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**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 pursuant to Rule 9.2 of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments providing initial observations on the implementation of *Selahattin Demirtaş v. Turkey (No.2)* (Application no. 14305/17) Grand Chamber judgment, 22 December 2020.**

## Summary

In *Selahattin Demirtaş v. Turkey (No. 2)*, the Grand Chamber of the European Court of Human Rights ("the Court" or "ECtHR"), on 22 December 2020, found violations of Article 10 (freedom of expression), Article 5(1) and 5(3) (right to liberty and security), Article 18 (limitation on use of restrictions on rights) taken together with Article 5, and Protocol no. 1 Article 3 (right to free elections) of the European Convention on Human Rights ("the Convention" or "ECHR"). Finding that Mr. Demirtaş's detention had "pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society", the Court requested individual measures and ordered the Government of Turkey to "take all necessary measures to secure [his] immediate release." The Court stated that the continuation of Mr. Demirtaş's pre-trial detention would entail a prolongation of the violations, as well as breaching Turkey's obligation to abide by the Court's judgment in accordance with Article 46(1) of the Convention (paragraph 442).

To date, the Government of Turkey has failed to implement the individual measures the ECtHR ordered. Selahattin Demirtaş, a former member of parliament and co-chair of the opposition Peoples' Democratic Party (HDP), remains incarcerated in Edirne F-Type Prison.

The NGOs' submission provides a full analysis of political and legal developments - including a new indictment dated 30 December 2020 – since the issuing of the ECtHR Grand Chamber judgment on 22 December 2020.

On the day of the ECtHR judgment and over subsequent days, Turkey's president and other senior government officials voiced strong criticism of the ruling and the Court itself, argued that local remedies had not been exhausted and advanced claims that this, and indeed ECtHR judgments in general, were not binding on Turkey.

Following the Turkish politicians' pronouncements, three local courts - on 25 December 2020, 31 December 2020, 7 January 2021 and 5 February 2021- prolonged Mr. Demirtaş's pre-trial detention, flouting the ECtHR judgment.

The third local court ruling by the Ankara 22nd Assize Court accepted a 3,500-page indictment against Mr. Demirtaş and 107 other defendants, issued by the Ankara public prosecutor on 30 December 2020. The NGOs offer a detailed assessment of the indictment which purportedly concerns protests that took place from 6 to 8 October 2014, allegedly resulting in 37 deaths in 32 cities across Turkey. The indictment charges Mr. Demirtaş with 30 offences, including undermining the unity and territorial integrity of the state, homicide, robbery and

damage to property, and is built upon the problematic allegation that Mr. Demirtaş committed the alleged offences because he shared his and his party's political views on social media and/or in his public statements.

The NGOs submit that the Ankara public prosecutor's new indictment, which forms the basis of Mr. Demirtaş's continuing detention, is based on the same set of facts and incidents that the Grand Chamber already found to constitute insufficient grounds for his detention. The Grand Chamber found that "the applicant was placed in pre-trial detention [on 20 September 2019] on the basis of a new legal classification of the 'acts and incidents' relating to the period of 6-8 October 2014 that had also formed part of the grounds relied on to justify the specific deprivation of liberty raised in his application, which ended on 2 September 2019" (paragraph 441). The Court thus found a continuity between Mr. Demirtaş's pre-trial detention from 4 November 2016 to 2 September 2019, and again from 20 September 2019 and continuing in the present, and termed the detention order on 20 September a "return to pre-trial detention".

The new indictment presents as evidence against Mr. Demirtaş the same social media postings cited as evidence in his ongoing trial in the Ankara 19th Assize Court which the Grand Chamber had found could not be construed as a call for violence (paragraph 327).

The NGOs submit that scope of the Grand Chamber judgment fully covers Mr. Demirtaş's continuing detention, and that there is a continuing violation of his rights.

Also examining the ECtHR's response to the recurring problem of Turkey's misuse of criminal procedure to secure detention, the NGOs offer the following recommendations to the Committee of Ministers:

**i.** Ensure that *Demirtaş v. Turkey (No.2)* be placed under enhanced procedures and treated as a leading case under Articles 5 and 18 of the Convention concerning politically motivated detentions of members of parliament.

**ii.** Call for the immediate release of Selahattin Demirtaş as required by the ECtHR judgment, and indicate that Mr. Demirtaş's ongoing detention constitutes a prolongation of the violation of his rights, as found by the Grand Chamber.

**iii.** Underline that the Grand Chamber´s judgment clearly applies to Mr. Demirtaş's ongoing detention, which constitutes a continuation of the violations established by the Court, and to any future charges or detentions where the factual or legal basis is substantially similar to that which the ECtHR has already addressed in its judgment.

**iv.** Call for the halt of all criminal proceedings initiated against Mr. Demirtaş following the constitutional amendment lifting his 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 be deemed unlawful.

**v.** Request the Government of Turkey to end the abuse of judicial proceedings to harass Selahattin Demirtaş, including by dropping all charges under which he has been investigated 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.

**vi.** Emphasise that the *restitutio ad integrum* in this case requires the cessation of the harassment of Mr. Demirtaş through judicial processes in the form of future detentions and prosecutions solely for his political activities and his political speech.

**vii.** Request the Government of Turkey to end interference directly in Mr. Demirtaş's cases, especially by attempting to pressure or unduly influence judicial authorities.

**viii.** Publicly correct false claims promoted by senior officials of the Government of Turkey that the Grand Chamber judgment in the case of Mr. Demirtaş, and ECtHR judgments more generally, are not binding.

**ix.** Recognize at the earliest possible occasion that the continuing detention of Selahattin Demirtaş violates Article 46 of the Convention concerning the binding nature of final judgments of the ECtHR and may trigger Article 46(4).

## I. Introduction

**1.** In line with Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, ARTICLE 19, Human Rights Watch, the International Commission of Jurists, the International Federation for Human Rights, and the Turkish Human Rights Litigation Support Project ("the NGOs") hereby present an initial communication regarding the execution of the European Court of Human Rights ("the Court" or "ECtHR") judgment in the case of *Selahattin Demirtaş (No. 2) v. Turkey (No. 2)*.

**2.** ARTICLE 19 is an international non-governmental organisation working around the world to protect and promote the rights to freedom of expression and freedom of information. It advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional level, and the implementation of such standards in domestic legal systems, including in Turkey.

**3.** Human Rights Watch (HRW) is a non-profit, non-governmental human rights organization 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.

**4.** International Commission of Jurists (ICJ) is a non-governmental organization working to advance understanding and respect for the rule of law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva, Switzerland. It is made up of some 60 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organizations.

**5.** International Federation for Human Rights (FIDH) is an international human rights non-governmental organisation founded in 1922 and headquartered in Paris, France. It brings together 192 national human rights organisations from 117 countries across the world. FIDH's mandate is to defend all human rights enshrined in the Universal Declaration of Human Rights. It is involved in strategic litigation before domestic, regional (e.g. ECtHR, Inter-American Court of Human Rights and African Commission and Court on Human and Peoples' Rights) and international (e.g. International Criminal Court, Extraordinary Chambers in the Courts of Cambodia) courts and mechanisms.

**6.** The Turkey Human Rights Litigation Support Project (TLSP) provides expertise and support to bring effective legal action to address the emerging human rights issues crisis in Turkey. Consisting of a group of human rights law experts, within Turkey and internationally, the Project provides advice and legal support in cases before domestic courts, including the Turkish Constitutional Court, as well as the ECtHR and United Nations bodies and procedure.

**7.** This submission focuses on individual measures Turkey must take to implement the Grand Chamber's judgment in *Selahattin Demirtaş v. Turkey (No. 2)*, in particular ensuring Selahattin Demirtaş's immediate release, and explains why the scope of the Court's judgment fully covers Mr. Demirtaş's current detention in Edirne F-Type Prison.

**8.** **Part II** of the submission highlights the key findings of the Grand Chamber judgment of 22 December 2020 of relevance to the implementation of individual measures. **Part III** summarizes the Government's response to the Grand Chamber judgment. **Part IV** draws the attention of the Committee to Turkey's failure to abide by the Grand Chamber judgment by refusing Mr. Demirtaş's immediate release from detention; and provides an analysis of the subsequent Court decisions to prolong his detention and the indictment dated 30 December 2020 by the Ankara public prosecutor's office concerning the events of 6 to 8 October 2014. **Part V** of the submission examines the ECtHR's response to the recurring problem of Turkey's misuse of criminal procedure to secure detention. **Part VI** of the submission offers recommendations to the Committee of Ministers.

## II. Key Findings of the Grand Chamber of the ECtHR

**9.** Selahattin Demirtaş is a prominent Kurdish politician who was co-chair of the Peoples' Democratic Party (HDP, a left-wing pro-Kurdish political party) between 2014-18 and an elected member of the Turkish Grand National Assembly ("the Parliament") from 2007 until 2018. He was also a candidate for president in the 10 August 2014 and 24 June 2018 elections, in which he received 9.76% and 8.32% of the votes respectively.

**10.** Mr. Demirtaş was placed in pre-trial detention on 4 November 2016 along with several HDP members of parliament (MPs) and has been tried before Ankara 19th Assize Court on several counts of terrorism-related offences, including forming or leading an armed terrorist organization, disseminating terrorist propaganda and incitement to public hatred and hostility. The charges against him are based on the political speeches he made in his capacity as an HDP MP and co-chair on the Kurdish issue and his identification of the Government's problematic policies in relation to Kurds.

**11.** The Grand Chamber delivered its landmark ruling in the case of *Selahattin Demirtaş v. Turkey (No. 2)* on 22 December 2020, finding violations of Article 10 (freedom of expression), Article 5(1) and (3) (right to liberty and security), Article 18 (limitation on use of restrictions on rights) taken together with Article 5, and Protocol no. 1 Article 3 (right to free elections) of the European Convention on Human Rights ("the Convention"). The Court requested the Government to "take all necessary measures to secure the immediate release of" Mr. Demirtaş and stated that the continuation of his pre-trial detention would entail a prolongation of the violations, as well as breaching the obligation on Turkey to abide by the Court's judgment in accordance with Article 46(1) of the Convention (paragraph 442). Key findings of violations relevant to this submission on individual measures are highlighted below.

### *a. Violation of Mr. Demirtaş's right to freedom of expression (Article 10)*

**12.** The Grand Chamber found a violation of Article 10 of the Convention on the grounds that the lifting of Mr. Demirtaş's parliamentary immunity as a result of a 20 May 2016 constitutional amendment, his subsequent detention on 4 November 2016 and continued pre-trial detention, and the criminal proceedings brought against him on the basis of evidence comprising his political speeches, had not complied with the requirement of the quality of law for lack of foreseeability (paragraph 281). The Court pointed out that Mr. Demirtaş, as an MP for the HDP, "in defending a political viewpoint, could legitimately [have] expect[ed] to enjoy the benefit of the constitutional legal framework in place, affording the protection of immunity for political speech and constitutional procedural safeguards" (paragraph 270).

**13.** According to the Court, the judicial authorities had placed Mr. Demirtaş in pre-trial detention and prosecuted him mainly on account of his political speeches, without any assessment of whether his statements were protected by parliamentary non-liability (paragraph 263) and not altered by the 2016 constitutional amendment.[1]

[1] On 20 May 2016, Parliament passed a constitutional amendment entailing the insertion of a provisional Article in the 1982 Constitution. Pursuant to the amendment, parliamentary immunity, as provided for in the second paragraph of Article 83 of the Constitution, was lifted in all cases where requests for the lifting of immunity had been transmitted to Parliament prior to the date of adoption of the amendment in question. See for more detail Venice Commission, Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution (Parliamentary Inviolability), CDL-AD(2016)027, 14 October 2016.

Moreover, even assuming that the impugned speeches were not covered by the protection afforded under the first paragraph of Article 83 of the Constitution, the Court underlined that the 20 May 2016 constitutional amendment in itself raised an issue in terms of foreseeability (paragraphs 268, 269). The Court also drew attention to the judicial authorities' broad interpretation of the offences provided for in Article 314(1) and (2) of the Criminal Code, namely forming or leading an armed terrorist organization and membership of such an organization. It stressed that "the content of Article 314 of the Turkish Criminal Code, coupled with its interpretation by the domestic courts, [did] not afford adequate protection against arbitrary interference by the national authorities" (paragraph 337) and that "such a broad interpretation of a provision of criminal law cannot be justified where it entails equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link" (paragraph 280).

***b. Violation of Mr. Demirtaş's right to liberty and security (Article 5):***

**14.** The Court found a violation of Article 5(1) of the Convention on the basis of Mr. Demirtaş's detention despite lack of reasonable suspicion that he had committed crimes. The detention order of 4 November 2016 relied on Mr. Demirtaş's political speeches as evidence of terrorism-related offences, in particular under Article 314(1) and (2) of the Criminal Code.[2] The Court pointed out that "not only were the charges against the applicant based essentially on facts that could not be reasonably considered criminal conduct under domestic law, they related mainly to the exercise by him of his Convention rights" (paragraph 339). The Court also found a violation of Article 5(3), as repeated judicial decisions to prolong Mr. Demirtaş's detention could not be considered valid in the absence of a reasonable suspicion.

***c. Violation of Mr. Demirtaş's right to be elected and to sit in Parliament (Article 3 of Protocol No. 1)***

**15.** The Grand Chamber considered that its findings under Articles 10 and 5(1) of the Convention were equally relevant for the purposes of Article 3 of Protocol No. 1, and also found a violation of that provision. The Court held that the domestic courts had failed to comply with the procedural obligations under Article 3 of Protocol No. 1, as they had not examined whether Mr. Demirtaş was entitled to parliamentary immunity guaranteed by the Constitution for the acts of which he had been accused (paragraph 394). The Court underlined that when an MP is deprived of their liberty, judicial authorities should perform a balancing exercise, to ensure protection of the freedom of expression of political opinions by the MP and that the alleged offence is not directly linked to the MP's political activity.

**16.** The Court held that the Government had been unable to show that the competent domestic courts had performed any such balancing exercise when ruling on the lawfulness of Mr. Demirtaş's initial and continued pre-trial detention (paragraph 395). Notably, even though Mr. Demirtaş was both an MP and a political opposition leader, whose performance of parliamentary duties called for a high level of protection, the domestic courts had not examined whether the offences in question were directly linked to Mr. Demirtaş's political activities or why an alternative measure to detention would have been insufficient (paragraphs 395 and 396). The Court noted that Mr. Demirtaş was not able to take part in the activities of the Parliament as a result of his pre-trial detention and concluded that his pre-trial detention was incompatible with the very essence of his right under Article 3 of Protocol No. 1 to be elected and to sit in Parliament (paragraph 397).

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[2] The applicant was initially placed in pre-trial detention on suspicion of two offences: membership of an armed terrorist organization, punishable under Article 314(2) of the Criminal Code, and public incitement to commit an offence, punishable under Article 214(1) of the same Code. In the bill of indictment of 11 January 2017, however, the applicant was charged with imprisonment for the following offences: forming or leading an armed terrorist organization, disseminating propaganda in favour of a terrorist organisation, public incitement to commit an offence, praising crime and criminals, incitement to hatred and hostility, incitement to disobey the law, organising and participating in unlawful meetings and demonstrations, and refusing to comply with orders by the security forces for the dispersal of an unlawful demonstration (paragraph 273).

***d. Pursuing an ulterior purpose by Mr. Demirtaş's detention (Article 18 in conjunction with Article 5 of the Convention):***

**17.** Lastly, in finding a violation of Article 18 in conjunction with Article 5, the Court identified six factors, which taken together constituted evidence beyond reasonable doubt that Mr. Demirtaş's detention had "pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society".

**18.** First, in the Court's view, "until the onset of the political tension between, on the one hand, the HDP and, on the other, the President and the ruling party, the applicant had not been exposed to the risk of being deprived of his liberty" (paragraph 426). After the end of the "solution process"[3] and the speeches of the President targeting the leaders of the HDP, the number and pace of the criminal investigations against the applicant had increased (paragraph 426). As a result of the constitutional amendment adopted on 20 May 2016, 55 MPs of the HDP (which at the time had had 59 MPs) had been stripped of their parliamentary immunity. While the amendment had lifted the parliamentary immunity of 154 MPs in total, only members representing the opposition parties HDP and CHP had been detained and/or convicted following the institution of criminal proceedings against them (paragraph 427). In particular, 14 MPs from the HDP, including both co-chairs, had been placed in pre-trial detention (paragraph 427).

**19.** Second, the Court noted that a number of leading figures and elected mayors from the HDP had also been placed in pre-trial detention. This led the Court to consider that the decisions on Mr. Demirtaş's initial and continued pre-trial detention were not an isolated example but appeared to follow a pattern (paragraph 428).

**20.** Third, the Court underscored that Mr. Demirtaş had been deprived of his liberty during two crucial campaigns, that of the referendum of 16 April 2017 concerning the introduction of a presidential system in Turkey and that of the presidential election of 24 June 2018. Due to his pre-trial detention, he had had to conduct his campaigns from prison (paragraph 429).

**21.** Fourth, the Court noted that although the Ankara 19th Assize Court had ordered Mr. Demirtaş's release on 2 September 2019, he had remained in detention as a result of his conviction in a separate case against him at the Istanbul Assize Court for "disseminating propaganda in favour of a terrorist organization", relying on a speech he had given at a rally in Istanbul on 17 March 2013. Mr. Demirtaş would have been eligible for a conditional release as a result of the Istanbul Assize Court's judgment dated 20 September 2019 concerning the execution of his prison sentence. However, on the same day, upon a request from Ankara public prosecutor's office, the Ankara Magistrate Court ordered the pre-trial detention of the applicant and the other former co-chair of the HDP, Figen Yüksekdağ, in connection with a separate criminal investigation. On 21 September 2019, the following day, President Erdoğan had made a statement to the press accusing Mr. Demirtaş of being the "killer" of "53 people" who had died during the protests on 6 to 8 October 2014 and stated that he had been following the matter and that the two co-chairs could not be "let go" (paragraphs 118 and 432).

**22.** Fifth, the Court noted that "the apparent purpose of the applicant's return to pre-trial detention [on 20 September 2019] was to investigate 6 to 8 October events" (paragraph 433). However, according to the Court "although the alleged offences were classified differently, this criminal investigation concerned part of the facts forming the basis of the trial that is still ongoing in the Ankara [19th] Assize Court, in connection with which the applicant had already been placed in pre-trial detention" (paragraph 433). The Court concluded, in light of the circumstances surrounding Mr. Demirtaş's "return"[4] to pre-trial detention on 20 September 2019, that "the domestic authorities [did] not appear to be particularly interested in the applicant's suspected involvement in an

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[3] The "solution process" is a peace process that was initiated towards the end of 2012 with a view to finding a lasting, peaceful solution to the Kurdish question. It is considered that it *de facto* ended in mid-2015. For more details on this, see *Selahattin Demirtaş v. Turkey (No. 2)* [GC] (Application no. 14305/17), paragraphs 29-33.

[4] A term used by the Grand Chamber in its judgment.

offence allegedly committed between 6 and 8 October 2014, some five years previously, but rather in keeping him detained, thereby preventing him from carrying out his political activities" (para. 433).

**23.** Lastly, in relation to Article 18, the Court noted the findings of the Venice Commission on the independence of the judicial system in Turkey, and more specifically those concerning the Supreme Council of Judges and Prosecutors ("the Supreme Council"),[5] which had pointed out that the amendments made in the composition of the Supreme Council seriously endangered the independence of the judiciary (paragraph 434). It also referred to the comments by the Commissioner for Human Rights indicating that "the tense political climate in Turkey during recent years [had] created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency, when hundreds of judges [had been] dismissed, and especially in relation to criminal proceedings instituted against dissenters" (paragraph 434). Based on the above, the Court found that through Mr. Demirtaş's initial and ongoing detention the Turkish authorities had pursued an ulterior purpose of stifling pluralism and limiting freedom of political debate.

**24.** Following these findings, the Court concluded that the continuation of Mr. Demirtaş's 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 Turkey's obligation to abide by the Court's judgment in accordance with Article 46(1) of the Convention. Accordingly, the Court held that Turkey must take all necessary measures to secure the immediate release of Mr. Demirtaş under Article 46 of the Convention (paragraph 442).

## III. Reactions to the ECtHR Judgment by Turkey's President and Senior Officials

**25.** Despite the ECtHR's clear findings and request for his immediate release, Selahattin Demirtaş remains in pre-trial detention in Edirne F-Type Prison as of the date of this submission. The sequence of events following the judgment is briefly outlined to demonstrate that the Government has prolonged the violation of his rights and breached the obligation to abide by the Court's judgment in accordance with Article 46(1) of the Convention.

**26.** Turkey's President Recep Tayyip Erdoğan responded to the Court's judgment on the day of its delivery at a meeting of the central executive committee of his Justice and Development Party (AKP). He reportedly said, "[a] decision hasn't yet come out of our courts. They took this decision without domestic remedies being exhausted. They act against Turkey. They protect their own men. This decision does not bind us."[6] The president publicly repeated similar comments one day later in an address to members of the AKP parliamentary group, accusing the ECtHR of seeking the release of a "terrorist" whom the president held responsible for the "murder" of "39 people" in violent protests that mainly occurred in Turkey's southeast on 6-8 October 2014.[7]

**27.** On 24 December 2020, Interior Minister Süleyman Soylu in a meeting with provincial police chiefs, stated: "Demirtaş is a terrorist. The European Court of Human Rights ruling, whatever the reason, is meaningless."[8]

**28.** On the same day, the leader of the Nationalist Action Party (MHP), the coalition partner of President Erdogan's AKP, stated: "We do not accept, and we reject the ECtHR's decision that denies our national will and our courts."[9]

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[5] Venice Commission, "Opinion of the Venice Commission on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and submitted to a national referendum on 16 April 2017", CDL-AD(2017)005-e, 10-11 March 2017).
[6] See Erdoğan'dan Demirtaş açıklaması: 'Bu karar bizi bağlamaz' - Son Dakika Haber (hurriyet.com.tr); Turkish President Recep Tayyip Erdoğan dismisses European Court of Human Rights' Selahattin Demirtaş ruling, says it doesn't bind Turkey (duvarenglish.com).
[7] Erdoğan: European court ruling on jailed Kurdish politician 'hypocritical' | Reuters; Erdoğan slams ECtHR over Demirtaş verdict, says it can't replace Turkey's courts - English (bianet.org).
[8] Anatolian Agency, "ECHR ruling on 'terrorist' HDP leader 'meaningless'," 24 December 2020: see ECHR ruling on 'terrorist' HDP leader is 'meaningless'.
[9] MHP leader, interior minister slam ECHR's ruling on Demirtaş - Turkey News (hurriyetdailynews.com).

**29.** On 28 December 2020, Mehmet Uçum, a senior advisor to President Erdoğan and the deputy director of the Presidential Law and Policy Board expanded on the President's views and argued at length in a media interview[10] that Turkey did not have to implement the ECtHR Demirtaş judgment; that domestic remedies had not been exhausted in this case; and that the judgment was a political attack on Turkey. In answer to an essay by two jurists from Turkey refuting his argument that ECtHR judgments were not binding on Turkey,[11] he wrote a further article in a Turkish daily newspaper on 18 January 2021 laying out at greater length an argument that the ECtHR judgments offer guidance but to insist that they are binding would undermine the independence of Turkey's courts and national sovereignty and that the principle of subsidiarity means the ECtHR cannot be above Turkey's courts. [12]

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

## IV. Non-implementation of Urgent Individual Measures: The Continuing Detention of Selahattin Demirtaş

**31.** The NGOs submit that the responses of Turkey's highest public officials to the ECtHR judgment and the arguments they have advanced that ECtHR judgments are not binding, and that the ECtHR judgment does not apply to Mr. Demirtaş's current detention, have exerted and continue to risk exerting undue pressure or influence on judicial authorities involved in the domestic legal proceedings against Mr. Demirtaş.

***a. Two court decisions after the ECtHR judgment reject Mr. Demirtaş's application for release**:*

**32.** On 25 December 2020, the Ankara 7th Magistrate Court issued a decision rejecting Mr. Demirtaş's lawyers' application for his release in compliance with the ECtHR decision on the grounds that an official translation of the decision had not yet been provided by the Ministry of Justice (Annex I).[13] On 31 December, the Ankara 8th Magistrate Court rejected Mr. Demirtaş's lawyers' appeal against the decision of the Ankara 7th Magistrate Court and again prolonged his detention (Annex II).

***b. The new bill of indictment dated 30 December 2020 against Mr. Demirtaş:***

**33.** On 30 December 2020, the Ankara Chief Prosecutor's office prepared a new indictment against Mr. Demirtaş and 107 others, among whom were HDP former MPs, accusing them of involvement in the 6-8 October 2014 events. It was reported that a trial would take place in the Ankara 22nd Assize Court.[14]

**34.** The NGOs submit that the indictment of the Ankara public prosecutor dated 30 December 2020, which forms the basis of Mr. Demirtaş's ongoing detention, represents (another) reclassification of the same set of facts and incidents that had already been addressed by the Grand Chamber in *Selahattin Demirtaş v. Turkey (No. 2)*. Mr. Demirtaş's ongoing detention, therefore, constitutes a continuation of the violation of his rights, as found by the Court.

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[10] "Atanmışsınız" demek yeni vesayet üretme talebidir - Son Dakika Haberleri İnternet (hurriyet.com.tr).
[11] Kerem Altıparmak and Başak Çalı, "Esastan Bağlayıcı: AİHM Büyük Daire Selahattin Demirtaş Kararı," ("Substantively Binding: The ECtHR Grand Chamber Selahattin Demirtaş Decision," Turkish only), İnsan Hakları Okulu, Ankara, 9 January 2021: see ÇM 24 kapak (insanhaklariokulu.org).
[12] Mehmet Uçum: Milli yargı yetkisi devredilemez | Gündem Haberleri (haberturk.com).
[13] Court refuses to release Demirtaş despite ECtHR ruling, cites 'translation' issues - English (bianet.org).
[14] SON DAKİKA HABERİ: Kobani soruşturmasında flaş gelişme! Aralarında Selahattin Demirtaş da var - Son Dakika Haberler (sabah.com.tr).

### *i. Charges:*

**35.** The 30 December 2020 bill of indictment from the Ankara public prosecutor purportedly concerns the events of 6- 8 October 2014, and was approved by the Ankara 22nd Assize Court on 7 January 2021. In the indictment, Mr. Demirtaş has been charged with 30 different offences which include:[15]

- undermining the unity and territorial integrity of the State (Article 302 of the Criminal Code);
- homicide (37 times) (Article 82 of the Criminal Code);
- attempted murder (31 times) (Article 82, Article 35(1) of the Criminal Code);
- aggravated robbery (24 times) (Article 149 of the Criminal Code);
- damage to property (1750 times) (Article 151(1) of the Criminal Code); and
- damage to property which belongs to a public institution or corporation, or which is designated for use for public service or in a place reserved for the benefit of the public (1060 times) (Article 152(1)(a) of the Criminal Code).

**36.** The indictment is built upon the extravagant foundation that Mr. Demirtaş committed all these alleged offences because he shared his and his party's political views on social media and/or in his public statements, which the Grand Chamber deemed to be protected speech. In an indictment of wildly outsized breadth and scope, Mr. Demirtaş was charged with being responsible for all offences allegedly committed during the series of protests that took place from 6-8 October 2014 in 32 different cities across Turkey, on the basis that through his political statements he had organized those protests. Based on this, the prosecutor charged Mr. Demirtaş with any offence allegedly committed in the course of events of 6 to 8 October 2014, arguing that Mr. Demirtaş was a leading member of the PKK (Kurdistan Workers' Party)/KCK (Kurdistan Communities Union) and should be held responsible for any offence committed by the organization.[16]

### *ii. A criminal law assessment of the indictment in light of the Grand Chamber's findings on the same events and facts:*

**37.** The indictment relies on the same vague assertions and facts that the Grand Chamber had found to be insufficient to justify Mr. Demirtaş's detention. It contains no concrete evidence linking Mr. Demirtaş with any of the alleged unlawful acts, nor does it provide any plausible ground for Mr. Demirtaş's ongoing detention. The prosecutor fails to explain why the allegations are brought now against the applicant separately in relation to events that took place **more than six years ago**. Moreover, the serious deficiencies of the indictment are evidently at odds with the clear findings of the Grand Chamber and Turkey's obligation to faithfully execute the judgments of the ECtHR.

**38.** As addressed by the ECtHR in its judgment, in charging a prominent politician with such serious offences, the indictment relies on very "weak evidence".[17] First, the factual basis for the prosecutor's accusations are public speeches Mr. Demirtaş gave as a political leader, and a number of social media posts he shared on Twitter on behalf of the HDP's central executive board. This was despite the Grand Chamber's finding that the detention and prosecution of Mr. Demirtaş based on his political speech constituted a violation. His statements principally concerned the siege of Kobani (a Syrian town near Suruç, a Turkish border town) by members of the Islamic

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[15] See pages 230 and 231 of the bill of indictment.

[16] See page 3530 of the bill of indictment.
The prosecutor relies on Article 220 (5) of the Criminal Code (establishing organizations for the purpose of committing crimes) providing that: "*Any leaders of such organizations shall also be sentenced as if they were the offenders in respect of any offence committed in the course of the organization's activities.*"

[17] See paragraph 337 of *Selahattin Demirtaş v. Turkey (No. 2)*, in which the Court underlined the tendency of the domestic courts to decide on a person's membership of an armed organization on the basis of very weak evidence.

State of Iraq and the Levant (Daesh or ISIL) in 2014,[18] demanded solidarity with the people of Kobani and called on people in Turkey to protest.[19] The content and context of these statements and his calls for solidarity with the people of Kobani could not be construed as calls for violence. They were within the limits of political expression protected under Article 10 of the Convention, as already confirmed in the Grand Chamber's ruling (paragraph 327). Failing to take into account the Grand Chamber's authoritative findings, the indictment charges Mr. Demirtaş with all the alleged offences committed in 32 cities in Turkey during the events of 6 to 8 October 2014.

**39.** Second, despite lack of convincing evidence, the allegations reiterate once again spurious claims that Mr. Demirtaş was leading and following the instructions from the PKK/KCK in his statements. The Grand Chamber already found that the accusations of the terrorism-related offences against Mr. Demirtaş, as interpreted and applied in his case, were not "foreseeable", that "this consideration [was] equally valid as regards the charges relating to the applicant's speeches" and that "the statements he [had] made as co-chair of the second largest opposition party [could] not be deemed sufficient justification of the reasonableness of the suspicion on which his pre-trial detention was supposed to have been based." (paragraph 337). Despite these clear pronouncements, the prosecutor ignores the Grand Chamber's conclusions and once again charges the applicant in the new indictment under Article 302 of the Criminal Code, on the grounds that he was acting as a leader of a terrorist organization by giving specific political speeches.

**40.** Third, as found by the Grand Chamber, Mr. Demirtaş had already been held in pre-trial detention and charged with different crimes on the basis of the same facts, which contributed to the findings of violations in the proceeding pending before the Ankara 19th Assize Court. Although the Ankara 19th Assize Court decided to release Mr. Demirtaş from pre-trial detention on 2 September 2019, notably a few days before the hearing before the Grand Chamber, Mr. Demirtaş was never released and continued to be held in pre-trial detention in connection with the same events under the present file.

**41.** The Grand Chamber has already addressed the sequence of the events described above. The Court found that "the applicant was placed in pre-trial detention [on 20 September 2019] on the basis of a new legal classification of the 'acts and incidents' relating to the period of 6 to 8 October 2014 that had also formed part of the grounds relied on to justify the specific deprivation of liberty raised in his application, which ended on 2 September 2019" (paragraph 441). According to the Court, Mr. Demirtaş's return to pre-trial detention on 20 September 2019 was not based on a new or different investigation file initiated to investigate alleged offences other than those which were already before the Grand Chamber.

**42.** The facts and evidence relied on in the indictment confirm this finding of the Court that the indictment covers the same facts:

**a.** First, three social media posts shared on the official HDP Twitter account, @HDPgenelmerkezi, on 6 October 2014 calling for solidarity with the people of Kobani against the Daesh siege and calling on the people to protest, were already examined by the Grand Chamber in its judgment, as those had been relied on by the domestic courts for the initial pre-trial detention of the applicant.[20] The Grand Chamber held

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[18] See paragraphs 17-18 of *Selahattin Demirtaş v. Turkey (No. 2)* [GC].
[19] See pages 3453-3454 and 3456-3458 of the bill of indictment.
[20] Those tweets are cited in paragraph 20 of the *Selahattin Demirtaş v. Turkey* (No. 2) as follows:
– "Urgent call to our people! Urgent call to our people from the HDP central executive board, currently in session! The situation in Kobani is extremely dangerous. We urge our people to join and support those protesting in the streets against Daesh attacks and the AKP [Justice and Development Party] government's embargo over Kobani." (Original version in Turkish: "*Halklarımıza acil çağrı! Şuanda toplantı halinde olan HDP MYK'dan halklarımıza acil çağrı! Kobane'de duruş son derece kritiktir. IŞİD saldırılarını ve AKP iktidarının Kobané'ye ambargo tutumunu protesto etmek üzere halklarımızı sokağa çıkmaya ve sokağa çıkmış olanlara destek vermeye çağırıyoruz*.")
– "We call upon all our people, from 7 to 70, to [go out into] the streets, to [occupy] the streets and to take action against the attempted massacre in Kobani." (Original version in Turkish: "*Kobane'de yaşanan katliam girişimine karşı 7 den 70 e bütün halklarımızı sokağa, alan tutmaya ve harekete geçmeye çağırıyoruz*.")

that these calls could not be construed as a call for violence (paragraph 327). In the new indictment, those social media posts are relied on once more by the prosecutor for the accusations against Mr. Demirtaş despite the Grand Chamber's findings and the fact that the criminal proceeding concerning them is ongoing before the Ankara 19th Assize Court.[21]

**b.** Secondly, the indictment also includes, as purported evidence of criminal conduct, certain political statements in which Mr. Demirtaş had expressed his view on the events of 6 to 8 October 2014.[22] Among those statements, the Grand Chamber already examined and found Mr. Demirtaş's statements dated 13 October 2014 within the limits of protected political expression.[23] The Court held that those statements "did not amount to terrorist indoctrination, praise for the perpetrator of an attack, the denigration of victims of an attack, a call for funding for terrorist organisations or other similar behaviour" (paragraph 328).

**c.** Thirdly, the other political statements of Mr. Demirtaş on the events of 6 to 8 October 2014 cited in the indictment are notably similar in nature. For instance, Mr. Demirtaş, in his statements dated 19 September 2014, expressing a moral imperative on humanity to defend Kobani against Daesh attacks, called for solidarity with the Kobani resistance and support to defend Kobani's honour and future.[24] He also stated that it was a duty for humanity to defend Kobani and to fight against "Daesh barbarity".[25] In another speech dated 30 September 2014, Mr. Demirtaş called on people to support the "historical resistance [of Kobani]."[26] Lastly, on 5 October 2014, Mr. Demirtaş stated that YPG (People's Protection Units, founded in Syria and one of the main resisting forces against Daesh) was "resisting on behalf of humanity with limited means", that they wanted to bring Kobani to "a stage of permanent peace", and warned the Turkish Government concerning its alleged support for Daesh.[27] The Grand Chamber already

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– "From now on, everywhere is Kobani. We call for permanent resistance until the end of the siege and brutal aggression in Kobani." (Original version in Turkish: "*Bundan böyle her yer Kobane'dir*. *Kobane'deki kuşatma ve vahşi saldırganlık son bulana kadar süresiz direnişe çağırıyoruz*.")

[21] See pages 3456-3458 of the bill of indictment.

[22] See pages 305, 317-318, 3453-3454 of the bill of indictment.

[23] See the indictment p. 317-318, and *Selahattin Demirtaş v. Turkey* (No. 2) paragraph 27 ("In an interview published on 13 October 2014 in the daily newspaper Evrensel, the applicant was quoted as follows:
'It is directly linked to Kobani. It is not for us to calm down the anger. We do not have so much influence over the people, nor is it necessary. We believe that the practical measures the government could take to drive Daesh out of Kobani will end this anger. Of course, I am not talking about acts of violence. We have not encouraged acts of violence such as the use of weapons, arson, destruction [and] robbery. We have not incited or organized [such acts]. But we have called for the people's anger to be channelled into an ongoing protest, day and night, everywhere, on the squares, in homes, in the streets, in cars. We still stand behind that call.' The original version in Turkish: "*Doğrudan Kobaniyle bağlantılıdır. Öfkeyi yatıştırabilecek olan biz değiliz. Bizim halk üzerinde ne böyle bir gücümüz vardır ne de buna gerek vardır. Yani halk IŞİD'e karşı durmasın sempati duysun diye uğraşacak değiliz. Biz hükümetin atacağı pratik adımların IŞİD'in Kobani'den püskürtülmesiyle sonuçlanmasının bu öfkeyi durduracağını düşünüyoruz. Elbette ki bundan kastettiğim şiddet olayları değil. Biz silah kullanma, yakıp yıkma, yapmalama gibi şiddet eylemlerini teşvik etmedik, tahrik etmedik, örgütlemedik ama halkın öfkesinin alanlarda, meydanlarda, gece gündüz evinde, sokakta, arabasında elindeki bütün imkanlarla bir protestoya dönüşmesinin çağrısını yaptık. O çağrının da halen arkasındayız*.").

[24] See page 3453 of the bill of indictment (Original version in Turkish: "*Gün artık Kobane, Kobane şahsında onurumuzu geleceğimizi savunma günüdür*").

[25] See page 3454 of the bill of indictment (Original version in Turkish: "*Suruç'ta insanlar çadır açacak, sivil eylem ve etkinlikler yapacaklar. Ama bununla yetinilmemeli. Bütün gençlere IŞİD'e karşı cephede savunma çağrısı yapıyorum. Bugün Kobani'de insanlık onuru savunuluyor. Mademki uluslararası güçler sesiz kalıyorsa, mademki Türkiye bu kadar sesiz kalıyor Türk'ü ile Kürt'ü ile Alevisi ile Sünnisi ile gençler gidip Kobani'de IŞİD barbarlığına karşı direnebilmelidir. Açıkça bu çağrıyı yapıyorum bu bir insanlık borcudur aynı zamanda*.").

[26] See page 3454 of the bill of indictment (Original version in Turkish is worded as follows: "Bu bir yalvarma değildir. Bu bir minnet değildir. Tarihi direnişe hep birlikte katılalım. Tarihi direnişi hep birlikte yapalım ki tarih ittifakıda tarih birliğide oluşturma fırsatımız olsun.")

[27] See page 3454 of the bill of the indictment (Original version in Turkish was taken from an internet site as : "Kobanê sınırında konuşan HDP Eş Genel Başkanı Selahattin Demirtaş, YPG'nin sınırlı imkanlarla insanlık adına direndiğine dikkat çekti. 'Kobanê'yi

evaluated similar speeches by Mr. Demirtaş on the same events in its judgment and found that they could not be construed as a call for violence.

**d.** Fourthly, the indictment includes as purported evidence of criminal conduct, Mr. Demirtaş's political statements which did not concern the events of 6 to 8 October 2014. Those statements - dated from 2012 to 2013 and 2015 to 2019 - were expressions critical of the policies pursued by the Government regarding the Kurdish issue, and in some of those Mr. Demirtaş defended self-governance and resistance.[28] The part of the indictment concerning Mr. Demirtaş's statements is more than 100 pages.[29] As these statements do not concern the events of 6 to 8 October 2014, the prosecutor's reliance on them in the indictment appears to lack relevance to the underlying allegation forming the basis of the charges. The indictment does not explain how and why these statements can be linked to the events of 6 to 8 October. In any case, the Grand Chamber already examined similar statements of Mr. Demirtaş concerning the Kurdish issue, self-governance and autonomy (paragraphs 45-47, and 50). The Court held that those statements also "did not amount to terrorist indoctrination, praise for the perpetrator of an attack, the denigration of victims of an attack, a call for funding for terrorist organisations or other similar behaviour*"* and that "the speeches would not satisfy an objective observer that the applicant may have committed the offences for which he was placed in pre-trial detention, unless other grounds and evidence justifying his detention were put forward" (paragraph 328).

**e.** Fifthly, the Court also examined Mr. Demirtaş's public statements of 13 November 2012 made during demonstrations that had been held in Nusaybin and Kızıltepe in protest against the conditions of PKK leader Abdullah Öcalan's detention. Mr. Demirtaş had been charged with propaganda in favour of a terrorist organisation on account of these comments in the criminal proceedings pending before the Ankara 19th Assize Court.[30] Considering that those comments had been made in a specific context during the "solution process",[31] the ECtHR held that they could be "seen as the applicant's assessment of the armed clashes in Turkey rather than as incitement to violence and glorification of terrorism" and that they could not be "regarded as capable of encouraging the pursuit of violence or exacerbating the security situation in a particular region of Turkey." (paragraph 334). However, these comments are also relied on once again by the prosecutor in the new indictment against Mr. Demirtaş.[32]

**f.** Lastly, the title the prosecutor uses for the part that lasts 413 pages and consists of statements of all defendants is "[Social media] Posts, News and Statements Illustrate that Defendants Acted under the Guidance of the Terrorist Organization". The prosecutor, without explaining how hundreds of pages of political statements that do not contain incitement to violence could be taken as evidence of alleged leadership of a terrorist organization, seems to claim that statements made by the applicant and other politicians at different times were, in fact, the proof of their leadership role.

**43.** Therefore, although the indictment charges all defendants in the case on many different counts, from murder to burglary, in essence there is no real difference between the first case file before the Ankara 19th Assize Court and

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sürecin biteceği bir noktaya değil, kalıcı barışa doğru bir hamle noktasına getirmek istiyoruz' diyen Demirtaş, Hükümet'i DAİŞ'e verdiği destek konusunda uyardı.")

[28] See the indictment, pp. 329, 338, 340-345.

[29] The part that includes Mr. Demirtaş's statements is at pp. 2979-3093.

[30] The statements are cited as follows in paragraph 79 of *Selahattin Demirtaş v. Turkey* (No. 2): "They said you couldn't put up the poster of Öcalan. Those who said it ... Let me speak clearly. We are going to put up a sculpture of President Apo. The Kurdish people have now risen up. With their leader, their party, their elected representatives, their children, their young and old, they are one of the greatest peoples of the Middle East." (original version in Turkish: "*Demişler ki Öcalan posteri asamazsınız. Onu diyenlere açıkça sesleniyorum... Biz başkan Apo'nun heykelini dikeceğiz heykelini. Kürt halkı artık ayağa kalkmış bir halktır. Önderiyle, partisiyle, seçilmişiyle, çocuğuyla, genciyle, yaşlısıyla Ortadoğu'nun en büyük halklarından biridir*").

[31] During this process, the national authorities had initiated negotiations with PKK leaders, including Abdullah Öcalan, with a view to finding a lasting, peaceful solution to the Kurdish question.

[32] See page 3469 of the bill of indictment.

the second one before the Ankara 22nd Assize Court with respect to the facts that have been reviewed by the Grand Chamber and were found to have led to violations of the Convention. Both of them accuse Mr. Demirtaş of leading a terrorist organization and expressing views under the orders of the organization, all of which were already found by the Grand Chamber to be baseless. As a result, the NGOs consider that it would be contrary to the object and purpose of Article 5 of the Convention, to interpret Mr. Demirtaş's detention as two different episodes of pre-trial detention. The current and ongoing detention of Mr. Demirtaş should be seen as a continuation of the violations found by the Grand Chamber.

**44.** Finally, the indictment remains silent on the question of whether Mr. Demirtaş's speeches under consideration are covered by his parliamentary non-liability. On this important issue, the Grand Chamber underlined that the national authorities had a procedural obligation to perform a judicial review "to determine first of all whether the speeches on account of which the applicant was charged and placed in pre-trial detention were covered by parliamentary non-liability as provided for in the first paragraph of Article 83 of the Constitution" (paragraph 261).

**45.** As cited in the Grand Chamber ruling, Mr. Demirtaş had already made similar statements in Parliament concerning the 6 to 8 October 2014 events on 9 October 2014 (paragraph 26) and on 28 July 2015 (paragraph 36); the "solution process" and Abdullah Öcalan on 11 October 2011 (paragraph 28); self-governance, autonomy and resistance on 22 December 2015 (paragraph 46) and 12 January 2016 (paragraph 50); the Kurdish issue and resistance on 9 February 2016 (paragraph 51), 23 February 2016 (paragraph 52) and 4 October 2016 (paragraph 54). The NGOs submit that considering the accusations against Mr. Demirtaş in the new indictment are based on similar statements which had been expressed in Parliament, the judicial authorities had an obligation to make an assessment on whether his statements were protected by parliamentary liability (see paragraph 263).

**46.** In sum, the ECtHR already examined in *Selahattin Demirtaş v. Turkey (No. 2)* the facts forming the basis of the indictment in question, which also formed the basis of Mr. Demirtaş's ongoing detention. As confirmed by the Court, although the alleged offences had been classified differently, the "acts and incidents" relating to the period of 6-8 October 2014 had already formed part of the grounds for Mr. Demirtaş's pre-trial detention which ended on 2 September 2019 and was found to have violated the Convention. In light of the above, the NGOs submit, in line with the Grand Chamber's conclusion, that the Turkish authorities instituted "new criminal investigations in relation to facts previously considered insufficient to justify detention, by means of a new legal classification" in order to circumvent the right to liberty of Mr. Demirtaş. As a consequence, Mr. Demirtaş's ongoing detention constitutes a continuation of the violations found by the Grand Chamber (Paragraph 440).

***c. Third court decision since the ECtHR judgment prolonging Mr. Demirtaş' detention:***

**47.** On 7 January 2021, the Ankara 22nd Assize Court formally accepted the indictment, and Mr. Demirtaş now faces 30 new charges in a trial the first hearing of which is set for 25 April 2021. In its interim decision (*tensip zaptı*) the Ankara 22nd Assize Court ordered the prolongation of Mr. Demirtaş's detention (Annex III). The interim decision merits scrutiny because it is the third Turkish court decision prolonging Mr. Demirtaş's detention since the ECtHR judgment.

**48.** The Ankara 22nd Assize Court's interim decision first justifies prolonging Mr. Demirtaş's detention by asserting that the ECtHR judgment is not applicable to his current detention. The Assize Court notes that the ECtHR referred to multiple criminal proceedings against Mr. Demirtaş by different judicial authorities and stated – in paragraph 63 of the judgment – that the case before it concerned the investigation of the Diyarbakir public prosecutor against Mr. Demirtaş. Based on this, the local court claims that the ECtHR judgment was about Mr. Demirtaş's "first detention" which had started on 4 November 2016 and continued until 2 September 2019. By referring only to paragraph 63 and leaving out mention of what the ECtHR went on to state on this matter in later paragraphs of the judgment, described below, the Ankara 22nd Assize Court incorrectly maintained that the

ECtHR judgment was not binding in the case of the "second detention" of the applicant which started on 20 September 2019 and continues.

**49.** The Ankara 22nd Assize Court's approach closely matches the government's position as advanced by President Erdogan's senior legal advisor, Mehmet Uçum. Like the Ankara 22nd Assize Court, Mr. Uçum maintained in his 28 December 2020 newspaper interview that Mr. Demirtaş's current detention from 20 September 2019 was distinct from his "first detention", had been taken in the scope of a separate set of proceedings and that local remedies had not been exhausted in this second case.[33] In another interview, he termed the ECtHR's observations about this second detention to be "scandalous".[34]

**50.** The Government's "Communication to the Committee of Ministers in the Execution of the Judgment of Demirtaş v. Turkey"[35] also echoes the reasoning of the Ankara 22nd Assize Court. After summarizing the findings of the Assize Court, the Government claims that there are two separate detention orders issued against the applicant and the scope of the execution of the judgment of *Demirtaş v. Turkey* is limited to the period between 4 November 2016 and 7 December 2018.

**51.** The Ankara 22nd Assize Court, as well as the Government's Communication, completely ignore the ECtHR determination that Mr. Demirtaş's detention on 20 September 2019 was, in fact, not a separate detention but a "**return to pre-trial detention,**" reliant on the Ankara prosecutor's criminal investigation into "**facts forming the basis of the trial that is still ongoing in the Ankara [19th] Assize Court, in connection with which the applicant had already been placed in pre-trial detention**" (paragraph 433). In other words, the ECtHR assessed that the pre-trial detention of Mr. Demirtaş on the basis of the same facts meant that the two periods of pre-trial detention – despite an 18-day interval between them – were to be understood as a whole and not as two distinct and separate episodes. The ECtHR did not consider Mr. Demirtaş's release on 2 September 2019 and re-detention 18 days later as a new detention because the facts justifying the detention – which the ECtHR found insufficient – were the same as those for which he had been detained earlier and was still on trial. For this reason, the ECtHR adopted the term "return to pre-trial detention", emphasizing a continuity between the two periods of detention. The NGOs submit that the ECtHR's use of the term "return to pre-trial detention" is clear and leaves no doubt as to the continuing nature of the violation of Article 5.

**52.** Disregarding the findings of the ECtHR judgment, the Ankara 22nd Assize Court's interim decision nevertheless makes the assessment that the grounds for Selahattin Demirtaş's detention in the scope of the new case before it do not rely on the same facts for which he was previously detained during his ongoing trial at the Ankara 19th Assize Court. The Ankara 22nd Assize Court asserts, on the contrary, that the facts and the parties to the case included in the new indictment are distinct from those in the ongoing trial before the Ankara 19th Assize Court with the statement: "Our court underlines that at the first stage the facts and the parties in the two cases are not

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[33] Mr. Uçum makes the argument in his media interview: see, "Atanmışsınız" demek yeni vesayet üretme talebidir - Son Dakika Haberleri İnternet (hurriyet.com.tr), Hurriyet newspaper.

[34] AİHM kararı hukuki mi, siyasi mi, interview with Mahmut Övür, https://www.sabah.com.tr/yazarlar/ovur/2020/12/26/aihm-karari-hukuki-mi-siyasi-mi;
In her dissenting opinion to the ECtHR judgment, the Turkish judge Saadet Yüksel also submitted similar views. Judge Yüksel stated that "To the best of my knowledge, this is the first Grand Chamber case in which an applicant's release has been recommended not on the basis of a complaint in respect of which the Grand Chamber finds a violation, but on the basis of a factual issue taken into consideration together with other factual issues under Article 18 of the Convention. In other words, the majority's conclusion under Article 46 of the Convention does not appear to have been aimed at putting an end to a violation that has been found to exist, given that the Grand Chamber was not called upon to examine the applicant's second detention from the point of view of Article 5 of the Convention, a question that is, I repeat, pending before the Constitutional Court". See "Partly dissenting opinion of Judge Yüksel shared by Judge Paczolay," in *Selahattin Demirtaş v. Turkey (No. 2)* [GC] (Application no. 14305/17), paragraph 9, p. 144.

[35] Communication to the Committee of Ministers of the Council of Europe in the Execution of the Judgment of Demirtaş v. Turkey (no. 14305/17), DH-DD(2021)12102 February 2021, paragraphs 3 and 62.

the same and the existence of a new and different case opened before our court."[36] In other words, the Ankara 22nd Assize Court attempts to negate the ECtHR's assessment that Mr. Demirtaş's current detention should be viewed part of a continuum with his earlier detention.

**53.** The Ankara 22nd Assize Court makes two other assumptions in its interim decision to justify ignoring the ECtHR's order that Mr. Demirtaş be released. Since the Assize Court views Mr. Demirtaş's current detention as separate from his earlier period of detention, it determines that it is only an appeal on the legality of the detention pending before the Constitutional Court that is operative here and not the ECtHR judgment. The NGOs recall that this is one of the arguments advanced by the president and his senior advisor as grounds for rejecting the ECtHR's order to ensure the release of Mr. Demirtaş.

**54.** The Ankara 22nd Assize Court decision also emphasizes that the 30 new charges against Mr. Demirtaş are not the same as those charges he faces in his ongoing trial before the Ankara 19th Assize Court. This ignores the ECtHR assessment which focused on Mr. Demirtaş's detention on the basis of "facts forming the basis of the trial that is still ongoing" as more significant than the matter of the alleged offences being "classified differently" (paragraph 433). It is not surprising that the ECtHR did not comment on other charges brought against Mr. Demirtaş, since his application concerned his right to liberty. He was detained and returned to pre-trial detention in two merged sets of criminal proceedings. No detention order has been imposed in other pending criminal trials against him and they were, in any case, out of the scope of the Strasbourg procedure that relates to Articles 5, 10 and 18.

**~~55.~~** The Ankara 22nd Assize Court decision makes a further assessment of the grounds to prolong Mr. Demirtaş's detention, including risk of flight, assessment of reasonable suspicion, and risk to public order of the defendant being at liberty. The argument to prolong his detention is justified by reproducing pages of the indictment offering an account of the history of the PKK, news reports alleging that Mr. Demirtaş and other HDP politicians visited the northern Syrian city of Kobani in the month before the 6-8 October 2014 events, had extensive meetings with Kurdish authorities there, as well as their speeches and claims about them by witnesses. The court does not provide an assessment of how any of this information supports the reasonable suspicion that Mr. Demirtaş could have committed the 30 crimes the indictment accuses him of.

**56.** Finally, the interim decision of the Ankara 22nd Assize Court includes two items concerning the issue of whether Mr. Demirtaş's speeches are covered by his parliamentary non-liability as explicitly addressed in the Grand Chamber judgment. In the operative part, the court decides to ask Turkey's Parliament which of the defendants including Mr. Demirtaş were MPs in the year 2014, which statements in the indictment were made in parliamentary proceedings and whether some statements made later could be seen as having the same content as statements already made in Parliament.[37] This part of the decision demonstrates that no judicial authority had examined the matter of whether the speeches of Mr. Demirtaş and other former MPs were covered by parliamentary non-liability in the course of the 15 months of Mr. Demirtaş's return to pre-trial detention under this investigation. The Assize Court also seems to act on the assumption that only speeches that are the "same" as, and made "after", those delivered in Parliament can fall within the scope of parliamentary non-liability. Such an approach is also in conflict with the ruling of the Grand Chamber.

***d. Fourth court decision since ECtHR judgment prolongs Mr. Demirtaş's detention:***

**57.** On 5 February 2021, the Ankara 22nd Assize Court prolonged Mr. Demirtas's detention once again, and corrected the date of the first hearing in the case to 26 April 2021 (Annex IV).

**58.** The NGOs submit that the court decisions prolonging Mr. Demirtaş's detention and the new indictment against him simply reflect and accept at face value the official views expressed by senior government officials. Failing

[36] In Turkish: "Mahkememiz ilk etapta iki dosyanın olay ve taraflarının aynı olmadığı ve mahkememize açılan yeni ve farklı bir dosyanın varlığının altını çizmektedir." page 145.
[37] Interim Report (Tensip Zaptı), items 9 and 10.

to implement the ECtHR judgment in terms of individual measures demonstrates that there has been a prolongation of the violation of Mr. Demirtaş's rights as well as a breach of the obligation by the Government to abide by the Court's judgment in accordance with Article 46(1) of the Convention (paragraph 442).

## V. The Demirtaş ECtHR Judgment as a Reflection of a General Pattern of Abuse of Criminal Procedure in Turkey

**59.** The Grand Chamber ordered the immediate release of Mr. Demirtaş in the operative part of its judgment. However, it is also clear in its reasoning that the Court is aware of a recurring problem in Turkey relating to abuse of criminal procedure – namely, politically motivated prosecutions and unlawful continuing detentions. Indeed, the case of Selahattin Demirtaş is not isolated, but reflects patterns and practices arising in other cases that have been documented by the signatory NGOs and have come before the Court and Committee.

**60.** Following the judgment *Kavala v. Turkey*, the applicant in that case, Mr. Osman Kavala, was released by the domestic judicial authorities in the Gezi Park protests case he had been detained for when the ECtHR delivered its judgment. However, a new detention order imposed a day later by a magistrate court, based on the same facts which had already been reviewed by the ECtHR, means that to date Mr. Kavala has not been released from prison. The Committee of Ministers, in its decisions concerning the implementation of the Kavala judgment by Turkey considered that the information available to the Committee raised a "strong presumption" that Mr. Kavala's current detention was a continuation of the violations found by the ECtHR. The Committee of Ministers also adopted an interim resolution with the same wording in its 1390th meeting held in December 2020.[38]

**61.** The ECtHR has also identified this pattern in *Atilla Taş v. Turkey*.[39] On the day a decision was given to release Mr. Taş from pre-trial detention by an Istanbul assize court, the Istanbul public prosecutor's office had launched a new criminal investigation against him on the basis of the same facts, only changing the legal classification of the alleged offenses. As a result, Mr. Taş had remained deprived of his liberty. Similar to the case of *Selahattin Demirtaş v. Turkey (2)*, in *Atilla Taş v. Turkey,* the ECtHR concluded that recognising these two detention orders as separate legal acts would be against the object and purpose of Article 5:

> "En l'occurrence, la Cour relève que, formellement, la privation de liberté du requérant se décompose donc en deux périodes distinctes : la première du 31 août 2016 au 31 mars 2017 et la seconde du 31 mars 2017 au 24 octobre 2017. Cependant, elle estime qu'il serait contraire à l'objet et au but de l'article 5 de la Convention, lequel consiste essentiellement à protéger l'individu contre une privation de liberté arbitraire ou injustifiée d'interpréter la détention subie par le requérant comme deux détentions provisoires différentes." (paragraph 77).

**62.** Considering this recurring problem in politically motivated detention cases in Turkey, the Grand Chamber in *Selahattin Demirtaş v. Turkey*, despite opposing arguments by the Government, concluded that:

> "In this context, the apparent purpose of the applicant's return to pre-trial detention was to investigate the events of 6 to 8 October 2014. However, although the alleged offences were classified differently, this criminal investigation concerned part of the facts forming the basis of the trial that is still ongoing in the Ankara Assize Court, in connection with which the applicant had already been placed in pre-trial detention (see paragraph 70 above). 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

[38] http://hudoc.exec.coe.int/eng?i=004-55161
[39] *Atilla Taş v. Turkey*, Application no. 72/17, 19 January 2021.

> 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 between 6 and 8 October 2014, some five years previously, but rather in keeping him detained, thereby preventing him from carrying out his political activities."(paragraph 433)
>
> "In the present case, therefore, the Court cannot disregard the fact that the applicant was placed in pre-trial detention on the basis of a new legal classification of the "acts and incidents" relating to the period of 6 to 8 October 2014 that had also formed part of the grounds relied on to justify the specific deprivation of liberty raised in his application, which ended on 2 September 2019. In the light of the findings it has reached, in particular its finding of a violation of Article 18 in conjunction with Article 5, the Court emphasises that the execution measures that must now be taken by the respondent State, under the supervision of the Committee of Ministers, as regards the applicant's situation must be compatible with the conclusions and spirit of this judgment" (paragraph 441).

**63.** As these cases and others pending before the Court illustrate, the method of "detain-release-detain" under other criminal provisions for the same acts aims to circumvent the implementation of ECtHR judgments and itself constitutes a separate violation of Article 18.

**64.** Finally, the Grand Chamber examined the application of Article 314 of the Criminal Code in Mr. Demirtaş's case. The Court concluded that "the national judicial authorities, including the public prosecutors who conducted the criminal investigation and charged the applicant, the magistrates who ordered his initial and/or continued pre-trial detention, the assize court judges who decided to extend his pre-trial detention, and lastly the Constitutional Court judges, adopted a broad interpretation of the offences provided for in Article 314 §§ 1 and 2 of the Criminal Code. The political statements in which the applicant expressed his opposition to certain government policies or merely mentioned that he had taken part in the Democratic Society Congress – a lawful organisation – were held to be sufficient to constitute acts capable of establishing an active link between the applicant and an armed organisation" (paragraph 278).

**65.** Whilst reaching this conclusion, the Court referred to the Venice Commission's Opinion on Articles 216, 299, 301 and 314 of the Criminal Code[40] of Turkey as well as the observations of the Commissioner for Human Rights on the same subject. The Court itself had also previously observed that some other provisions of Turkey's anti-terror legislation did not meet the legality standard of the Convention.[41]

**66.** All these experts, and many others, have criticised the Turkish judicial authorities' application of anti-terror legislation. The legislation does not comport with the principle of legality, as those to whom it might be directed are not able to foreseeably determine what conduct would be proscribed. The law has also been interpreted in a way to punish individuals for the exercise of rights protected under the Convention. While, to date, Turkey's judicial authorities have subjected individuals to criminal prosecution for the alleged danger they cause through their speech, the current indictment and interim decision of the Ankara 22nd Assize Court against Mr. Demirtaş mark a new departure by holding him and the other defendants directly responsible for the violent acts of other people – among them, murder, attempted murder, burglary, and looting. It should be noted that the indictment does not aim to prosecute the defendants for instigating or inciting these acts. The indictment alleges that all defendants are responsible for every single act allegedly committed by other people during the 6-8 October 2014 events. The prosecutor claims that all 108 defendants were leaders of the "terrorist" organization. Consequently, all of them are held responsible for the very same number of acts. The prosecution provides hundreds of pages of political statements made by the defendants over 6 years as alleged evidence that all were leaders of a terrorist organization. However, it should be noted that none of these statements had been investigated at the time they

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[40] Venice Commission, *Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey*, CDL AD(2016)002,15 March 2016.
[41] *Işıkırık v Turkey*, App. no. 41226/09), 14 November 2017; *İmret v Turkey*; *Bakır and Others v. Turkey*, 46713/10, 10 July 2018.

were made. As a result of this unforeseeable and implausible interpretation of the Criminal Code, Mr. Demirtaş, among others, is being prosecuted for "killing 37 individuals" through his political speech including tweets, statements and interviews.

**67.** The NGOs consider that although the prosecutor has adopted this absurd interpretation to present the case otherwise, in essence there is no real difference between the facts of the first criminal case against Mr. Demirtaş before the Ankara 19th Assize Court and the second case before the Ankara 22nd Assize Court. Mr. Demirtaş's current detention in the context of this indictment against him should be regarded, in line with the Grand Chamber's findings, as a continuation of the detention that started on 4 November 2016.

**68.** The NGOs conclude that, in failing to implement the individual measures, in which the ECtHR explicitly required Mr. Demirtaş's immediate release, the Government is responsible for continuing violations of Articles 5(1) and (3), 10, 18 (in conjunction with Article 5) and Protocol No. 1 Article 3 of the Convention in relation to Mr. Demirtaş's case, which also breaches Article 46(1) of the Convention.

## VI. Recommendations to the Committee of Ministers on Individual Measures

**Regarding procedural matters, the NGOs urge the Committee of Ministers to:**

**i.** Ensure that *Demirtaş v. Turkey (No.2)* be placed under enhanced procedures and treated as a leading case under Articles 5 and 18 of the Convention concerning politically motivated detentions of members of parliament.

**Regarding individual measures, the NGOs urge the Committee of Ministers to:**

**ii.** Call for the immediate release of Selahattin Demirtaş as required by the ECtHR judgment, and indicate that Mr. Demirtaş's ongoing detention constitutes a prolongation of the violation of his rights, as found by the Grand Chamber.

**iii.** Underline that the Grand Chamber´s judgment clearly applies to Mr. Demirtaş's ongoing detention, which constitutes a continuation of the violations established by the Court, and to any future charges or detentions where the factual or legal basis is substantially similar to that which the ECtHR has already addressed in its judgment.

**iv.** Call for the halt of all criminal proceedings initiated against Mr. Demirtaş following the constitutional amendment lifting his 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 be deemed unlawful.

**v.** Request the Government of Turkey to end the abuse of judicial proceedings to harass Selahattin Demirtaş, including by dropping all charges under which he has been investigated 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.

**vi.** Emphasise that the *restitutio ad integrum* in this case requires the cessation of the harassment of Mr. Demirtaş through judicial processes in the form of future detentions and prosecutions solely for his political activities and his political speech.

**vii.** Request the Government of Turkey to end interference directly in Mr. Demirtaş's cases, especially by attempting to pressure or unduly influence judicial authorities.

**viii.** Publicly correct false claims promoted by senior officials of the Government of Turkey that the Grand Chamber judgment in the case of Mr. Demirtaş, and ECtHR judgments more generally, are not binding.

**ix.** Recognize at the earliest possible occasion that the continuing detention of Selahattin Demirtaş violates Article 46 of the Convention concerning the binding nature of final judgments of the ECtHR and may trigger Article 46(4).