

DGI - Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the ECHR
F-67075 Strasbourg Cedex France
E-mail: dgi-execution@coe.int

Sent by e-mail

23 July 2021

Submission by ARTICLE 19, Human Rights Watch, the International Commission of Jurists, the International Federation for Human Rights and the Turkey Human Rights Litigation Support Project to the Council of Europe Committee of Ministers, pursuant to Rule 9.2 of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments on the implementation of *Selahattin Demirtaş v. Turkey (No.2)* (Application no. 14305/17) Grand Chamber judgment.

I. Introduction

- 1.** On 22 December 2020, the Grand Chamber of the European Court of Human Rights ("ECtHR") found in its landmark *Selahattin Demirtaş v. Turkey (No. 2)* judgment that Turkey violated Articles 5(1) and (3) (the right to liberty), Article 10 (freedom of expression), Article 3 of Protocol No. 1 (the right to free elections) and Article 18 (restrictions on rights for an unauthorised purpose) in conjunction with Article 5 of the European Convention on Human Rights ("the Convention"). In its judgment, the Grand Chamber explicitly ruled that Turkey must take all the necessary measures to secure Mr. Demirtaş's immediate release, and held that "the continuation of his pre-trial detention, on grounds pertaining to the same factual context, would entail a prolongation of the violation of his rights as well as a breach of the obligation on the respondent State to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention" (paragraph 442).
- 2.** In its decision of 11 March 2021, the Committee of Ministers ("CM") followed the Court in calling for Mr. Demirtaş's immediate release and, in addition, decided that the obligation of *restitutio in integrum* required that all negative consequences of the violation be eliminated by Turkey without delay.¹
- 3.** Despite the Court's clear order under Article 46 to release the applicant and the CM's call in its 11 March 2021 decision, Mr. Demirtaş remains in detention, and the Turkish authorities continue to defy the Court's judgment by failing to comply with it, and to ensure *restitutio in integrum* with respect to all the Court's findings of violations.
- 4.** This submission draws to the attention of the CM the Government of Turkey's failure to ensure Selahattin Demirtaş's immediate release in compliance with the ECtHR's judgment and the CM's 11 March 2021 decision. It provides an analysis of the criminal proceeding brought against Mr. Demirtaş before the İstanbul 26th Assize Court under which he was convicted for 'propagandising for a terrorist organisation' pursuant to Article 7(2) of the Prevention of Terrorism Act. It maintains that the scope of the ECtHR's judgment fully covers Mr. Demirtaş's ongoing detention, both as a convict (in relation to the criminal proceeding before the İstanbul 26th Assize Court) and a pre-trial detainee (in relation to the criminal proceeding pending before the Ankara 22nd Assize

¹ CM decision, 1398th meeting (DH) 9-11 March 2021 - H46-40 *Selahattin Demirtaş v. Turkey (No. 2)*

Court). The submission concludes by offering concrete recommendations to the CM including the triggering of infringement proceedings.

II. Continuing failure of Turkey to execute the individual measure to release Selahattin Demirtaş

5. The Turkish Government has sought to argue before the CM that Mr. Demirtaş's detention following the Ankara 19th Assize Court's release order on 2 September 2019 falls outside of the scope of the Grand Chamber judgment. With respect to this, we submit that this argument is wholly without merit, and no more than another effort to circumvent the Court's judgment.
6. The CM decided on 11 March 2021 that the Government's arguments "[had] been already examined and rejected by the Court."² Underlining the Court's conclusion in relation to Article 46(1) of the Convention (see paragraph 1 above), the CM urged the Turkish authorities "to ensure the applicant's immediate release."³
7. Information provided to the CM by Mr. Demirtaş's lawyers on 17 May 2021 clearly indicates that, despite these calls, Mr. Demirtaş continues to be detained in connection with facts that led the Grand Chamber to make findings of multiple violations of the Convention. On 16 March and 20 April 2021, the Ankara 22nd Assize Court rejected Mr. Demirtaş's lawyers' requests for his release, and prolonged his pre-trial detention.⁴ On 25 May 2021, the Ankara 19th Assize Court, which had been hearing the main case against Mr. Demirtaş since 2017, gave a decision of joinder to the effect that case files before the Ankara 19th and 22nd Assize Courts are now being heard by the Ankara 22nd Assize Court jointly.⁵ After the latest hearings before the Ankara 22nd Assize Court held on 15 June and 25 June 2021, the court prolonged Mr. Demirtaş's pre-trial detention once again, while releasing 8 other defendants pending trial.⁶ Mr. Demirtaş, therefore, remains in pre-trial detention as of the date of this submission in connection with proceedings concerning the events of 6-8 October 2014, which the CM found to have been addressed by the ECtHR in its judgment.⁷
8. As we also explained in our Rule 9.2 submission dated 7 February 2021 to the CM, ongoing pre-trial detention of Mr. Demirtaş, subsequent to the Grand Chamber judgment, in connection with the criminal proceedings against him on the similar factual or legal basis that led the Court to find multiple violations of the Convention, constitutes a prolongation of the violations of his rights. Thus, his ongoing pre-trial detention is fully covered within the scope of the Grand Chamber judgment, in particular by its finding of a violation of Article 18 in conjunction with Article 5.⁸

2 Ibid.

3 Ibid.

4 1406th meeting (June 2021) (DH) - Rule 9.1 - Communication from the applicant (17/05/2021) in the case of Selahattin Demirtaş v. Turkey (No. 2), paragraph 9.

5 Cumhuriyet, *Demirtaş davasında yeni gelişme*, 25 May 2021, <https://www.cumhuriyet.com.tr/haber/demirtas-davasinda-yeni-gelisime-1839081>; Duvar, *Demirtaş davasında tahliye yerine Kobanê ile birleştirme kararı*, 25 May 2021, <https://www.gazeteduvar.com.tr/demirtas-davasinda-tahliye-yerine-kobane-ile-birlestirme-karari-haber-152334>.

6 Bianet English, *Kobanî trial: Court releases four defendants*, 15 June 2021 <https://bianet.org/english/law/245729-kobani-trial-court-releases-four-defendants>; T24, *Kobani davası, Emine Ayna, Beyza Üstün, Zeki Çelik ve İbrahim Binici adli kontrole tahliye edildi*, 25 June 2021, <https://t24.com.tr/haber/kobani-davasi-avukat-urkut-dun-siyasi-tutuklulara-yonelik-cezaevinde-kotu-muamele-gerceklesti,961625>.

7 CM decision, 1398th meeting (DH) 9-11 March 2021 - H46-40 Selahattin Demirtaş v. Turkey (No. 2).

8 See Communication from NGOs (ARTICLE 19, Human Rights Watch, International Commission of Jurists, International Federation for Human Rights and Turkey Human Rights Litigation Support Project) (08/02/2021) in the case of Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), paragraphs 31-58, available at [http://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)192revE](http://hudoc.exec.coe.int/eng?i=DH-DD(2021)192revE).

III. Selahattin Demirtaş's recent conviction falls within the scope of the ECtHR judgment

9. In its submission of 2 July 2021 to the CM, the Government claims that the applicant "is no longer a detainee but a convict since 3 May 2021", and that his new legal status falls outside the scope of the Grand Chamber judgment.⁹ This statement is factually and legally incorrect.
10. The Grand Chamber judgment, the applicant's lawyers' and the Government's above-mentioned submissions provide details of the criminal proceeding brought against Mr. Demirtaş before the İstanbul 26th Assize Court, and about the Court of Cassation's decision upholding a September 2018 decision by the İstanbul Court convicting him. Mr. Demirtaş was found guilty of the offence of 'propagandising for a terrorist organisation' under Article 7(2) of the Prevention of Terrorism Act under this case, and sentenced to four years and eight months' imprisonment on the ground of a speech he gave at the Newroz celebrations in İstanbul on 17 March 2013. The circumstances and timing of Mr. Demirtaş' conviction are especially noteworthy (as set out below).
11. On 16 November 2018, the Second Section of the ECtHR announced that it would deliver its judgment in the case of Selahattin Demirtaş on 20 November 2018. On 19 November 2018, the İstanbul Regional Court of Appeal expedited Mr. Demirtaş's appeal against his conviction by the İstanbul 26th Assize Court, even though there were reportedly hundreds of cases before Mr. Demirtaş's case pending for review. On 20 November 2018, the Second Section of the ECtHR delivered its judgment¹⁰ (which was later referred to the Grand Chamber). On the same day, President Erdogan publicly criticised the ECtHR judgment, stating: "It does not bind us. We will make our counter-move and finish the job".¹¹ On 4 December 2018, the İstanbul Regional Court of Appeal dismissed Mr. Demirtaş's appeal and upheld his conviction with final effect.
12. On 2 September 2019, the Ankara 19th Assize Court, which had previously rejected all requests for Mr. Demirtaş's release for more than two years, decided that he could be released pending trial if he were not convicted of another crime. That decision was issued 16 days before the Grand Chamber hearing on 18 September 2019 during which the Turkish Government claimed that the applicant's pre-trial detention had ended, and he had not been a detainee but a convict at the time.
13. On 24 October 2019, an amendment to the Code of Criminal Procedure introduced the right to appeal against conviction on points of law for a number of offences linked to freedom of expression, including the offence in question: disseminating propaganda in favour of a terrorist organisation.¹² Relying on this amendment, Mr. Demirtaş appealed against his conviction before the Court of Cassation. The Court of Cassation dismissed his appeal on 26 April 2021, meaning that Mr. Demirtaş's conviction became final on that date.¹³
14. The Government submitted to the CM that the applicant started serving the remainder of this prison sentence on 3 May 2021.¹⁴ Two years after the judgment of the Regional Court of Appeal, the Government once again relies on the same case, this time before the CM, to justify the ongoing

9 Communication from the Turkish authorities concerning the case of *Selahattin Demirtaş v. Turkey* (No. 2) (Application No. [14305/17](http://hudoc.exec.coe.int/ENG?i=DH-DD(2021)685E)), 2 July 2021, paragraph 27, [http://hudoc.exec.coe.int/ENG?i=DH-DD\(2021\)685E](http://hudoc.exec.coe.int/ENG?i=DH-DD(2021)685E)

10 See <http://hudoc.echr.coe.int/spa?i=001-187961>

11 BBC, *Turkey must free Selahattin Demirtaş, European rights court says*, 20 November 2018, <https://www.bbc.com/news/world-europe-46274330>.

12 See Section 29 of Law no. 7188 amending certain provisions of the Code of Criminal Procedure.

13 CM Decision, 1406th meeting (DH), 7-9 June 2021 - H46-32 *Selahattin Demirtaş v. Turkey* (No. 2) (Application No. 14305/17), paragraph 3, available at [http://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2021\)1406/H46-32E](http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2021)1406/H46-32E).

14 Communication from the Turkish authorities concerning the case of *Selahattin Demirtaş v. Turkey* (No. 2), 2 July 2021, para 21.

detention of Mr. Demirtaş. The Government has been continuously using this case as the basis for its refusal to release Mr. Demirtaş, when the pressure increases from the ECtHR or the CM.

15. As a matter of law, Mr. Demirtaş's conviction in this case falls within the scope of the Grand Chamber's findings under Article 10 and Article 18 in conjunction with Article 5, contrary to the Turkish Government's arguments.¹⁵ The Grand Chamber judgment does not merely concern the violation of Article 5(1)(c). The national authorities are under an obligation to implement the ruling *in its entirety*, and to ensure that all measures taken "must be compatible with the conclusions and spirit of [the] judgment" (paragraph 441).
16. The NGOs first recall that, in relation to Article 10, in its judgment the Grand Chamber held that the lifting of the applicant's parliamentary immunity and the way the criminal law was applied to penalise him for his political speech were neither foreseeable nor 'prescribed by law' (paragraphs 270 and 281). In this regard, it should be underlined that the Court's finding applies to the applicant's prosecution and conviction for the speech he gave in İstanbul on 17 March 2013 while he was a member of parliament. Indeed, the applicant's conviction in the case was only possible as a result of the 20 May 2016 constitutional amendment lifting his parliamentary immunity. Yet, the Court of Cassation in its 26 April 2021 decision upholding his conviction failed to properly address the matter. Despite the Grand Chamber's finding under Article 10 regarding the constitutional amendment lifting Mr. Demirtaş's parliamentary immunity, the criminal proceedings against him continued, and his conviction was upheld. The Court of Cassation summarily dismissed Mr. Demirtaş's appeal without any reference, let alone due regard, to the ECtHR's finding of an Article 10 violation with respect to the criminalisation of the political speech of Mr. Demirtaş while he was a member of parliament.¹⁶
17. The Court of Cassation did not make any genuine assessment, in line with the ECtHR's judgment, of whether Mr. Demirtaş's 17 March 2013 statements were protected by the parliamentary non-liability enshrined in Article 83(1) of the Constitution. The Court of Cassation summarily rejected the applicant's argument that his speech was constitutionally protected under Article 83(1) on the ground that he made the speech outside of the parliament and the speech was not related to the applicant's 'legislative activities'.¹⁷ However, Article 83(1) makes clear that non-liability extends to statements and views parliamentarians "repeat or reveal ... outside the Assembly", and not only to those made during formal parliamentary proceedings. The ECtHR judgment recalled this point (paragraph 258), and went on to say, "[a]s both parties also stated at the [Grand Chamber] hearing, it is clear that repeating a political speech outside the National Assembly cannot be construed as being limited to repeating the same words that were used in Parliament" (paragraph 259).
18. In its decision, the Court of Cassation made no reference to the ECtHR's judgment. Nor did it take into account the fact that the Newroz celebration, at which Mr. Demirtaş delivered his speech, was one of the most important annual events for the Kurdish electorate; that his political party, HDP, was one of the organisers of the event; and that the remarks he made did not diverge from, and were in fact similar to, remarks he had made in parliament. Contrary to the position of the Court of Cassation, the Grand Chamber found such an assessment to be important for the purposes of determining complaints of violations of Article 10 and Article 3 of Protocol No. 1 of the Convention (paragraphs 263 and 394). Furthermore, under Article 3 of Protocol No. 1, the ECtHR specifically stated that the domestic courts' failure to carry out any such examination did not comply with their procedural obligations under Article 3 of Protocol No. 1.

15 Ibid, paras 5 and 27.

16 Ibid, para 16.

17 Ibid, para 17.

19. Second, the NGOs underline that achieving *restitutio in integrum* in this case requires the discontinuation of these types of proceedings against the applicant that criminalise his political speech as a member of parliament. The CM in its decision of 11 March 2021 confirmed as much and specifically held as follows:

*...the obligation of restitutio in integrum calls for the negative consequences of the violation to be eliminated without delay, including as regards the two sets of proceedings pending before the Ankara Assize Court (concerning the thirty-four investigation reports and the events of 6-8 October 2014) and the appeal proceedings pending before the **Istanbul Assize Court** (against the applicant's conviction for disseminating propaganda in favour of a terrorist organisation during a meeting held in March 2013) (...).¹⁸ (emphasis added)*

20. Third, the aforementioned criminal proceedings and conviction, through which the Turkish authorities have ensured the continuation of Mr. Demirtaş's detention, demonstrate that Turkey continues to pursue "the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society" (paragraph 437). In its analysis leading the Court to find a violation of Article 18 in conjunction with Article 5, the ECtHR made clear references to the proceedings before the Istanbul 26th Assize Court. Drawing attention to the temporal links between the criminal proceedings against Mr. Demirtaş, the Court stated that:

*"Considering these aspects together with the close temporal links between the applicant's release from detention, ordered by the Ankara Assize Court on 2 September 2019 (see paragraph 114 above) and the **Istanbul 26th Assize Court's decision of 20 September 2019** (see paragraph 115 above), his immediate return to pre-trial detention on the same day (see paragraph 117 above) and the speech given by the President immediately afterwards (see paragraph 118 above), the Court is of the view that the domestic authorities do not appear to be particularly interested in the applicant's suspected involvement in an offence allegedly committed ..., but rather in keeping him detained, thereby preventing him from carrying out his political activities." (paragraph 433, emphasis added).*

21. Finally, the Court of Cassation's decision to uphold Mr. Demirtaş's conviction for his political speech, without any proper assessment of the issues relating to the unlawful lifting of his parliamentary immunity and the constitutional protection of his speech in the light of the Grand Chamber judgment, must be seen as another example of Turkey's abuse of criminal proceedings to persecute Mr. Demirtaş. The Court of Cassation's decision constitutes a continuation and deepening of the violations found by the ECtHR. The NGOs submit that in its totality the approach pursued by the Turkish authorities aims to circumvent the implementation of the ECtHR judgment, and as such, in itself constitutes a separate violation of Article 46(1).¹⁹ The absence of such an evaluation would effectively mean that governments facing similar judgments could avoid implementing them through recourse to different criminal proceedings, even if they were devoid of any legitimate basis and initiated and applied for the same purposes as those that had already been strongly condemned by the Court.

18 CM decision, 1398th meeting (DH) 9-11 March 2021 - H46-40 Selahattin Demirtaş v. Turkey (No. 2) (Application No. [14305/17](#)).

19 See also Communication from NGOs (ARTICLE 19, Human Rights Watch, International Commission of Jurists, International Federation for Human Rights and Turkey Human Rights Litigation Support Project) (08/02/2021) in the case of Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), paragraphs 59-68.

22. The NGOs conclude that, in failing to implement the individual measures in this case, including the ECtHR's explicit order for Mr. Demirtaş's immediate release, the Turkish Government is responsible for continuing violations of Articles 5(1) and (3), 10, 18 (in conjunction with Article 5) and Article 3 of Protocol No. 1 to the Convention. There has also been a breach of Article 46(1) of the Convention – the obligation to abide by any final judgment of the Court. In their February 2021 submission, the NGOs made several recommendations to the CM on the issue of individual measures that Turkey should take.²⁰ The NGOs invite the CM to adopt the recommendations formulated in that submission and below. They further urge the CM to reaffirm its call on Turkey for the immediate release of Mr. Demirtaş, and exhort the CM to take other necessary steps against Turkey to ensure full implementation of the entirety of the ECtHR's judgment.

IV. Recommendations to the CM on individual measures

Regarding individual measures, the NGOs urge the CM to:

- i. Insist on the immediate release of Selahattin Demirtaş as required by the ECtHR judgment, and indicate that continuation of Mr. Demirtaş's detention in any form under the criminal proceedings remaining within the scope of the Grand Chamber judgment constitutes a prolongation of the violation of his rights under the Convention, as found by the ECtHR.
- ii. Underline that the Grand Chamber judgment clearly applies to Mr. Demirtaş's ongoing pre-trial detention, the criminal proceeding under which he was convicted, and to any other ongoing or future proceedings or detention, in which the factual or legal basis is substantially similar to that already addressed, and found to violate his Convention rights, by the ECtHR in its judgment.
- iii. Call for the halt of all criminal proceedings initiated against Mr. Demirtaş following the constitutional amendment lifting his parliamentary immunity, as the Grand Chamber found that the amendment did not meet the legality standard of the Convention, and that all proceedings initiated pursuant to it should therefore be deemed unlawful.
- iv. Request the Government of Turkey to end the persecution through abusive criminal proceedings of Selahattin Demirtaş, including by dropping all charges under which he has been investigated, prosecuted and detained, which have pursued an ulterior purpose of stifling pluralism and limiting freedom of political debate, in conformity with the Court's finding that his rights under Article 5(1) in conjunction with Article 18 were violated, and that his exercise of the right to freedom of expression was wrongfully used as evidence to incriminate him.
- v. Emphasise that *restitutio in integrum*, in this case, requires the cessation of the persecution of Mr. Demirtaş through criminal proceedings, in the form of future investigations, prosecutions and detentions, including pre-trial detentions, solely for his political activities and his political speech.
- vi. In the event that Selahattin Demirtaş remains in detention at the time of the 1411DH 14-16 September 2021 meeting, to trigger infringement proceedings against Turkey under Article 46(4) of the Convention.

²⁰ Ibid, pp 18-19.