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Hearing of the Grand Chamber of the European Court of Human Rights

in the case of Selahattin Demirtaş v. Turkey (no. 2)

18 September 2019

Oral submission of the Commissioner for Human Rights, Dunja Mijatović

Mr President, distinguished members of the Court,

I have decided to take part in this hearing because of the importance of this case for a number of human rights issues that my Office has been following very closely in Turkey, in particular the use of pre-trial detention in the Turkish justice system.

At the outset, let me stress that I fully subscribe to the original written submission that my predecessor, Nils Muižnieks, made in the present case in November 2017. But I would like to take this occasion to complement that submission based on my recent work. I hope that this will help to put in context numerous cases pending before this Court, including this one.

Since the beginning of my mandate in April 2018, questions relevant to this case have featured prominently on my agenda. In January this year, I made a written submission in the case of *Kavala v. Turkey* and shared with this Court my concerns about the use of pre-trial detention in Turkey, and criminal proceedings in general. More recently at the beginning of July, I conducted a country visit to Turkey focusing on the judiciary, paying particular attention to the functioning of the criminal justice system and the independence of the judiciary.

The present case, which concerns allegedly unlawful arrest and detention, is far from being isolated: my Office also intervened as a third party before this Court concerning the detention of many other members of parliament, of journalists, and, as just mentioned, a human rights defender. These cases are representative of a widespread pattern raising fundamental human rights concerns.

Among my main concerns regarding these cases is the systematic failure by Turkish courts to meet the requirements of Article 5 for arrest, initial and continued detention. Decisions ordering initial detention and its continuation, and in particular the decisions of magistrates (also known as criminal judgeships of the peace), continue to be stereotypical and abstract in nature. They often fail to reference credible evidence to establish reasonable suspicion, and to address the factual grounds of the case and the individual circumstances of the suspect. Likewise, courts often fail to demonstrate other grounds to justify deprivation of liberty, such as necessity and proportionality.

It is also increasingly common that the evidence used to justify detention is exclusively limited to statements and acts which are clearly non-violent and should *a priori* be protected under the Convention, in particular under Article 10. Turkish prosecutors and courts systematically fail to make an appropriate, contextual analysis and filter such evidence in the light of the well-established case-law laid down by this Court regarding Article 10, despite a large body of case-law finding violations of the right to freedom of expression in Turkey spanning more than two decades.

Furthermore, the suspects' ability to challenge their detention is limited. A significant problem is the closed-circuit system in which magistrates operate. Another one is the denial of access to the investigation file without proper justification. Rather than being exceptional, such access restriction has become almost automatic in the Turkish legal system. I think that in such cases, it should be up to the authorities to prove why such a restriction was absolutely necessary in the circumstances.

As regards the question of a speedy judicial review, I already argued before this Court that systematic delays affecting the review of detention cases by the Turkish Constitutional Court cast serious doubts on the effectiveness of the individual application procedure.

I consider that the Constitutional Court has neither the capacity, nor should it have the role, to act as an appeal court for all detention cases, while lower courts continue to ignore the principles contained in the Constitutional Court's case-law.

The combination of these and other factors results in a situation where detention on remand becomes *de facto* an instrument of punishment. In the case of members of parliament, including the applicant, lengthy detentions also had the obvious result of depriving a significant portion of the Turkish population from democratic representation.

Regarding the issue whether detention is being used for purposes other than those prescribed by the Convention, my predecessor put to this Court that laws and criminal proceedings in Turkey were being used to silence dissenting voices. The Chamber gave significant weight to these observations in its judgment finding a violation of Article 18.

This problem is still ongoing in Turkey, affecting not only opposition parliamentarians, but also human rights defenders, journalists, academics, and other critical voices. They are regularly subjected to judicial actions based on their supposed intentions, often with no proof of criminal activity other than non-violent statements. To be clear, the problem goes far beyond detention, and affects criminal proceedings as a whole. Indeed many people were convicted in this manner for very serious offences in recent years, including to life sentences. This led me to state after my recent visit to Turkey that this long-standing problem, which results from an overbroad definition of terrorism in statutes and the judiciary's tendency to stretch it even further, has now reached unprecedented levels.

During this visit, I also observed that what is used as evidence is sometimes so inconsistent that it has become virtually impossible to foresee in good faith the legal consequences of actions. The crucial problem in this connection is the fact that whether an investigation is initiated or not appears to be heavily determined by prevailing political circumstances. This uncertainty discourages legitimate dissent and criticism.

I would also like to add that, since my predecessor's written submission in this case, the independence and impartiality of the Turkish judiciary continued to deteriorate, as a direct result of certain measures taken during the two-year state of emergency following the attempted coup in Turkey in July 2016. These measures included: changes to the Turkish Council of Judges and Prosecutors in clear contradiction with Council of Europe standards; and the suspension of ordinary safeguards and procedures for the dismissal, recruitment and appointment of judges and prosecutors. Around 3 900 judges and prosecutors were thus dismissed – and 10 000 appointed. This may explain why the Turkish judiciary appears today less able and willing than before to uphold the rights set out in the Convention when confronted with sensitive cases.

In the specific case of parliamentarians, my predecessor put to this Court that the detention of HDP MPs formed part of a more general pattern of repression against different groups in Turkey who are critical of official policy. He gave the example of the removal of mayors from office and their replacement by non-elected officials, using criminal investigations against them as a pretext. This practice is still ongoing despite criticism from many bodies of the Council of Europe (Venice Commission, Parliamentary Assembly, Congress of Local and Regional Authorities, Commissioner's Office).

Such measures are symptomatic of the continuing repressive climate affecting the democratic opposition in Turkey, especially the applicant's party. It is against this background that I see the interplay between the judicial, political and legislative processes that led to the eventual detention of

the applicant and other MPs. Crucially, this included the lifting of their parliamentary immunity in what was considered a misuse of the constitutional amendment procedure by the Venice Commission and the Parliamentary Assembly.

The resulting criminal proceedings affected almost all MPs of HDP, and some MPs from CHP, since the prosecutors had been disproportionately active in initiating investigations against them, mainly targeting their statements for supposed terrorist propaganda, incitement to hatred or insulting the President. The preamble of the constitutional amendment itself stated that its purpose was to address public indignation about the, I quote, "statements of certain deputies constituting emotional and moral support to terrorism". For an objective observer, this situation would create a strong impression that these criminal proceedings were seriously flawed from the very outset and sought to silence them as parliamentarians. It bears repeating that these proceedings also systematically disregarded Turkey's obligations under Article 10 of the Convention, as articulated by this Court in numerous judgments, many of which against Turkey.

In these circumstances, it is difficult to discredit the argument that criminal proceedings have been and are being used selectively and *ab initio*, starting with criminal investigations, arrests and initial detention decisions, with the express purpose to silence dissenting voices and discourage criticism.

The chilling effect caused by this state of affairs is very palpable in all segments of Turkish society today, and I think that Turkey and Turkish courts at all levels need the guidance of this Court more than ever to change course.

I hope my comments will be helpful to the Court and I thank you for your attention.