IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 13609/20

BETWEEN:

SELAHATTİN DEMİRTAŞ
Applicant

- and –

TURKEY
Respondent

- and –

Turkey Human Rights Litigation Support Project,
Human Rights Watch,
International Commission of Jurists
Interveners

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

I. Introduction

1. The Third-Party Interveners (the Interveners) submit these written comments by leave of the President of the Second Section of the Court granted on 20 April 2021 under Rule 44(3) of the Rules of the Court.

2. The issues raised by the present case represent some of the most fundamental human rights challenges in Turkey today. Restrictions on freedom of expression, widespread detention and criminal prosecution under expansive anti-terrorism laws, and the impact on democratic debate and rights protection are now well documented. This is particularly striking, and the repercussions serious, when opposition politicians are targeted for their expressions of opinion and engagement in democratic debate.

3. Drawing on expertise as organisations specialising in international human rights law (IHRL) and working extensively on human rights and the judicial process in Turkey, the Interveners will address two central issues: the nature and application of anti-terror criminal laws in Turkey and the implications for articles 5(1), 10 and 18 (Section II) of the European Convention on Human Rights (ECHR); and the effectiveness of the Constitutional Court, in particular in cases concerning the detention of government opponents (Section III).

II. International and Comparative Legal Standards in Relation to Anti-Terror Laws and their Abusive Application in Turkey

4. The issues raised in this case, and the questions posed by the court, are inherently interlinked with the issue of the lawful limits of criminal law. Specifically, the case raises the question of the implications of the nature and scope of criminal law as a ground for detention which purports to be lawful on the basis of criminal law (under article 5(1)), for the lawfulness of the onerous restrictions on free expression that criminal law entails (under article 10), and for article 18.

5. There is no doubt that criminal law is among the arsenal of measures that states can, and often must, adopt pursuant to their 'positive obligations' to prevent and respond to terrorist violence,[1] as this Court confirmed in the *Beslan School Siege* case.[2] However, the legitimacy of criminal law depends on it meeting core standards reflected across IHRL and national and international criminal law.[3] The principle of **legality** is at the heart of a rule of law - as opposed to an arbitrary - approach to criminal law. The following are among the benchmarks of legality, which are pre-requisites for the lawfulness of measures under the Convention, against which the Turkish law and practice in the next section must be considered.

6. First is the requirement of legal certainty, including ***clarity and specificity of criminal law***. The principle of *nullum crimen sine lege* is separately enshrined in article 7, and across legal systems, but is also a pre-requisite to detention pursuant to criminal charges under article 5(1). Indeed, this Court has underlined that a strict approach to legal certainty is particularly important where deprivation of liberty is concerned.[4] Likewise, in respect of restrictions under Article 10 which must be "prescribed by law," it is clear that the law must be formulated "*with sufficient precision to enable people to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the*

[1] ECtHR, *Osman v. United Kingdom*[GC], App. No. 23452&94,28 October 1998, para. 115.
[2] ECtHR, *Tagayeva and Others v Russia*, App. No. 26562/07, 13 Apr. 2017.
[3] International Commission of Jurists, Counter-Terrorism and Human Rights in the Courts: Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism, November 2020, p.7.
[4] See e.g., ECtHR, *Şahin Alpay v. Turkey,* App. No. 16538/17, 20 March 2018, para.116.

circumstances, the consequences which a given action may entail."[5] Both the material and mental elements of crimes must be previously defined in law with sufficient precision and clarity to ensure foreseeability.[6] This is linked to the most basic principle of criminal law, that individuals are held responsible for their own conduct and any associated intent.[7] Responsibility must be individual, not collective.[8]

7. Terrorism laws, and in particular crimes such as indirect incitement or propagandizing for terrorism, have often tended to be broadly formulated, and have commonly been criticised by international courts and bodies for their inherent vagueness, unduly broad scope, and insidious rights implications, in particular for freedom of expression. Multiple United Nations Special Rapporteurs[9], the Council of Europe commissioner for human rights,[10] and the UN Secretary General, are among those that have drawn a sharp distinction between direct incitement to terrorist violence, which should be prosecuted, and more problematic, vaguer forms of 'indirect' incitement of terrorism such as by "encouraging", "praising", "provoking", "advocating" or "justifying" terrorism.[11]

8. Second, even where criminal law is not inherently unclear, the principle of legality requires that they must be ***strictly applied and restrictively interpreted***.[12] Reflecting broader international standards, this Court has noted that criminal law "must not be extensively construed to an accused's detriment, for instance by analogy."[13] The principle of legality and the presumption of innocence also require that prosecutions take place only when there is a solid, adequate basis in law and fact.[14]

9. Third, resort to criminal law should be exceptional in accordance with the ***principle of restraint***. This reflects the established principle of criminal law that it should be employed as the "*ultima ratio"*, reserved for sufficiently grave violations of a core harm to a protected social value.[15] This Court has noted that "the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings,

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[5] ECtHR, *Selahattin Demirtaş v. Turkey* (no. 2) [GC], App. no. 14305/17, 22 December 2020, para 250; *Öztürk v Turkey*, App. No. 22479/93, 28 Sep.1999, para. 54.

[6] International Commission of Jurists, Counter-Terrorism and Human Rights in the Courts (n 3), p. 14; see e.g. ECtHR, *Parmak and Bakır v. Turkey*, App. Nos. 22429/07 and 25195/07, 3 Dec. 2019, para. 58.

[7] See e.g., "European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI))", European Parliament, P7_TA(2012)0208, (hereafter, European Parliament, EU Approach to Criminal Law).

[8] ICTY, *Prosecutor v. Tadic*, (Case No. IT-94-1-A), Judgment (Appeals Chamber), 15 July 1999, para. 186: "nobody may be held criminally responsible for acts in which he has not personally engaged or in some way participated". On the prohibition on collective punishments in International Humanitarian Law (IHL) (as well as IHRL), see Article 33 of the 1949 Geneva Convention (IV) on Civilians; Article 75 of Additional Protocol I, Article 6(2) Additional Protocol II.

[9] The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and responses to conflict situations, 4 May 2015, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15921&LangID=E.

[10] The Council of Europe Commissioner for Human Rights, 'Misuse of anti-terror legislation threatens freedom of expression', 4 December 2018.

[11] See e.g., ECtHR, *Ekin Association v. France*, (Application no. 39288/98), Judgment of 17 July 2001, paras. 58-65; UN Human Rights Committee, Concluding Observations on the United Kingdom (2008), UN Doc. CCPR/C GBR/CO/6.

[12] Jeremy McBride, Human rights and criminal procedure: The case law of the European Court of Human Rights (Council of Europe Publishing 2009), p. 184.

[13] ECtHR, *Baskaya and Okçuoglu v. Turkey*, 8 July 1999, para. 36; see also European Parliament, EU Approach to Criminal Law (n 7).

[14] UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN Special Rapporteur on terrorism), E/CN.4/2006/98, 28 December 2005, para. 42.

[15] Inter-American Court of Human Rights, *Ulloa v Costa Rica*, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C no. 107 (2 July 2004). See more broadly, Natasa Mavronicola, "Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context" (2015) Human Rights Law Review 721.

particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries".[16]

10. This principle of restraint aligns with the requirements under article 10 that any *limitation on freedom of expression must be strictly "necessary" and proportionate* to the specified legitimate aims.[17] Given the onerous impact of criminalising speech, the proportionality analysis suggests this could only be justified exceptionally.[18] In this connection, the Office of the High Commissioner for Human Rights, the Inter-American Commission on Human Rights and the Special Rapporteur for Freedom of Expression of the OAS have also lent their weight to the international standards indicating that there should be "a direct and immediate connection" between the speech and the violence to justify restrictions on free speech.[19] Likewise, criminal law can never punish opinion or abstract danger.[20] The exceptional intervention of criminal law is justified where conduct has caused harm (the harm principle) or, exceptionally, intentionally caused a real and serious danger of such harm, and there is a proximate link between the speech and the harm. This is reflected in, for example, the EU Directive on Combating Terrorism requirement that a statement must manifestly cause a danger that a terrorist act will be committed, and other standards.[21]

11. Finally, the human rights impact of criminal law must be considered, including through the *chilling effect of the existence of criminal law and its application*. Where rights defence, the functioning of the democratic system, and political expression or debate on matters of public interest are at stake, restrictions placed on free expression or association through criminal law require the most compelling justification of necessity and proportionality.

The nature and expansive interpretation of anti-terror laws in Turkey

12. Criminal law and practice in Turkey stand in sharp contrast to these principles. While the problem is longstanding, in the aftermath of the failed *coup d'etat* of 15 July 2016, the widespread abuse of over-broad criminal legislation, and specifically anti-terror laws, has given rise to increased alarm internationally.[22] In particular, the inherent vagueness and breadth of many provisions of anti-terrorism criminal laws, and their expansive interpretation and widespread application by prosecutors and judges, have been severely criticised by international

[16] ECtHR, *Karatas v. Turkey*, App. No. 23168/94, 8 July 1999, para.50.
[17] ECtHR, *Handyside v. UK,* App. no. 5493/72, 7 December 1976, para. 49.
[18] ECtHR, *Sunday Times v. UK (no. 1)* (Series A, no. 30), Judgment of 29 March 1979, para. 65.
[19] The Inter-American Commission on Human Rights, its Special Rapporteurship for Freedom of Expression and the Office of the United Nations High Commissioner for Human Rights in Honduras express concern over adopted reforms in the Honduran penal code, retrogressive for human rights and freedom of expression (Joint press release: 23 February 2017); https://www.oas.org/en/iachr/expression/showarticle.asp?artID=1054&lID=1; the Joint Declaration on Freedom of Expression and Countering Violent Extremism adopted by the Rapporteurs on Freedom of Expression in 2016, Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted 1 October 1995, UN Doc. E/CN.4/1996/39.
[20] Roman law principle *cogitationis poenam nemo patitur* ("nobody endures punishment for thought.", Justinian's *Digest* (48.19.18)); French Constitutional Court, Decision no. 2017-682 QPC, 15 December 2017 (declaring French legislation criminalising visiting terrorist websites, without proof of harm, unconstitutional in 2017).
[21] EU Directive 2017/541 on Combatting Terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 15 March 2017, para. 10 and art. 5. Even in the broadly framed crime of provocation of terrorism in the Council of Europe Convention on the Prevention of Terrorism, there is an explicit requirement that a statement must "cause a danger that an offence may be committed," (article 5(1)).
[22] See e.g. Commissioner for Human Rights of the Council Europe, Report Following Her Visit to Turkey From 1 to 15 July 2019, CommDH(2020)1, 19 February 2020; Office of the United Nations High Commissioner for Human Rights, Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January-December 2017, March 2018 https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf.

organisations.[23]

13. Firstly, the response of this Court and other international bodies and experts suggest that the definitions of certain crimes in Turkish anti-terrorism legislation fall short of the requirements of legality and foreseeability.[24] The Court has already held that some provisions of Turkey's anti-terror legislation fail to meet the legality standard under the Convention.[25] The cases before this Court illustrate that under the existing law and practice in Turkey, participation in a public event such as a public march, funeral or demonstration, or expression of opinion of a non-violent nature, can be construed as acting "on behalf of" or "aiding" an illegal organization or lead to convictions for "membership" of illegal organisations. Likewise, in its comprehensive analysis of provisions of the Criminal Code and the Law on Prevention of Terrorism, the Venice Commission concluded that provisions of these laws, including provisions on membership of terrorist organisations, are vague and unforeseeable.[26]

14. Secondly, far from adopting a restrictive interpretation of these broadly formulated laws, Turkish judicial practice suggests they have been broadly and loosely applied. The Grand Chamber in *Selahattin Demirtaş v. Turkey (No. 2)* held that the offences in Article 314(1) and (2) of the Criminal Code, namely forming, leading or membership of an armed terrorist organization, were broadly interpreted by domestic courts. The Court stressed that "the content of Article 314 […] coupled with its interpretation by the domestic courts, [did] not afford adequate protection against arbitrary interference by the national authorities"[27] 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."[28]

15. The result of inherently problematic anti-terror legislation, widely construed by the judicial authorities, has been to punish a broad array of legitimate activity, including notably the expression of political dissent.[29] In this context, widespread pre-trial detention and prosecutions have been described by various experts as "judicial harassment" of government opponents or perceived opponents.[30]

16. In the aftermath of the failed *coup* of 15 July 2016, this Court ruled on a number of crucial cases that illustrate this expansive interpretation of anti-terrorism laws in Turkey and its impact on legitimate activity. A first group of cases concerns journalists arbitrarily detained and prosecuted for alleged terrorism-related offences involving publications critical of the government.[31] The Court found violations of Articles 5(1) and 10 of the Convention in these cases,

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[23] UN Special Rapporteur on the right to freedom of opinion and expression, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression on his Mission to Turkey, A/HRC/35/22/Add.3, 21 June 2017, pp. 5-6; Venice Commission, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002,15 March 2016.

[24] UN Special Rapporteur on the right to freedom of opinion and expression, A/HRC/35/22/Add.3, (n 23), pp. 5-6; Venice Commission, CDL-AD(2016)002 (n 23).

[25] See e.g. ECtHR, *Işıkırık v Turkey*, App. no. 41226/09, 14 November 2017; *Bakır and Others v. Turkey*, App. no. 46713/10, 10 July 2018; *İmret v. Turkey (no. 2)*, App. no.57316/10, 10 July 2018.

[26] Venice Commission Opinion, CDL-AD(2016)002 (n 23), p. 25.

[27] *Selahattin Demirtaş v. Turkey* (no. 2) (n 5), para. 337; See also Venice Commission Opinion, CDL-AD(2016)002 (n 23) pp. 26, 27.

[28] *Selahattin Demirtaş v. Turkey (no. 2)* (n 5), para. 280.

[29] Ibid. para. 280.

[30] The Commissioner for Human Rights of the Council of Europe, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, Section II; Thomas Hammarberg and John Howell, Parliamentary Assembly of the Council of Europe (PACE) Report on the functioning of democratic institutions in Turkey, Doc. 15272, 21 April 2021, paras. 36, 42 and 52.

[31] The accusations included:
-belonging to a terrorist organisation (Article 314 of the Criminal Code)

reflecting the chilling effect on legitimate journalistic activities.[32]

17. The second group of cases, consisting of *Kavala v. Turkey* and *Selahattin Demirtaş v. Turkey (no. 2),* concern arbitrary pre-trial detention of prominent critical voices similarly charged with terrorism-related offences.[33] Finding that Turkey had violated article 18 in conjunction with article 5, the Court held that the applicants were detained and prosecuted for their legitimate activities protected under the Convention. The authorities had pursued an 'ulterior purpose': in *Kavala,* the silencing of a human rights defender and in *Demirtaş,* stifling pluralism and limiting freedom of political debate which is at the core of democratic society.[34] The Court's two judgements affirm the finding of Commissioner of Human Rights that the situation reveals "a broader pattern of repression against those expressing dissent or criticism of the authorities, which is currently prevailing in Turkey".[35]

18. Recent statistics lend weight to the vast scope of application of anti-terror laws in Turkey today. Notably, according to the Council of Europe's Annual Penal Statistics on prison populations for 2020, Turkey has 29,827 prisoners convicted of terrorism offences, whereas in all Council of Europe member states prison authorities reported a combined total of 30,524 prisoners convicted of terrorism offences.[36] Moreover, Turkish Justice Ministry's statistics indicate that there has been a serious increase in the use of anti-terror legislation on individuals by public prosecutors after the failed coup of 15 July 2016. For example, Article 314 of the Criminal Code prescribing the offence of 'establishment, command or membership of an armed organisation' was invoked at trial stage in: 5362 cases in 2014; 13409 cases in 2015; 34595 in 2016; 133505 in 2017; 85888 in 2018 and 56302 in 2019.[37] Article 220 of the Criminal Code proscribing the offence of 'involvement in organisations established for the purpose of committing crimes', often linked with terrorism offenses via several sub-provisions, was invoked at trial in: 16643 cases in 2014;

-attempting, by force or violence, to overthrow the government (Article 312 of the Criminal Code)
-attempting, by force or violence, to overthrow the constitutional order (Article 309 of the Criminal Code)
-attempting, by force or violence, to overthrow the Turkish Grand National Assembly (Article 311 of the Criminal Code)
- committing an offence on behalf of an illegal organisation without being a member of that organisation (Article 220(6) of the Criminal Code)
- assisting terrorist organisations without being a member of them (Article 220(7) of the Criminal Code).

[32] ECtHR, *Mehmet Hasan Altan v. Turkey*, App. no. 13237/17, 20 March 2018; *Şahin Alpay v. Turkey*, App. no. 16538/17, 20 March 2018; *Sabuncu and Others v. Turkey*, App. no. 23199/17, 10 November 2020; *Şık v. Turkey (no. 2)*, App. no. 36493/17, 24 November 2020; *Atilla Taş v. Turkey*, App. no. 72/17, 19 January 2021; *Ahmet Hüsrev Altan v. Turkey*, App. no. 13252/17, 13 April 2021; *Murat Aksoy v. Turkey*, App. no. 80/17, 13 April 2021.

[33] ECtHR, *Kavala v. Turkey*, App. no. 28749/18; 10 December 2019; ECtHR, *Selahattin Demirtaş v. Turkey (no. 2)* (n 5).

[34] *Kavala v. Turkey* (n 33) para. 232; *Selahattin Demirtaş v. Turkey (no. 2)* [GC] (n 5) para. 437.

[35] Third party intervention by the Council of Europe Commissioner for Human Rights in the cases of Ahmet Hüsrev Altan v. Turkey (no. 13252/17), Alpay v. Turkey (no. 16538/17), Atilla Taş v. Turkey (no. 72/17), Bulaç v. Turkey (no. 25939/17), Ilıcak v. Turkey (no. 1210/17), Mehmet Hasan Altan v. Turkey (no. 13237/17), Murat Aksoy v. Turkey (no. 80/17), Sabuncu and Others v. Turkey (no. 23199/17), Şık v. Turkey (no. 36493/17), Yücel v. Turkey (no. 27684/17), 10 October 2017, para. 44 (hereafter, Third party intervention by the Commissioner for Human Rights of 10 October 2017); Third party intervention by the Council of Europe Commissioner for Human Rights in the case of Kavala v. Turkey (App. No. 28749/18) para. 44 (hereafter, Third party intervention by the Commissioner for Human Rights in the case of *Kavala*); Third party intervention by the Council of Europe Commissioner for Human Rights" in applications Abdullah Zeydan v. Turkey (no. 25453/17), Ayhan Bilgen v. Turkey (no. 41087/17), Besime Konca v. Turkey (no. 25445/17), Çağlar Demirel v. Turkey (no. 39732/17), Ferhat Encü v. Turkey (no. 25464/17), Figen Yüksekdağ Şenoğlu v. Turkey (no. 14332/17), Gülser Yıldırım v. Turkey (no. 31033/17), İdris Baluken v. Turkey (no. 24585/17), Nihat Akdoğan v. Turkey (no. 25462/17), Nursel Aydoğan v. Turkey (no. 36268/17), Selahattin Demirtaş v. Turkey (no. 14305/17), Selma Irmak v. Turkey (no. 25463/17), 2 November 2017, paras 18 and 23 (hereafter, Third party intervention by the Commissioner for Human Rights of 2 November 2017) ; see also, The EU European Commission, Commission Staff Working Document Turkey 2020 Report, 6 October 2020.

[36] Council of Europe, Prison Populations, Space I – 2020, Strasbourg, 15 December 2020, PC-CP (2020)12, page 52.

[37] See for Ministry of Justice's official statistics: https://adlisicil.adalet.gov.tr/Home/SayfaDetay/adalet-istatistikleri-yayin-arsivi.

10814 cases in 2015; 9672 cases in 2016; 9821 cases in 2017; 12190 in 2018; and 15837 cases in 2019. [38]

19. Other problematic judicial practices and trends underscore the lack of a rule of law approach to criminal law. First, ***pre-trial detention,*** in particular in purportedly terrorism-related cases, is not used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings, as anticipated in IHRL.[39] Even a brief analysis of pending cases before this Court shows the extent to which allegations of arbitrary detention based on these criminal laws have burgeoned in the post-coup context, with around 600 arbitrary detention cases communicated and currently pending before the Court.[40]

20. Second, as described above, the widespread and expansive resort to criminal law to prosecute those critical of the government has been accompanied by decisions to charge them with "***particularly serious offences"***, incompatible with the principle of proportionality and of restraint.[41] The lack of sufficient objective and subjective elements in crimes that, for example, endanger the state through attempts to divide it or to overthrow the government has undermined the principle of individual criminal responsibility.[42] This also applies to crimes where the state is said to be endangered through criticism of its leaders.

21. Third and relatedly, it is increasingly common for detention to be based exclusively on statements and acts that were manifestly ***non-violent***, and in principle protected by ECHR article 10. In addition to the blocking of opposition politicians from assuming office, as confirmed by this Court, members of the HDP in particular have been increasingly targeted with prosecutions and detentions for political expression.[43] Furthermore, parliamentarians are subject to possible immunity stripping for statements or publications allegedly falling under the amorphous scope of the anti-terror law and related crimes under the Criminal Code, impeding the exercise of their democratic functions.[44] Practice shows a pattern of systematic failure on the part of Turkish prosecutors and courts to perform an appropriate analysis of the facts of cases in the light of the Court's well-established case-law under Article 10.[45]

22. A fourth aspect of particular relevance to this case is the recurring problem of the Turkish authorities' reclassifying substantially the same facts as new crimes to justify ongoing detention. This has been seen, for example, in the cases of *Kavala v. Turkey*, *Atilla Taş v. Turkey* and *Selahattin Demirtaş v. Turkey (no. 2)*.[46] Repeatedly using such a method as a means to bypass

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[38] Ibid.

[39] See e. g., *Mehmet Hasan Altan v. Turkey* (n 32) para. 211; *Şahin Alpay v. Turkey* (n 32) para. 181.

[40] See e. g., *Taner Kılıç v. Turkey* (App. no. 208/18); *Ilıcak v. Turkey* (App. no. 1210/17); *Murat Aksoy v. Turkey* (App. no. 80/17), *Yücel v. Turkey* (App. no. 27684/17); *Abdullah Zeydan v. Turkey* (App. no. 25453/17), *Ayhan Bilgen v. Turkey* (App. no. 41087/17), *Besime Konca v. Turkey* (App. no. 25445/17), *Çağlar Demirel v. Turkey* (App. no. 39732/17), *Ferhat Encü v. Turkey* (App. no. 25464/17), *Figen Yüksekdağ Şenoğlu v. Turkey* (App. no. 14332/17), *Gülser Yıldırım v. Turkey* (App. no. 31033/17), *İdris Baluken v. Turkey* (App. no. 24585/17), *Nihat Akdoğan v. Turkey* (App. no. 25462/17), *Nursel Aydoğan v. Turkey* (App. no. 36268/17), *Selma Irmak v. Turkey* (App. no. 25463/17).
Also see cases about judges and prosecutors: *Ulusoy v. Turkey and 168 others*, (App. no. 73062), *Sevinç v. Turkey and 252 other applications*, (App. no. 63634/16), *Ataman v. Turkey and 53 others,* (App. no. 14676/17), *Kuris v. Turkey and 104 other applications* (App. no. 56483/16).

[41] *Selahattin Demirtaş v. Turkey (no. 2)* (n 5) para. 276.

[42] See e.g., *Mehmet Hasan Altan v. Turkey (n 32)* paras. 203-214.

[43] *Selahattin Demirtaş v. Turkey (no. 2)* (n 5) para 427.

[44] Hammarberg and Howell, PACE Report on the functioning of democratic institutions in Turkey (n 30) para. 13.

[45] Commissioner for Human Rights Report CommDH(2020)1 (n 22) para. 52.

[46] Submission by Human Rights Watch, the International Commission of Jurists, 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, Additional Observations on the Implementation of *Osman Kavala v. Turkey* (Application no. 28749/18) final judgment, 7 February 2021,

judicial decisions, nationally or by this Court, or to prevent individuals from securing the effective protection of the law and the opportunity for release, amounts to a form of arbitrariness and abuse of process.[47]

23. Finally, non-implementation of ECtHR judgments means that problematic practices are not being remedied by the authorities, as has been recently stressed by the Parliamentary Assembly of the Council of Europe (PACE) in a resolution adopted on 22 April 2021.[48] On the contrary, since this Court ruled in the case of *Selahattin Demirtaş v. Turkey (no. 2)*, the Turkish authorities have continued to target opposition parliamentarians by arbitrary criminal procedures, and parliamentarians from the HDP are disproportionally targeted.[49] The Committee of Ministers of the Council of Europe also noted that the problem of the disproportionate use of the criminal law in Turkey to punish persons who express critical or unpopular opinions had been pending before the Committee in relation to various judgments for over 20 years, and has yet to be remedied.[50]

24. In the light of the context described above, the Interveners submit that, in Turkey, criminal law is used as impediments to the exercise of the Convention rights, mainly freedom of expression, against those expressing dissent or criticism of the authorities, through arbitrary prosecutions and detention, which constitutes, among others, a violation of article 18 in conjunction with both articles 5 and 10 of the Convention.

III. Effectiveness of the Constitutional Court remedy in detention cases

25. Under Article 35 (1) of the Convention, this Court may deal with a matter only after all domestic remedies meeting the criteria of availability and effectiveness are exhausted.[51] Several problems in Turkey currently cast serious doubt on the effectiveness of the individual application procedure to the Constitutional Court as a remedy in detention cases, in particular in the context of the exercise of the right to freedom of expression.

Failure to meet the requirement of speedy review of lawfulness:

26. The practice of the Constitutional Court in relevant cases fails to satisfy the requirement of speediness under Article 5(4) of the Convention. Reflecting on this, the Commissioner for Human Rights pointed out that the Constitutional Court's delay in examining the individual applications lodged by the detained MPs, journalists and human rights defenders was unreasonably prolonged.[52]

27. This Court has acknowledged the exceptional situation due to the size of the Constitutional Court's caseload following the attempted *coup* and declaration of the state of

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paras. 25-26, https://static1.squarespace.com/static/5b8bbe8c89c172835f9455fe/t/603d17ae7b5a401e70fb4aed/1614616511653/Rule+9.2+Kavala+v.+Turkey+by+HRW+ICJ+and+TLSP.pdf.

[47] 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, 18 February 2021, paras. 59-63, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680a1747c.

[48] The Parliamentary Assembly of the Council of Europe (PACE), The Functioning of Democratic Institutions in Turkey, Resolution 2376 (2021), para. 14 (Turkey has been under the parliamentary monitory procedure of the PACE since April 2017).

[49] Ibid., para 9; Hammarberg and Howell, PACE Report on the functioning of democratic institutions in Turkey (n 30) para. 8.

[50] Committee of Ministers, 1369th meeting, 3-5 March 2020 (DH), see the analysis by the Secretariat concerning the general measures.

[51] ECtHR, *Sejdovic v. Italy* [GC], App. no. 56581/00, para. 55.

[52] Commissioner for Human Rights, Third party intervention of 2 November 2017 (n 35) para. 22; Commissioner for Human Rights in the case of *Kavala* (n 35) para. 39; Commissioner for Human Rights, Third party intervention of 10 October 2017 (n 35) para. 31.

emergency, and adopted a flexible approach, finding no violation of the speediness requirement in a number of cases.[53] Nevertheless, it stated that this finding did not mean that the Constitutional Court had *carte blanche* when dealing with any similar complaints in the future,[54] as the Court has an "obligation under Article 5(4) to decide speedily on the lawfulness of the applicant's detention in order to guarantee that the right to a speedy decision remains practical and effective, especially as the exhaustion of this remedy unlocks the possibility of lodging an application with the Court."[55] In *Kavala v. Turkey*, this Court held that the time period in question – one year, four months and twenty-four days – could not be considered compatible with the "speediness" requirement of Article 5(4). The Court went on to underline that the state of emergency had been lifted on 18 July 2018 and that more than eleven months had subsequently elapsed before the Constitutional Court delivered its judgment.[56]

28. Recent statistics of the Constitutional Court show that the Constitutional Court is clearly far from meeting the standards set by this Court in its case law. Notably, the average time period for the Constitutional Court's review in thirty cases delivered in the last six months concerning the lawfulness or length of pre-trial detention of the applicants is about two years and nine months.[57]

Erosion of the independence and impartiality of the Court

29. Constitutional and legislative measures eroding the institutional independence of the judiciary, and the chilling effect of the mass dismissals of judges, have undermined the capacity of the Turkish judiciary as a whole to provide an effective remedy for human rights violations.[58] This erosion of the independence and impartiality of the Turkish judiciary has been noted by a number of international bodies and civil society reports.[59] In its assessment on article 18 of the Convention in *Selahattin Demirtaş v. Turkey (No. 2)*, this Court highlighted the problem and noted the findings of the Venice Commission and the Commissioner for Human Rights indicating that "*the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency, when hundreds of judges were dismissed, and especially in relation to criminal proceedings instituted against dissenters*."[60]

30. Recent developments make clear that the Constitutional Court is not exempt from the independence deficit.[61] Firstly, growing political pressure on the judiciary in Turkey is clear from multiple instances where high-ranking officials, including President Erdoğan, have publicly

[53] The Court found acceptable the length of the Constitutional Court's review, in the cases of *Mehmet Hasan Altan*, *Şahin Alpay*, and *Akgün* (decision) that lasting one year, two months and three days (*Mehmet Hasan Altan,*para. 164), one year, four months and three days (*Şahin Alpay,*para. 136), one year, one month and four days (*Selahattin Demirtaş v. Turkey* (no. 2), para. 369).
[54] Ahmet *Hüsrev Altan v. Turkey*, App. no. 13252/17, 13 April 2021, para. 182.
[55] *Kavala v. Turkey* (n 33), para. 184.
[56] Ibid., para. 193.
[57] According to the data obtained from the official website of the Constitutional Court (https://kararlarbilgibankasi.anayasa.gov.tr). The research concerned the judgments delivered between the dates 4 November 2020 and 11 May 2021, in which the Court decided on the merits of the question of lawfulness and/or the length of detention under the right to liberty and security.
[58] International Commission of Jurists and Human Rights Joint Platform, Turkey's Judicial Reform Strategy and Judicial Independence, November 2019, page 9, https://www.icj.org/wp-content/uploads/2019/11/Turkey-Justice-Reform-Strat-Advocacy-Analysis-brief-2019-ENG.pdf.
[59] Commissioner for Human Rights, Third party intervention of 2 November 2017 (n 35) para. 20; Venice Commission, Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 , CDL-AD(2017)005-e, Venice, 10-11 March 2017, pp. 25-27; The EU European Commission, Commission Staff Working Document Turkey 2020 Report, 6 October 2020; International Commission of Jurists and the Human Rights Joint Platform (n 58).
[60] *Selahattin Demirtaş v. Turkey (no. 2)* (n 5) para. 434.
[61] Commissioner for Human Rights, Third party intervention of 2 November 2017 (n 35) paras. 20-21.

undermined the work of the Constitutional Court, or disregarded the (relatively rare) Convention-compliant decisions, especially in politically sensitive cases.[62]

31. Secondly, the practice of the Constitutional Court itself, particularly since the attempted coup, reveals its failure to address systemic human rights violations in emblematic cases, some of which have been later addressed by this Court. This is apparent from the fact noted above that around 600 applications to this Court on the issue of arbitrary detention in Turkey should have been, but were not, resolved by the Constitutional Court. These have been communicated to the government and are currently pending before this Court.

32. Thirdly, international standards reflect that procedures and practice on the appointment and dismissal of judges are essential safeguards of judicial independence.[63] In Turkey the dismissals of thousands of judges, including two Constitutional Court judges,[64] and detention of many in the aftermath of the attempted *coup d'etat* of 2016, represent a clear and incontrovertible interference with judicial independence that resonated across judicial ranks.[65] This Court ruled in *Alparslan Altan v. Turkey* and *Baş v. Turkey* that the pre-trial detention of the applicants, who were judges, lacked legal basis (as an unreasonable extension of the concept of *in flagrante delicto)*.[66]

33. Moreover, the latest judicial appointments by President Erdoğan on 22 January 2021, have raised more questions about the independence and impartiality of the Constitutional Court. The newest member of the Constitutional Court, Mr. İ. F. was the prosecutor of many controversial high-profile criminal cases, in which the Constitutional Court or the ECtHR found violations of human rights, in particular of the rights to freedom of expression and to liberty and security. The criminal cases prosecuted by Mr. İ. F., or which he was indirectly involved in, in his former capacity as the İstanbul Chief Public Prosecutor include cases against Academics for Peace (Z. Füsun Üstel and others)[67], journalists Can Dündar[68], Erdem Gül[69], Şahin Alpay[70], Atilla Taş[71], politician Enis Berberoğlu[72], and the Gezi Park case (analysed by this court in *Kavala v. Turkey*).[73] The appointment procedure of Mr. İ. F. has been described as an 'anomaly' since, in an expedited

[62] See e. g., Deutsche Welle, 'Erdogan says he will not respect court ruling in favor of "Cumhuriyet" journalists', 28 February 2016, https://www.dw.com/en/erdogan-says-he-will-not-respect-court-ruling-in-favor-of-cumhuriyet-journalists/a-19081024; Bianet English, 'From Minister Soylu to Constitutional Court President: Cycle to work', 15 September 2020, https://bianet.org/english/politics/230873-from-minister-soylu-to-constitutional-court-president-cycle-to-work#; Bianet English, 'Interior Minister targets Constitutional Court again, this time over "Academics for Peace" ruling', 24 September 2020, https://bianet.org/english/politics/231507-interior-minister-targets-constitutional-court-again-this-time-over-academics-for-peace-ruling#; Bianet English, 'Bahçeli targets Constitutional Court, HDP again', 17 February 2021, https://bianet.org/english/politics/239433-bahceli-targets-constitutional-court-hdp-again; Cumhuriyet, 'TBMM Başkanı Şentop AYM'nin Berberoğlu kararını eleştirdi, TBMM kararı geri gönderdi' (The president of the Parliament, Mustafa Şentop, stating in a press statement that the part of the Constitutional Court's judgment calling on the Parliament to enforce the court's decision was an improper "political statement" and that the court had acted beyond its powers), 4 February 2021.

[63] UN Human Rights Committee (HRC), General Comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, para. 20 (The Human Rights Committee stressed that the dismissal of judges by the executive, for example, before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal, is incompatible with the independence of the judiciary).

[64] Alparslan Altan and Erdal Tercan were dismissed by the decision of the Constitutional Court dated 4 August 2016.

[65] 4236 members of the judiciary were dismissed in total. See ECtHR, *Alparslan Altan v. Turkey*, App. no. 12778/17, 16 April 2019, para. 14 ("In the context of a criminal investigation opened by the Ankara public prosecutor's office, some 3,000 judges and prosecutors, including two judges of the Constitutional Court (including the applicant) and more than 160 judges of the Court of Cassation and the Supreme Administrative Court, had been taken into police custody and subsequently placed in pre-trial detention.")

[66] ECtHR, *Alparslan Altan v. Turkey*, App. no. 12778/17, 16 April 2019; *Baş v. Turke*y, App. no. 66448/17, 3 March 2020.

[67] Constitutional Court, *Zübeyde Füsun Üstel ve Diğerleri,* App. no. 2018/17635, 26 July 2019.

[68] Constitutional Court *Erdem Gül ve Can Dündar*, App. no. 2015/18567, 25 February 2016.

[69] Ibid.

[70] ECtHR, *Şahin Alpay v. Turkey*, App. no. 16538/17, 20 March 2018.

[71] ECtHR, *Atilla Taş v. Turkey*, App. no. 72/17, 19 January 2021

[72] Constitutional Court, *Kadri Enis Berberoğlu*, App. No. 2018/30030, 17 September 2020.

[73] Kemal Gözler, '*Elveda Anayasa Mahkemesi: İrfan Fidan Olayı',* 23 January 2021: https://www.anayasa.gen.tr/irfan-fidan-olayi.htm.

process, he was elected as the top candidate of the list submitted to the President only twenty days after he had officially begun his tenure at the Court of Cassation.[74] By contrast, since 1962, the 44 former Constitutional Court judges had served on average nine years in the Court of Cassation before joining the Constitutional Court.[75] Considering the divisions within the members of the Constitutional Court which could take decisions with only slim majorities in some important cases,[76] the appointment of Mr. İ.F. is considered to have not only symbolic but also concrete practical implications for the decisions of the Constitutional Court in the future.

Non-compliance of the lower courts and the prosecutors with the Convention-compliant case-law of the Constitutional Court

34. The discourse of Turkey's president as well as other high-ranking officials mentioned above (paragraph 28) has also encouraged the judges of the lower courts not to comply with the Constitutional Court's limited number of rights-protecting decisions,[77] specifically in matters concerning the detention of 'critical voices'.[78] In *Şahin Alpay v. Turkey* and *Mehmet Hasan Altan v. Turkey*, for instance, the lower courts refused to implement the decisions of the Constitutional Court which had ordered the release of the applicants on the ground that the Constitutional Court's decisions were not binding upon them. The lower courts released the applicants two months and five months later, respectively, only after the second decisions of the Constitutional Court.[79] Similarly, in another case regarding an opposition party parliamentarian (Enis Berberoğlu of *Cumhuriyet Halk Partisi*), the lower courts implemented the decision of the Constitutional Court only after it issued a second decision finding a violation.[80] Moreover, in the case of Mehmet Altan, where the Constitutional Court (and the ECtHR) considered the evidence against him insufficient to justify initial pre-trial detention, he was nonetheless convicted by another court on the basis of the same evidence and given an aggravated life sentence, upheld by a local court of appeal and only later overturned.[81]

35. As the Council of Europe Commissioner for Human Rights has noted, this disregard for the Constitutional Court's more Convention-compliant case-law in the matter of detentions means that the Court "has been constrained to act as an appeal court for detention decisions, a role that it cannot be expected to fulfil. This situation goes against the spirit of the individual application procedure and jeopardises the effectiveness of the Constitutional Court as a domestic remedy as a whole."[82]

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[74] Ibid; İlker Gökhan Şen, ' The Final Death Blow to the Turkish Constitutional Court: The Appointment of the Former Chief Prosecutor', 28 January 2021, https://verfassungsblog.de/death-blow-tcc/ ; see also Bianet English, 'Erdoğan appoints judge to Constitutional Court after only 20-day term at Court of Cassation', 25 January 2021, https://bianet.org/english/law/238119-erdogan-appoints-judge-to-constitutional-court-after-only-20-day-term-at-court-of-cassation.

[75] Kemal Gözler (n 73).

[76] See e. g., Academics for Peace case *Zübeyde Füsun Üstel ve Diğerleri* (no. 2018/17635), 26 July 2019.

[77] The Constitutional Court rendered 237 judgments finding a violation of the right to liberty and security of the person between September 2012 and December 2020, according to the official statistics accessed on the website of the Constitutional Court.

[78] Third party intervention by the Commissioner for Human Rights in the case of *Kavala* (n 35), paras. 41, 45.

[79] See the Constitutional Court's decisions finding another violation of right to liberty and security of the applicants as a result of non-execution of the first violation decisions of the Constitutional Court*, Şahin Alpay (2)*, App. No. 2018/3007, 15 March 2018; *Mehmet Hasan Altan (3)*, App No. 2018/2620, 9 Jan. 2020.

[80] Hammarberg and Howell, PACE Report on the functioning of democratic institutions in Turkey (n 30), para. 10;
See for the second judgment of the Constitutional Court on the matter, *Kadri Enis Berberoğlu (3)* (App. No. 2020/32949); see also Kemal Gözler, "*Istanbul 14. Ağir Ceza Mahkemesi Anayasa Mahkemesine Karşı: Anayasa Mahkemesinin 17 Eylül 2020 Tarihli Enis Berberoğlu Kararından Sonra İstanbul 14. Ceza Mahkemesinin 13 Ekim 2020 Tarihli 'Yeniden Yargılama Yapılmasına Yer Olmadığı Kararı' Hakkında Bir Eleştiri',* 17 October 2020, https://www.anayasa.gen.tr/berberoglu-2.htm.

[81] Third party intervention by the Commissioner for Human Rights in the case of *Kavala* (n 35), para. 41.

[82] Ibid. paras. 42, 45.