

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

Sent by e-mail

4 November 2022

Submission by the Turkey Human Rights Litigation Support Project, ARTICLE 19, Human Rights Watch, the International Commission of Jurists, and the International Federation for Human Rights (collectively “the NGOs”) pursuant to Rule 9.2 of the Committee of Ministers’ Rules for the Supervision of the Execution of Judgments providing additional observations on the implementation of *Selahattin Demirtaş v. Turkey (No.2)* (Application no. [14305/17](#)) Grand Chamber judgment of 22 December 2020.

I. Summary

1. To date, Türkiye has failed to implement the individual measures the European Court of Human Rights ordered in *Selahattin Demirtaş v. Turkey (No. 2)*. Mr. Demirtaş, a former member of parliament and co-chair of the opposition Peoples’ Democratic Party (HDP), remains incarcerated in prison.
2. The NGOs roundly reject the Turkish Government’s claim that the applicant is currently detained on the basis of “new evidence and allegations” that are different in substance from those examined by the Court in its judgment. On the contrary they reiterate that Mr. Demirtaş’s ongoing pre-trial detention is fully within the scope of the Grand Chamber judgment, in particular its finding of a violation of Article 18 in conjunction with Article 5. Therefore, the authorities’ claims should be seen as nothing more than a further attempt by the Government to evade its legal obligation to release Mr. Demirtaş immediately.
3. Since the ECtHR judgment was published and the CM started its supervision process, Türkiye has adopted various strategies to ensure the continuation of Mr. Demirtaş’s arbitrary detention. The political purpose behind his ongoing arbitrary detention is confirmed by three main elements of the proceedings against him, all relevant to the facts leading the Grand Chamber to find a violation of Article 18 of the Convention in conjunction with Article 5:
 - Developments in the criminal proceedings against Mr. Demirtaş: First, there are serious irregularities in the proceedings before the Ankara 22nd Assize Court concerning the purported “new evidence and allegations”, such as the use of ‘anonymous/secret witnesses’, the timing of the steps taken by the Government and domestic courts relating to Mr. Demirtaş, and the lack of clear and reliable information by the Government concerning the alleged new evidence.
 - Context of the case: Second, the continuous detention of Mr. Demirtaş must be seen in the context of actions of the Turkey Government against HDP and HDP politicians. These continue to be seriously targeted after the ECtHR’s judgment. Attacks against them have followed the similar pattern noted by the Court in finding a violation of Article 18 in conjunction with Article 5. In the lead up to next year’s elections the oppression the HDP and HDP politicians have been facing seriously reduces the prospect of free democratic debate and a fair election in the country.

- The ongoing interference by the Government in the judicial proceedings against Mr. Demirtaş: Third, the Government’s public interference in the judicial process has continued. The arbitrary criminal proceedings against Mr. Demirtaş and the HDP politicians, and the lawsuit filed against the HDP seeking its closure, have continued to be accompanied by a coordinated public targeting of them by senior government officials, including President Erdoğan, the President’s Director of Communications, Fahrettin Altun, the Minister of Interior and the chair of one of the governing political parties, the MHP, Devlet Bahçeli. In addition, the latest judicial appointments to the Constitutional Court have raised more serious questions about the independence and impartiality of this court.
4. The NGOs submit that the Turkish Government has failed to prove that it has ceased to conduct politically motivated criminal proceedings against Mr. Demirtaş; thus, that it is responsible for continuing violations of Mr. Demirtaş’s Convention rights and of violating Article 46(1) ECHR – the obligation of Türkiye to abide by any final judgment of the ECtHR. The NGOs also submit that Mr. Demirtaş’s continued detention in prison, despite the Grand Chamber judgment, demonstrates flagrant disregard for the Convention rights and system. The NGOs accordingly urge the CM to ensure that his detention is brought to an end. In this connection, the NGOs underline the following:
- The CM should disregard the false and misleading claims made by the Turkish government and firmly condemn Türkiye’s ongoing attempts to avoid executing the ECtHR judgment.
 - The CM should use all the legal, political and diplomatic tools designated in the Convention system to increase the pressure on Türkiye to secure the immediate release of Mr. Demirtaş, especially taking into account the deleterious impact his ongoing detention will have on the upcoming presidential and parliamentary elections in June 2023. This should include the triggering of infringement proceedings against Türkiye under Article 46(4) of the Convention in the event that Mr. Demirtaş remains in detention, as well as efforts to ensure the direct and continuing engagement, through all available channels, by member states, the Secretary General, the PACE, and all other Council of Europe institutions.
 - This case should remain high on the agenda of the Council of Europe institutions and member states in any relations with Türkiye and its full resolution must be identified as one of the main conditions for maintaining constructive co-operation with the country.

II. Introduction

5. On 22 December 2020, the Grand Chamber of the European Court of Human Rights (“ECtHR” and “Court”) found in its landmark judgment in the case of *Selahattin Demirtaş v. Turkey* (No. 2) that Turkey violated Articles 5(1) and (3) (the right to liberty and security), Article 10 (freedom of expression), Article 3 of Protocol No. 1 (the right to free elections) and Article 18 (restrictions on rights for an unauthorised purpose) in conjunction with Article 5 of the European Convention on Human Rights (“the Convention”). In its judgment, the Grand Chamber held that Turkey must take all the necessary measures to secure Mr. Demirtaş’s immediate release, and that “the continuation of his pre-trial detention, on grounds pertaining to the same factual context, would entail a prolongation of the violation of his rights as well as a breach of the obligation on the respondent State to abide by the Court’s judgment in accordance with Article 46 § 1 of the Convention” (paragraph 442). Despite the passage of almost two years since the judgment, Mr. Demirtaş remains in arbitrary detention.
6. The CM’s supervision process in relation to the *Selahattin Demirtaş v. Turkey* (no 2) judgment is at a critical stage. During its 1451st meeting in December 2022, the CM will determine its next

steps in ensuring that the Court's judgment is fully implemented by Türkiye. The NGOs have been closely following the supervision process and have already made several Rule 9.2 submissions.¹ This submission focuses on the recent developments in the domestic proceedings against Mr. Demirtaş and their potential effects on the supervision process.

7. Most recently, during its 1443rd Human Rights meeting on 20-22 September 2022, the CM again strongly urged the Turkish authorities to ensure the applicant's immediate release, underlining that Mr. Demirtaş had been held in pre-trial detention since 4 November 2016.² In the same decision, the CM noted the Turkish authorities' claim that the applicant was being detained on the basis of "new evidence and allegations" which were in substance different from those examined by the Court in its judgment, and considered that further information on this issue was needed before the Committee could make its decisive assessment on the individual measures required to remedy the violations found by the Court.³
8. The NGOs averred in their Rule 9.2 submission of 24 May 2022 that the authorities' claim that the applicant was being detained on the basis of "new evidence and allegations" should be considered as a further attempt by the Government to evade its obligation to immediately release Mr. Demirtaş.⁴ The NGOs reiterate that, as set out in their previous submissions (dated 7 February 2021, 23 July 2021 and 24 May 2022), the ongoing pre-trial detention of Mr. Demirtaş, after the publication of the Grand Chamber judgment, is a consequence of criminal proceedings which have the same factual or legal basis as the earlier proceedings which led the Court to find multiple violations of the Convention, and that this situation clearly constitutes a further prolongation of the violations of his rights.⁵ Thus, his ongoing pre-trial detention is fully covered within the scope of the Grand Chamber judgment, in particular by its finding of a violation of Article 18 in conjunction with Article 5.⁶
9. The NGOs underline that in two emblematic cases under the CM's supervision, namely the Demirtaş and Kavala cases, the Government has an established track record of relying on judicial tactics that have been developed to avoid releasing the applicants from detention and thereby evading the obligation to implement the ECtHR judgments. The Government's recent claims that 'new evidence' has purportedly emerged in Mr. Demirtaş's case, just after the CM's interim resolution adopted in December 2021 stipulating his immediate release, is a further example of bad faith tactics aimed at ensuring that he remains arbitrarily behind bars. The ongoing arbitrary detention of Mr. Demirtaş continues to have a seriously deleterious impact not only on his individual rights and freedoms, but also on the rights of the general population of Türkiye, especially in the lead up to the upcoming presidential and parliamentary elections expected to

¹ Communications from ARTICLE 19, Human Rights Watch, International Commission of Jurists, International Federation for Human Rights and Turkey Human Rights Litigation Support Project in the case of *Selahattin Demirtaş v. Turkey (No. 2)*, Application No. [14305/17](http://hudoc.exec.coe.int/eng?i=DH-DD(2021)192revE), 7 February 2021, 23 July 2021, and 30 May 2022, [http://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)192revE](http://hudoc.exec.coe.int/eng?i=DH-DD(2021)192revE), [https://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)759](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)759), and [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)586E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)586E).

² The CM had already called for Mr. Demirtaş's immediate release during its examination of the case at its 1411st meeting (14-16 September 2021), at the 1419th meeting (30 November-2 December 2021) and at the 1428th (8-9 March 2022).

³ The CM also noted the same point in its examinations of the case at its 1428th (8-9 March 2022) and 1436th meetings (8-10 June 2022),

⁴ Communication from the NGOs, 24 May 2022 (n 1).

⁵ See the Communications from the NGOs of 7 February 2021, 23 July 2021, and 24 May 2022, (n 1).

⁶ *Ibid.* The ECtHR found in *Selahattin Demirtaş v. Turkey (No. 2)* judgment that Turkey violated Articles 5(1) and (3) (the right to liberty and security), Article 10 (freedom of expression), Article 3 of Protocol No. 1 (the right to free elections) and Article 18 (restrictions on rights for an unauthorised purpose) in conjunction with Article 5 of the European Convention on Human Rights ("the Convention").

take place in June 2023 and in which the applicant, and his political party, the HDP, have a central role to play. The NGOs urge the CM to take this fully into account in determining the next steps in discharging its supervisory role.

III. The Turkish authorities continue arbitrary detention of Mr. Demirtaş for political purposes

10. Mr. Demirtaş had been held in detention since November 2016 and has been charged with different crimes by means of parallel or subsequent criminal investigations - proceedings on the basis of the same facts and allegations which led to the ECtHR's finding that the criminal proceedings against him and his detention pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate (para. 437). Since the Grand Chamber judgment and the beginning of the CM's supervision process, Türkiye has adopted a number of bad faith tactics to ensure the continuation of Mr. Demirtaş's arbitrary detention.⁷
11. During its 1398th (9-11 March 2021) and 1419th (30 November – 2 December 2021) meetings, the CM decided that the applicant's ongoing detention in relation to the 6-8 October 2014 events in the case before the Ankara 22nd Assize Court was based on the same facts already reviewed by the ECtHR and that he must be released immediately.⁸ Nevertheless, the Government did not cease its abuse of the criminal process against Mr. Demirtaş. This was evident in the steps taken by the Ankara 22nd Assize Court and the arguments advanced by the Turkish government to justify the continuance of Mr. Demirtaş's detention.
12. In their May 2022 submission, the NGOs stated that the burden of proof remained firmly on Turkey to establish that its reliance on purported "new evidence and allegations" was not simply a further tactic to circumvent the Court judgment and to perpetuate the violations found by the Court in relation to Article 18 of the Convention. Nevertheless, despite the Committee's decisions during its 1428th, 1436th and 1443rd meetings indicating that it needed further information to "make its decisive assessment on the individual measures required to remedy the violations found by the Court", the Government has still not provided full details of its claims to facilitate the CM's review. This serious failure underscores that the Government's aim is to delay the proceedings, to prevent concrete actions being taken by the CM with respect to Türkiye, and to render the supervision process ineffective, while also ensuring Mr. Demirtaş's ongoing detention.
13. The circumstances of the domestic proceedings against Mr. Demirtaş and the Government's actions establish that the political purpose behind Mr. Demirtaş's ongoing detention remains firmly intact. This is supported by three important elements, all relevant to the facts leading the Grand Chamber to find a violation of Article 18 of the Convention in conjunction with Article 5: 1) developments in the criminal proceedings against Mr. Demirtaş; 2) developments concerning the HDP and HDP politicians; and 3) the ongoing interference by the Government in the judicial proceedings against Mr. Demirtaş and the HDP.

a. There are serious irregularities in the proceedings before the Ankara 22nd Assize Court, including the reliance on purported "new evidence and allegations".

14. ***Systemic issues around the use of 'anonymous/secret witnesses':*** It must first be noted that the practice of using anonymous/secret witnesses in Türkiye has been found to be highly problematic. Since the Council of Europe Human Rights Commissioner's 2012 report underlining this issue by referring to the Turkish courts' reliance on 'testimonies by secret witnesses without direct links to substantial points of the indictment, or providing hearsay testimonies' and his suggestion that this

⁷⁷ See the Communications the NGOs of 7 February 2021, 23 July 2021, and 24 May 2022, (n 1).

⁸ CM decisions, available at <https://hudoc.exec.coe.int/ENG?i=004-56539>.

practice is reviewed,⁹ the issue has become more systemic and serious. Recent reports indicate that in numerous cases concerning alleged terrorism-related offences the ‘authorities used secret evidence or witnesses to which defence attorneys and the accused had no access or ability to cross-examine and challenge in court, particularly in cases related to national security. The Government occasionally refused to acknowledge the use of evidence from, or to provide information about, secret witnesses during open court proceedings and in interactions with defence.’¹⁰

15. A series of cases against detained Kurdish mayors, which show strong similarities with the proceedings against Mr. Demirtaş, were analysed by Human Rights Watch who concluded that ‘in most of the cases, the identity of the witnesses is protected’; that these witnesses allege mayors’ connections with an armed group ‘in a generalized and vague way’; and that the local courts relied on ‘vague and generalized allegations against the mayors by witnesses, some secret, and on details of their political activities and social media postings, which fail to establish reasonable suspicion of criminal activity that would justify detention’.¹¹ These evaluations apply equally to Mr. Demirtaş’s case and must be considered in light of the Court’s Article 18 findings. As the Government refers in their submissions before the CM,¹² Mr. Demirtaş’s pre-trial detention has been extended by the Ankara 22nd Assize Court based on, *inter alia*, the statements of anonymous witnesses, including, Mahir and ABC123.¹³
16. ***The timing of the steps taken by the Government and domestic courts relating to Mr. Demirtaş have a temporal link with the proceedings before the ECtHR and CM:*** The criminal proceedings against Mr. Demirtaş concern the events of 6-8 October 2014, that took place more than 8 years ago. The investigations which led to the opening of the cases before the Ankara 19th Assize Court and Ankara 22nd Assize Court started in 2014. The indictment for the Ankara 19th Assize Court was completed in 2017 while the indictment for the Ankara 22nd Assize Court was drafted in December 2020. These cases, which were based on the same facts and accusations, were later joined in May 2021.
17. According to information provided to the CM by the Government and Mr. Demirtaş’s lawyers, the statement from the anonymous witness ‘Mahir’ was taken in December 2019, witness S.B.’s statement was taken in December 2019, witness K.G.’s in January 2020, and anonymous witness ‘Ulaş’s in March 2020 - all more than 5 years after the October 2014 events, before the judgment

⁹ Commissioner for Human Rights of the Council of Europe, ‘Administration of justice and protection of human rights in Turkey’, CommDH(2012)2, 10 January 2012, paras. 85, 86 and 153, <https://wcd.coe.int/ViewDoc.jsp?id=1892381&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>.

¹⁰ US Department of States, 2021 Country Reports on Human Rights Practices: Turkey, available at <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/turkey/>.

¹¹ Human Rights Watch, Turkey: Kurdish Mayors’ Removal Violates Voters’ Rights: End Politically Motivated Arrests and Trials, 7 February 2020, available at <https://www.hrw.org/news/2020/02/07/turkey-kurdish-mayors-removal-violates-voters-rights>.

¹² See Communication from the authorities (17/11/2021) concerning the case of Selahattin Demirtas v. Turkey (No. 2) (Application No. [14305/17](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)1211E)), para. 4, available at [https://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)1211E](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)1211E); Communication from the authorities (20/01/2022) concerning the case of Selahattin Demirtas v. Turkey (No. 2) (Application No. [14305/17](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)101E)), para. 3, available at [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)101E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)101E); Communication from the authorities (20/04/2022) concerning the case of Selahattin Demirtas v. Turkey (No. 2) (Application No. [14305/17](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)446E)), para. 3, available at [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)446E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)446E).

¹³ See for more detail the Communications from the NGOs, 24 May 2022, paras. 20-31.

of the Grand Chamber on 22 December 2020, and before the date of the indictment submitted to the Ankara 22nd Assize Court on 30 December 2020.¹⁴

18. This timeline is significant as it provides certain conclusions which are relevant to establishing the continuance of the political purpose in the proceedings against Mr. Demirtaş.

- First, these witness statements were taken while the case was still pending before the Grand Chamber. The Grand Chamber adopted its December 2020 judgment based on information available before it. Therefore, the documents submitted to the Grand Chamber by the Government, at the time, must have consisted of all available information in the investigation file or important developments in it, including these statements. For this reason, these statements cannot be deemed ‘new’ as they had been taken while the case was still pending before the ECtHR.
- Second, since the Committee of Ministers started its supervision process following the December 2020 judgment, the Government has made several submissions to the CM advancing different arguments which were adapted to different stages of the proceeding. In the December 2020 indictment submitted to the Ankara 22nd Assize Court, the public prosecutor made several references to these witness statements. The NGOs made a detailed analysis of this indictment in their 7 February 2021 submission including the fact that the witness statements were being used as a basis for the applicant’s continuing detention (para. 55).¹⁵ The Government, on the other hand, had not advanced any arguments in relation to these statements which were already available in the file and were relied on by the prosecutor and the local courts at the time. Indeed, as the notes from the Secretariat confirm, the Government raised their claims in clear terms about “new evidence and allegations” in January 2022 for the first time, just after the CM adopted its resolution in December 2021.

19. The timeline around the Government’s submissions to the CM clearly indicates that the Government wanted to advance different arguments from those that had been already rejected by the CM leading it to adopt its resolution. It is noticeable that at the same time the domestic courts started to take steps in relation to witnesses some 7 ½ years after the October 2014 events, 14 months after the date of the indictment and just after the Committee’s December 2021 resolution. Indeed, in February 2022 the Ankara 22nd Assize Court heard, for the first time in the case, a secret witness named ‘ABC123’, and, in June 2022, it heard another anonymous witness A53T61MCTS21SS92 for the first time.¹⁶ The domestic court or the Government has no plausible explanation as to why the evidence claimed to be “new” was obtained and advanced such a long time after the events, in particular, following the ECtHR’s December 2020 judgment finding

¹⁴ See Rule 9.5 - Reply from the authorities (13/04/2022) following a communication from the applicant in the case of Selahattin Demirtas v. Turkey (no. 2) (Application No. 14305/17), para. 3. See also, Communication from the authorities (17/11/2021) concerning the case of Selahattin Demirtas v. Turkey (No. 2) (Application No. [14305/17](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)1211E)), para. 4, available at [https://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)1211E](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)1211E); Communication from the authorities (20/01/2022) concerning the case of Selahattin Demirtas v. Turkey (No. 2) (Application No. [14305/17](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)101E)), para. 3, available at [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)101E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)101E); Communication from the authorities (20/04/2022) concerning the case of Selahattin Demirtas v. Turkey (No. 2) (Application No. [14305/17](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)446E)), para. 3, available at [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)446E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)446E); Addendum to an Action Plan (14/04/2022) - Communication from Turkey concerning the case of Selahattin Demirtas v. Turkey (no. 2) (Application No. [14305/17](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)434E)), available at [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)434E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)434E).

¹⁵ Supra note 1.

¹⁶ See Rule 9.1 - Communication from the applicant (13/09/2022) in the case of Selahattin Demirtas v. Turkey (No. 2) (Application No. 14305/17), available at [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)968E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)968E).

Mr. Demirtaş's detention politically motivated, the CM's subsequent calls for his release and its adoption of an interim resolution.¹⁷

20. In addition, it should be also underlined that even if the evidence that is claimed to be "new" by the Turkish Government needed to be examined by the domestic courts, this would not have constituted a sufficient reason to extend Mr. Demirtaş's extremely prolonged pre-trial detention, considering that he has been deprived of his liberty since November 2016, for 6 years at the time of this submission.¹⁸
21. ***Serious irregularities in the practice of the Ankara 22nd Assize Court*** The problematic use of anonymous witnesses has also become more prevalent in the practice of the Ankara 22nd Assize Court in the course of the proceedings against Mr. Demirtaş, which further affirms the authorities' ongoing political purpose. In their submission to the CM, Mr. Demirtaş's lawyers stated that the Ankara 22nd Assize Court did not respect the rules and principles regulating the hearing of secret witnesses,¹⁹ nor did it take any measures to balance and protect the defendant's rights. An important example of this is the taking of the witness 'ABC123's statement on 9 February 2022, a date on which there was no hearing.²⁰ Accordingly, the local court did not open a formal hearing to hear this witness and did not secure the participation of the defendants, their lawyers, and the prosecutor. They further noted that the following day, 10 February 2022, was in fact a hearing day, but the lawyers only heard about this action when the presiding judge read a note about it in order to add it to the hearing records.²¹ The information available to the NGOs shows that the local court continued this practice and heard other secret witnesses 'Mahir' and 'Ulaş' on a weekend in July 2022 without the presence of Mr. Demirtaş and his lawyers.²²
22. Mr. Demirtaş's lawyers also report serious inconsistencies between the statements of the witnesses as well as a concentrated effort from the Turkish authorities to withhold information

¹⁷ CM decisions, 1398th meeting (DH) 9-11 March 2021 - H46-40; 1411th meeting (DH) 14-16 September 2021 - H46-39; and Interim Resolution, 1419th meeting, CM/ResDH(2021)428, 2 December 2021.

¹⁸ In *Selahattin Demirtaş v. Turkey (no.2)*, the Court found a continuity between Mr. Demirtaş's pre-trial detention from 4 November 2016 to 2 September 2019, and again from 20 September 2019 and continuing in the present, and termed the detention order on 20 September a "return to pre-trial detention" (para. 441).

¹⁹ See e.g. the Code of Criminal Procedure, Article 201 - "Posing questions directly":

"(1) The public prosecutor, defence counsel [*müdafi*], lawyer[s] taking part in the hearing in [his or her] capacity as a representative [*vekil*] may, in conformity with the order of the hearing, directly pose questions to the accused, intervening parties, witnesses, experts and the other individuals summoned to the hearing. The accused and intervening parties may also pose questions through the president of the court or the judge. The president of the court shall decide whether it is necessary to pose a [given] question if it has been objected to. If need be, those concerned may ask questions again. (...)"

Article 52 (3): "Hearing evidence [from] witnesses": "Image and audio may be recorded in the course of witnesses giving evidence. However, such recordings are mandatory in the testimony of: (...)

(b) Individuals who cannot be brought to a hearing and whose evidence is imperative for revealing the material fact[s]."

Article 58 (3): "In cases where hearing evidence from a witness in the presence of those who are present would constitute a grave danger to that witness and where such danger could not be averted in any other way or [it] would pose a danger in terms of revealing the material fact[s], the judge may examine the witness in the absence of those who have the right to be present. Audiovisual transmission shall be made in the course of witness evidence. The right to put questions [to the witness] is preserved."

²⁰ Rule 9.1 - Communication from the applicant (13/04/2022) in the case of *Selahattin Demirtaş v. Turkey (no. 2)* (Application No. 14305/17), para. 5.

²¹ Ibid.

²² *Bianet, Gizli Tanıkların İfadesi 'Gizlice' Alınmış*, 5 July 2022, available at <https://m.bianet.org/bianet/insan-haklari/264143-gizli-taniklarin-ifadesi-gizlice-alinmis>. See also Rule 9.1 - Communication from the applicant (13/09/2022) in the case of *Selahattin Demirtaş v. Turkey (No. 2)* (Application No. 14305/17), para. 6.

from the defence about the witnesses' backgrounds, how they acquired the alleged information, how they were identified and contacted by the domestic courts, and whether they were offered or granted any benefits as a result of making their statements.²³ There are accordingly serious questions about the reliability of these witnesses and the veracity of their statements which are relevant to the political purpose element of the proceedings. The Government has manifestly failed to explain these irregularities, or to provide the CM with clear and reliable information concerning the alleged new pieces of evidence or provide information on any safeguards which were followed so as to prevent arbitrariness. Nor did it provide any explanation as to how these witness statements differ from the evidence presented previously against Mr. Demirtaş, which had already been examined within the scope of the Grand Chamber judgment and considered insufficient to justify the applicant's pre-trial detention by the European Court (para. 336).

b. The targeting of the HDP and its members by judicial proceedings is deepening.

23. In finding a violation of Article 18 in conjunction with Article 5, the Grand Chamber relied, *inter alia*, on the targeting of HDP politicians by the constitutional amendment lifting their parliamentary immunity, and the criminal proceedings brought against them. As noted by the NGOs previously, the developments concerning the HDP and HDP politicians after the ECtHR's judgment have followed a similar pattern to Mr. Demirtaş's case. Most notably, a case was brought before the Constitutional Court by the Chief Public Prosecutor of the Supreme Court on 7 June 2021 requesting the permanent closure of the HDP. In this case, exactly the same accusations as those brought against Mr. Demirtaş²⁴ are relied on by the Chief Public Prosecutor to support his request for the dissolution of the HDP.

24. Furthermore, HDP politicians and their supporters face unprecedented oppression, including by way of arbitrary criminal proceedings, on a daily basis. Their arrest, detention, and conviction under ill-defined anti-terror laws, including sitting mayors, former MPs, co-chairs, and members of its executive boards have become established practices. This situation was described in the European Union's 2021 Turkey report in this way:

"Around 4 000 members and officials of the People's Democratic Party (HDP) remain in prison, including a number of parliamentarians. In June, the Constitutional Court accepted an indictment demanding the closure of the HDP, seeking a political ban for 451 HDP executives, including the party's co-chairs and all past and present members of Parliament and executives as well as a freeze on the party's bank accounts. There were pending requests by the prosecution in the Parliament to lift the immunity of almost all HDP lawmakers."²⁵

25. The NGOs consider that, in the lead up to next year's elections, these practices are being used to advance the current Government's political agenda, reduce the prospect of free democratic debate in the country and prevent HDP's potential increase in its public exposure and support. This corresponds directly with the Grand Chamber's finding in respect of Article 18 (para. 436):

"In the present case, the concordant inferences drawn from this background support the argument that the judicial authorities reacted harshly to the applicant's conduct as one of the leaders of the opposition, to the conduct of other HDP members of parliament and elected mayors, and to dissenting voices more generally. The applicant's initial and continued pre-trial

²³ See Rule 9.1 - Communication from the applicant (13/04/2022) in the case of Selahattin Demirtaş v. Turkey (no. 2) (Application No. 14305/17), para. 30; Rule 9.1 - Communication from the applicant (13/09/2022) in the case of Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), para 35.

²⁴ Mr. Demirtaş's speeches and activities, which had been prosecuted for alleged terrorism-related offences.

²⁵ European Commission, Turkey 2021 Report, SWD(2021) 290 final/2, 19 October 2021, p. 4, available at https://neighbourhood-enlargement.ec.europa.eu/turkey-report-2021_en.

detention not only deprived thousands of voters of representation in the National Assembly, but also sent a dangerous message to the entire population, significantly reducing the scope of free democratic debate. These factors enable the Court to conclude that the purposes put forward by the authorities for the applicant's pre-trial detention were merely cover for an ulterior political purpose, which is a matter of indisputable gravity for democracy."

c. The Government's public interference in the judicial process is increasing.

26. The Grand Chamber found in its judgment a direct correlation between the public speeches of the government officials and the developments in the steps taken against Mr. Demirtaş and the HDP by the Turkish judiciary (paras. 426 and 432). The arbitrary criminal proceedings against Mr. Demirtaş and the HDP described above have continued to be accompanied by coordinated public targeting of them by government officials.
27. In a series of social media posts in March 2021, the President's Director of Communications, Fahrettin Altun, wrote about the dissolution case brought against the HDP. He stated that "[i]t is an indisputable fact that HDP has organic ties to PKK –which Turkey, the United States and the European Union consider a terrorist entity. HDP's senior leaders and spokespeople, through their words and deeds, have repeatedly and consistently proved that they are the PKK's political wing."²⁶ In May 2021, he stated that: "S[elahattin] D[emirtaş] and HDP, the political extension of the terrorist organization, tried to incite discord among our nation with all kinds of lies. They targeted the unity and solidarity of our country. They have the blood of thousands of our people on their hands."²⁷
28. President Erdoğan's speech on 23 October 2021 once again confirmed clearly the Government's intention not to release Mr. Demirtaş. He stated that "these people [the 10 diplomats who requested the release of Osman Kavala in a statement] acted together with the terrorist Selo [Mr. Demirtaş]. There is no shame in them. Wasn't it Selo who killed Yasin Börü? Wasn't he the one who spilled people to the streets? Now they stand and are in action to get him out [of prison]. What the judiciary says stands. You cannot get him out."²⁸
29. During a public speech in September 2022, the chair of one of the governing political parties, the MHP, Devlet Bahçeli, made the following comments: "Giving a ministry to the HDP means that terrorists are placed in ministries just like municipalities. The promise of a ministry to the HDP means that the PKK clings to the state and that treachery and malice are deployed. CHP and other disgrace parties are in cooperation with the baby killer, terrorist Demirtaş, and Soros supporter Kavala. Their secret agenda is to form a coalition with the HDP and to give the PKK a ministry." He has also been publicly demanding the closure of the HDP and criticizing the local courts for not concluding the cases against Mr. Demirtaş and HDP fast enough.²⁹
30. The Minister of Interior, Süleyman Soylu, who is the administrative head of the country's police forces conducting the investigations against the applicant and HDP politicians, targets them by repeatedly calling them 'terrorists' and using the term 'HDPKK' (combining the HDP and PKK

²⁶ Available at

<https://twitter.com/fahrettinaltun/status/1372281437211201538?s=20&t=KQ4re3qtDdqn4wNjC4Tq-Q>.

²⁷ Available at <https://www.hurriyet.com.tr/gundem/altundan-demirtas-aciklamasi-41803104>.

²⁸ Available at <https://www.trthaber.com/haber/gundem/cumhurbaskani-erdogandan-10-buyukelciye-kavala-tepkisi-619679.html>.

²⁹ See e.g. the statement in December 2020, available at

<https://twitter.com/dbdevletbahceli/status/1337421500220116998?s=20&t=rNjQAWG6Eihhc6aQg2j99Q>; and speech in June 2021, available at <https://www.dw.com/tr/bah%C3%A7eli-hdp-a%C3%A7%C4%B1mamak-%C3%BCzere-kapat%C4%B1mal%C4%B1d%C4%B1r/a-57990154>.

acronyms).³⁰ The President also continues to accuse the European institutions of being biased and describes the demands for the release of Mr. Demirtaş and Osman Kavala as being political demands.³¹

31. Lastly, it should be also noted that whereas in its decision of 20-22 September 2022 the CM underlined the urgent need for Mr. Demirtaş's application concerning his current detention to be examined rapidly by the Constitutional Court, the latest judicial appointments to this court have raised further questions about its independence and impartiality. In particular, the appointment procedure of two of the three newest member of the Constitutional Court, İ. F. and M. İ., has been described by a prominent Constitutional Law professor as an "anomaly".³²
32. First, Mr. İ. F. was elected as the top candidate on the list submitted to the President, only twenty days after he had officially begun his tenure at the Court of Cassation.³³ By contrast, since 1962, the 44 former Constitutional Court judges had served on average 9 years in the Court of Cassation before joining the Constitutional Court.³⁴ It should be born in mind that 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. Füsün Üstel and others)³⁵, journalists Can Dündar³⁶, Erdem Gül³⁷, Şahin Alpay³⁸, Atilla Taş³⁹, politician Enis Berberoğlu⁴⁰, and the Gezi Park case (addressed by the ECtHR in *Kavala v. Turkey*⁴¹).⁴²
33. Second, M. İ., the latest member of the Constitutional Court, was also appointed in an expedited process. Mr. M. İ. was the deputy Minister of Interior between August 2018 and June 2022. After having served for only four months on the Audit Court, on 5 October 2022, Mr. M. İ. was elected to the Constitutional Court by the votes of the governing coalition members of the National

³⁰ See e.g. <https://www.diken.com.tr/suruklenen-ogretmeni-hedef-gosteren-soyluya-tepki-yagdi-suclu-olsa-seninle-fotografi-olurdu/>; and <https://www.duvarenglish.com/turkish-interior-minister-suleyman-soylu-brands-hdp-mp-omer-faruk-gergerlioglu-terrorist-for-exposing-practice-of-strip-searches-in-police-custody-news-55621>.

³¹ See e.g. the speech in September 2022, available at <https://www.egepolitik.com/erdogan-aihm-kararlarinda-adil-degil-konu-turkiye-olunca-karar-siyasi/84102/>.

³² See Kemal Gözler, 'Elveda Anayasa Mahkemesi: İrfan Fidan Olayı', 23 January 2021: <https://www.anayasa.gen.tr/irfan-fidan-olayi.html>.

³³ 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-toconstitutional-court-after-only-20-day-term-at-court-of-cassation>.

³⁴ Kemal Gözler (n 32).

³⁵ Constitutional Court, *Zübeyde Füsün Üstel ve Diğerleri*, App. no. 2018/17635, 26 July 2019.

³⁶ Constitutional Court, *Erdem Gül ve Can Dündar*, App. no. 2015/18567, 25 February 2016.

³⁷ Ibid.

³⁸ ECtHR, *Şahin Alpay v. Turkey*, App. no. 16538/17, 20 March 2018.

³⁹ ECtHR, *Atilla Taş v. Turkey*, App. no. 72/17, 19 January 2021.

⁴⁰ Constitutional Court, *Kadri Enis Berberoğlu*, App. No. 2018/30030, 17 September 2020.

⁴¹ ECtHR, *Kavala v. Turkey*, App. no. 28749/18; 10 December 2019.

⁴² Kemal Gözler (n 32).

Assembly (the opposition political party groups of Republican People's Party (CHP) and HDP boycotted this election).⁴³

34. Considering the divisions within the members of the Constitutional Court which have taken decisions with only slim majorities in some important cases,⁴⁴ these appointments are considered to have not only symbolic but also concrete practical implications for the decisions of the Constitutional Court in the future. Moreover, with the latest appointments, the number of AYM members appointed under the rule of President Erdoğan has increased to 10. The Constitutional Court has 15 members in total and a two-thirds majority of its members would be sufficient to order the closure of the HDP.⁴⁵

IV. Conclusion

35. In the light of the above, the NGOs submit that the Turkish government has continued to conduct politically motivated criminal proceedings against Mr. Demirtaş; and thus, that it is responsible for continuing violations of Mr. Demirtaş's Convention rights and for violating Article 46(1) ECHR – the obligation of Türkiye to abide by any final judgment of the Court. The NGOs reiterate that the continuation of Mr. Demirtaş's arbitrary detention in prison despite the Grand Chamber judgment demonstrates flagrant disregard for the Convention rights and the Convention system. It is the CM's fundamental role to ensure that this serious threat to the Convention system is brought to an end.

V. Recommendations to the CM on individual measures

36. Regarding individual measures, the NGOs reiterate their previous recommendations urging the CM to:
- i. Insist on the immediate release of Selahattin Demirtaş as required by the ECtHR judgment and indicate that the continuation of Mr. Demirtaş's detention in any form under criminal proceedings remaining within the scope of the Grand Chamber judgment constitutes a prolongation and entrenchment of the violation of his rights under the Convention, as found by the ECtHR.
 - ii. Call for the halt of all criminal proceedings initiated against Mr. Demirtaş following the constitutional amendment lifting his parliamentary immunity, as the Grand Chamber found that the amendment did not meet the legality standard of the Convention, and all proceedings initiated pursuant to it should therefore be deemed unlawful.
 - iii. Emphasise the continuing nature of the breach and that *restitutio in integrum* in this case requires – inter alia - the cessation of the persecution of Mr. Demirtaş through criminal proceedings, in the form of ongoing and future investigations, prosecutions and detentions, including pre-trial detentions, solely for his political activities and speeches.

⁴³ Duvar English, 'Turkish former deputy interior minister elected as top court member', 6 October 2022, <https://www.duvarenglish.com/turkish-former-deputy-interior-minister-elected-as-top-court-member-news-61393>.

⁴⁴ See e. g., Academics for Peace case Zübeyde Füsün Üstel ve Diğerleri (no. 2018/17635), 26 July 2019.

⁴⁵ Duvar English, 'Turkish former deputy interior minister elected as top court member', 6 October 2022

- iv.** Continue disregarding the false and misleading arguments made by the Turkish government, including those addressed above, and firmly condemn Türkiye's ongoing attempts to avoid executing the judgment.
- v.** Use all legal, political, and diplomatic tools designated in the Convention system to ensure the immediate release of Mr. Demirtaş, especially taking into account the impact his ongoing detention will have on the upcoming elections. This should include the triggering of infringement proceedings against Türkiye under Article 46(4) of the Convention in the event that Mr. Demirtaş remains in detention, as well as efforts to ensure the direct and continuing engagement, through all available channels, by member states, the Secretary General, the PACE, and all other Council of Europe institutions.
- vi.** Keep this case high on the agenda of the Council of Europe institutions and states in any relations with Türkiye, and its appropriate resolution must be identified as one of the main conditions for maintaining constructive co-operation with the country.