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## Committee on Legal Affairs and Human Rights

# Should politicians be prosecuted for statements made in the exercise of their mandate?

## Introductory memorandum

Rapporteur: Mr Boris Cilevičs, Latvia, Socialists, Democrats and Greens Group

### 1. Introduction

1. The authors of the motion underlying this report were “concerned about the growing number of national, regional and local politicians prosecuted for statements made in the exercise of their mandate, in particular in Spain and Turkey.” They recalled Resolution 1900 (2012) on “Definition of political prisoners” and Resolution 1950 (2013) on “Keeping political and criminal responsibility separate”. The motion also refers to the Venice Commission’s view that “the primary purpose of parliamentary immunity lies in the fundamental protection of the parliamentary institution and in the equally fundamental guarantee of the independence of elected representatives, which is necessary for them to exercise their democratic functions effectively without fear of interference from the executive or judiciary.” According to the Venice Commission, parliamentarians’ freedom of speech must be a wide one and should be protected also when they speak outside Parliament. “This applies also, and especially, to parliamentarians who belong to the opposition and whose ideas differ strongly from those of the majority.”<sup>1</sup> At the same time, the motion insists that “hate speech and calls for violence cannot be tolerated, also from politicians.” The stated purpose of the motion is for the Assembly “to examine, from a legal and human rights perspective, the situation of politicians imprisoned for exercising their freedom of speech, in light of the principles upheld by the Council of Europe and, in particular, of the European Convention on Human Rights.” My future report will deal with the specific issues raised by this motion and *not* with more general legal or political issues such as the conditions under which secession is or should be possible.<sup>2</sup>

2. In order to fulfil this mandate, I will need to look, firstly, at the Council of Europe’s *acquis* as regards politicians’ freedom of speech and the limits that it can legally be subjected to; and secondly, I will have to look at some concrete cases of politicians in Spain and Turkey where it is alleged that politicians have been improperly prosecuted for statements they made in the exercise of their mandate.

3. The cases that come to mind in the two countries specified in the motion include politicians prosecuted for separatist speech (in favour of Catalan or Kurdish independence or autonomy); in Turkey, there are also prosecutions for alleged involvement in the “FETÖ” (Gülenist) movement accused of being responsible for the failed coup attempt in July 2016, and for insult to the State or to its leadership against politicians who pointed out alleged corrupt or politically debatable practices and policies pursued by the authorities in place. Despite the fact the motion speaks only of Spain and Turkey, I will be open to refer in my final report also to examples from other states if the committee wants me to do so.

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<sup>1</sup> European Commission for Democracy through Law (Venice Commission), Turkey, “Opinion on the suspension of the second paragraph of Article 83 of the Constitution (Parliamentary Inviolability)”, adopted by the Venice Commission at its 108<sup>th</sup> Plenary Session, Venice, 14-15 October 2016, Opinion No. 858/2016.

<sup>2</sup> See on this topic the reports by Marina Schuster (Germany/ALDE) on National sovereignty and statehood in contemporary international law: the need for clarification (document 12689 dated 12 July 2011 and the Information Report by the Committee on Legal Affairs and Human Rights Towards a democratic approach to the issues of self-determination and secession (document 14390 of 4 September 2017).

4. In this introductory memorandum, I will first sum up the Assembly's and other Council of Europe bodies' earlier work in this field and present relevant case law of the European Court of Human Rights. Then I will present a few examples of cases where politicians are allegedly being prosecuted or were even convicted for political statements covered by their freedom of speech.

5. To cover relevant cases without over-stretching the scope of the future report, I will use the term "politicians" to include national, regional and local deputies as well as ministers and mayors, but also candidates for such offices and former officeholders. All of these play an important role in the democratic process and are particularly exposed to becoming a "target" for the powers that be.

6. Finally, I will ask the committee for its authorization for some fact-finding activities.

## 2. The Council of Europe's *acquis* on freedom of speech of politicians

### 2.1. Parliamentary Assembly

7. Two earlier texts of the Parliamentary Assembly are especially relevant to the issue at hand: [Resolution 1900 \(2012\)](#) on "The definition of political prisoner" (Rapporteur: Christoph Strässer, Germany/SOC); and [Resolution 1950 \(2013\)](#) on "Keeping political and criminal responsibility separate" (Rapporteur: Pieter Omtzigt, Netherlands/EPP).

#### 2.1.1. [Resolution 1900 \(2012\)](#) on "Definition of political prisoners"<sup>3</sup>

8. [Resolution 1900 \(2012\)](#) has reconfirmed, in non-country specific terms, the definition of political prisoner developed by the independent experts tasked by the Secretary General with assessing the status of alleged political prisoners in Armenia and Azerbaijan, at the time of their accession to the Council of Europe. The criteria by which the independent experts assessed and resolved well over 700 cases had been agreed by all relevant Council of Europe bodies, including the Committee of Ministers.<sup>4</sup> [Resolution 1900 \(2012\)](#), which simply reconfirmed these criteria in the context of an ongoing inquiry into cases of alleged political prisoners in Azerbaijan, has since become the "gold standard" used by numerous non-governmental organizations for assessing the political nature of the prosecution of politicians, civil society activists and journalists in many countries, even beyond the Council of Europe's geographical remit.

9. The definition of political prisoner is summed up in paragraph 3 of Resolution 1900. The most relevant criteria for politicians detained for political statements are the following:

9.1. "if the detention has been imposed in violation of [...] freedom of expression and information, freedom of assembly and association"; [...]

9.2. if, for political motives, the length of the detention or its conditions are clearly out of proportion to the offense the person has been found guilty of or is suspected of; or [...]

9.3. if the detention is the result of proceedings which were clearly unfair and this appears to be connected with political motives of the authorities."

10. The explanatory memorandum stresses that persons prosecuted or convicted for "purely political offences" are often, though not always, "political prisoners". The test is whether the detention would be regarded as lawful under Article 5 (1) of the European Convention on Human Rights ("the Convention") as interpreted by the European Court of Human Rights ("the Court"). "Purely political offences" are offences which only affect the political organization of the State, including attempts to change the State's territorial makeup or its constitutional order or simply the "defamation" of its authorities. As a rule, "political" speech, even very critical of the State and the powers in place, is protected by Article 10 – there is no "pressing social need" in a "democratic society", in the terms of Article 10, to suppress such speech.<sup>5</sup>

11. But there are cases in which political speech exceeds the limits set by the Convention, for example when it incites violence, racism or xenophobia. A key question is whether the prohibition of calls for peaceful, non-violent, but otherwise "radical" constitutional change is "necessary in a democratic society". It should also be noted that in the rare cases where the Court has found the repression of such speech acceptable under

<sup>3</sup> Document no. 13011 (2012, Rapporteur : Christoph Strässer (Germany/SOC).

<sup>4</sup> See document SG/Inf(2001)34, paragraph 10.

<sup>5</sup> See document 13011 (note 4 above), paras. 8-9.

the Convention, the penalties handed down by the national courts were largely symbolic and did not involve deprivation of liberty. Criminal sanctions for political speech that is not protected by Article 10 can still be a violation of the Convention when the punishment meted out is disproportionate, discriminatory or the result of an unfair trial. The analysis of the Court's case law on these issues (below) is therefore of paramount importance.

### 2.1.2. [Resolution 1950 \(2013\)](#) on “Keeping political and criminal responsibility separate”<sup>6</sup>

12. In its [Resolution 1950 \(2013\)](#), the Assembly urged “governing majorities in member States to refrain from abusing the criminal justice system for the persecution of political opponents.” The resolution was based on a report by our colleague Pieter Omtzigt establishing guiding principles designed to protect politicians from being held to account for their *political* activities in the criminal courts. Instead, politicians shall be held to account by their voters. At the same time, politicians should not enjoy impunity for crimes committed outside the political sphere or by abusing their elected office. The “guiding principles” proposed in this report are intended to help distinguish the one from the other. The legal expert<sup>7</sup> at the hearing on this issue before the committee drew a parallel with sports. A football player is subject to sanctions under the rules of the game in case of foul play and thus escapes ordinary criminal responsibility for causing bodily harm. His opponent will be compensated with a free kick, or even a penalty, but the perpetrator of the foul will not be prosecuted criminally – unless he committed such an outrageous attack on the opposing player that the presumed waiver of criminal responsibility applicable to “normal” fouls does not apply. Similarly, a politician (or his or her “team” (party) will lose votes at the next elections if he or she makes a political mistake, even one that looks particularly bad. But criminal responsibility should come into play only if and when the politician's acts, omissions or statements fall clearly outside the perimeter of normal political activities.

13. Whilst Resolution 1950 dealt specifically with politicians acts or omissions (e.g. not preventing the banking crisis in Iceland, or a Ukrainian Prime Minister signing an allegedly disadvantageous gas treaty with Russia), the guiding principles developed in this report should in principle also apply to political statements made by politicians or during peaceful assemblies in which they participate, as part of their job as elected representatives of the people.

### 2.1.3. [Resolution 2127 \(2016\)](#) on “Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly”

14. In its [Resolution 2127 \(2016\)](#), the Assembly laid down a number of general principles for parliamentary immunity. Most importantly, for the purposes of this report, it stressed that

“immunity is a fundamental democratic safeguard born of the need to preserve the integrity and independence of parliaments [...]. Parliamentary immunity protects the free exercise of the parliamentary mandate [...] account must be taken of the crucial need to preserve the rights and integrity of members of the political minority [...] ; freedom of speech is an intrinsic part of parliamentary work and elected politicians must be able to debate, without fear, many different issues of public interest, including controversial or divisive subjects or matters relating to the operation of the executive or the judiciary; however, remarks and statements inciting hatred, violence or the destruction of democratic rights and freedoms can be excluded from the scope of non-liability”.<sup>8</sup>

15. The Assembly has thus taken a firm stand on freedom of speech of parliamentarians, for the sake of the functioning of democracy.<sup>9</sup>

## 2.2. *European Commission for Democracy through Law (Venice Commission)*

16. In December 1999, the Venice Commission adopted a report on “Self-Determination and Secession in Constitutional Law”<sup>10</sup>. As explained above, the issue of self-determination, territorial integrity and the right of secession does not fall within my rapporteur mandate. The Venice Commission's views are nevertheless of interest for this report. Its comparative analysis shows that numerous member States outlaw secession and have constitutional provisions which clearly render any activities aimed at secession or independence

<sup>6</sup> Document 13214 dated 28 May 2013 (Rapporteur: Pieter Omtzigt, Netherlands/EPP)

<sup>7</sup> Professor Bernd Satzger, University of Munich

<sup>8</sup> [Resolution 2127 \(2016\)](#), para. 12.

<sup>9</sup> Another report on parliamentary immunity is currently under preparation by the Committee on Rules of Procedure, Immunities and Institutional Affairs.

<sup>10</sup> European Commission for Democracy for Law (Venice Commission), Report on “Self-Determination and Secession in Constitutional Law”, Document CDL-INF(2000)2 dated 12 January 2000.

unconstitutional. The Venice Commission report also lists many examples of countries basing restrictions of fundamental rights on the need to protect their territorial integrity. Political parties which, by their aims, militate against territorial integrity (Moldova, Romania, Russia, Georgia, Ukraine, Portugal, Bulgaria, Croatia, Greece, Slovakia, Turkey) are denied freedom of association. Threats to territorial integrity may also prompt emergency measures that restrict freedoms (Croatia, France; Lithuania, where the threat must be of external origin).<sup>11</sup>

17. In the Turkish constitution, the first ground for restrictions to fundamental rights mentioned in the general constitutional provision dealing with such restrictions is that of safeguarding the “indivisible integrity of the state with its territory and nation.” The Constitution itself provides that infringements of this prohibition are punishable by law. Political parties are forbidden to proclaim themselves in favour of the self-determination of the Kurdish people and even of a federal system. The unitary form of the state is thus not open to challenge by political parties. As the Venice Commission points out, the European Court of Human Rights has set some limits for restrictions of fundamental rights in defense of territorial integrity, despite the fact that Article 10 (2) of the Convention refers to “territorial integrity” as one of the interests for the protection of which freedom of expression may be restricted.

18. Upon request by the Assembly (in Resolution 2127, above), the Venice Commission also gave an important Opinion<sup>12</sup> on the temporary amendment of the Turkish Constitution allowing for the wholesale lifting of parliamentary immunity for a large number of opposition parliamentarians (see below).

### 2.3. Case law of the European Court of Human Rights

19. The European Court of Human Rights has always attached high importance to freedom of expression and freedom of association, including, and especially, for politicians.

#### 2.3.1. Freedom of expression for political statements, in particular by politicians

20. A leading case on freedom of expression (not only) of politicians is the 1992 judgment of *Castells v. Spain*<sup>13</sup>, the Court dealt with the case of a senator elected on the list of Herri Batasuna, a political party supporting independence for the Basque Country. He had made harsh statements in public accusing the Spanish Government of tolerating killings of Basque activists by paramilitaries. He was sentenced to a prison term. When discussing the “necessity” of the interference with his freedom of speech, the Court recalled that freedom of expression

“constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress [...] it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. [...] While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.” (para. 42).

21. In my initial research of the Strasbourg Court’s case law on freedom of expression of politicians, I came across a number of recent Turkish cases in which politicians were given criminal sanctions for offences such as insult to the President or the Prime Minister, denigration of Turkishness, or spreading of terrorist propaganda (e.g. several cases brought by HDP Co-Chair *Selahattin Demirtas*, one of which is still pending before the Grand Chamber, 2019; *Uzan v. Turkey*, 2018). In each case, the Court reiterated the importance it attaches to freedom of expression of politicians for the functioning of democracy and the need for the national courts to carefully analyze the meaning of the impugned statement in its political context.

22. In these cases, as well as in a series of Article 10 cases brought not by politicians, but by journalists (e.g. *Önal v. Turkey* (no. 2); *Fatih Tas v. Turkey* (no. 5, 2018); *Sahin Alpay v. Turkey*, 2018; *Saygili and Karatas v. Turkey*, 2018, *Ali Gürbüz v. Turkey*, 2019; *Gürbüz and Bayar v. Turkey*, 2019), the determining factor for the Court was whether the impugned statement constituted a call for violence. When this was not the case, the Court found violations of Article 10. When a call for violence was made, even if it was merely indirect or implied, it found no violation - as in the case of *Gürbüz and Bayar v. Turkey*, in which a newspaper published

<sup>11</sup> See Venice Commission opinion (note 10 above), pages 5-6.

<sup>12</sup> See Venice Commission opinion (note 1 above),

<sup>13</sup> *Castells v. Spain*, appl. no. 11798/85, judgment of 23 April 1992.

statements by PKK leaders relating to a ceasefire proposal. The Court found that the statement by the PKK leader that if a dialogue is not established then 2005 will become a year of transition to guerilla warfare can be considered a public provocation to commit terrorist acts and thus incitement to violence. Even though the applicants were not personally associated with the PKK or the statements of their leaders, they had provided a forum for them to be disseminated.

23. In *Sahin Alpay v. Turkey*, the Court provides a definition of what it understands by “incitement of violence”, namely words that

“advocate recourse to violent actions or bloody revenge, justify the commission of terrorist acts in pursuit of their supporters’ goals and can be interpreted as likely to encourage violence by instilling deep-seated and irrational hatred towards specific individuals.” (para. 179)

24. In *Stern Taulats and Roura Capellera v. Spain* (2018), the Court specified that in the case of political speech a prison sentence is only compatible with Article 10 in exceptional circumstances and that the essential element to consider is whether the speech incites violence or constitutes hate speech.<sup>14</sup>

25. Let us go back to cases directly concerning politicians’ freedom of expression, concerning very different sets of facts. In its Grand Chamber judgment in the case of *Karacsony and Others v. Hungary*<sup>15</sup>, the Court found that a fine imposed on opposition MPs for showing billboards and using a megaphone during parliamentary votes violated the MP’s freedom of expression. The Court stressed that speech in Parliament enjoys an elevated level of protection which is reflected by the rule of parliamentary immunity. It also acknowledged that some regulation may be considered as necessary in order to prevent forms of expression such as direct or indirect calls for violence.

26. In *Uzan v. Turkey*<sup>16</sup>, the applicant, the leader of an opposition party and majority shareholder in two companies targeted by government measures, was sentenced to eight months imprisonment and fined for publicly insulting the Prime Minister and attacking his honour and reputation (using terms such as “treacherous”, “looter”, “insolent” and “godless one”). Although the prison sentence was later deferred on condition of submitting to judicial supervision for five years, the Court found that the domestic courts had failed to properly assess the proportionality of the penalty, and to take into account the (political) context in which the impugned remarks were made.

27. In *Roland Dumas v. France*<sup>17</sup>, the applicant was a politician who was formerly a government minister and President of the Constitutional Council. In 2003, he was acquitted of aiding and abetting the misappropriation of company assets and handling misappropriated assets. Shortly afterwards, he published a book including an account of an incident at a court hearing in 2001 when he said that during the war, the public prosecutor could have sat in the “Special Sections” (set up during the Nazi occupation). The applicant was ordered to pay fines and damages for having defamed a member of the judiciary. The Court found that this violated his freedom of expression. The relevant passages of the book concerned an affair of State that had attracted wide-spread media coverage and the applicant’s book amounted to a form of political expression. Therefore Article 10 called for a high degree of protection; and the authorities had a particularly limited margin of appreciation in assessing whether the measure in question had been “necessary in a democratic society”.

28. By contrast, the Court declared inadmissible, as manifestly ill-founded, another application against France in which a politician severely criticized a judge. The applicant, an MP who spoke at a political rally before an election, called the judge investigating a complaint of electoral fraud against him a “political commissar”, who had acted *ultra vires* and “sullied the judiciary”. He was fined € 1000 for contempt of court. The Court accepted the reasoning of the domestic court according to which the comments of the applicant had come down to his personal dispute with the investigating judge, whom he had already attempted to disparage by publishing tracts a few months previously. Therefore, in the absence of any wider debate which could have been useful in terms of public information, it had not been unreasonable to conclude that the comments and statements amounted to a gratuitous personal attack.

<sup>14</sup> The applicants, at an anti-monarchist rally, had publicly set fire to a photograph of the royal couple. They were convicted of insulting the Crown and sentenced to 15 months in prison in case they could not pay their fine of € 2700 each. The Court found a violation of Article 10, arguing that the intention of the applicants was not to incite violence against the King but rather considered the burning of the photo as a symbolic act of protest and dissatisfaction.

<sup>15</sup> *Karacsony and Others v. Hungary* [GC], appl. nos. 42461/13 and 44357/13, judgment of 17 May 2016.

<sup>16</sup> *Uzan v. Turkey*, appl. no. 30569/09, judgment of 20 March 2018.

<sup>17</sup> *Roland Dumas v. France*, appl. no. 34875/07, judgment of 15 July 2010

29. In *Makraduli v. "The former Yugoslav Republic of Macedonia"*<sup>18</sup>, the Court found a violation of Article 10 after an opposition MP was convicted for libel for accusing the head of the Security and Counter Intelligence Agency and later the Prime Minister of corrupt acts of corrupt actions.

30. Regarding, specifically, politicians punished or otherwise sanctioned for "secessionist speech", I found only two directly relevant cases. The first is that of *Piermont v. France*<sup>19</sup>. In this case, France expelled a German national and member of the European Parliament from New Caledonia and prohibited her from re-entering. She had spoken at a pro-independence and anti-nuclear rally in French Polynesia. The Court found that this interference (even without criminal sanctions) was not "necessary in a democratic society" and thus a violation of Article 10 because the statements held against her were made at a peaceful, authorized demonstration and contributed to democratic debate in French Polynesia. There had been no call for violence and the demonstration had not been followed by any disorder.

31. In the other case – *Ahmet Sadik v. Greece* - the application was declared inadmissible for failure to exhaust national remedies. But the European Commission on Human Rights had considered that the conviction of the applicant for having publicly (during an electoral meeting) addressed members of the Islamic minority of Western Thrace as "Turks" violated the applicant's freedom of speech.<sup>20</sup>

32. In *Gorzelik v. Poland*<sup>21</sup>, the Court found no violation of Article 11 in the refusal of the Polish authorities to register an association called "Union of People of Silesian Nationality". The Court accepted the Governments argument that the association's real intention was to abuse of the electoral privileges granted to national minorities in Polish law, at the expense of other, recognized national minorities (see paragraphs.97, 102, 106 of the judgment).

33. The last case I should like to present in this section is *Kerestecioglu Demir against Turkey*.<sup>22</sup> It has been communicated, but not yet decided by the Court. The applicant was an MP, whose parliamentary immunity was lifted because of her participation in a statement made to the press. The immunity was lifted in a peculiar fashion. Following a "provisional" constitutional change adopted on 20 May 2016, the applicant lost her immunity alongside all other MPs against whom the prosecution had requested the lifting of immunity before the date of the adoption of this constitutional change in a one-off summary procedure.<sup>23</sup> This concerned a total of 139 MPs, a large majority of them members of the opposition CHP and HDP parties. In its questions to the parties, the Court has asked whether the provisional constitutional amendment was an interference with the applicant's freedom of expression, and whether, if so, it was "necessary in a democratic society", corresponding to a pressing social need and being proportional to the legitimate aim pursued.

34. To sum up, the European Court of Human Rights attaches a high degree of importance to freedom of expression, and in particular that of politicians. Limitations are acceptable in the case of calls for violence and gratuitous personal attacks outside the context of a wider political debate. It should also be noted that in the cases in which the Court did not find a violation, the sanctions imposed were mild. Harsh sanctions, notably ones involving deprivation of liberty, have been found disproportionate.

### 2.3.2. Freedom of association

35. As the Venice Commission noted in its above-mentioned report (para. \*), many States have restricted the freedom of association of political parties advocating secessionist or even federalist ideas. The European Court of Human Rights has set some limits for such restrictions.

36. In a case concerning the dissolution of the *United Communist Party of Turkey* (TBKP), the Court did not find the interference with freedom of association "necessary in a democratic society". The TBKP's programme referred to the Kurdish "people", "nation" or "citizens", but without claiming on their behalf the conferment of special rights (or minority rights). The party programme mentioned the right to self-determination and deplored the fact that due to recourse to violence it was not "exercised jointly, but separately and unilaterally". The Court stressed that

<sup>18</sup> *Makraduli v. "The former Yugoslav Republic of Macedonia"*, appl. nos. 64659/11 and 24133/13, judgment of 19 July 2018.

<sup>19</sup> *Piermont v. France*, appl. nos. 15773/89 and 15774/89, judgment of 27 April 1995.

<sup>20</sup> *Ahmet Sadik v. Greece*, appl. no. [18877/91](#), judgment of 15 November 1996.

<sup>21</sup> *Case of Gorzelik and others v. Poland*, appl. no. 44158/98, [GC] judgment of 17 February 2004.

<sup>22</sup> *Kerestecioglu Demir v. Turkey*, appl. no. 68136/16, case communicated (see case law information note no. 227, March 2019).

<sup>23</sup> See Venice Commission opinion (note 1 above).

“democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. To judge by its programme, that was indeed the TBKP’s objective in this area.”<sup>24</sup>

37. In another Turkish case concerning the dissolution of the Turkish Socialist Party (SP), which advocated setting up a federation and whose Chairman made public declarations such as “the Kurdish people are standing up” and spoken of the “Kurdish nation’s right to self-determination and to create a separate state by referendum.” The Court considered the dissolution of the SP as excessive. It found that - interpreted in context - the impugned statements did not advocate separation from Turkey. They were intended to stress that the federation proposed by the SP could not be achieved without the free consent of the Kurds, expressed by referendum. Also, there was no incitement to violence or to infringe the rules of democracy. The Court, in its Grand Chamber judgment in *Socialist Party and Others v. Turkey*<sup>25</sup> stressed that

“the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do no harm democracy itself.” (para. 47)

38. The case of *Sidiropoulos and Others v. Greece*<sup>26</sup> concerned a Greek association named “Home of Macedonian Civilisation”, whose statutory purpose was to preserve the folk culture and the traditions of the Florina region. The Greek authorities refused to register this association, on the grounds that it had separatist intentions, as the term “Macedonian” was used to dispute the Greek identity of Macedonia and its inhabitants by indirect means. The Court found that the mere assertion that the association represented a danger to Greece’s territorial integrity did not justify such a restriction on freedom of association.

39. In *UMO Ilinden – Pirin and others v. Bulgaria*<sup>27</sup>, the Court found that

“the mere fact that a political party calls for autonomy or even requests secession of part of the country’s territory is not a sufficient basis to justify its dissolution on national security grounds. In a democratic society bases on the rule of law, political ideas which challenge the existing order without putting into question the tenets of democracy, and whose realization is advocated by peaceful means must be afforded a proper opportunity of expression through, *inter alia*, participation in the political process.”

40. To sum up, the European Court of Human Rights generally protects the freedom of association of political parties (and also of other associations) even when they advocate radical changes to the constitutional order – provided their means are non-violent and do not violate the rules of democracy and the objectives pursued do not harm the very essence of democracy.<sup>28</sup>

41. It is thus quite clear that the European Convention on Human Rights strongly protects both the freedom of expression, even for “unconstitutional” speech, of politicians and the freedom of association of political parties advocating radical constitutional change – on condition of non-violence and respect for basic democratic principles. What makes this report so difficult is that the Spanish and Turkish politicians covered by my mandate are – at least officially - not prosecuted for what they said, but for what they allegedly did: namely the crimes of rebellion, or attempted rebellion (in Spain), and membership of or support for terrorist organizations (in Turkey). Let us have a preliminary look at some of these cases.

<sup>24</sup> *United Communist Party of Turkey and Others v. Turkey*, appl. no. 133/1996/752/951, judgment of 30 January 1998, para. 57.

<sup>25</sup> *Socialist Party and Others v. Turkey*, appl. no. 20/1997/804/1007, judgment [GC] of 25 May 1998.

<sup>26</sup> *Sidiropoulos and Others v. Greece*, appl. no. 57/1997/841/1047, judgment of 10 July 1998

<sup>27</sup> *Case of the United Macedonian Organisation Ilinden – Pirin and others v. Bulgaria*, appl. no. 59489/00, judgment of 20 January 2006.

<sup>28</sup> This is what distinguishes the above-mentioned Turkish cases from the *Refah Partisi* case (*Refah Partisi (the Welfare Party) and Others v. Turkey*), appl. nos. [41340/98](#), [41342/98](#), [41343/98](#) and [41344/98](#) [GC] judgment of 13 February 2003. In this case, the Court accepted the prohibition of the (Islamist) Welfare Party, whose programme advocated the introduction of Sharia principles that the Court found incompatible with core democratic values.

### 3. Some cases of alleged improper prosecution of politicians for political speech

#### 3.1. Spain

42. In Spain, criminal prosecutions target the President and members of the ousted autonomous Catalan government, the Speaker and three members of the parliament's presiding board, dozens of senior government officials and over 700 mayors.<sup>29</sup> These prosecutions must be seen in the context of the events around the referendum on self-determination held on 1 October 2017. The referendum was held on the basis of two laws adopted by the Catalan parliament in September<sup>30</sup>. Both laws were challenged in the Spanish Constitutional Court (CC), which rapidly suspended their application and later declared them unconstitutional. The CC's decisions were notified to the members of the Catalan government, 60 of its senior officials and all mayors of Catalonia. They were personally reminded of their duty not to take any action contrary to the suspension. The Spanish government also took control of the finances of Catalonia and placed the Catalan police force (the "Mossos d'Escquadra") under the control of the Spanish Ministry of the Interior. Nevertheless, the referendum went ahead, despite attempts by the national police to block it. It was accompanied by mass demonstrations with several hundreds of thousands of participants. These were largely peaceful, except for some minor incidents. On 10 October 2017, a plenary session of the Catalan parliament was convened, following the suspension by the CC of a session convened for the previous day.<sup>31</sup> At this session, President Puigdemont stated that the mandate from the people was that Catalonia become an independent state, as a republic. He continued "with the same solemnity" that the Parliament would suspend the effects of the declaration of independence so that in the coming weeks we may engage in a dialogue, without which it is impossible to reach a negotiated solution.<sup>32</sup> Following this declaration, the Spanish Government launched the process leading to the application of Article 155 of the Spanish Constitution. Based on this Article, on 27 October 2017, the autonomous government of Catalonia was dismissed and substituted by bodies set up by the central government. These called for new parliamentary elections in Catalonia, which were held 21 December 2017, and again resulted in a pro-independence majority.<sup>33</sup>

43. Prosecutions for crimes carrying up to 30 years in prison were launched against top Catalan politicians. Many of them are kept in pretrial detention, for about two years to date. Others, including the former President, Mr Carles Puigdemont, have left Spain. Their extradition, requested by the Spanish authorities, was refused in all cases, on different grounds.<sup>34</sup> The charges against them - rebellion, sedition and organized criminal activity are considered by many commentators as grossly disproportionate.

44. The critics point out that the organization of an illegal referendum was explicitly decriminalized by Organic Law 2/2005. The preamble of this law states that "criminal law is governed by the principles of minimal intervention and proportionality, as stated by the Constitutional Court, which has reiterated that it cannot deprive a person of their right to freedom unless it is absolutely indispensable. In our legal framework there are means for control of legality other than criminal law." These "means for control of legality" include the sharp tools put at the disposal of the Spanish Constitutional Court to ensure execution of its own decisions, including the suspension of laws pending the completion of their review on the merits, and heavy fines and other sanctions inflicted on non-compliant officials.<sup>35</sup>

45. It is now argued that the organizers of the referendum of 1 October 2017 could not foresee that after their explicit decriminalization, the organization of an unconstitutional referendum would be subsumed under other, even harsher provisions of the criminal code. The crime of rebellion, in particular, has always been interpreted as requiring the use of violence - violence that can be attributed to the person accused of the crime

<sup>29</sup> See *El Defensor de les Persones* (Catalan Ombudsman), "The violation of fundamental rights and freedoms arising from the criminal justice reaction following October 1, and application of the Article 155 of the Spanish Constitution", May 2018 (henceforth: Catalan Ombudsman report), at page 13.

<sup>30</sup> Laws 19/2017 of 6 September 2017 and 20/2017 of 8 September 2017.

<sup>31</sup> A complaint against this suspension by 76 members of the Catalan parliament was rejected as inadmissible by the European Court of Human Rights (*Maria Carmen Forcadell I Lluís and others v. Spain*, appl. no. 75147/17, decision of 7 May 2019).

<sup>32</sup> See Catalan Ombudsman report (note 29), page 9.

<sup>33</sup> 70 of 135 seats, with a record participation of 79%.

<sup>34</sup> See the report adopted by the Committee on Legal Affairs and Human Rights on 25 June 2019 on "Interpol reform and extradition: creating trust by fighting abuse" (Rapporteur: Aleksander Pocij, Poland/EPP), paragraphs 59-63.

<sup>35</sup> The Venice Commission had discouraged Spain from endowing the Constitutional Court with the responsibility to enforce its own decisions by applying severe pecuniary and institutional sanctions without the necessary procedural guarantees. "Attributing the overall and direct responsibility for the execution of the Constitutional Court's decision to the Court itself should be reconsidered, in order to promote the perception that the Constitutional Court only acts as a neutral arbiter, as judge of the laws." (Spain, Opinion on the Law of 16 October 2015 amending the Organic Law no. 2/1979 on the Constitutional Court, adopted at the 110<sup>th</sup> Plenary Session (10-11 March 2017, Opinion no. 827/1917, paragraph 71).



of rebellion.<sup>36</sup> The prosecution of the politicians who organized the referendum of 1 October 2017 for the crime of rebellion can hardly be based on actual violence. As many observers noted, the mass demonstrations surrounding the referendum were peaceful. The widely shown video footage of these demonstrations are indeed impressive. The rare violent incidents that were nevertheless observed are attributed by supporters of the Catalan politicians to the police, who occasionally used baton charges, tear gas and rubber bullets to hinder the voting and cordon off polling stations.<sup>37</sup> Some defensive action by demonstrators for self-protection is seen as inevitable and could not be blamed on the organisers of the referendum. Having apparently understood this<sup>38</sup>, the Spanish prosecution and Supreme Court reportedly adopted a novel interpretation of the violence requirement for the crime of rebellion dubbed “violence without violence” or “bloodless violence”<sup>39</sup>. Under this interpretation, the sheer number of demonstrators mobilized by the organizers constitutes an inherent threat of violence, designed to intimidate and overwhelm the authorities. According to the Supreme Court<sup>40</sup>, there was violence from the moment in which the president and government acted by intending to declare independence, placing themselves outside the rule of law, and doing so “from the exercise of power, which explains why they did not need to use violence to attack it at that time as a step prior to the execution of the plan”. The Supreme Court even likened the actions of the Catalan politicians to the behavior of putschist officers such as those bursting into parliament armed with pistols on 23 February 1981. The Catalan Ombudsman finds this comparison “disproportionate, distorted, unfair and alarming”.

46. In my view, such a wide interpretation of the notion of violence, in conjunction with the earlier explicit decriminalization of the organization of an illegal referendum, creates an issue of “*nullum crimen, nulla poena sine lege*”. Such an unpredictable interpretation of the law might violate Article 7 of the Convention. Also, an interpretation which would penalize the organization of peaceful demonstrations on the sole ground of the large number of participants could violate the freedom of assembly protected by Article 11. The German court refusing the extradition of Carles Puigdemont based its decision precisely on the fact that the Spanish authorities did not produce any evidence of violence that could be attributed to him.<sup>41</sup> Other criminal charges based on the same facts include the crimes of sedition, belonging to a criminal organization, terrorism and embezzlement of public funds. In addition, the CC has imposed heavy pecuniary and other sanctions on numerous Catalan officials. Their appropriateness has also been challenged on many occasions.<sup>42</sup>

47. Keeping in mind the criteria of Resolution 1900 on the definition of political prisoners (see above point 2.1.1.), allegations of defense rights violations, unfair imposition of pre-trial detention and doubts on the neutrality of the courts dealing with the cases of the Catalan politicians may also be relevant. The trials were held very much in public, having been televised in full. This is an impressive amount of transparency. But it is alleged that some investigated individuals had to testify without a clear idea of the offenses for which there were being investigated. Reportedly, the members of the Catalan government were summoned less than 48 hours before their hearing in court on pretrial detention. The individuals accused of rebellion were served their bill of indictment (68 pages) only two hours before their detention hearing. Carles Puigdemont’s lawyer was reportedly denied access to the case file until his client’s arrest in Germany.<sup>43</sup> Regarding judicial impartiality, doubts have been raised due to the direct contacts which allegedly took place between the judges of the CC and members of the national government. Also, the President of the CC publicly stated that the judiciary’s mission was to guarantee the unity of Spain. This has been understood as openly taking a stand against the political positions defended by the indicted Catalan leaders, whose court cases were still pending.<sup>44</sup>

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<sup>36</sup> See for example Catalan Ombudsman report (note 29), pages 29-31 and footnote 51, with references to the legislative history of the current Article 472 (rebellion).

<sup>37</sup> See Amnesty International, “Spain: Excessive use of force by National Police and Civil Guard in Catalonia”, 3 October 2017.

<sup>38</sup> Reportedly, the bill of indictment dated 4 April 2018 of the High Court of Spain (Audiencia Nacional) categorically stated that there was no violence in the events of September and of 1 October. Similarly, the Supreme Court, in its interlocutory order of 17 April confirming the bill of indictment of 21 March, admitted as a possibility “the scenario in which the element of violence was not sufficiently proven in the specific case.”

<sup>39</sup> See Catalan Ombudsman report (note 29), page 31.

<sup>40</sup> Cited in the Catalan Ombudsman report (note 29), page 31.

<sup>41</sup> See press release of 12 July 2018 of the Oberlandesgericht Schleswig Holstein, “Matter Carles Puigdemont: The extradition for the accusation of embezzlement of public funds is admissible; an extradition for the accusation of rebellion is inadmissible. Carles Puigdemont remains free”, available at: <https://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201806Puigdemontenglisch.html>

<sup>42</sup> See for example Jean-Paul Costa and others, “Judicial controls in the context of the 1 October referendum”, Catalonia Human Rights Review, pages 40-45.

<sup>43</sup> See Catalan Ombudsman report (note 29), page 26-27.

<sup>44</sup> See Catalan Ombudsman report (note 29), page 37 and footnote 67.

48. Numerous trial observers have periodically published detailed assessments of the fairness of the proceedings against the Catalan leaders.<sup>45</sup> I cannot go into any detail, at least at this stage. Criticisms made include the long hours the defendants had to stay in the courtroom, purportedly biased and distorting statements by the prosecutors and the influence exercised on access to the courtroom by supporters of the far-right VOX party, which was even granted procedural status as “civil party”. The observers also acknowledged that some of the problems raised by them were solved.

49. The Court’s case law on the demands of Article 6 (3) (a) (right to a fair trial) is clear: the accused must be made aware “promptly” and “in detail” of the accusation, including the facts on which it is based and their legal qualification.<sup>46</sup> The Court has also upheld the defendant’s right to adequate time and facilities for the preparation of their defense.<sup>47</sup> Regarding independence and impartiality, the Court has developed standards requiring the absence of subordination of judges to any type of executive authority and the absence of prejudice or bias. Whilst the personal impartiality of the judge is presumed, an objective element requires that a given judge in a given case offers enough guarantees to exclude any legitimate doubt in this respect.<sup>48</sup>

50. Numerous international, NGO’s and parliamentarians from many countries have denounced the arrests, detention and prosecution of the former Catalan government members.<sup>49</sup> For lack of space, I shall just refer to two particularly important findings, by the UN Working Group on Arbitrary Detentions (UNWGAD). The UNWGAD, at the end of May 2019<sup>50</sup>, determined that the detention of Oriol Junqueras, Jordi Sanchez and Jordi Cuixart was “arbitrary” within the meaning of the Universal Declaration of Human Rights (Article 3) and the International Covenant on Civil and Political Rights (Article 9). Despite an unusually sharp rebuke by the Spanish government, a second decision in July came to the same conclusion for three more Catalan politicians (Raül Romeva, Dolors Bassa and Joaquim Forn). Two more cases are still pending before the UNWGAD.

### 3.2. Turkey

#### 3.2.1. The mass *ad hoc* lifting of parliamentary immunity in 2016

51. Presently, 10 members of the Grand National Assembly are in detention, including the two Co-Chairs of the opposition HDP, Mr Selahattin Demirtas and Ms Figen Yüksekdağ. In a “one shot”, *ad hominem* procedure involving a temporary change of the Turkish Constitution, the parliamentary immunity of 139 parliamentarians was lifted *en bloc*, automatically, on the sole basis of requests (“dossiers”) filed by the prosecution within a given deadline. The usual procedure for lifting immunity, involving procedural safeguards and the right of the parliamentarians whose immunity shall be lifted to defend themselves before their peers, was suspended temporarily for these cases only. Both the Venice Commission<sup>51</sup> and the Assembly itself<sup>52</sup> strongly criticized this move, which deprived many parliamentarians, a vast majority of them members of opposition parties, of the opportunity to participate in the fundamental debate on the constitutional changes replacing the parliamentary by a presidential system of government. Whilst the lifting of immunity by itself did not prevent parliamentarians from exercising their mandates, it paved the way for the detention of a significant number of them and had a severe chilling effect on freedom of expression in parliament. An application concerning the suspension of immunity is also pending before the European Court of Human Rights (see para. \*). I will not go into any detail on this point. The Assembly’s position and that of the Venice Commission are quite clear, and the Court will reach its own conclusions in due course, in full independence.

<sup>45</sup> For example, International Trial Watch, Catalan Referendum Case, press release of 18 February 2019, Assessments of 1-0 Trial (Week 1), etc. (weekly); Briefings of the Generalitat de Catalunya (Government of Catalonia), starting on 13 February 2019

<sup>46</sup> For example, *Mattoccia v. Italy*, appl. no. 23969/94, judgment of 25 July 2000, paragraphs 58-59.

<sup>47</sup> For example, *Sadak and others v. Turkey*, appl. no. [29900/96](#), [29901/96](#), [29902/96](#) and [29903/96](#), judgment of 17 July 2001, paragraphs 57-58.

<sup>48</sup> See *Piersack v. Belgium*, appl. no. 8692/79, judgment of 1 October 1982, paragraph 30.

<sup>49</sup> I have received a massive “Compilation of Positionings by International Organisations regarding Catalonia’s Human Rights Situation before and after the Referendum of 1 October 2017”, dated 23 January 2019. Since then, many more such statements have reached me, most highly critical of the treatment of the Catalan politicians in question. Most recently, 52 French MPs voiced their concerns in an opinion article in the *Journal du Dimanche* on 1 September 2019.

<sup>50</sup> [https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A\\_HRC\\_WGAD\\_2019\\_6.pdf](https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_6.pdf)

<sup>51</sup> See Venice Commission Opinion (note 1, above).

<sup>52</sup> [Resolution 2156 \(2017\)](#) on “Functioning of democratic institutions in Turkey”, paras. 10 and 11.

### 3.2.2. Political speech as ground for criminal prosecution of politicians in Turkey?

52. It is alleged<sup>53</sup> that criminal law has been used in an arbitrary way in order to silence dissenting voices over many years in Turkey, and especially since July 2016 (the attempted military coup).

53. The Venice Commission noted in its Opinion on the mass lifting of parliamentary immunity<sup>54</sup>

“that Turkey belongs to the countries where the European Court of Human Rights has most often found a violation of the right to freedom of expression. At the moment, 104 cases (Incal group of cases) of violation of the freedom of expression with respect mainly to propaganda for terrorism are pending for execution in the Committee of Ministers of the Council of Europe. To these cases further cases on insulting the President and other public officials have to be added.”

54. The criminal law provisions used to prosecute politicians for political speech include such offenses under Turkish law as “praising a crime and a criminal”, “inciting people to hatred and enmity”, “insulting a public officer”, “terror propaganda”, “insulting the President” or even membership in and/or aiding and abetting a terrorist organization. The question arises whether these provisions are sufficiently clear and foreseeable in order not to violate Article 7 of the ECHR (no punishment without law). Human Rights Watch has examined the indictments against several opposition MPs for terrorism-related offenses. In its view “evidence cited in the indictments consists mainly of political speeches rather than any conduct that could reasonably support charges of membership of an armed organization or separatism.”

55. The General Preamble of the constitutional amendment enabling the above-mentioned (chapter 3.2.1.) mass lifting of parliamentary immunity states quite openly that the intent of the amendment is to enable prosecutions of politicians in respect of forms of expression, i.e. of political speech: according to the Preamble, the purpose of the amendment is to address public indignation about “statements of certain deputies consisting of emotional and moral support to terrorism, the de facto support and assistance of certain deputies to terrorists and the calls for violence by certain deputies.”

56. Here are some examples of parliamentarians allegedly prosecuted or even convicted for terrorism-related offenses. They deserve to be examined more closely in my further work on this topic.

57. The charge brought against Ms Nihat Akdogan of “making the propaganda of a terrorist organization” is based on a parliamentary question she asked the Minister of the Interior about the whereabouts of allegedly smuggled property seized from shop owners by the police in 2015, in her constituency in south-eastern Anatolia with a majority Kurdish population. The same charge against Mr Selahattin Demirtas and Ms Idris Baluken are reportedly based on simply using the words “Kurds” and “Kurdistan”. According to HRW, the evidence against Mr Demirtas consists mainly of his speeches, “none of the information seems to point to anything approaching criminal activity”<sup>55</sup> The conviction of Ms Figen Yüksedag Senoglu for “spreading terrorist propaganda” was based on the fact that she attended a militant’s funeral at which some (other) attendees shouted slogans.

58. Another feature of the alleged intimidation campaign against opposition politicians is the widespread use of pre-trial detention.<sup>56</sup> Pre-trial detention must generally be used as means of last resort, on strictly interpreted ground such as risk of absconding, recidivism or tampering with evidence. In the case of parliamentarians, the careful balancing required by the Court must also include the fact that detention prevents them from debating, campaigning or voting in parliament and generally engaging in public debate in the exercise of their democratic mandate. Abusive pre-trial detention may therefore raise not only an issue under Article 5 of the ECHR (right to liberty and security), but also under Articles 10 (freedom of speech) and 11 (freedom of assembly and association).<sup>57</sup> The Court will also need to examine allegations that the detentions of parliamentarians, especially those since July 2016, are motivated by political considerations, such as weakening the opposition in view of the wide-ranging constitutional changes (switch to a presidential system)

<sup>53</sup> See for example Third Party Intervention Submissions on Behalf of Article 19 and Human Rights Watch, in the European Court of Human Rights in the case of Selahattin Demirtas and others v. Turkey, pages 1 and 8 pp

<sup>54</sup> Venice Commission Opinion (note 1, above), para. 51.

<sup>55</sup> See Third Party Intervention (note 52 above), at footnote 28.

<sup>56</sup> On the topic of abuse of pretrial detention, including in Turkey, see the report by Pedro Agramunt on “Abuse of pretrial detention in States Parties to the European Convention of Human Rights, [doc. 13863](#) dated 7 September 2015.

<sup>57</sup> Interestingly, a court in Ankara has recently (on 3 September 2019) ordered the conditional release of Selahattin Demirtas from pre-trial detention in a pending criminal case against him, just ahead of the hearing before the European Court of Human Rights scheduled for 18 September 2019. But his lawyers pointed out that this decision would not lead to Mr Demirtas’ actual release, as he is also still serving a prison term resulting from conviction in another case (see “Turkey: Curt orders pro-Kurdish leader Demirtas released”, DW, 3 September 2019.

in early 2017 and the votes on extensions of the state of emergency declared after the coup. This would point to a violation also of Article 18 in conjunction with the afore-mentioned provisions. The interference with the elective mandates of parliamentarians and candidates may also constitute a violation of the right to free elections (Article 3 of the [first] Protocol to the Convention). Under Assembly Resolution 1900, politicians detained in violation of these provisions would be considered as “political prisoners”.

59. The Turkish politicians’ cases have also attracted a large amount of attention at the international level. The Inter-Parliamentary Union (IPU)’s Governing Council adopted a Decision in 2019 concerning 61 parliamentarians.<sup>58</sup> The “summary of the case” recalls that over 600 criminal and terrorism charges have been brought against the parliamentarians of the People’s Democratic Party (HDP) since 15 December 2015, when the Constitution was amended to allow the “wholesale lifting of parliamentary immunity.” (see point 3.2.1. above). The IPU Decision is highly critical, noting

“with deep concern that the information received so far by the Committee, particularly court decisions, confirms to a large extent that HDP parliamentarians have been charged and convicted primarily for making critical public statements, issuing tweets, participating, organizing or calling for rallies and protests, and political activities in furtherance of their parliamentary duties and their political party programme, such as mediating between the PKK and the Turkish Government as part of the peace process between 2013, publicly advocating political autonomy, and criticizing the policies of President Erdogan in relation to the current conflict in south-eastern Turkey (including denouncing crimes committed by the Turkish security forces in that contact).”<sup>59</sup>

60. The IPU trial observers also noted numerous procedural (fair trial) issues and complained about not having been given access to imprisoned MPs as requested.

#### **4. Preliminary conclusions and proposals for fact-finding activities**

##### *4.1. Preliminary conclusions*

61. We have seen that the European Convention on Human Rights foresees strong protections for freedom of speech of politicians, not only in their own, personal interest, but for the sake of the functioning of democracy. In a democracy, politicians are permitted to argue and campaign even in favour of changes that would violate the existing constitution – provided these changes would not violate the principles of democracy, the rule of law and the protection of human rights, and provided the means advocated to achieve these changes are democratic and non-violent. The Strasbourg Court has recognized that hate speech and calls for violence are not covered by freedom of speech. In order to protect democratic debate, it has – rightly, in my view - interpreted the limits of free speech which are “necessary in a democratic society” quite narrowly.

62. We have also seen that in the two countries mentioned in the motion for a resolution underlying my mandate as Rapporteur, these protections have allegedly been violated in several high-profile cases.

63. In Spain, the authorities argue that the politicians in question are not prosecuted for what they have said, but for what they have done –organizing an illegal referendum on independence and generating political pressure by organizing mass demonstrations, by abusing their position of power as members of the regional government. It is true that the mere expression of pro-independence views is not a ground for criminal prosecution in Spain. Many Catalan politicians who publicly advocate these views and even fly the pro-independence flag in front of public buildings are not prosecuted. Spain is a living democracy with a culture of free and open public debate. The question remains for which facts exactly the former members of the Catalan government are being prosecuted – given that the organization of an illegal referendum was explicitly decriminalized not long ago, and that participating in and even organizing peaceful demonstrations constitutes the exercise of a fundamental right. Can the exercise of a constitutional right constitute a crime, one that is punished by long prison sentences such as those requested against the Catalan politicians in Spain?

64. In Turkey, it seems to be more explicit that the politicians in question are being prosecuted for what they said, rather than for something they did. Here, the key question is whether the provisions criminalizing certain types of political speech are sufficiently clear, foreseeable and narrowly drafted in light of the requirements of the Convention, as interpreted by the Court.

<sup>58</sup> IPU, Decision adopted by consensus by the IPU Governing Council at its 204th session (Doha, 10 April 2019, available at: [https://www.ipu.org/sites/default/files/documents/2019\\_-\\_159\\_public\\_-\\_decisions\\_governing\\_council-e.pdf](https://www.ipu.org/sites/default/files/documents/2019_-_159_public_-_decisions_governing_council-e.pdf)

<sup>59</sup> IPU Decision (note 56), B. 5. (page 4).

65. Whilst many of the cases in question are pending before the Strasbourg Court, or are likely to be the subject of applications in due course, I do not intend to “pre-empt” the Court’s future judgments by taking position in favour or against the appropriateness of the prosecution or conviction in the one or other individual case. But I will not hesitate to sum up the general principles the Assembly might wish to reaffirm and point out systemic problems for which the cases in question can be referred to as examples, as has been the practice of the Assembly for many years.

#### 4.2. *Proposals for fact-finding activities*

66. In order to prepare my final report, I should like to propose the following fact-finding activities.

66.1. To call for an Opinion of the Venice Commission to clarify in which circumstances, if any, the European Convention on Human Rights allows the criminalization of calls by politicians or representatives of civil society for radical constitutional changes by peaceful means - including calls for independence or far-reaching autonomy for parts of the national territory.

66.2. To address a request for information to all participant parliamentary research services through the European Centre for Parliamentary Research and Documentation (ECPRD), asking whether the laws of their countries criminalize calls for constitutional change by peaceful means; and whether this also applies to calls for independence or far-reaching autonomy for parts of the national territory?

66.3. To carry out a fact-finding visit to Spain (Madrid and Barcelona).

67. I have refrained from also asking for a visit to Turkey (the second country mentioned in the underlying motion for a resolution), because Turkey is currently subject to a monitoring procedure, which involves fact-finding visits (the first one being foreseen before the end of this year). As member (and Vice-Chair) of the Monitoring Committee I trust the information the co-rapporteurs will collect will be made available to me in due course.

68. Last not but least, I invite colleagues to present relevant cases from other states than the two mentioned in the motion for a resolution (Spain and Turkey). I will be happy to take them into account in the preparation of the final report.