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Meeting: 1468th meeting (June 2023) (DH)

Communication from an NGO (Media and Law Studies Association (MLSA)) (14/04/2023) in the case of Selahattin Demirtas v. Turkey (No. 2) (Application No. 14305/17).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1468^e réunion (juin 2023) (DH)

Communication d'une ONG (Media and Law Studies Association (MLSA)) (14/04/2023) dans l'affaire Selahattin Demirtas c. Turquie (n° 2) (requête n° 14305/17) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

DGI
14 AVR. 2023
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Rule 9.2 Submission
for the 1468th meeting of the Committee of Ministers in the

Selahattin Demirtaş v. Turkey (No.2) (Application no. 14305/17)

April 2023



Media and Law Studies Association
Medya ve Hukuk alıřmaları Derneđi

About MLSA

The Media and Law Studies Association (MLSA) is an İstanbul based non-profit organization (registered as Medya ve Hukuk alıřmaları Derneđi) founded in December 2017. With our work, we aim to respond to an urgent yet growing need for defending freedom of expression, freedom of the press and the right to information. We provide a holistic response to threats to media freedoms by combining legal support and advocacy work for mainly journalists but also academics, activists, lawyers and other professional groups, regardless of their popularity level or ideology.

Our core activities are combined with the following specific projects:

- judicial monitoring programme focused on freedom of expression trials
- human rights training for lawyers
- professional journalism workshops
- creating of writing opportunities for independent journalists
- monitoring of internet censorship and speaking up for internet freedoms



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I. INTRODUCTION

1. This communication is submitted for the 1468th meeting of the Committee of Ministers in June 2023 according to Rule 9.2 of the Rules of the Committee of Ministers (“the Committee”).
2. In the present communication, MLSA shares with the Committee further violations of freedom of expression of Mr. Selahattin Demirtaş who the Grand Chamber ruled to be held in detention “with the ulterior purpose of stifling pluralism and limiting freedom of political debate.”

II. INFORMATION ON THE STATUS OF IMPLEMENTATION

3. On 22 December 2020, the Grand Chamber of the European Court of Human Rights (“ECtHR”) delivered its judgment in *Selahattin Demirtaş v. Turkey (No.2)* (Application no. 14305/17) and found 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 unauthorized purpose) in conjunction with Article 5 of the European Convention on Human Rights (“the Convention”). In its judgment, the Grand Chamber ordered Turkey to take all the necessary measures to secure Mr. Demirtaş’s immediate release, and stressed 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 fact that more than two years have passed since the judgment, Mr. Demirtaş continues to be held in detention.
4. Examining the case during its 1398th meeting (9-11 March 2021), the Committee of Ministers (“CM”) recalled that Mr. Demirtaş’s “arrest and pre-trial detention especially during two crucial campaigns pursued an ulterior purpose, namely to stifle pluralism and limit freedom of political debate” and his political speeches were punished through misuse of criminal law. Drawing attention to Mr. Demirtaş’s ongoing detention, the CM underlined the Court’s ruling and requested Mr. Demirtaş’s immediate release.¹
5. Examining the case during its 1411st meeting² (14-16 September 2021), the CM “underlined that the heart of the violation of Article 10 found by the Court was that the unprecedented, *ad homines* amendment of Article 83 § 2 of the Turkish

¹ CM/Del/Dec(2021)1398/H46-40 (10 March 2021), 1398th meeting (DH) 9-11 March 2021 - H46-40 Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), <https://rm.coe.int/0900001680a1b20f>

² Prior to the 1411st meeting, the CM examined the case during its 1406th meeting (7-9 June 2021), <https://rm.coe.int/0900001680a2c110>

Constitution on 20 May 2016 had unforeseeably deprived the applicant of parliamentary inviolability in respect of statements he made as a member of parliament.” The CM concluded that “the obligation to provide him with *restitutio in integrum* in respect of this violation requires the removal of all the negative consequences for the applicant’s freedom of expression which resulted from the constitutional amendment, in particular the consequences of criminal prosecutions in respect of statements made by him which would otherwise have been protected under Article 83 § 2 of the Constitution.” Repeating its call for Mr. Demirtaş’s immediate release, the CM also called for “the quashing of his conviction by the Istanbul Assize Court, and termination of the criminal proceedings pending before the 22nd Ankara Assize Court, together with the removal of all other negative consequences of the constitutional amendment.”³

6. After having examined the case during its 1419th meeting (30 November-2 December 2021)⁴, the CM decided to adopt an Interim Resolution.⁵ Drawing attention to Mr. Demirtaş’s ongoing detention since 4 November 2016, the CM underlined that the Turkish authorities’ argument that “the applicant’s current pre-trial detention falls outside the scope of the Court’s judgment” has no basis as “the Court in its indication under Article 46, as well as by the CM in its previous examinations based on the information available to it” rejected such argument. Expressing its “strong hope that the Constitutional Court concludes its examination of the applicant’s complaints in the shortest possible time frame and in a manner compatible with the spirit and conclusions of the Court’s judgment”, the CM once again strongly urged Mr. Demirtaş’s immediate release.
7. During its examination of the case at the 1428th meeting (8-9 March 2022), the CM reminded Turkey of its obligations and urged Turkey to secure Mr. Demirtaş’s immediate release. The CM rejected 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 urged the Turkish authorities to provide further information to support their claim.⁶
8. Most recently, after having examined the case at its 1459th meeting (7-9 March 2023)⁷, the CM adopted an Interim Resolution and expressed “deep regret that,

³ CM/Del/Dec(2021)1411/H46-39 (15 September 2021), 1411th meeting (DH), 14-16 September 2021 - H46-39 Selahattin Demirtaş v. Turkey (Application No. 14305/17), <https://rm.coe.int/0900001680a3c4da>

⁴ CM/Del/Dec(2021)1419/H46-39 (01 December 2021), 1419th meeting (DH), 30 November- 2 December 2021 - H46-39 Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), <https://rm.coe.int/0900001680a4acb7>

⁵ CM/ResDH(2021)428, Interim Resolution CM/ResDH(2021)428 - Execution of the judgment of the European Court of Human Rights - Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), <https://rm.coe.int/0900001680a4b407>

⁶ CM/Del/Dec(2022)1428/H46-37 (08 March 2022), 1428th meeting (DH), March 2022 - H46-37 Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), <https://rm.coe.int/0900001680a5c3c4>

⁷ CM/Del/Dec(2023)1459/H46-26 (08 March 2023), 1459th meeting (DH), March 2023 - H46-26 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), <https://rm.coe.int/0900001680aa75d0>



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despite its repeated calls, the Constitutional Court had not delivered its decision and the applicant remained in detention; and accordingly urged the authorities, once again, to take all possible steps to ensure that the Constitutional Court makes its determination concerning the applicant's ongoing detention in the shortest possible time frame and with full regard to the Court's findings, particularly its reasoning under Article 18 of the Convention" and called for Demirtaş's "immediate release, for example by exploring alternative measures to detention pending the completion of the proceedings before the Constitutional Court."⁸

9. In light of the CM's latest resolution, this submission addresses developments which are the exact opposite of the CM's calls. MLSA would like to share with the CM that not only the Turkish authorities refuse to implement the Court's judgment but they also take steps aimed to further restrict Demirtaş's freedom of expression and further isolate Demirtaş from taking part in political debate ahead of elections.

III. FURTHER ARTICLE 10 VIOLATIONS

10. Since his arrest in 2016, Mr. Demirtaş has been in contact with the outside world through various means. As a prolific writer, he produced five novels and wrote numerous articles published in respected newspapers in and outside of Turkey, including the New York Times.⁹ Aside from novels and articles, the most important tool of communication has been Mr. Demirtaş's Twitter account which he operates through his lawyers and advisors. At different times and with different severity, the Turkish authorities tried to cut off these communication lines either directly or indirectly.
11. The Twitter account Mr. Demirtaş, who describes himself as a "political hostage," has been vital for his continuous participation in political debate in Turkey. The importance of his social media presence has proven himself time and time again but perhaps the most important examples of this importance manifested themselves during the June 24 election campaign in 2018. On 21 May 2018, Mr. Demirtaş and his lawyers petitioned the local court to secure his release for campaigning. Their requests were denied by the local court and their appeals were left unanswered by the Constitutional Court.¹⁰ Consequently, Mr. Demirtaş had to run his campaign from

⁸ CM/ResDH(2023)36 (08 March 2023), Interim Resolution CM/ResDH(2023)36 - Execution of the judgment of the European Court of Human Rights - Selahattin Demirtaş (No. 2) against Turkey (Application No. 14305/17), <https://rm.coe.int/0900001680aa6b49>

⁹ Selahattin Demirtaş, "Free Speech Isn't the Only Casualty of Erdoğan's Repression" (13 April 2016), *the New York Times*, <https://www.nytimes.com/2016/04/14/opinion/free-speech-isnt-the-onlycasualty-of-erdogans-repression.html> (Accessed on 11 April 2023)

¹⁰ ODIHR Election Observation Mission Final Report (21 September 2018), https://www.osce.org/files/f/documents/9/4/397046_0.pdf (Accessed on 11 April 2023), p. 14

prison over his social media account.¹¹ As Mr. Demirtaş pointed out, his campaign was limited to “100 tweets.”¹² However, he and his followers have faced consequences because of Mr. Demirtaş’s activities on Twitter.

12. On 30 September 2017, Mr. Demirtaş announced that he was subjected to an impromptu cell search.¹³ Suspecting that Mr. Demirtaş was tweeting from his prison cell, the prison administration conducted an unannounced search in his cell. In his tweets announcing the search, Mr. Demirtaş jokingly said that the only thing they found during the search was his “kettle” which became a popular joke that is even recalled by Çiğdem Mater, one of the Gezi Trial prisoners.¹⁴ ¹⁵ As the next elections approach, there may be more attempts to silence Mr. Demirtaş.
13. On 11 January 2023, during a press conference, Minister of Justice Bekir Bozdağ was asked by a reporter if there is a “legal gap” when it comes to restricting prisoners' access to social media. The reporter specifically mentioned Mr. Demirtaş and said: “We see many people charged with terrorism crimes continue their leadership by digital means. Thus the imprisoned person is not really imprisoned. For instance, Selahattin Demirtaş continues to lead his organization over social media and is trying to intervene in politics in Turkey.”¹⁶ Minister Bozdağ responded, “Convicts don't have such a thing. Convicts have the right to see their lawyers. It is just a matter of reflection of what they relay to their lawyers or families during visits. They themselves cannot post on social media directly. But what they tell them when they meet with their lawyers or with those who have the right to meet with their families, is published by [the lawyers and families] outside. We take this seriously and we are currently working on this issue. We are aware that there is a need for evaluation in this regard.”
14. *MLSA’s Legal Evaluation*: The statement of Minister of Justice Bekir Bozdağ is concerning as it refers to the right to defense of a detainee whom the ECtHR found to have been detained with political motivations. The right to defense is enshrined as a fundamental right under the second section titled “Rights and Obligations of

¹¹ “Erdogan’s Most Charismatic Rival in Turkey Challenges Him, From Jail” (31 July 2018), *the New York Times*, <https://www.nytimes.com/2018/07/31/world/europe/turkey-kurds-selahattin-demirtas.html> (Accessed on 11 April 2023)

¹² Mr. Demirtaş’s tweet dated 25 June 2018, <https://twitter.com/hdpdemirtas/status/1011172178375606273> (Accessed on 11 April 2023)

¹³ Mr. Demirtaş’s tweets dated 30 September 2017, <https://twitter.com/hdpdemirtas/status/914054326934315009> (Accessed on 11 April 2023)

¹⁴ Çiğdem Mater, “Bir kettle nelere kadir? [What power does a kettle hold?]” (1 September 2022), *BiaNet*, <https://m.bianet.org/bianet/yasam/266533-bir-kettle-nelere-kadir> (Accessed on 11 April 2023)

¹⁵ Pınar Tremblay, “How a tea kettle came to symbolize Turkish election opposition” (19 June 2018), *Al Monitor*, <https://www.al-monitor.com/originals/2018/06/turkey-imprisoned-kurdish-leader-runs-positive-campaign.html> (Accessed on 11 April 2023)

¹⁶ Bozdağ on social media posts of Demirtaş: ‘We are working on it at the moment’ (12 January 2023), *BiaNet*, <https://bianet.org/english/human-rights/272727-bozdag-on-social-media-posts-of-demirtas-we-are-working-on-it-at-the-moment> (Accessed on 11 April 2023)

Individuals” of the second part titled “Fundamental Rights and Duties” in Article 36 of the Constitution of the Republic of Turkey (“the Constitution”) under the heading “Freedom to Seek Remedies.” Article 6 of the Convention titled “Right to a Fair Trial” also regulates the right to defense as an integral part of a fair trial. This right has also been safeguarded in domestic legislation. Article 149 of the *Code of Criminal Procedure* titled “Choice of Defense Counsel by Suspect or Defendant” states that “The right of the lawyer to meet, take statements or be present with the suspect or defendant during the investigation and prosecution stages cannot be prevented or restricted.” Article 19 of the *Regulation on the Visits of Convicted and Detained Persons* (dated 17 June 2005), stipulates that “The detainee shall meet with the defense counsel at any time without the requirement of a power of attorney, and the conversation shall be conducted openly in an environment where others cannot hear, but the conversation may be monitored by officials.” The relevant articles safeguard the right to defense, while also ensuring the protection of the presumption of innocence of the detainee, and regulate that the detainee's communication, correspondence, and sharing of documents with their lawyer cannot be prevented. According to Article 114 titled “Rights of Detainees” of Law No. 5275 on the *Execution of Penalties and Security Measures*, the detainee has the right to choose and appoint the defense counsel they desire for their defense, and their communication with their defense counsel and their contacts and meetings within the framework of the institution's regulations cannot be prevented or restricted in any way. In other words, detention is not a civil death, and the rights of the detainee continue to exist. The detainee has the right to benefit from the presumption of innocence, the right to defense, and the legal assistance of a lawyer. Any legislative amendment designed to restrict the exercise of this fundamental right will be a violation. Therefore Minister of Justice Bozdağ’s statements must be taken seriously as it may fundamentally violate the rights of those in prison including Mr. Demirtaş.

15. On 28 January 2023, in a rally, President Erdoğan claimed that he is eligible to run for a third term in office by saying “The chronometer was reset in 2018 with the new system.”¹⁷ Mr. Demirtaş responded to President Erdoğan on the same day. Mr. Demirtaş, quoted a news article from Yeni Yasam daily and tweeted: “In his mind, he reset the chronometer in 2018 and is paving the way for himself for four terms. On election night, when the people stop your chronometer, you will see zero. These matters are not like resetting money to zero.”¹⁸ On 2 February 2023, the Istanbul Anatolian 6th Criminal Judgeship of Peace ordered 78 different contents which contained Mr. Demirtaş’s tweet to be removed.¹⁹ Among the 78 different contents

¹⁷ Erdogan says opposition is "throwing mud" at him because it can not name a candidate (28 January 2023), *Gerçek News*, <https://www.gerceknews.com/turkey/erdogan-says-opposition-is-throwing-mud-at-him-because-it-can-not-name-a-218535h> (Accessed on 12 April 2023)

¹⁸ Mr. Demirtaş’s tweet dated 28 January 2023, <https://twitter.com/hdpdemirtas/status/1619389879569510401> (Accessed on 12 April 2023)

¹⁹ Decision no: 2023/1053

removed from the internet were also the news articles published in Halk TV, Cumhuriyet and Diken, all of which are prominent opposition news outlets.

16. *MLSA's Legal Evaluation:* Freedom of expression, which is an indispensable element of pluralistic democracies, has gained even greater importance in today's internet age with the widespread use of social media and the ease of instantly sharing messages, comments, and other content. According to Article 9 of Law No. 5651 on the Regulation of Publications on the Internet and Combating Crimes Committed through These Publications, the decision to block access (remove content) is an exceptional measure to protect personal rights, and there must be apparent justification for blocking access to internet publications, the need to quickly remedy the damage must be essential, and the violation of personality rights through the publication must be clearly evident at first glance. Otherwise, the right to freedom of expression, protected by the Constitution, the Convention, and other international agreements to which Turkey is also a party, will be violated. The removal of content from news websites that reported on a tweet posted by Selahattin Demirtaş constitutes a violation of freedom of expression protected by Article 10 of the Convention, including the freedom to hold opinions, the freedom to receive and access information and opinions, and the freedom to express and disseminate information and opinions.
17. After Halk TV anchor Serhan Asker mentioned Mr. Demirtaş's latest book *Dad* during a live broadcast, saying "Selahattin Demirtaş must have written his fifth book in prison. Production, production, production... Selahattin Demirtaş is writing. I read his storybook *Dad* with great pleasure. We thank Mr. Selahattin Demirtaş for his thoughtfulness. At the same time, we send greetings from the earthquake region to all our people, and to the detainees and convicts who are fighting for freedom in prison." Radio and Television Supreme Council (RTÜK) President Ebubekir Şahin issued a statement via Twitter saying, "Provocative broadcasts like those made by Halk TV are unacceptable, especially when the rules that the media should pay attention to are clear as elections approach. It is unacceptable to claim that our country is colonialist, and it is unacceptable to praise someone who is convicted of being a member of an armed terrorist organization. The necessary investigation has been initiated."²⁰ Four days after this tweet, RTÜK imposed a fine on Halk TV in the amount of five percent of their advertisement revenue and suspended the program in which Demirtaş's book was mentioned for five episodes on the grounds of "praising criminals."²¹

18. *MLSA's Legal Evaluation:* It is clear that the statement made by Ebubekir Şahin,

²⁰ Ebubekir Şahin's tweet dated 18 March 2023: <https://twitter.com/ebekirsahin/status/1637099843020619779> (Accessed on 11 April 2023)

²¹ Turkey's media watchdog fines opposition channel for airing Demirtaş's book (22 March 2023), *Duvar English* <https://www.duvarenglish.com/turkeys-media-watchdog-fines-opposition-channel-for-airing-demirtass-book-news-62074> (Accessed on 11 April 2023)



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constitutes a violation of the right to be presumed innocent which is guaranteed by Article 6/2 of the Convention and Article 38/4 of the Constitution, which states that “No one shall be deemed guilty until their guilt has been established by a final court judgment.” Demirtaş, who does not have a finalized conviction for “membership in a terrorist organization” offense, was slandered as if he had been convicted of terrorism just because his book was mentioned during a live broadcast and the media outlet was penalized for “praising a criminal.” This constitutes a violation of the presumption of innocence, as well as a clear violation of the right to receive and impart information. Imposing fines and program interruption penalties solely for mentioning the book of Selahattin Demirtaş would constitute a violation of absolute freedom of expression for the owner of the book, and would mean criminalizing and imposing various sanctions on any channel that has the possibility of mentioning the book, resulting in a violation of press freedom and thus freedom of expression for the broadcasting channel.

IV. CONCLUSIONS AND RECOMMENDATIONS

19. MLSA would like to draw the Committee’s attention that all these politically motivated interferences with Mr. Demirtaş’s freedom of expression came after Minister Bozdağ’s worrying statements. As is shown above, Mr. Demirtaş’s Twitter account plays a vital role in his limited participation in political debate. Further restrictions on his freedom of expression will aggravate the ongoing violations. Considering that Turkey is approaching very important elections, Mr. Demirtaş’s continued participation in election campaigns is also important for the opposition’s efforts.
20. MLSA kindly requests the Committee to:
 - a. strongly insist on the immediate release of Mr. Demirtaş and strongly communicate with the Turkish authorities that the continuation of Mr. Demirtaş’s detention further violates his rights under the Convention, as the ECtHR found,
 - b. communicate clearly that the Grand Chamber’s judgment is applicable Mr. Demirtaş’s ongoing detention, the criminal proceeding under which he was convicted, and to any other ongoing or future proceedings or detention,
 - c. strongly urge the Turkish authorities cease all criminal proceedings against Mr. Demirtaş,
 - d. strongly urge the Turkish authorities to stop issuing statements which constitute an attack on Mr. Demirtaş’s right to be presumed innocent and on his person,
 - e. request information from the Turkish authorities regarding any work conducted or being carried out to restrict Mr. Demirtaş’s access to social



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media,

- f. request information from the Turkish authorities on the number of criminal proceedings initiated against third persons because of their interaction with Mr. Demirtař's social media posts