 of the Convention, as well as Article 11 and Article 3 of Protocol No. 1:

28.1. The Amendment permits the executive branch of government to decide to whom it applies. It is easy to see how this may have, and how in these cases it did have, a disproportionate effect on members of the opposition. Virtually all of the HDP's deputies (55 out of 59) had their immunity lifted. The potential for greater impact on the opposition is plainly capable of chilling free speech, in that it is entirely foreseeable that (i) there will be self-censorship; (ii) there will be (as here) criminal proceedings brought against, in particular, opposition members in respect of things they have said and other forms of expression, thus delegitimising the validity of their expression rights and, more practically, preventing them from speaking in and, no less importantly, voting in parliament, if subject to pre-trial detention or custodial sentences. The Amendment itself therefore amounts to an interference with Articles 10 and 11 of the Convention and Article 3 of Protocol No. 1.

28.2. Whilst provided for in law, the Interveners consider that the Amendment fails to meet the tests of foreseeability and the requirements of the rule of law. In particular, the Amendment is *ad hoc* and *ad hominem* and hands decision-making power as to whose immunity shall be lifted to executive agencies while simultaneously removing the right to be heard from the process.

28.3. The Interveners further consider that the Amendment is not "necessary in a democratic society". In particular:

28.3.1. In a political and historical context such as Turkey, where democratic structures and the system of democracy have been repeatedly under threat, the need for parliamentary immunity is eminently justifiable and indeed arguably necessary for the protection of free speech in the course of exercising the rights of an elected member of parliament, especially one from the opposition.

28.3.2. At the same time, in certain cases there may be a need to lift such immunities where, for example: (i) there is objective evidence of a crime having been

committed; (ii) the prosecution of that crime will not itself amount to a disproportionate interference with Article 10; (iii) the Assembly (not the executive) itself considers the desirability of bringing a prosecution outweighs the maintenance of the immunity in that particular case; and (iv) the process provides appropriate procedural safeguards from abuse, including in particular the right of a parliamentarian to put his or her defence.

28.3.3. The Amendment hands the power to decide which parliamentarians' immunities should be lifted to the executive, meaning that this is not simply a parliamentary matter in respect of which a wide margin of appreciation is applicable, as envisaged in previous jurisprudence.[32]

28.3.4. The fact that the applicants' immunities were lifted simply by the submission of a file by the executive, without any necessary consideration, and in particular consideration by the Assembly, of the nature of the charges brought or proposed to be brought (including their compatibility with Article 10 of the Convention), and the evidence in support of those charges, is demonstrative of the fact that the Amendment at issue goes beyond what is necessary in a democratic society.

## ARBITRARY USE OF THE CRIMINAL LAW SINCE JULY 2016

General principles

29. The Court will recall that both criminal laws and prosecutions may, even if such a prosecution is abandoned or discontinued, amount to an interference with Article 10.[33] Indeed, legislation which suppresses the expression of specific types of opinion, leading the potential 'perpetrators' to self-censor, can amount to interference with freedom of expression.

30. In the specific context of the fight against terrorism, Johannesburg Principle[34] 1.2 provides that "*Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest."*[35] Likewise, Johannesburg Principle 8 provides that expression which only transmits information from or about an organisation that a government has declared threatens national security must not be restricted. As the Court has held in the context of Turkey:
"*While the Court does not underestimate the difficulties to which the fight against terrorism gives rise, it considers that that fact alone does not absolve the national authorities of their obligations under Article 10 of the Convention. Accordingly, although freedom of expression may be legitimately curtailed in the interests of national security, territorial integrity and public safety, those restrictions must still be justified by relevant and sufficient reasons and respond to a pressing social need in a proportionate manner."*[36]

31. Deprivation of liberty pursuant to pre-trial detention in relation to charges brought for the exercise of freedom of expression is a "*real and effective constraint*" on Article 10 of the Convention.[37] No final conviction is necessary.[38] Moreover, the pre-trial detention of parliamentarians, particularly those in opposition, may have draconian effects on freedom of political expression and rights of representation, because it prevents the individual from speaking and, *a fortiori*, voting in the Assembly on legislative and constitutional measures. Accordingly, such detention may prevent an opposition parliamentarian from representing his

electorate, drawing attention to their preoccupations and from defending their interests and it therefore "*calls for the closest scrutiny*".[39]

32. A breach of Article 18 of the Convention occurs where an applicant proves, "*the real aim of the authorities was not the same as that proclaimed"*[40] Pre-trial detention has been found to fall foul of Article 18 on a number of occasions where it has been used for a purpose other than that contained in Article 5(1)(c).[41] Such a violation will be found, *inter alia*, where (i) there is a general context of increasingly harsh and restrictive legislative regulation; (ii) statements by high-ranking officials and state media are indicative of the real aim; and (iii) whether a pattern has emerged where individuals are targeted in similar terms.[42]

The situation post-*coup*

33. On 15 July 2016, an attempted *coup* took place. It is the Interveners' view that the Turkish government has misused legitimate concerns about the attempted *coup* to redouble its already significant crackdown on human rights, including on freedom of expression, particularly by opposition or dissenting persons, in ways that are wholly unjustified under international law.

34. In particular, the use of presidential decrees, permissible by virtue of the (presidentially declared) state of emergency, has, as set out in HRW's report on the crackdown, [43] enabled:
    34.1. the take-over of local government where opposition parties were in power;
    34.2. the arrest – as of March 2017 - of over 5,000 HDP party officials, including its heads of provincial and district branches, of whom 1,482 were in pre-trial detention;
    34.3. the closure of media organisations; and
    34.4. the arrest and detention of myriad journalists and human rights workers.

35. As the Interveners (and others) have previously said, "*[a] paradigm example of a situation where a State has decided to undermine human rights protections would include the mass closure of civil society organisations, the reintroduction of incommunicado detention and torture, the shutdown of newspapers, radio stations and TV channels critical of the Government and the imposition of censorship of the internet. That is the situation in Turkey now, where arbitrary detention of individuals, including journalists, critical of the State is also commonplace*."[44] One aspect of this post-*coup* hostile environment is the arbitrary and/or lack of evidential basis put forward to support an indictment. This can be seen in multiple post-coup cases against journalists and human rights defenders that the Interveners have worked or reported on,[45] and the cases at issue in these applications fall into this category.

Offences and Prosecutions

36. The prosecutions in these cases are based on offences in Turkish law such as "*praising a crime and a criminal*", "*inciting people to hatred and enmity*", "*insulting a public officer*", "*terror propaganda*", "*violating anti-terror law*" and "*insulting the president*", which can be charged simply on the basis of protected acts of expression. For example, under Turkish law, the mere expression of support of a group deemed a terrorist organisation, can and is prosecuted as aiding and abetting. HRW has examined the indictments. It its view, the "*evidence cited in the indictments consists mainly of political speeches rather than any conduct that could reasonably support charges of membership of an armed organization or*

*separatism*."[46] These laws are, we submit, overly broad and do not accord with either Johannesburg Principle 1.2 or 8 or Article 10 of the Convention.

37. Further to the examples given above at paragraph 26, we note that the charge brought against Nihat Akdoğan (no.25462/17) of "*making the propaganda of a terrorist organisation*" relates to a question asked by Akdoğan in the Assembly to the Minister of the Interior about the fate of allegedly smuggled property seized from shop owners by the police in raids in 2015. Likewise, the Interveners understand that the charges in relation to the same offence brought against Selahattin Demirtaş (no.14305/17) and İdris Baluken (no.24585/17) relate to simply using the words "*Kurds*" and "*Kurdistan*".

38. We would invite the Court to give careful consideration under Article 10 to each of the offences charged and in particular whether: (i) the offences themselves are sufficiently precise in their terms and implementation to be foreseeable and accordingly "prescribed by law"; and (ii) whether the prosecution of each of the offences charged is itself "necessary in a democratic society" as it appears to the Interveners that in many cases they are not. We would furthermore invite the Court to consider whether the prosecutions are brought for an improper purpose contrary to Article 18.

Detention

39. The applicants' detention goes beyond the democratic principles in play under Article 5(1), namely the protection of the individual against arbitrary interference with his or her right to liberty[47] and we therefore invite the Court to consider the applicants' detention under Articles 10 and 11 of the Convention and Article 3 of Protocol No. 1.

40. First, the Interveners understand that in respect of certain types of crimes – "catalogue crimes" – pre-trial detention is mandatory. This includes terrorism-related offences. It is submitted that such a blanket rule, especially in the context of the detention of opposition parliamentarians, is disproportionate.

41. Secondly, the pre-trial detention of the applicants has prevented them from engaging in debate, campaigning on or voting in the Assembly on, *inter alia*, the following:
    41.1. The wide-ranging constitutional amendments passed by the Assembly on 11 January 2017 and put to a referendum on 16 April 2017, moving Turkey to a presidential system of government, constituting the greatest change to its political institutions since 1946.[48]
    41.2. Debating and campaigning on the three-monthly decisions by the National Security Council and cabinet to extend the state of emergency declared after the *coup*;
    41.3. Debating and voting on the 24 September 2017 extension of the authority for the government to pursue military action in Iraq and Syria for a further year.

42. Further, in light of all of the above, it is submitted that these Applications disclose breaches of Article 18 of the Convention. When examined in detail, the affidavits against the Applicants do not disclose any proper basis for their prosecution. The Interveners invite the Court to infer, therefore, that their prosecutions have been brought to silence the political opposition in Turkey.

**CONCLUSION**

43. As set out above, the Interveners submit that these applications provide the first opportunity, to consider the application of Articles 10 and 11 of the Convention, and Article 3 of Protocol No. 1, in the context of the disapplication of parliamentary immunities and the prosecutions and pre-trial detention arising from such disapplication. The Interveners accordingly invite the Court to apply the strictest of scrutiny to the measures taken against each of the Applicants and to find that the Amendment itself violates Articles 10 and 11 of the Convention as well as Article 3 of Protocol No. 1.

**PAUL SKINNER**
**Matrix Chambers**

**Gabrielle Guillemin**
**ARTICLE 19**

**Aisling Reidy**
**Human Rights Watch**

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[1] See e.g. *Animal Defenders International v United Kingdom* [GC], no. 48876/08, §100; *Karácsony v Hungary* [GC], no. 42461/13, §132
[2] *Handyside v UK* A 24 (1976); 1 EHRR 737, para 49; *Dudgeon v UK* A 45 (1970); 1 EHRR 149, §53
[3] *Karácsony v Hungary* [GC], no. 42461/13, §137
[4] 23 April 1992, Series A no.236, §42
[5] *Piermont v France*, 27 April 1995, §76ff, Series A no. 314; *Jerusalem v Austria*, no.26958/95, §36, ECHR 2001-II; *Féret v Belgium*, no.15615/07, §65, 16 July 2009; *Otegi Mondragon v Spain*, no.2034/07, § 50, ECHR 2011; *A v United Kingdom*, no.35373/97, §79, ECHR 2002-X; *Cordova v Italy (no. 1)*, no.40877/98, §59, ECHR 2003-I; *Cordova v Italy (no.2)*, no. 45649/99, §60, ECHR 2003-I (extracts); *Zollmann v United Kingdom* (dec.), no.62902/00, ECHR 2003-XII; *De Jorio v Italy*, no.73936/01, §52, 3 June 2004; *Patrono, Cascini and Stefanelli v Italy*, no.10180/04, §61, 20 April 2006; *CGIL and Cofferati v Italy*, no.46967/07, §71, 24 February 2009.
[6] *Karácsony v Hungary* [GC], no. 42461/13, §137, 17 May 2016.
[7] *Manuel Cepeda Vargas v Colombia* (Inter-American Court of Human Rights, Judgment of 26 May 2010), §173
[8] See case law starting with *M. v. the U.K.*, (App. No. 10316/83, Commission decision, reported in D.R. 37, p. 129), *Ganchev v. Bulgaria*, (App. No. 28858/95, Commission decision reported in D.R. 87, p. 130), and *Gaulieder v. Slovakia*, (App. no. 36909/97, Commission's report of 10 September 1999, § 41).
[9] *Güzel v Turkey* (App no. 29483/09, §27, 13 September 2016)
[10] *Murat Vural v Turkey* (no. 9540/07, §52, 21 October 2014); *Güzel v Turkey* (App no. 29483/09, §27, 13 September 2016)
[11] *ibid,* §§44-51
[12] *Ibid,* §54; *Güzel v Turkey* (App no. 29483/09, §28, 13 September 2016)
[13] See e.g *Sadak and others v Turkey (No.2)* § 33 (App. No(s).25144/94, 26149-54/95, 27100-1/95, 11 June 2002).
[14] *Kart v Turkey* [GC] (No 8917/05, §§44-55, 3 December 2009)
[15] *Kart v Turkey* [GC] (No 8917/05, §88, 3 December 2009)
[16] *Kart v Turkey* [GC] (No 8917/05, §97, 3 December 2009)
[17] CDL-AD(2914)011, at paragraph 35
http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e
[18] http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536461/IPOL_IDA(2015)536461_EN.pdf
[19] *Kart v Turkey* [GC] (No 8917/05, §83, 3 December 2009)
[20] *Kart v Turkey* [GC] (No 8917/05, §82, 3 December 2009)

[21] *Döner v Turkey* (no. 29994/02, §85, 7 March 2017)
[22] See *Erdoğdu v Turkey* [GC] (no. 25067/94, §53, 8 July 1999)
[23] E.g. *United Communist Party of Turkey v Turkey* (no.19392/92, 30 January 1998); Socialist Party v Turkey (no.21237/93, 25 May 1998); *Freedom and Democracy Party (ÖZDEP) v Turkey* [GC] (no.23885/94, 8 December 1999); *Sadak v Turkey (No 1)* (no.29900/96, 17 July 2001); *Yazar, Karataş, Aksoy and the People's Labour Party (HEP) v Turkey* (no.22723/93, 9 April 2002); *Refah Partisi v Turkey* (no.41340/98, 13 February 2003); *HADEP and Demir v Turkey* (no.28003/03, 14 December 2010; *Party for a Democratic Society (DTP) v Turkey* (no. 3870/10, 12 January 2016); *Cumhuriyet Halk Partisi v Turkey* (no. 19920/13, 26 April 2016)
[24] https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition The case referred to is *Sadak v Turkey (No 1)* (no.29900/96, 17 July 2001)
[25] No 8917/05, December 2009
[26] https://www.tbmm.gov.tr/kanunlar/k6718.html
[27] https://www.birgun.net/haber-detay/biri-dugmeye-basti-meclis-e-fezleke-yagdi-111077.html
[28] https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition
[29] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)027-e
[30] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)027-e
[31]https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2961658&SecMode=1&DocId=2397056&Usage=2
[32] *A v United Kingdom* (no.35373/97, §88, 17 December 2002); *Kart v Turkey* (no 8917/05, §82, 3 December 2009)
[33] *Dilipak v Turkey* (no. 29680/05, §§40-50, 15 September 2015); *Altuğ Taner Akçam v Turkey* (no. 27520/07, §§ 70-75, 25 October 2011); *Döner v Turkey* (no. 29994/02, §§85-89, 7 March 2017).
[34] The Johannesburg Principles authoritatively interpret international human rights law in the context of national security-related restrictions on freedom of expression.
[35] https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf
[36] *Döner v Turkey* (no. 29994/02, §102, 7 March 2017)
[37] Şik v Turkey (no. 53413/11, §85, 8 July 2014); *Nedim Şener* (no.38270/11, §96, 8 July 2014)
[38] *Dilipak v Turkey* (no. 29680/05, §§40-50, 15 September 2015); *Altuğ Taner Akçam v Turkey* (no. 27520/07, §§ 70-75, 25 October 2011); *Döner v Turkey* (no. 29994/02, §§85-89, 7 March 2017).
[39] *Karácsony v Hungary* [GC], no. 42461/13, §137, 17 May 2016
[40] *Khordokovskiy v Russia* (no.11082/06, §899, 25 July 2013)
[41] E.g. *Merabishvili v Georgia* (no.72508/03, §106, 21 February 2006); *Lutsenko v Russia* (no.6492/11, §108, 3 July 2012); *Tymoshenko v Ukraine* (no.49872/01, §§299-301, 30 April 2013); *Cerbotari v Moldova* (no.35615/06, §53, 13 Nov. 2007); *Mammadov v Azerbaijan* (no.15172/13, 22 May 2014); *Jafarov v Azerbaijan* (no.69981/14, 17 March 2013)
[42] *Jafarov v Azerbaijan* (no.69981/14, §§159-162, 17 March 2013)
[43] https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition. A number of independent organisations have been monitoring Turkey in recent months and have produced a large amount of publically available information.
[44] See the written intervention of PEN International, ARTICLE 19, the Committee to Protect Journalists, the European Centre for Press and Media Freedom, the European Federation of Journalists, Human Rights Watch, Index on Censorship, the International Federation of Journalists, the International Press Institute and Reporters Without Borders in *Deniz Yücel v Turkey* (no. 27684/17) and others.
[45] See, domestically, the prosecutions brought against Ahmet and Mehmet Altan (https://www.article19.org/resources.php/resource/38799/en/turkey:-article-19-submits-expert-opinion-in-the-case-of-brothers,-ahmet-and-mehmet-altan)
and that against human rights defenders (on which see https://www.hrw.org/news/2017/10/27/civil-society-trial-turkey)
[46] https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition
[47] See, *inter alia*: *Guzzardi v Italy (*6 November 1980, §92, Series A no. 39); *A v the United Kingdom* [GC], (no. 3455/05, §§ 162-164, 19 February 2009); *Creangă v Romania* [GC] (no. 29226/03, §84, 23 February 2012).
[48] On the significance of these amendments, see https://www.hrw.org/news/2017/04/04/questions-and-answers-turkeys-constitutional-referendum