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Registry
European Court of Human Rights Council of Europe
F-67075 Strasbourg Cedex France

19 February 2019

Re: Request for Grand Chamber referral in *Demirtaş v. Turkey (No. 2)* (Application no. 14305/17)

Dear Registry of the European Court of Human Rights,

Pursuant to Article 43 of the European Convention on Human Rights and Fundamental Freedoms, the applicant, Mr Selahattin Demirtaş, in the case of *Demirtaş v. Turkey (No. 2)* upon which the Chamber (2nd Section) delivered a judgment on 20 November 2018, requests his case to be referred to the Grand Chamber.

The applicant submits that this case raises serious questions affecting the interpretation or application of the Convention, and qualifies as a serious issue of general importance, which, in its view, warrants consideration by the Grand Chamber.

In its judgment of 20 November 2018, the Chamber held, unanimously, that there is no need to examine separately the admissibility or merits of the complaint under Article 10 of the Convention, and held unanimously, that the complaint under Article 5 § 1 of the Convention concerning the lawfulness of the applicant's arrest and detention in police custody was inadmissible and held unanimously that there has been no violation of Article 5 § 1 of the Convention (alleged lack of reasonable suspicion that the applicant committed an offence). The Chamber also held, unanimously, that there has been a violation of Article 5 § 3 and Article 3 of Protocol No. 1 to the Convention due to the prolongation of the pretrial detention of the applicant, and by six votes to one, that there has been a violation of Article 18 of the Convention in conjunction with Article 5 § 3.

The majority's unanimous ruling, that there is no need to examine separately the admissibility or merits of the complaint under Article 10 of the Convention together with its unanimous finding that the complaint under Article 5 § 1 of the Convention

concerning the lawfulness of the applicant's arrest and detention in police custody was inadmissible and that there has been no violation of Article 5 § 1 of the Convention (alleged lack of reasonable suspicion that the applicant committed an offence) raises serious questions affecting the interpretation or application of the Convention with respect to Articles 10 and 5 and Article 18 in at least five respects.

1. Failure to examine whether restrictions to political speech under Court's well established Article 10 case law were proscribed by law, had a legitimate aim and was necessary and proportionate in a democratic society

The Court by not examining Article 10 aspects of this case has departed from its well established case law on Article 10 and the importance of maintaining and promoting the ideals and values of a democracy as a foundational value of the Convention system[1]. Under well-established case law, once an expression falls within the scope of Article 10, the Court reviews the compatibility of the restriction with the Convention by asking whether it is prescribed by law, whether it has a legitimate aim and whether it is necessary and proportionate in a democratic society.[2]

Yet, whilst the Chamber observed that a large proportion of the accusations brought against the applicant relate directly to his freedom of expression and his political opinions" (*Demirtaş v. Turkey (No. 2)* Application no. 14305/17 § 169) and therefore determined that the expression falls within the scope of Article 10, it continued that "however, in the context of the present application, it is not for the Court to determine whether the applicant is guilty of the offences of which he has been accused" (§ 169).

This is a significant departure from the Court's well-established case law on freedom of expression, leading the Chamber to lower the protection of the Convention significantly under Article 10 on protections offered to political expression.

Well-established case law of the Court holds that freedom of speech of politicians enjoys high protection under the Convention.[3] As stated in *Castells v. Spain* "while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court".[4]

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[1] *United Communist Party of Turkey v. Turkey,* App No. 19392/92, 30 January 1998, § 45

[2] *Perincek v. Switzerland (GC)*, App. No. 27510/02, 15 October 2015.

[3] ibid § § 16-51.

[4] *Castells v. Spain,* App No App no.11798/85, 23 April 1992 § 42.

Yet in this case**,** the Chamber has not scrutinised the interference at all.

The Chamber's decision not to examine an expression that falls within the scope of Article 10 is based on the argument that in the context of the present application, it is not for the Court to determine whether the applicant is guilty of the offences of which he has been accused. This results in the Chamber going against the narrow margin of appreciation afforded in cases falling within the scope of political speech and, in particular, political speech of opposition members of parliament.

Furthermore, in the Court's well established case law expressions that fall within the scope of Article 10 have a direct effect on assessing whether there is "reasonable suspicion" that the applicant committed a criminal offence under Article 5. The Court holds that if a speech comes within the scope of Article 10, the legitimacy of the restriction must to be assessed. If the restriction is found to be not prescribed by law, or without a legitimate aim or is not necessary or proportionate in a democratic society, it cannot form the basis of a reasonable suspicion under Article 5.

In *Nedim Şener*, the Court stated: "Elle rappelle également avoir estimé que certaines circonstances ayant un effet dissuasif sur la liberté d'expression procurent aux intéressés – non encore frappés d'une condamnation définitive – la qualité de victime d'une ingérence à ladite liberté : par exemple, être sous la menace de poursuites pénales pour d'éventuels travaux dans un domaine considéré comme sensible par l'État ou par un partie de la population (*Altuğ Taner Akçam c. Turquie*, no 27520/07, §§ 70-75, 25 octobre 2011) ou faire l'objet d'une condamnation au pénal non définitive conforme à la jurisprudence des juridictions nationales (*Aktan c. Turquie*, no 20863/02, § 27, 23 septembre 2008, *Dink c. Turquie*, nos 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09, § 105, 14 septembre 2010)." (§ 94).[5]

In this case and the authority cited therein, the applicants' claims that their right to freedom of expression had been breached before they were convicted was taken into account. In the case of Mr Demirtaş, too, the interference in his freedom of expression, started when preliminary investigation files (fezlekes) were transmitted by the prosecutors' offices to Parliament for political speech made in and outside of Parliament by the applicant. Yet, the analysis of when interference in political speech starts is absent in the Chamber's treatment of the case and thus is a significant departure from Court's case law on freedom of expression.

As noted by the Court several times "the Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various

[5] *Nedim Şener c. Turquie,* Requête No 38270/11, 8 Julliet 2014.

provisions".[6] Accordingly, when an act falls under the scope of Article 10, and this is indeed the case in the current application and is not disputed by the Chamber, then it would be inconsistent not to subject the 5(1) violation claim to close scrutiny in the light of Article 10. Furthermore, as we outline below, political expression of the applicant alongside his claim that the restrictions of his freedom of expression served a predominant political purpose are at the very core of this case. Whilst economy of judicial decision making in cases when similar claims in substance are reviewed under a different Convention article is warranted by the Court, this is not the case in this application. By not subjecting the interference in the applicant's political expression to close scrutiny, the Court significantly departs from its well established case law under Article 10 with the effect of lowering its standards under Article 10 and going against the holistic interpretation of Articles 10 and 5 of the Convention .

2. Inaccurate Employment of Deference to Domestic Judicial Authorities Doctrine when strong and weighty reasons not to defer are present

The lack of Convention scrutiny of interference in Article 10 rights of a leading political figure in Turkey's contemporary history, in particular with respect to whether the restriction of his political speech and the deprivation of his liberty were a lawful restriction within the scope of the Convention, leads the Court to employ its deference doctrine to domestic courts inaccurately, when the Court analyses the case solely under Article 5(1) and with no due regard to Article 10.

In this respect, the Chamber judgment first recognised that "quality of the law" requirement under Article 5 implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness (*Demirtaş v. Turkey (No. 2)* § 143). The Chamber further stated that 'the standard of "lawfulness" set by the Convention thus requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.' (§ 143)

Indeed in the Court's well-established case law, "the requirement of lawfulness laid down by Article 10 and 5/1 (e) ("lawful detention" ordered "in accordance with a procedure prescribed by law") is not satisfied merely by compliance with the relevant domestic law. Domestic law must itself be in conformity with the Convention, including the general principles expressed or implied in it, particularly the principle of the rule of law, which is expressly mentioned in the Preamble to the Convention. The notion underlying the expression "in accordance with a

[6] *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 30-31, § 68; see also *Maaouia v. France* [GC], no. 39652/98, § 36, ECHR 2000-X, and *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

procedure prescribed by law" requires the existence in domestic law of adequate legal protections and "fair and proper procedures".[7]

The applicant argued before the Chamber that the unprecedented, one off and retrospective lifting of the immunity of members of Parliament on 20 May 2016, which pursued the political aim of criminalising the political speech of HDP MPs, does not fulfil the Convention's autonomous assessment of 'quality of law' because it was neither foreseeable nor satisfied the 'fair and proper procedures' limb of the quality of law requirement under the Convention under Articles 10 and 5.

Because the Chamber did not examine Article 10 claims of the applicant, despite the Court's well established case law on the principle of close scrutiny of restrictions of political speech that fall within the scope of Article 10, the argument of whether the legal measures were arbitrary were examined solely under Article 5 (1). This approach led to the Court not to scrutinise the lifting of parliamentary immunities and finding the Article 5 claim of the applicants being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

With respect to the legal measure of lifting of parliamentary immunities, the Chamber first stated that "the Constitutional Court noted that in judgment no. 2016/117 of 3 June 2016 it had found that the case before it concerned a constitutional amendment in the formal sense of the term, entailing the lifting of immunity for members of parliament, including the applicant, in respect of whom a request to that effect had been submitted to the National Assembly prior to the date of adoption of the amendment. That being so, it concluded that the applicant's pre-trial detention could not be said to have had no basis in law or to breach the Constitution." (*Demirtaş v. Turkey* § 146) The Chamber then invoked the Court's doctrine of deference to domestic judicial authorities by stating that 'it is primarily for the national authorities, notably the courts, to interpret and apply domestic law' (§ 148) and concluded that "neither the interpretation nor the application of domestic law by the Constitutional Court in the present case appears arbitrary or manifestly unreasonable"(§ 148).

The deference standard that the Chamber employed towards domestic law and the Constitutional Court, in particular, raises serious questions of the application of the margin of appreciation in the form of deference to domestic courts when political speech and deprivation of liberty of elected members of parliaments, alongside Article 18 claims (which we discuss further below) are at stake.

There is no doubt that the Court cannot examine all claims relating to domestic law reviewed by the Constitutional Courts in detail and there must be weighty reasons for the Court to reverse its presumption of deference to domestic courts in such matters.[8] The Court leaves a

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[7] *Pleso v. Hungary*, no. 41242/08, 02.10.2012, § 59.

[8] *Pla and Pucernau v. Andorra*, App No. 69498/01, 13 July 2004, § 46.

wider margin of appreciation if national and judicial procedures are fair and of high quality and if they have enabled a through scrutiny of all interests involved.[9] However, there are strong and weighty reasons for the Court not to defer to the national authorities in this case.

A one off and retroactive constitutional amendment to lift the immunities of members of parliament has no precedent under Turkish law. Furthermore, the judgment of the Constitutional Court quoted above by the Chamber did not carry out a domestic judicial review of this amendment, rendering the deference to the Constitutional Court on the account of its review baseless. In fact, the Constitutional Court abstained from subjecting the lifting of parliamentary immunities to constitutional review. Specifically, the Constitutional Court held that as the legal measure was a constitutional amendment in the formal sense of the term, it was outside of the scope of the review of the Constitutional Court.[10] Thus, the Constitutional Court has never examined the main Convention reliant argument of the applicant that the constitutional amendment was not foreseeable or that it was not a fair or proper procedure.

The Chamber, instead of carrying out a Convention review of the constitutional amendment, left compatibility of the amendment with the Convention completely unexamined, departing from its case law on close scrutiny of domestic legal measures that result in restrictions of political expression and subsequently, deprivation of liberty. Yet, given the Turkish Constitutional Court's lack of review of this constitutional amendment, the Chamber merely relied on the existence of amendment as a legal fact, without any review of whether it was arbitrary or manifestly unreasonable.

Article 83 of the Turkish Constitution provides two types of immunities for MPs: non-liability and inviolability. The provision is as follows:

"*ARTICLE 83- Members of the Grand National Assembly of Turkey shall not be liable for their votes and statements during parliamentary proceedings, for the views they express before the Assembly, or, unless the Assembly decides otherwise, on the proposal of the Bureau for that sitting, for repeating or revealing these outside the Assembly.*

A deputy who is alleged to have committed an offence before or after election shall not be detained, interrogated, arrested or tried unless the Assembly decides otherwise. This provision shall not apply in cases where a member is caught in flagrante delicto requiring heavy penalty and in cases subject to Article 14 of the Constitution as long as aninvestigation has been initiated before the election. However, in such situations the competent authority has to notify the Grand National Assembly of Turkey of the case immediately and directly."

The procedure to be followed for lifting parliamentary immunity is based on Articles 83 and 85 of the Constitution. Further detailed rules are provided in the Rules of Procedure of the Parliament. An MP's immunity can only be lifted with regards to the crimes that fall within the second paragraph of Article 83. The MP can submit his/her defense during the procedure

[9] *Krisztian Baranabas Toth v. Hungary*, App No. 484994/06, 12 February 2013, §. 37.
[10] Constitutional Court, Case no. 2016/54, Decision no. 2016/117, 3.6.2016, § 15.

at the Parliament. Details of this process are narrated in the Venice Commission report[11] (§ § 25-31).

The first paragraph of Article 83 is related to legislative non-liability of MPs, and implies that MPs shall not be punished for the expressions they use in parliament and repeated outside. The second part is related to inviolability and provides immunity to the MPs throughout their mandate except for the situations where the member is caught in *flagrante delicto* requiring heavy penalty.

As a result of this, the first paragraph Article 83 of the Constitution offers a special protection to the political expression of MPs. The person who makes a speech as an MP at Parliament or repeats it outside the Parliament cannot be investigated and prosecuted even after termination of his/her term for that political speech.

It must be obvious that repeating a political speech outside the Parliament cannot be understood as repeating literally the same words said in the Parliament. Rather the protection extends to oral expressions of the politics of an MP conducted in Parliament and outside Parliament.

The core purpose of this constitutional protection is to allow MPs speak freely without thinking that he/she will be subject to prosecution for what he/she says while h/she is an active member of Parliament. The Court also held in previous cases that "the inherent characteristics of the system of parliamentary immunity and the resulting derogation from the ordinary law pursue the aim of allowing free speech for representatives of the people and preventing partisan complaints from interfering with parliamentary functions" (*Kart v. Turkey*, Application no. 8917/05, § .88)

The Venice Commission describes non-liability as follows: "Rules on non-liability (special freedom of speech) for members of parliament are to be found in almost all democratic countries, although the details differ quite a bit. Non-liability is closely linked to the parliamentary mandate, and protects the representatives when acting in their official capacity – discussing and deciding on political issues." (Opinion on the Scope and Lifting of Parliamentary Immunities, CDL-AD(2014)011, § 12).

Prior to the unprecedented, one off, and retrospective constitutional amendment, just like in many democratic countries, freedom of political speech of MPs in Turkey benefited from

[11] European Commission for Democracy Through Law (Venice Commission) , Opinion on the Suspension of the Second Paragraph of Article 83 of the Turkish Constitution (Parliamentary Inviolability), Adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016) Opinion No. 858 / 2016 CDL-AD(2016)027 available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2016)027-e

absolute immunity. Thus, there is no doubt that while making a speech, defending a view, a member of parliament would be fully entitled to think that he/she will benefit from this constitutional protection of absolute immunity and constitutional procedural safeguards provided for her/his political speech.

In the case of the present application, however, the applicant's freedom of political expression as a member of Parliament was restricted by means of an unprecedented, one off and retroactive constitutional amendment, introduced after he made his speeches over a span of approximately ten years as an acting member of Parliament. Given the lack of previous examples of a one off retroactive lifting of immunity for political speech of MPs in Turkish history, it is impossible to assert that this amendment, which subsequently led to the charge, arrest and the detention of the applicant, was foreseeable in terms of the Court's case law.

Considering that the Chamber indeed accepted that a large proportion of the accusations brought against the applicant relate directly to his freedom of expression and his political opinions, it is therefore necessary to examine whether these speeches are protected by the *lex specialis* political expression protections in the form of parliamentary immunity and whether he could have foreseen when he delivered these speeches, in some cases ten years before the amendment, that he could be held responsible sometime in the future for his political speech.

The Court's well-established case law requires that a legal measure that restricts political expression must be seen as fair and proper procedures. As we outline under the Article 18 discussion below, whilst the lifting of immunities de jure applied to all members of parliament retroactively, there is no doubt that *de facto*, this legal measure targeted predominantly members of HDP and Mr. Demirtas, in particular.

In its report, the Venice Commission underscored this *ad hominem* nature of the Amendment: "The Amendment under examination can be characterized as a piece of ad hominem constitutional legislation. While the Amendment is drafted in general terms, in reality it concerned 139 individually identifiable deputies. This constitutes a misuse of the constitutional amendment procedure: its substance amounts to a sum of decisions on the lifting of immunity of identifiable parliamentarians; decisions which, according to the suspended Article 83, should have been taken individually and subject to specific guarantees". The Venice Commission also added that "As all ad hominem legislation, the Amendment is also problematic from the point of view of the principle of equality. The distinction between the 139 deputies on the one hand, and all earlier cases as well as the cases which arose since adoption of the Amendment on the other hand, cannot be justified with the workload of the Assembly. The Amendment violates therefore the principle of equality".[12]

Indeed, that the amendment targeted HDP MPs is evidenced not only through the openly targeting of HDP politicians by President Erdogan in 2015 and 2016, but is also supported by

[12] Ibid § 75.

the actual consequences of this one off and retroactive measure. This measure had consequences almost exclusively for HDP MPs. Out of a total of 798 preliminary investigation files transmitted to the Parliament by the Prosecutors offices, 510 of them (64%) concerned HDP MPs. While 55 out of 59 HDP members were affected by the amendment, the immunity of only 27 deputies out of 317 from the ruling AKP were affected. Following the lifting of immunities retroactively, no government MP or government coalition member MP was indicted by prosecutors, yet all MPs from HDP and Mr Demirtas were indicted, detained and in most cases, convicted, as a consequence.

Finally, the scrutiny of the lifting of parliamentary immunity, which has interfered with the applicant's right to political speech, under the tests of necessity in a democratic society and proportionality limbs of Article 10 does not yield to a different outcome. During the constitutional debates for lifting of immunity, the workload of the Assembly to review the preliminary investigation files submitted by the prosecutors to the Parliament was presented as a reason to introduce this *sui generis* one off and retroactive measure. Yet, the decision to lift parliamentary immunities predominantly concern the applicant and members of parliament from HDP. There is no doubt that a legal measure that explicitly imposes unequal burdens on a certain section of society cannot meet the necessity and proportionality tests under the Convention. For the measure to be necessary in a democratic society, the Court requires that there has to be a pressing social need for the restriction. Yet, the preliminary investigation files transmitted by the prosecutors to the Parliament with respect to Mr. Demirtas in 2015 and 2016 concern political speeches that he has made three or four years prior to the preparation of such files.

The constitutional amendment lifting the immunity interfered with the political expression of the applicant as member of Parliament. It does not fulfil the proscribed by law, necessity and proportionality tests of the well-established case law of the Court. By failing to examine this restriction under Article 10 and Article 18 and by deferring to domestic law, which has not been reviewed under Convention standards by any judicial organ in Turkey, the Court has departed from is case law on the high level of protection afforded to political speech and the narrow margin of appreciation when examining restrictions to political speech and deprivation of liberty directly flowing from political speech.

3. Lack of an adequate review of reasonable suspicion under Article 5

Whilst the Chamber did not examine the applicant's claims concerning his freedom of expression, it nevertheless concluded under Article 5 (1) that there existed reasonable suspicion that the applicant committed a criminal offence. The Chamber justified this by referring to charges that are not the basis of the applicant's deprivation of liberty in this specific case. It has also departed from its well established case law which holds that a

restriction that is not necessary in a democratic society cannot be a basis for detention under Article 5 (1).

The Chamber, in its decision noted that "the public prosecutor alleged that the applicant had declared, among other things, that he intended to display a sculpture of the leader of a terrorist organisation (*Demirtaş v. Turkey* § 57). In addition, it observed that, according to the indictment, in a speech given in the BDP offices in Diyarbakır on 21 April 2013, the applicant stated that the Kurdish people in Turkey owed its existence to the armed struggle led by the PKK. In that regard, it was alleged that the applicant had referred to the first terrorist attacks by the PKK as the "coup in 1984" and the "resistance in Şemdinli [and] Eruh" (ibid.). Moreover, the public prosecutor asserted that the applicant was in charge of the political wing of the KCK, an illegal organisation. In this connection, the Court noted that evidence such as records of conversations among PKK leaders, and between those leaders and the applicant had been obtained by the public prosecutor prior to the applicant's arrest on suspicion of having committed the criminal offence of which he was accused (ibid.). It further noted that, having regard to the content of those conversations, the national authorities, in particular the first-instance courts and the Constitutional Court, found that it was possible to conclude that the applicant had been acting in accordance with the instructions of the leaders of a terrorist organisation".

It seems that these three acts were found sufficient by the Chamber to assume that reasonable suspicion did exist. However, it is not clear why these three acts were selected by the Chamber as a basis to justify the existence of reasonable suspicion. Firstly, these three acts have nothing to do with events of 6-8 October 2014 or the end of the "solution process" and the trench events, narrated in the Chamber's judgment in some details (§§ 13-38). The Chamber broadly summarizes these events but then justifies the existence of reasonable suspicion with these observations that are not relevant to the charge that forms the basis of the case which led to his arrest and detention. Secondly, and more importantly, the first detention order of the Diyarbakır Criminal Peace Judge does not refer to these three events as the basis for applicant's detention. It is surprising to see that two years later, some criminal accusations that were not used to detain the applicant by the domestic court is evaluated as the basis for assessing the reasonable suspicion grounding the applicant's detention.

In addition to this significant error in the establishment of reasons for the applicant's detention, it is highly questionable whether the speeches referred to by the Chamber can amount to reasonable suspicion when Article 5 is read together with Article 10 protections.

In its semi-pilot judgment in the case of *Gözel and Özer v. Turkey,* the Court summarised a basic formula which clearly shows that the probability of the statement to cause violence must be considered when determining incitement: "A statement cannot be prescribed only because it is a statement made by or about a terrorist organisation if it does not incite to violence,

justify terrorist acts to facilitate the aims of its supporters and cannot be construed to encourage violence based on a deep and unreasonable hatred towards certain people."[13]

In such cases, the Court finds that it is not acceptable to impose criminal sanctions based solely on the statement itself. In numerous judgments issued after 2005, the Court has repeatedly found violations and made reference to its earlier judgments without the need for any additional in depth examination in cases where national courts had issued decisions of imprisonment, in the absence of any examination, solely because the statements in question were unfavourable and amounted to propaganda and incitement to hostility and hatred.[14]

The mere fact that an expression is harsh and critical of the government and even one-sided does not necessarily mean that it amounts to incitement. In this regard, the Court has found various statements to fall within the acceptable limits of freedom of expression. These include statements such as those suggesting that Kurdistan was annexed as a colony by the Turkish state; portraying the Turkish state as an oppressor of "Kurdistan" in "political, military, cultural [and] ideological" terms; claiming the "racist policy of denial" *vis-à-vis* the Kurds as instrumental in the development of a "fascist movement";[15] romanticizing the aims of the Kurdish movement by saying that "it is time to settle accounts"; referring to the Republic of Turkey as a "terrorist state";[16] condemning the "*military action*" of the state which includes the state's "dirty war against the guerrillas" and the "open war against the Kurdish people";[17]saying that "*Kürdistan is burning*" and "describing events as genocide";[18] claiming that the State is engaging in "massacre" or defining the conflict as "a war".[19]

It should be noted that while assessing whether interference with freedom of expression and assembly is necessary in a democratic society, the content of the expression, in which context it was uttered, classification procedure and the affect of the interference on the expression have to be taken into consideration. The applicant's two speeches selected by the Chamber should be read against the background of this jurisprudence. In the first speech, the applicant stated that "even the statue of killer of Kurds, Kenan Evren, can be built, why the poster of their leader could not be put up". It is obvious that this statement cannot be seen as an incitement violence or hatred. In the second speech, the applicant delivered his personal opinions about the start of PKK activities. He argued that this had been the result of pressure

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[13] *Sürek v. Turkey (no. 1)*; *Gözel and Özer v. Turkey*, App No. 43453/04 and 31098/05, 06.07.2010; *Faruk Temel v. Turkey*, App No. 16853/05, 01.02.2011; *Öner and Türk v. Turkey*, App No. 51962/12, 31.03.2015; *Gül and Others v. Turkey*, §§. 41-45.

[14] Judgments in this category are still under supervision by the Committee of Ministers in the group of cases *Gözel and Özer v. Turkey* and *İncal v. Turkey*. For access to the list of over 100 judgments: https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Del/OJ/DH(2014)1230&Language=lanFrench&Ver=prel0002&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true

[15] *Başkaya and Okçuoğlu v. Turkey,* App No. 23536/94, 08.07.1999, § 64.

[16] *Sürek (no. 4) v. Turkey*, App No 24762/94, 08.07.1999, § 56

[17] *Erdoğdu v. Turkey*, App No 25723/94, 15.6.2000, §. 62.

[18] *Şener*, §. 44.

[19] *Karkın v. Turkey*, App No 43928/98, 23.9.2003.

imposed upon the Kurdish people. However, he did not glorify violence or incited people to commit crimes in this speech either.

In hundreds of cases brought against Turkey, the Court has stated that "although certain particularly acerbic passages of the article paint an extremely negative picture of the Turkish State and thus give the narrative a hostile tone, they do not encourage violence, armed resistance or insurrection and do not constitute hate speech. In the Court's view, this is the essential factor in the assessment of the necessity of the measure. (Amongst many authorities see *Gümüş and Others v. Turkey*, no. 40303/98, 15.3.2005, para. 18). The Chamber does not explain how and why Mr. Demirtaş's case differs from this well-established case law and how his speech can fulfil the conditions of reasonable suspicion.

4. Inadequate examination of the totality of circumstantial evidence in the examination of Article 18 aspects of the case

The Chamber's decision not to scrutinise an expression that falls within the scope of Article 10 and that forms the sole reason of the charge, arrest and detention of the applicant as a member of Parliament significantly distorts the sequence of events as a whole that culminated in the prosecution and the detention of the applicant. As such, this raises a separate "serious question affecting the interpretation" of Article 18 of the Convention in conjunction with Articles 5 and 10 of the Convention.

General principles concerning the interpretation and application of Article 18 of the Convention have been set out by the Grand Chamber in its judgment in *Merabishvili v. Georgia* ([GC], no. 72508/13, 28 November 2017, §§ 287-317).

According to the Grand Chamber, Article 18 is autonomous to the extent that there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies (*Merabishvili v. Georgia* ([GC], §§ 287-88). As re-stated in *Aliyev. Azerbaijan* by the Fourth Section:

'The mere fact that a restriction of a Convention right or freedom does not meet all the requirements of the clause that permits it does not necessarily raise an issue under Article 18. Separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case.' (*Aliyev. v. Azerbaijan* nos. 68762/14 and 71200/14 28 September 2018, §199)

Accordingly, the Court holds that Article 18 is engaged when there is a claim that a Convention restriction is solely for a purpose not prescribed in the Convention or when there is a plurality of purposes, both an ulterior purpose and a purpose prescribed by the Convention. In the latter case, a restriction can be compatible with a substantive Convention provision because it pursues a permissible aim under that provision, but it may still infringe Article 18 because it was chiefly meant for another purpose. In such cases, the Court shall investigate the totality of evidence at its disposal to determine which purpose was predominant. In so doing, the Court needs to have regard to the 'the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law' (*Merabishvili v. Georgia* ([GC] §§ 292-307).

In *Merabishvili v. Georgia* the Grand Chamber further clarified the principles of handling evidence to scrutinise Article 18 claims. The starting point of the principles laid out by Grand Chamber is that as a general rule, the burden of proof is not borne by one or the other party because the Court examines all material before it irrespective of its origin, and because it can, if necessary, obtain material of its own motion (*Merabishvili v. Georgia* ([GC]§ 311). The Court further established that the standard of proof is that of is "beyond reasonable doubt" and that standard has an autonomous meaning and is not determined by how national legal systems employ it. According to the Grand Chamber, such proof follows from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. Circumstantial evidence comprises information about primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts. Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts can be taken into account, in particular, to shed light on the facts, or to corroborate findings made by the Court (*Merabishvili v. Georgia* ([GC], § 317). The level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake (*Merabishvili v. Georgia* ([GC], § 314 and *Aliyev v. Azarbaijan* § 203). When provided with circumstantial evidence, it is the Court's task to assess the probative value of each item of evidence before it.

In Demirtaş v. Turkey, the presence of a dominant purpose not prescribed by the Convention in conjunction with Articles 10 and 5 is the fundamental aspect of the case. The applicant claims that interference with his political expression as a member of parliament, the charges against him, his arrest, and his detention all pursue the sole or the predominant purpose of silencing him as the most vocal opposition leader against President Erdogan. The applicant maintains that the totality of domestic criminal measures taken against him, initiated by the blanket lifting of immunities as a one off and retrogressive measure with respect to his

political speech, together pursue the predominant political aim of silencing him as the most outspoken political opponent of the President and his government. Given that Mr Demirtas, as a vocal and influential opposition leader in Turkey is under risk of being imprisoned for over 120 years, the nature and degree of reprehensibility of the alleged ulterior purpose and the risks this poses to the maintenance of the ideals and values of a democratic society governed by the rule of law is beyond any doubt.

In order to substantiate his claim, the applicant followed the guidance provided by the Grand Chamber in *Merabishvili v. Georgia* closely and provided specific, strong, clear, concordant, sequential and contextual circumstantial evidence in support of the argument that the restrictions to his Article 10 and 5 rights had the quality of a sole or a predominant purpose not permitted by the Convention. More significantly, the evidence provided by the applicant identified the crystallisation of a predominantly political purpose as occurring in 2015 since this had been the critical year in which the government had pursued an intensive campaign of harassment against the HDP politicians and against Mr. Demirtas in particular predominantly for political ends. That political purpose has been to prevent the HDP from being represented in Parliament and in the political life of the country and to silence Mr Demirtas as the political leader of the party and a leading opposition politician.

Mr. Demirtas was a member of parliament between 2007 and 2018 and the co-president of HDP for eight years until 5 January 2018**.** When Mr Demirtas ran for presidential elections in 2014, he received 9.76 percent of the votes. By early 2015, his popularity was on the rise, not only in the predominantly Kurdish regions, but also in the west of the country amongst Turkish voters as the pro peace and progressive face of Turkish politics.

On 7 March 2015, President Erdogan, in violation of his (then) de jure presidential impartiality and referring to the upcoming June 2015 elections made a speech in which he said " give me 400 members of parliament and all will be sorted out peacefully."[20] This speech was made with reference to number of members of parliament needed to change the constitutional system of Turkey to a presidential system with significant concentration of powers in the hands of an elected and partisan president. This was also a time when there still was an effective ceasefire between the security forces and the armed group PKK.

In response, on 18 March 2015, Mr Demirtas made a very short speech in Parliament and he said 'Erdogan, we will not make you president. We will not make you President. We will not make you president.'[21] This speech had quickly gone viral and influenced the overall political

[20] Speech by President Erdoğan, 8 March 2015, Gaziantep, available at http://www.gazetevatan.com/-400-vekil-verin-bu-is-huzur-icinde-cozulsun--747571-gundem/

[21] Mr. Selahattin Demirtaş, Speech at Parliament, 18 March 2018, Ankara available at https://www.youtube.com/watch?v=FwKUBhyny8Y

climate running up to the June 2015 elections, becoming the key HDP election slogan, positioning HDP and Mr. Demirtas in direct opposition to Erdogan's plans to alter the constitutional system in Turkey. As the popularity of HDP increased in the polls, on 18 May 2015 HDP offices were attacked by unknown perpetrators in Mersin and Adana simultaneously. On 5 June 2015, two days before the 7 June 2015 elections, there was a terrorist attack at the HDP Diyarbakir rally leading to the death of two persons just before Demirtas took on the stage for his final pre-election mass rally.

On 7 June 2015 and despite the well-documented widespread control of the mainstream media by the AKP government,[22] HDP achieved a historical all time high number of votes from the electorate. With 13% of the vote in total, HDP passed the 10 percent threshold and become the third party with the larger share of votes after AKP and CHP in Parliament. This was the first time that a political party with predominantly Kurdish left politicians achieved representation as a mainstream political party in Turkish Parliament in Turkish history, therefore, the importance of this cannot be underestimated by any account of recent history. Consequently, and significantly, the AKP lost its majority to establish a government in Parliament for the first time since 2002 due to the success of HDP overcoming the 10 percent threshold. Had HDP remained below the 10 percent threshold, AKP would have been the net winner of seats in Parliament under the party-list proportionate representation election system of Turkey.

Following this election, altering AKP's dominance in parliament for the first time since it came to power in 2002, President Erdogan called for a snap re-election to take place in November 2015 on the grounds that there was a failure to form a coalition government. Between June-November 2015, Turkey saw some of the worst terrorist attacks on its soil and the end of the cease fire between the security forces and the PKK. On 20 July 2015, a suicide bomber killed 33 persons in a gathering in support of Syrian Kurds at the Syrian border town of Suruc. On 22 July 2015 two police officers were shot dead in Sanliurfa. Three years on, on 19 June 2018, the Court acquitted all six suspects affiliated with the PKK for this shooting and therefore perpetrators of these killings are still unknown. On 19 August 2015, eight solders died due to explosives laid on the roads by the PKK in Siirt. On 6 and 8 September 2015, 16 soldiers and 13 police officers died in two separate attacks carried out by the PKK. On 10 October 2015, Turkey has seen the most deadly terrorist attack on its soil in its capital. In a peace march organised, amongst others by HDP, in Ankara a suicide bomber killed 103 persons.

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[22] OSCE/ODIHR, Needs Assessment Mission Report, Republic of Turkey 7 June Parliamentary Elections, 14-17 April 2015 available at https://www.osce.org/odihr/elections/turkey/153211?download=true and OSCE/ODIHR, Limited Election Observation Mission Final Report, Republic of Turkey 7 June Parliamentary Elections, 7 June 2015, available at https://www.osce.org/odihr/elections/turkey/177926?download=true

President Erdogan, in ongoing violation of his (then) constitutional role as an impartial President of the country, pursued an open campaign against the HDP in this period, despite the lack of effective and conclusive investigations into these events, including the investigation of state's positive obligations to prevent such attacks. Instead, Erdogan single handedly pointed the finger at HDP parliamentarians framing them as terrorist collaborators. On 28 July 2015, President Erdoğan stated "*I don't approve closing down political parties. However, deputies of the Peoples' Democratic Party (HDP) should pay the price one by one. The parliament should do what is needed and remove their parliamentary immunity shields. If people collaborate with a terrorist organization, they pay the price*". [23]

Yet, the HDP succeeded passing the 10 percent threshold once again in the November 2015 elections.

President Erdogan's open and unequivocal demands for the criminalisation of the HDP members of Parliament in 2015 had a direct influence on the actions of the office of the prosecutors. The evidence for this is the exponential increase in the number of preliminary investigation files (fezlekes) prepared by prosecutors against the members of HDP and Mr Demirtas in 2015 and 2016 and transmitted to Parliament. According to the Ministry of Justice records there were a total of 330 preliminary investigation files before the Parliament on 15 December 2015. 182 of these were related to HDP MPs covering the full period of eight years between 2007-2015. For the same period there were 110 files concerning the MPs of the second largest opposition party CHP, 36 files concerning the AKP MPs and 10 files concerning the MHP MPs.

On 2 January 2016, President Erdogan said 'HDP MPs should go to prison.'[24] Between 15 December 2015 and May 2016, the number of preliminary investigation files against HDP MPs before the Parliament almost tripled, reaching 510 files by May 2016. Between April and May 2016, 154 files were sent by prosecutors' offices to Parliament against HDP members. The number of preliminary investigation files went up from 110 to 195 for the CHP (the largest opposition party) from 36 to 46 for AKP and from 10 to 20 for MHP in the same period.

The total number of preliminary investigation files concerning Mr Demirtas were 48 in the period 2007-2014. In 2015 and 2016, an equal number of preliminary investigation files, 48 in total, were prepared by prosecutors and sent to Parliament. That is, the number of preliminary

[23] Statement by President Erdoğan, 28 July 2015, Ankara, available at http://www.cumhuriyet.com.tr/haber/turkiye/332325/Erdogan_cozum_surecini_bitirdi_HDP_lilerin_dokunulmazliginin_kaldirilmasini_istedi.html

[24] Statement by President Erdoğan, 2 January 2016, on plane returning from his official visit to Saudi Arabia to Ankara, available at https://www.bbc.com/turkce/haberler/2016/01/160102_erdogan_hdp

investigation files for seven years with respect to the applicant equals to the total number in one and a half years. More significantly 35 of these files were submitted by prosecutors between January 2016-May 2016. That is, as the Erdogan openly targeted HDP parliamentarians as terrorist collaborators to bring down their share of votes in the June and November 2015 elections, the number of preliminary investigations against HDP members increased from an average of 1.9 per month over the period 2007-2015 to an average of 73 files a month between January and May 2016. What is more, these preliminary investigation files all concerned political speeches by parliamentarians. The most common charge against HDP MPs is terrorist propaganda followed by violating the law on assembly. Both of the laws that underpin these charges and their employment have been reviewed and found to be not fully compatible with the Convention by this Court on numerous occasions.[25] This huge growth, and the temporal link between the speeches of Erdogan and the files forwarded by the Prosecutors' office to the Parliament, cannot be ignored under the *Merabisvhili standard* of sequential evidence.

In follow up to the huge increase of preliminary investigation reports by prosecutors sent to the Parliament concerning HDP politicians and Demirtas, in March 2016, Erdogan called on the Parliament to conclude the immunity issue and targeted the applicant, saying: "*We should immediately conclude the immunity issue. The Parliament should rapidly take a step for it. We cannot discuss whether we lift the immunity of one MP, or two. We should adopt a principle. What is this principle? The ones who cause the death of 50-52 people by getting my Kurdish brothers to pour into the streets will not be prosecuted and they will show up in the Parliament and my people will overlook, is that so? If the Parliament does not take necessary action, this nation and history will hold it accountable.'*[26] In April 2016, referring to the number of preliminary investigations by the prosecutor, he said, " "*There are 550 dossiers requesting prosecution. They should be addressed as soon as possible. Afterwards, those who are found guilty should serve their sentences. Politics shouldn't be a barrier to these prosecution dossiers. The judiciary takes the necessary action.*".[27]

During the debates on lifting of immunity, one argument put forward in favour of a one-off measure was the sheer number of preliminary investigation reports that come before the Parliament and the number of parliamentary hours it would take to review 562 reports one by one. On 20 May 2016, parliamentary immunities were lifted, as a one-off and retroactive

[25] Cf. Department for the Execution of the Judgments of the European Court of Human Rights Turkey Country Factsheet, available at https://rm.coe.int/tur-eng-fs4/1680709767

[26] Speech by President Erdoğan, 16 March 2016 , Ankara available at https://t24.com.tr/haber/cumhurbaskani-erdogan-muhtarlar-toplantisinda-konusuyor,332319

[27] Speech by President Erdoğan, 11 April 2016, İstanbul, available at 11 Nisan 2016 available at http://www.cumhuriyet.com.tr/haber/turkiye/513635/Erdogan__Yargilanacaksin_kardesim_ya_.html and https://www.yeniakit.com.tr/haber/erdogandan-dokunulmazliklarla-ilgili-sert-sozler-160925.html

measure, only relating to all the existing files against members of Parliament. As a general principle, once immunities are lifted, it is up to the prosecutor to decide whether they will carry out a full investigation leading up to an indictment. Up until 2019, not a single AKP or MHP member of parliament has been indicted based on the preliminary investigation files prepared by Turkish prosecutors. MHP is a current coalition partner of AKP. Yet, the prosecutors have decided to indict 55 out of 59 HDP members of parliament**.**

Furthermore, there is circumstantial evidence that the political influence of President Erdogan over the prosecutors is ongoing. Between May 2016 and 10 February 2019, the number of preliminary files concerning MPs have once again reached an all-time high number of 527. This time, the requests to investigate members of parliament solely focus on members of two opposition parties, HDP and CHP. There has been not a single file to investigate a member of parliament from AKP or its coalition partner MHP since May 2016.

This means that not a single MP who is part of the governing coalition was investigated or charged by a prosecutor despite the existence of a preliminary investigation file and lifting of immunities. It also means that since 20 May 2016, when the immunities were lifted as a one off and retroactive measure, not a single request to investigate a member of the AKP -MHP coalition was sent by prosecutors.

In contrast, 95 out of 96 preliminary investigation files concerning Mr. Demirtas have been turned into an indictment by public prosecutors. Of these reports, 39 of them charge him with "spreading terrorist propaganda", 10 of them charge him with praising crimes or criminals, 17 concern violations of the law on assembly (no. 2911), 4 of them with membership of a terrorist organisation, 7 of them with committing crimes on behalf of a terrorist organisation, 9 of them for insulting the Turkish Republic; 7 of them for insulting the President and 3 of them for insulting the Prime Minister.

There are currently 29 separate ongoing court cases against Mr Demirtas. All of these cases focus on the speeches of Demirtas as a member of parliament and as the political leader of HDP, and all of these fall within the scope of Article 10 of the Convention.

When Mr. Demirtas was arrested on 4 November 2016, 31 separate preliminary investigation files prepared by multiple prosecutors in multiple provinces concerning his political expressions between 2008 and 2016 were merged into a single indictment. Even though all these files concern Mr. Demirtas' political speech at different times and places, and there are no connections between these files, they were then combined as a single indictment against him so that his detention could be justified under domestic law.

Furthermore, blatant factual errors and irregularities underpinning the indictment and the initial decision to detain Mr Demirtaş raise significant concerns with regard to whether the

indictment and the trial following the lifting of the immunity of Mr Demirtas as a whole pursue a sole political purpose. Whilst the initial detention (and subsequent decisions of continued detention) relied on two specific witness statements, in the course of the trial, it has become clear that the witness code named 'Mercek' was a fictional witness and did not exist at all **(Annex-1)**. What is more, the Court did not find it necessary to examine the second witness, Mr. Nurullah Akan at all **(Annex-2)**. This means that the two witnesses that were relied on for the initial detention of Mr Demirtaş are no longer material to the indictment against him or to his trial. Furthermore, the indictment referred to eleven voice recordings as an additional basis for his indictment. Yet, there are serious doubts as to whether these eleven voice recordings central to the indictment actually exist. All requests by Mr Demirtaş and his lawyers to attach these recordings to the case file and to verify their authenticity have been refused by the first instance court trying Mr. Demirtaş **(*see,* Annex-2)**. The indictment against Mr. Demirtaş alleged that he personally met with the members of PKK. It is now known that every single meeting record provided as evidence for this refer to meetings held with publicly known HDP politicians, mayors and deputies **(Annex-3)**. Finally, there are serious doubts regarding the authenticity of a twitter account "@murat_karayılan" from which the prosecutor alleges that the HDP twitter account took instructions **(Annex-4)**. The time of a particular tweet, central to the prosecutions case for incitement to violence, allegedly asking the members of the pubic to take to the streets on 10.20 am in the morning on the day of 6 October 2014 is also proven to be factually incorrect, as the correct time of the tweet is 20.20 pm and after people took to streets on this day **(Annex-5)**. It has also emerged during judicial proceedings that the frequently emphasized strong criminal suspicion related to Demirtaş conveying a letter and communicating with the family of a person named Ikram Ersöz upon the directives of the organization, is entirely untrue. Investigation carried out by the court has revealed that such a letter has not been conveyed, and that no communication took place **(Annex-6)**. These blatant errors and factual inaccuracies individually and as a whole have significant probative value as to the sham nature of the indictment, detention and the ongoing trial.

Against the background of this primary, concordant, sequential, clear and strong circumstantial evidence, laid out as key factors to examine Article 18 claims by the Grand Chamber and diligently applied, most recently in the case of *Intigam Aliyev v. Azerbaijan,* the Second Chamber has chosen not to examine the circumstantial evidence from the critical date of 2015, either in conjunction with Article 10 or in conjunction with article 5(1). It also did not examine whether Article 18 claims relate to the sole purpose or the dominant purpose with respect to the silencing of Mr Demirtas as the strong and vocal opposition to Mr. Erdogan, holding the key to the parliamentary configuration of majority and minority in 2015 June and November 2015 elections.

Instead, the Chamber artificially identified an unclear critical date (sometime after the refusal of the release of the detention of the applicant, sometime after November 2016) and argued that 'it appears from the reports and opinions by international observers, in particular the observations by the Council of Europe Commissioner for Human Rights, 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.' (para. 271).

Yet, this vague temporal starting point of political influence over prosecutors and judges clearly fails to take into account the full sequence of political, prosecutorial, and judicial actions since 2015 and the strong and concordant inferences that are drawn from these sequential events, in conjunction with Article 10 and 5(1).

Once HDP had become stronger as a political party capable of passing the 10 percent threshold in 2015, Erdogan increased his open and strongly worded campaign targeting HDP members as terrorists or terrorist collaborators. When Erdogan targeted Demirtas and HDP politicians openly, directly and in strong words, prosecutors responded by submitting to the Parliament a huge and unprecedented number of preliminary investigation files against these politicians and Mr Demirtas. Once the number, in a very short space of time of six months between December 2015 and May 2016, increased exponentially, Erdogan called for a one-off retroactive lifting of parliamentary immunity of these politicians based on the very increase in the number of files which he himself, in 2015, had originally called for. Once the immunity was lifted retroactively and as a one-off measure, the prosecutors almost exclusively targeted HDP politicians and not a single AKP or a MHP politician was prosecuted. Once Demirtaş was brought before a court he was immediately detained despite the lack of a risk he would flee or tamper with evidence since all charges against him were based on his public speeches. The Court in charge of the applicant's case accepted a huge indictment which includes temporally unrelated and contextually distinct political speeches of the applicant as a single case. The Constitutional Court refused to carry out a constitutional review of the constitutional amendment lifting the immunities and the claims of the applicant concerning the political purpose of the charges, arrest and detention. All of these sequential events took place leading up the constitutional amendment vote in 2017 which aimed at fundamentally altering the Turkish constitutional regime and the Presidential and Parliamentary elections of 2018.

The approach of the Chamber artificially separating sequence of events that led to the inference in political expression, his prosecution and detention significantly departs from the clear standards set by the Grand Chamber and applied by other Sections of the Court with respect to the duty to scrutinise sole or predominant purpose through a holistic treatment of all

circumstantial and sequential evidence with respect to rights restrictions. This is all the more concerning given that the right at stake is the political speech rights of a very vocal opposition leader against President Erdogan.

The lack of attention to the full sequence of events further undermines the foreseeability of how the Court examines the totality of circumstantial evidence when rights are restricted with the sole or dominant non-Convention compliant purposes. Given the Court's clarification of the standard of proof in *Merabishvili v. Georgia,* this pick and choose approach as to the sequence of circumstantial evidence makes the Court highly vulnerable to charges of arbitrary and non-judicial treatment of circumstantial evidence in the context of erosion of the independence and impartiality of prosecutors and judges. As the Court is to face more and more Article 18 claims, it is the role of the Grand Chamber to consolidate its standards on the holistic treatment of circumstantial evidence, in particular, in its sequential and temporal aspects, and the application of these standards to the alarming decline of rule of law and the independence and impartiality of the prosecutors and judges in Turkey. *Demirtas v Turkey* constitutes the test case for Turkey's erosion of rule of law and pluralist democracy under Article 18. The Court cannot afford to get the sequence of events wrong and it must use all evidence at its disposal or seek further evidence on its own initiative to offer a robust analysis of the sequence of events in Turkey.

5. Mass criminalisation, detention and imprisonment of members of parliament as a significant general question

The judgment raises a very significant general question regarding the mass criminalisation, detention and imprisonment of members of parliament. This question further is of significant practical import concerning the legal consequences of finding of violation by the European Court of Human Rights, in particular when found in conjunction with Article 18. Under Article 46, the Chamber held 'having regard to the particular circumstances of the case, the reasons for its finding of a violation and the urgent need to put an end to the violation of Article 5 § 3 and Article 18 of the Convention, the Court considers that the respondent State must ensure that the applicant's pre-trial detention, ordered in the criminal proceedings forming the subject of the present case, is ended at the earliest possible date, unless new grounds and evidence justifying his continued detention are put forward.' (§ 283).

In response to the judgment, on 20 November 2019, the President of Turkey stated 'We will make our move and finish the job'.[28] Following the judgment of the Chamber, Ankara 19th

[28] Speech by President Erdoğan, 20 November 2019, Ankara available at: Ankara,

Assize Court, the court that detained the applicant rejected the request of the applicant to be released three times. Referring to the Chamber's unanimous decision that there had been no violation of Article 5 § 1 of the Convention (alleged lack of reasonable suspicion that the applicant committed an offence), the 19th Assize Court concluded that the judgment of the Chamber had not become final, therefore not binding for the domestic judicial authorities.[29] On 19 November 2019, the appeal processes of a separate conviction of Mr. Demirtas was expedited and on 4 December 2018 he received a finalized sentence and became a convicted person.[30] 25 former members of parliament from HDP now have convictions delivered by first instance courts ranging from 1 year to 19 years.

If the Chamber's judgment is allowed to stand without addressing the serious issues of fundamental importance we outline above, national authorities in some member states could interpret the judgment as a signal to expedite criminal prosecutions and convictions of the freedom of speech of their opponents, to render the judgments of the Court void of any significance when Article 18 violations are found in conjunction with Article 5(3). Whilst the Chamber stated that 'it is not only the applicant's rights and freedoms as an individual that could be said to be under threat but the whole democratic system itself' ((§ 272), this obiter dicta is rendered completely ineffective by the way in which the Chamber decided in this case.

The European Court of Human Rights finds violations of Article 18 in exceptional cases in order to sound alarm bells with respect to the serious erosion of rule of law protections in Council of Europe member states. As the President of the European Court of Human Rights in his speech on the occasion of the opening of the judicial year on 25 January 2019 stated:

'..One of the indicators of the decline in the rule of law is undoubtedly the application of Article 18 of the Convention. It provides that any restriction of the rights and freedoms guaranteed by the European Convention on Human Rights must not be applied for any purpose other than that for which it has been prescribed. This provision, which is crucial for a pluralistic democracy, has been breached only twelve times, but five times during the year 2018 alone. This is both a worrying and a revealing symptom. Without pinpointing any particular country, it can be seen that the aim is often to reduce an opponent to silence, to stifle political pluralism, which is an attribute of an "effective political democracy" – a concept contained in the preamble to the Convention.'[31]

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https://tr.sputniknews.com/turkiye/201811201036237362-erdogan-bahceli-ittifak-gorusmesi/

[29] Ankara 19th Assize Court, Case no. 2017/189, decisions of 30.11.2018, 13.12.2018 and 04.01.2019.

[30] İstanbul 2nd Criminal Chamber of Court of Appeals, Case no. 2018/2362, Decision no. 2018/1534.

[31] Speech by President Guido Raimondi on the occasion of the opening of the 2019 judicial year of the European Court of Human Rights, 25 January 2019, Strasbourg available at https://www.echr.coe.int/Documents/Speech_20190125_Raimondi_JY_ENG.pdf

Yet, the way in which Article 18 is employed in the Chamber judgment with respect to one of the most outspoken political opponent to Turkey's political establishment, who has been reduced to silence and under serious risk of life time imprisonment, risks trivialising the finding of an Article 18 violation and appropriate remedial consequences that ought to follow.

For all these reasons, we strongly urge the Panel to accept the applicant's request for a referral that would allow the Grand Chamber to reconsider these issues. There is no question in our minds that the current case raises "a serious question affecting the interpretation" of Articles 5 and 10 of the Convention, interpretation of Article 18 of the Convention in conjunction with Articles 5 and 10 of the Convention as well as "a serious issue of general importance" (Art. 43).

Lastly we kindly request from the Panel that the Applicant demands to open a hearing before the Grand Chamber and to attend the hearing.

Yours sincerely,

Mahsuni Karaman, ***attorney***

Legal Representative to the Applicant

Encs. :

Annex-1, minutes of the local court of 16.2.2018
Annex-2, minutes of the local court of 13.4.2018
Annex-3, list of HDP politicians referred in the indictment
Annex-4, minutes of the local court of 4.10.2018
Annex-5, Expert Report of 15.8.2018
Annex-6, Document of Research of Security Directorate of Istanbul