IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No.: 14305/17

B E T W E E N :

SELAHATTIN DEMİRTAŞ

Applicant

- v –

TURKEY

Respondent

THIRD-PARTY INTERVENTION SUBMISSIONS ON BEHALF OF ARTICLE 19 AND HUMAN RIGHTS WATCH

INTRODUCTION

1. The present application concerns the removal of parliamentary immunity and the arrest and pre-trial detention of the applicant, who was a serving member of the Turkish Grand National Assembly. By leave of the President of the Court, as set out in a letter dated 28 March 2019, this third-party intervention is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression ('ARTICLE 19') and Human Rights Watch ('HRW'), hereinafter 'the Interveners'.

2. The Interveners welcome the opportunity to act as Third Parties in this application considering its importance, as it represents the first opportunity for the Grand Chamber to examine the compatibility with the Convention of measures which were taken against opposition parliamentarians both before and after the attempted coup in July 2016 in Turkey.

3. ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression and the right to information. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends, and develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression, nationally and globally.

4. HRW is a non-profit, non-governmental human rights organisation working in over 90 countries around the world to defend human rights. Established in 1978, HRW is known for its accurate fact-finding, impartial reporting, effective use of media, and targeted advocacy, often in partnership with local human rights groups.

5. In this submission, the Interveners draw on their experience and expertise to address: the right to freedom of expression of parliamentarians and opposition politicians; the context of the disapplication of parliamentary immunity in Turkey; and, the abusive application of criminal law following the attempted coup of July 2016.

6. In particular, the Interveners submit that:

   - The imposition of a measure of pre-trial detention on an opposition politician engages protection also under Article 10 of the Convention, in addition to Article 3 of Protocol No. 1;
   - The detention in this case is based on political speech, is part of a pattern of such detentions, and as such is arbitrary, does not constitute detention on "reasonable suspicion" of having committed an offence, and is incompatible with Article 5 (1) and Article 10.
   - The Constitutional Amendment that provided for the lifting of parliamentary immunity itself violates the rights to freedom of expression, which the Court should take into account in determining whether the applicant's detention amounts to an unjustified interference with Article 10 of the Convention, as well as Article 3 of Protocol No. 1; and,
   - Given the lack of a proper basis for the detention and prosecution of the applicant and the negative impact on his freedom of expression and in particular his political expression, and in light of hostile post-coup climate in Turkey, the prosecutions at hand have been brought with the ulterior motive of silencing the political opposition in Turkey and as such, also violate Article 18 in conjunction with Article 10 of the Convention and Article 3 of Protocol No.1, as well as in conjunction with Article 5 (1) and (3).

7. This submission builds on the Interveners' comments to the Chamber in the current case.

FREEDOM OF EXPRESSION OF PARLIAMENTARIANS AND OPPOSITION POLITICIANS

General principles

8. The Interveners reiterate their endorsement of the importance placed by the Court on freedom of expression as one of the essential foundations of a democratic society, and as a guarantee for the maintenance and promotion of a democratic system and society, which includes pluralism, tolerance and broadmindedness.[1]

[1] *Inter alia*, *Handyside v UK*, App. No. 5439/72, 7 December 1976, para. 49.

9. This Court has repeatedly[2] underscored the special importance of freedom of expression for elected representatives of the people, as "he represents his electorate, draws attention to their preoccupation and defends their interests. Accordingly, interferences with the freedom of expression of opposition members of parliament … call for the closest scrutiny on the part of the court."[3]

10. Similarly, the Inter-American Court of Human Rights has held that "opposition voices are essential in a democratic society; without them it is not possible to reach agreements that satisfy the different visions that prevail in society. Hence, in a democratic society States must guarantee the effective participation of opposition individuals, groups and political parties by means of appropriate laws, regulations and practices that enable them to have real and effective access to the different deliberative mechanisms on equal terms, but also by the adoption of the required measures to guarantee its full exercise, taking into consideration the situation of vulnerability of the members of some social groups or sectors."[4]

11. In the Interveners' view, these foundational principles must lie at the heart of any analysis determining the application of Article 10 of the Convention to the facts of the case. In addition, the Interveners recall the Court's emphasis on the inter-related and inter-dependent nature of Article 10 and the rights pertaining to standing for elections protected by Article 3 of Protocol No. 1,[5] and submit these provisions are complimentary.

<u>The protection of politicians' expression under Article 10</u>

12. At the outset, the Interveners welcome the Chamber's finding in the current case that the imposition of a measure of pre-trial detention on a member of parliament constitutes an unjustified interference with the right to freedom of expression as well as with the elected politician's right to sit in Parliament and to take part in its activities and to fully exercise his or her office, and as such violates Article 3 of Protocol No. 1 to the Convention.

13. The Interveners however also wish to seize this opportunity for making additional comments before the Grand Chamber to reiterate their submission to the Chamber that voting in parliament is a form of expression that should also be explicitly protected by Article 10. Accordingly, the Interveners invite the Grand Chamber to also rule separately

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[2] *Inter alia*, *Karácsony v Hungary* [GC], App. No. 42461/13, para 137; *Piermont v France*, App. No. 15773/89 and 15774/89, 27 April 1995, para 76; *Jerusalem v Austria*, App. No. 26958/95, 27 February 2001, para 36; *Féret v Belgium*, App. No. 15615/07, 16 July 2009, para 65; *Otegi Mondragon v Spain*, App. No. 2034/07, 15 March 2011, para 50; *A v United Kingdom*, App. No. 35373/97, 17 December 2002, para 79; *Cordova v Italy* (No. 1), App. No.40877/98, 30 January 2003, para 59; *Cordova v Italy* (No.2), App. No. 45649/99, 30 January 2003, para 60; *Zollmann v UK* (dec.), App. No.62902/00, 27 November 2003; *De Jorio v Italy*, App. No.73936/01, 3 June 2004, para 52.; *Patrono, Cascini and Stefanelli v Italy*, App. No. 10180/04, 20 April 2006, para 61; *CGIL and Cofferati v Italy*, App. No.46967/07, 24 February 2009, para 71.

[3] *Castells v Spain*, App. No. 11798/85, 23 April 1992, para 42.

[4] Inter-American Court of Human Rights, *Manuel Cepeda Vargas v Colombia*, 26 May 2010, para 173.

[5] See case law starting with *M. v UK* (dec.), App. No. 10316/83, reported in D.R. 37, p. 129; *Ganchev v. Bulgaria* (dec.), App. No. 28858/95, reported in D.R. 87, p. 130; and *Gaulieder v. Slovakia*, App. No. 36909/97, Commission's report of 10 September 1999, para 41.

on the admissibility and merits of the complaint under Article 10 of the Convention, as well as under Article 3 of Protocol No. 1.

14. The right to freedom of expression covers a wide range of expression, not just speech and written text but also other media through which individuals convey opinions and ideas.[6] In this regard, this Court has stated that in determining whether a certain act of form of conduct falls within Article 10's ambit, "an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the intention of the person performing or engaging in the conduct in question."[7] Accordingly, the Interveners reiterate that in Parliament, not only do parliamentarians' speeches themselves engage Article 10 of the Convention but so too, *a fortiori*, does a parliamentarian's act of voting or abstaining from voting in Parliament, as a quintessential form of political expression.

15. The Interveners equally wish to recall the Court's constant approach in relation to members of parliament in particular, to require very strong reasons for justifying restrictions on their speech, since broad restrictions imposed in individual cases would undoubtedly affect respect for freedom of expression in general in the State concerned.[8] In this regard, the Court has noted that the "protection of free debate in Parliament is undoubtedly essential for a democratic society."[9]

16. The Interveners submit further that this extensive Convention protection for politician's right to freedom of expression extends beyond the exercise of their functions in Parliament *stricto sensu*. In this regard, the Interveners draw the Court's attention to Judge Wojtyczek's concurring opinion in *Makraduli*; in which he noted that "the fact that the applicant made his remarks on behalf of a political party is irrelevant from the viewpoint of the proportionality analysis. In particular, it affects neither the meaning of his message nor its impact upon the audience. Had he made the same remarks on his own behalf, his remarks would also belong to political speech. They belong to political speech because of their content and because they were made publicly. The scope of his freedom of speech should remain the same, whether the applicant's utterances were expressed in name of his party or not."[10]

17. The Interveners recall this Court's consistent emphasis that there is little scope under Article 10 para 2 for restrictions on political speech or on debate on matters of public interest.[11] Accordingly, very strong reasons are required for justifying such restrictions.[12] Given the existence of a matter of public interest, moreover, "a degree of hostility and the potential seriousness of certain remarks do not obviate the right to a high level of

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[6] *Güzel v Turkey*, App. No. 29483/09, 13 September 2016, para 27.
[7] *Murat Vural v Turkey*, App. No. 9540/07, 21 October 2014, para 54;); *Güzel v Turkey*, op. cit., para 28.
[8] *Fatullayev v Azerbaijan*, App. No. 40984/07, 22 April 2010, para 117.
[9] *Karacsony and others v Hungary*, op. cit., para 144.
[10] *Makraduli v FYROM*, App. No. 64659/11 and 24133/13, 19 July 2018, Concurring Opinion, para 6.
[11] *Sürek v Turkey* (No. 1) (GC), App. No. 26682/95, 8 July 1999, para. 61, *Lingens v Austria*, App. No. 9815/82, 8 July 1986, paras 38 and 41.
[12] *Kablis v Russia*, App. No. 48310/16 and 59663/17, 30 April 2019, para 101; *Feldek v Slovakia*, App. No. 29032/95, 12 Jul 2001, para 83.

protection."[13] Moreover, the dominant position which the government occupies makes it necessary to display restraint in resorting to criminal proceedings.[14]

18. Furthermore, the Interveners recall that the Court's supervisory function in this regard is not limited to ascertaining whether the national authorities exercised their discretion reasonably, carefully and in good faith. Rather, it must examine the interference in the light of the case as a whole and determines whether the reasons adduced by the national authorities to justify it were relevant and sufficient and whether the measure taken was proportionate to the legitimate aim pursued. The Court must be satisfied that the national authorities, basing themselves on an acceptable assessment of all relevant facts, applied standards which were in conformity with the principles embodied in Article 10 of the Convention.[15]

19. In light of the foregoing, the Interveners submit that the imposition of a measure of pre-trial detention on an opposition politician engages protection also under Article 10 of the Convention, in addition to Article 3 of Protocol No. 1 as found by the Chamber in the current case. Moreover, as opposed to the wide margin of appreciation enjoyed by governments in the sphere of implied limitations under the latter provision,[16] the margin of appreciation under Article 10 is especially narrow given the essence of democracy is at play when an opposition politician's right to free speech is infringed upon, and the Interveners invite the Court to exercise its extensive supervisory powers in this regard.

CONTEXT OF THE DISAPPLICATION OF PARLIAMENTARY IMMUNITY

20. In relation to the lifting of parliamentary immunity, the Interveners wish to reiterate here the salient points of their submissions to the Chamber in the current case.

21. The Interveners recall the Grand Chamber's jurisprudence that the practice of conferring varying degrees of immunity on parliamentarians "pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers."[17]

22. In Turkey, subsequent to the amendment of the Constitution by the introduction of Provisional Article 20, the decision as to which parliamentarians' immunity was lifted was transferred by the Assembly wholly to the Executive, and all procedural safeguards were removed from the process, in particular the right of the parliamentarian to be heard.

23. First, the Interveners note that exceptions to parliamentary immunity created *de facto* or *de jure* by the Executive undermine the legitimate aims pursued by such an immunity, by undermining the separation of powers and by virtue of their likely chilling effect on the free expression of those who oppose the government. The Interveners accordingly

[13] *Makraduli v FYROM*, *op. cit*., para 61.
[14] *Karatas v Turkey* (GC), App. No. 23168/94, 8 July 1999, para 50.
[15] *Chauvy and others v France*, App. No. 64915/01, 29 June 2004, para 70.
[16] *Mathieu-Mohin and Clerfayt v Belgium*, App. No. 9267/81, 2 March 1987, para 52.
[17] *Kart v Turkey* (GC), App. No. 8917/05, 3 December 2009, para 97.

reiterate their submission that the lifting of a parliamentary immunity may itself amount to an interference with Article 10 of the Convention and of Article 3 of Protocol No. 1.

24. Second, the Interveners also recall their submissions to the Chamber in relation to parliamentary immunity in Turkey specifically, which has long been a concern, as borne out also by this Court's jurisprudence.[18]

25. Such lifting of a parliamentarian's immunity may amount to an interference where this is the result of the individual's exercise of the right to freedom of expression. This is most clearly so in relation to prosecutions themselves brought because of the exercise of expression, but also where the measures have, as their intention or outcome, a chilling effect on the free expression of elected representatives, in particular those who are critical of the government;[19] and, where the measure in question denies elected parliamentarians their ability to speak and to vote in parliament.

26. In particular, the Interveners submit the Constitutional Amendment that provided for the lifting of parliamentary immunity itself in the current circumstances violates the rights to freedom of expression and association for the following reasons, which the Court should take into account in determining whether the applicant's detention amounts to an unjustified interference with Article 10 of the Convention, as well as Article 3 of Protocol No. 1:

    - The Amendment permits the executive branch of government to decide to whom it applies, which may have – and in the case at hand, did have – a disproportionate effect on members of the opposition, as virtually all of HDP´s deputies had their immunity lifted. The potential for greater impact on the opposition is plainly capable of chilling free speech and it is entirely foreseeable that there will be self-censorship, and that there will be criminal proceedings brought against opposition members of parliament that delegitimise their expression rights and, at a practical level, prevent them from speaking and voting in parliament if they are subject to pre-trial detention or custodial sentences;
    - The Interveners submit that the Amendment fails to meet the tests of foreseeability and the requirements of the rule of law. Specifically, it is *ad hoc* and *ad hominem* and hands decision-making power to executive agencies while simultaneously removing the right to be heard from the process;
    - The Interveners consider the Amendment is not necessary in a democratic society. The fact that decision-power lies in relation to lifting immunity lies with the Executive entails that this is not simply a parliamentary matter to which a wide margin of appreciation is applicable. Further, the lack of any necessary

[18] E.g. *United Communist Party of Turkey v Turkey*, App. No. 19392/92, 30 January 1998; *Socialist Party v Turkey*, App. No. 21237/93, 25 May 1998; *Freedom and Democracy Party (ÖZDEP) v Turkey* (GC), App. No. 23885/94, 8 December 1999; *Sadak v Turkey* (No 1), App. No. 29900/96, 17 July 2001; *Yazar, Karataş, Aksoy and the People's Labour Party (HEP) v Turkey*, App. No. 22723/93, 9 April 2002; *Refah Partisi v Turkey*, App. No. 41340/98, 13 February 2003; *HADEP and Demir v Turkey*, App. No. 28003/03, 14 December 2010; *Party for a Democratic Society (DTP) v Turkey*, App. No. 3870/10, 12 January 2016); *Cumhuriyet Halk Partisi v Turkey*, App. No. 19920/13, 26 April 2016.

[19] *Erdoğdu v Turkey* (GC), App. No. 25067/94, 8 July 1999, para 53.

consideration, in particular by the Assembly, of the nature of the charges brought or proposed to be brought and the evidence in support of those charges, is demonstrative of the fact that it goes beyond what is necessary in a democratic society.

ABUSIVE APPLICATION OF THE CRIMINAL LAW FOLLOWING THE ATTEMPTED COUP OF JULY 2016

27. The Interveners recall that under the Court's jurisprudence for deprivation of liberty to be compatible with Article 5 para 1 (c), the arrest must be based on a reasonable, concrete, suspicion of having committed an offence and it must be a proportionate and necessary measure to achieve the stated aim meaning that measures less severe than detention have to be considered and found to be insufficient to safeguard the individual or public interest.[20]

28. The Chamber found in this case that there was sufficient information in the criminal case file to satisfy an objective observer that the applicant concerned may have committed an offence. It did not explicitly rule on the proportionality or necessity of the arrest under Article 5 para 1 (c). The Interveners submit that in reaching its conclusion, the Chamber lowered the standard of "reasonableness" to such a de minimis requirement that it paves the way to enabling and justifying mass detentions and arrests of an arbitrary nature, based on political expression and opinion which is exactly what has happened in Turkey since the failed coup.

29. In the current case the Chamber itself observed "a large proportion of the accusations brought against the applicant relate directly to his freedom of expression and his political opinions." This fits into the larger pattern of detentions and prosecutions of individuals since the failed coup. In the period between the attempted coup and the time this application was filed, 1,482 members of the HDP, including fourteen members of parliament, had been placed in pre-trial detention, a large proportion of them had been detained for making political speeches. The government removed mayors in 94 municipalities under the control of the Democratic Regions Party (a sister party to the HDP) and up to 90 co-mayors (every municipality had a male and female co-mayor) were placed in pre-trial detention. In the same period, the number of journalists and media workers in prison rose to 144, and that number subsequently increased. Approximately 160 media outlets were closed down by state of emergency decree after the failed coup.

30. According to the Turkish government, by April 2018 over 77,000 people had been placed in pretrial detention in investigations carried out under terrorism laws since July 15, 2016, and as of November 2018, the number of remand and convicted prisoners held for terrorism offenses was over 44,000, approximately 17 per cent of the entire prison population. Such numbers are only possible due to use of overly broad and vague

[20] *Brogan and Others v the United Kingdom*, 11209/84 11234/84 11266/84, 11386/85, 29 November, 1988, paras 52-54; *Labita v Italy* [GC], App. No. 26772/95, 6 April 2000, para 155; *O'Hara v the United Kingdom*, App. No. 37555/97, 16 October 2001, para 36; *Ladent v. Poland*, App. 11036/03, 18 March 2008, paras 55-56; *Mehmet Hasan Altan v. Turkey*, App. No. 13237/17, 20 March 2018, para 125.

concepts of "terrorism", "terrorism propaganda" and "membership of armed terrorist organizations", and a failure by the courts in Turkey to apply a strict standard of reasonableness, proportionality and necessity to detention, sanctioning detentions merely on accusations and not concrete information or facts. It is therefore essential for the Grand Chamber to reinforce the requirements of Article 5 para 1 with respect to lawfulness, both in respect of compliance with procedural and substantive rules of national law, and the purpose of Article 5 to prevent arbitrary detention, and the requirements of Article 5 para 1 (c) as to the concrete nature of the suspicion regarding actual criminal behavior and not exercise of freedom of expression and opinion.

31. The Interveners note that under the equivalent provisions of the International Covenant on Civil and Political Rights, the UN Human Rights Committee has held that presumed connection with subversive activities is not sufficient grounds for the arrest and detention of a person. The Committee requires the authorities be able to explain the actual behaviour leading to arrest that constitutes a criminal offence under the relevant legislation. The Committee has noted that such explanations are particularly important where the applicant alleges that they have been detained and prosecuted solely for their opinions in violation of the Covenant.[21]

32. The Interveners recall that under the Court's jurisprudence, criminal prosecutions may amount to an interference with free speech, even if they are abandoned or discontinued.[22] Indeed, the mere existence of legislation that suppresses specific types of opinion may lead to self-censorship and can amount to interference with freedom of expression.

33. In the context of the fight against terrorism, Johannesburg Principle 1.2[23] provides that "any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest." Principle 8, further, provides that expression which only transmits information from or about an organisation that a government has declared threatens national security, must not be restricted.

34. The Interveners endorse the Chamber's finding that the applicant's pre-trial detention "pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very concept of a democratic society" and that accordingly, there has been a violation of Article 18 of the Convention in conjunction with Article 5 para. 3.[24]

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[21] *L. B. Carballal v. Uruguay*, Communication No. R.8/33, U.N. Doc. Supp. No. 40 (A/36/40) at 125, views adopted on 27 March 1981, paras 12-13; or *Mukong v Cameroon*, Communication No. 458/1991, CCPR/C/51/D/458/1991, views adopted on 10 August 1994.

[22] *Dilipak v Turkey*, App. No. 29680/05, 15 September 2015, paras 40-50; *Altuğ Taner Akçam v Turkey*, App. No. 27520/07, 25 October 2011, paras 70-75; *Döner v Turkey*, App. No. 29994/02, 7 March 2017, paras 85-89.

[23] The Johannesburg Principles authoritatively interpret international human rights law in the context of national security-related restrictions on freedom of expression; available at: https://bit.ly/1Oi176F.

[24] Para 273-274

35. The Interveners also wish to reiterate their invitation to the Court to consider whether the applicant's prosecution and detention also entail a violation of Article 18 in conjunction with Article 10 of the Convention and Article 3 of Protocol No. 1.

36. First, in this regard, the Interveners wish to draw the Court's attention to the hostile environment for opposition political speech subsequent to the attempted coup of 15 July 2016. The Interveners take the view that the Turkish government has misused legitimate concerns about the attempted coup to exacerbate its already significant crackdown on human rights, including on freedom of expression, in ways that are unjustified under international law. As documented by HRW and referenced above,[25] the use of presidential decrees under the state of emergency enabled: the take-over of local government where opposition parties were in power; the arrest – as of March 2017, of over 5000 HDP party officials, of whom 1482 were in pre-trial detention; the closure of media organisations; and, the arrest and detention of myriad journalists and human rights workers.

37. Second, the Interveners submit that the prosecutions in the case at hand are based on criminal code provisions that are overly broad and do not comply with the requirements of Article 10 of the Convention. Subsequent to HRW's examination of the indictments, which found that the evidence cited consists mainly of political speeches rather than any conduct that could reasonably support charges of membership of an armed organisation or separatism, the Interveners invite the Court to carefully consider under Article 10 each of the offences charged and in particular: whether the offences are sufficiently precise in their terms and implementation to be foreseeable and hence, "prescribed by law"; and, whether the prosecution of each of the offences charged is in itself "necessary in a democratic society" as it appears to the Interveners that they are not.

38. Third, the pre-trial detention is imposed under a blanket rule, mandating pre-trial detention in respect of certain types of crimes, including terrorism-related offences. Such a blanket rule, the Interveners submit, is *ipso facto* disproportionate, *a fortiori* in the context of the detention of opposition parliamentarians. In the context at hand, moreover, this prevented the applicant from engaging in debate, campaigning on or voting in the Assembly on, *inter alia*, the wide-ranging constitutional amendments passed on 11 January 2017, moving Turkey to a presidential system of government; the three-monthly decisions by the National Security Council and cabinet to extend the state of emergency declared following the coup; and, the extension of the authority for the government to pursue military action in Iraq and Syria.

39. In light of the foregoing, given the lack of a proper basis for the prosecution and detention of the applicant and the negative impact on his freedom of expression and in particular his political expression, the Interveners submit that in light of hostile post-coup climate in Turkey the prosecutions at hand have been brought with the ulterior motive of silencing the political opposition in Turkey and as such, violate Article 18 not just in conjunction with Article 5 para 1 and (3) but also in conjunction with Article 10 of the Convention and Article 3 of Protocol No. 1.

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[25] See HRW, Turkey: Crackdown on Kurdish Opposition, 20 March 2017, available at https://bit.ly/2mkpRH4.

CONCLUSION

40. For the above reasons, the Interveners invite the Court to apply the strictest scrutiny to the measures taken against the applicant. In the Interveners' view, the lifting of parliamentary immunity in the current context and the detentions and prosecutions subsequently arising from this disapplication of immunity, violate Article 5 (1) and (3), Article 10 and Article 18 of the Convention as well as Article 3 of Protocol No. 1.

London, 16 May 2019

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