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Committee on Legal Affairs and Human Rights

Should politicians be prosecuted for statements made in the exercise of their mandate?: follow-up of [Resolution 2381 \(2021\)](#)

Follow-up report on the implementation of [Resolution 2381 \(2021\)](#)

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

1. Introduction

1. On 21 June 2021, the Assembly adopted [Resolution 2381 \(2021\)](#) on “Should politicians be prosecuted for statements made in the exercise of their mandate?” Under Rule 50.1. of the Assembly’s Rules of Procedure, “A rapporteur shall remain in charge of the follow-up to his or her report for a term of one year after the adoption of the text by the Assembly.” The present report describes the progress that has been made in implementing [Resolution 2381](#) and the issues and concerns that remain unresolved.

2. Resolution 2381, as mandated by the underlying motion, referred to a number of high-profile cases in Türkiye and in Spain of politicians allegedly prosecuted for statements made in the exercise of their mandate. As explained in [Resolution 2381](#) and the underlying explanatory memorandum, this report does not cover the issue of whether Kurds or Catalans enjoy the right to self-determination or whether they should be granted greater autonomy or even independence.

3. The purpose of this follow-up report is only to assess whether, and to what extent Türkiye and Spain have implemented the Assembly’s recommendations addressed to both countries in [Resolution 2381](#). Whilst the resolution was adopted by the Assembly by a large majority,¹ the recommendations it addresses to the governments concerned are not binding per se – except where they re-state obligations of the states concerned under international law, for example the European Convention on Human Rights (the Convention) as interpreted by the European Court of Human Rights (the Court).

4. In order to collect additional, up-to-date information, I organized a public hearing during the meeting of the Committee on Legal Affairs and Human Rights on 29 April 2022 in Strasbourg, with the following experts:

- Mr Riza Türmen, Spokesperson of the Executive Committee of the Human Rights Center of the Union of Turkish Bar Associations and former Turkish judge at the European Court of Human Rights and former Ambassador of Türkiye with the Council of Europe, and
- Mr Rafael Ribó, the Catalan Ombudsman, who has recently submitted a detailed report to the Catalan parliament about the implementation, in Spain, of the recommendations addressed to the Spanish authorities.

5. Although Turkish and Spanish Members were free to take the floor in the discussion following the experts’ statements, I had, in addition, offered to the two delegation chairs to each name an additional representative to represent the views of their delegations. The Spanish delegation nominated Mr Marc Lamuà (SOC), who was given the same speaking time as Mr Ribó.

* Document declassified by the Committee on 21 June 2022.

¹ 70 votes in favour, 28 against, 12 abstentions.

6. During my year as rapporteur for follow-up, I also received a large volume of information from civil society and through the media. Also, regarding Türkiye, my role as co-rapporteur for the Monitoring Committee has given me the opportunity to collect much information on the situation of opposition politicians in this country, including on the cases mentioned in my 2021 report. On 10 June 2022, I also received a letter from Mr Ahmet Yıldız, Chair of the Turkish delegation with the Assembly, explaining the Turkish authorities' position on the issues raised in [Resolution 2381 \(2021\)](#).

7. I intend to structure this follow-up report in such a way that I deal one by one with the Assembly's recommendations in [Resolution 2381](#), following the same order as in the resolution. I should like to stress from the outset that this order, Türkiye first and then Spain, also reflects the order of gravity of the problems regarding freedom of speech of politicians in the two countries. As stated in [Resolution 2381](#), "the Assembly recognizes that Spain is a living democracy, with a culture of free and open public debate, and that the mere expression of pro-independence views is not a ground for criminal prosecution." (para. 9) Mr Lamuà recalled during our hearing on 29 April 2022 that the expression of separatist views is not a crime in Spain and that pro-independence political parties are an intrinsic part of Spanish political life and are always met with respect, and are even represented in governments, both in Madrid and Barcelona. He answered with a clear "no" the question asked in the title of [Resolution 2381](#), whether politicians should be prosecuted for statements made in the exercise of their political mandate. But statements should not be confounded with actions and these need to be examined further.

8. I am aware that there are some persons who have argued that it was wrong to treat the problems of Türkiye and Spain in the same report. In this respect I agree that in Türkiye, the human rights situation in general and regarding the freedom of speech of politicians in particular is far worse than in Spain, as documented in the report underlying [Resolution 2381](#). As I could see for myself during the fact-finding visits to Türkiye I carried out as Monitoring co-rapporteur over the past year, the situation has not improved, perhaps to the contrary. But the fact that both countries are treated in the same report is first and foremost due to the underlying motion the Assembly sent to our committee for report, and which mentions only these two countries. More than once I invited committee Members to submit relevant cases from other countries, but I received none.

2. Recommendations addressed to the Turkish authorities

In [Resolution 2381 \(2021\)](#), paragraph 10.2., the Assembly invited the Turkish authorities to:

10.2.1 urgently release Mr Demirtaş, thereby implementing the European Court of Human Rights' judgment and the decision of the Committee of Ministers;

9. This was not done. Mr Türmen explained at our hearing how this case, along with that of Mr Kavala, a philanthropist and civil society activist (not a politician) has given rise to a stand-off between Türkiye and the Council of Europe, potentially threatening the very membership of Türkiye in our organisation. Both the Court of Human Rights and the Committee of Ministers have called for the immediate release of Mr Demirtaş, who has already spent six years in prison (Mr Kavala five years) without there being any reasonable suspicion of a crime. The Court therefore considers that the real purpose of their imprisonment is to silence them. In the Kavala case, the Committee of Ministers has already resorted to the rarely used² procedure under Article 46 paragraph 4 of the Convention, whose outcome may well be sanctions against the State Party formally found to be in violation of the duty to implement a judgment by the Court. As a matter of principle, and to avoid setting any precedent for tolerating the outright refusal to implement a judgment of the Court, I plead for the Assembly to call on the Committee of Ministers to stay firm. Such outright rejection of the binding nature of the Court's judgments,³ stipulated clearly in Article 46, must not be tolerated, or else the authority of the Convention system as a whole is undermined, as Mr Türmen explained.

² Before the *Demirtaş* case, the Committee of Ministers only used this procedure once, in the case of *Ilgar Mammadov v. Azerbaijan* (who ended up being released, as requested by the Court and the Committee of Ministers, before the Committee of Ministers had to decide on "measures to be taken" under Article 46 paragraph 5.

³ President Erdogan himself declared publicly that he considers that the Court's judgments are not binding on Türkiye (see for example "Erdogan rejects European court's 'non-binding' decision over Demirtaş", <https://www.hurriyetdailynews.com/european-court-urges-Türkiye-to-free-demirtas-139022>; <https://www.dw.com/en/turkish-court-rejects-european-rights-court-ruling-to-release-top-kurdish-politician/a-46532769>)

10.2.2 take urgent steps to restore the independence of the judiciary, in particular of the criminal courts, and refrain from making public allegations that could be interpreted as instructions to the courts by senior officials;

10. The actions of the Turkish courts dealing with the cases against *Demirtaş* and *Kavala* seem to show that they are more than ready to follow the public “instructions” by the President. Mr Türmen, too, expressed scepticism regarding the independence of the Turkish judiciary. This said, some judges, in particular in the Turkish Supreme Court and Constitutional Court, still resist this trend and try to preserve their independence. They deserve our respect and support.

10.2.3 refrain from systematically prosecuting politicians for terrorism-related offences whenever they refer to the Kurdish people or the Kurdish region as such or criticise the actions of the security forces in this region;

11. The numerous cases described in the report underlying [Resolution 2381](#) are not resolved, and many new cases have unfortunately been added to the list since last year.

12. In a recent, apparently more positive development concerning the case of Ms Aysel Tuğluk, the Turkish Constitutional Court found that the former parliamentarian’s right to freedom of assembly had been violated by her detention and “postponed” prosecution. In December 2010. She had participated in an open-air meeting in Mardin province where, allegedly, flags of the PKK and its leader Mr Öcalan were shown. Ms Tuğluk did not speak at the event. In December 2016, she was indicted for participation in an illegal meeting, and in November 2018, she was placed under “supervision” for three years. Ms Tuğluk’s appeal was rejected, whereupon she filed an individual complaint with the Turkish Constitutional Court, which, on 25 May 2022, found a violation of her right to peaceful assembly and ordered a re-trial.⁴ This decision of the Constitutional Court should be swiftly implemented to ensure that Ms Tuğluk’s re-trial will take place without further delay. Ms Tuğluk is in a critical health condition; her repeated requests for release on health grounds have been rejected.

13. But the lawyers for Ms Tuğluk consider this judgment by the Turkish Constitutional Court as mere “window dressing” and point out that her application to the Turkish Constitutional Court against her 10-year sentence for statements to the press and funerals she attended was recently rejected as inadmissible, together with an application by fellow HDP politician Sebahat Tuncel. Both had been arrested along with seven other Kurdish politicians in December 2016.⁵ The Constitutional Court declared that the arrest warrants against which they complained – related to the “Kobani case” based on demonstrations in favour of the defenders of the predominantly Kurdish Northern Syrian town of Kobani, which was then besieged by the “Islamic State” – could not infringe their right to liberty as they were at the time being held in pre-trial detention on the basis of another arrest warrant.⁶

14. In a communication dated 3 May 2022 by Feleknas Uca and Hisyar Özsoy, Spokespersons for the HDP’s Foreign Affairs Commission, I was informed of a new wave of mass detentions of HDP members and functionaries linked to the “Kobani case”, which I already mentioned in my June 2021 report. On 12 April 2022, the Ankara Chief Public Prosecutor’s Office issued arrest warrants against 91 persons, including HDP party executives, mayors, municipal employees and even former party members and administrators. At least 46 persons were detained in numerous cities, including Mersin, Adana, Istanbul, Diyarbakir and Urfa. The detainees include Fazil Türk, former co-Mayor of Mersin Akdeniz, Zeki Celik, former HDP accountant, Mustafa Bilgic, Adana provincial administrator, and Sahin Eroglu, Kayapinar district administrator (both HDP members). The arrested persons were accused of “being involved in the financial organization of the Kobani incidents” and “providing financial assistance to PKK members who were killed or injured during the incidents”. Some were also charged with being a “member of a terrorist organization”. These cases were launched 8 years after the alleged crimes. They are related to the above-mentioned protests against the siege of Kobani by ISIS. On 20 April 2022, arrest warrants against 44 more HDP members were issued. They were accused of transferring funds to the PKK. The persons detained include Mr Necati Piriñçioğlu, former co-mayor of Kayapinar and the former co-mayors of Ergani, Ramazan Kartalmis and Mervan Yildiz.

⁴ The Turkish delegation chair sent a letter with a note explaining this decision to the Monitoring co-rapporteurs on 30 May 2022.

⁵ Constitutional Court rules Aysel Tuğluk’s right to a fair trial violated, 25 May 2022, at: <https://m.bianet.org/english/law/262346-constitutional-court-rules-aysel-tugluk-s-right-to-a-fair-trial-violated>

⁶ See [Top court rejects 2 Kurdish politicians’ applications claiming unlawful arrest in Kobani case – Stockholm Center for Freedom \(stockholmcf.org\)](#).

15. The HDP representatives consider the Kobani case as politically motivated. A number of leading HDP members, including the former co-chairs Selahattin Demirtas and Figen Yüksedag and other former MPs, mayors and members of the HDP's Central Executive Board face aggravated life sentences on charges of "attempted overthrow of the government" and "murder of people killed in the Kobani incidents" – on the basis of the HDP politicians' support to the protests in solidarity with Kobani between 6 and 8 October 2014, against the brutal siege of Kobani by ISIS and the inaction of the Turkish government. According to the HDP, the vast majority of the 43 people killed during the protests were members or sympathizers of the HDP, and they were killed by firearms used by the Turkish police. In the Grand Chamber case of *Selahattin Demirtas v. Türkiye*,⁷ the European Court of Human Rights has already concluded that Mr Demirtas' calls for non-violent protests in solidarity with Kobani were covered by his freedom of expression. The HDP representatives point out numerous procedural violations and anomalies in the ongoing Kobani case, which they qualify as a "legal pantomime". They note that the trumped-up charges related to the Kobani protests are used by the Chief Prosecutor in the parallel "HDP closure case" to criminalize and ultimately prohibit the party as a whole.

16. I would tend to support the proposal that the Turkish parliament should set up an independent, inclusive investigation to shed light on the Kobani protests and identify the instigators of the violence that has undeniably taken place.

10.2.4 re-examine all cases of politicians prosecuted or even convicted because of statements they made in the exercise of their political mandate; and to terminate any prosecutions and release those detained on such grounds, provided the politicians' statements concerned did not call for or condone violence or the overthrow of democracy and human rights;

17. In a communication I received from the HDP's Foreign Relations Department on 1 June 2022, the general assessment of the developments since the adoption of [Resolution 2381 \(2021\)](#) was very pessimistic. There were "not any positive developments concerning the aforementioned issues" (i.e. those mentioned in [Resolution 2381](#)). The situation was indeed getting worse, both as regards the independence of the judiciary and democratic politics in general. The above-mentioned cases assessed in some detail by Mr Türmen speak for themselves.

18. New cases have indeed been added to those referred to in paragraph 10.2.4. of [Resolution 2381](#), including, most recently that of Ms Canan Kaftancıoğlu, successful leader of the main opposition party CHP's Istanbul branch. She was handed a prison sentence of just under five years for "insult to the President" and similar offenses, on the basis of tweets that were up to ten years old. Many observers, with whom I tend to agree, consider this case as revenge for Ms Kaftancıoğlu's important role in the opposition victory in the municipal election in Istanbul in 2019. Whilst she was released under supervision the same day, she is banned from active politics. Observers see this as part of President Erdoğan's campaign to "gut the opposition of able politicians".⁸

19. Nevertheless, one of the cases flagged in the 2021 report, was resolved. HDP MP Ömer Faruk Gergerlioğlu was released from prison and reinstated to his parliamentary seat in July 2021 after the Turkish Constitutional Court found that a conviction for a social media post resulting in his expulsion from parliament in March and imprisonment in April violated his rights.⁹

20. Freedom of speech of Turkish politicians is also affected by a recent decision of the Turkish TV regulator (RTÜK), which imposed fines on four TV stations for broadcasting a statement of the leading CHP politician Kılıçdaroğlu, who accused President Erdoğan and his close circle to prepare for fleeing Türkiye in case of defeat at next year's elections and to have transferred 1 billion lira (\$61.6 million) of public funds to the United States for this purpose.

10.2.5 uphold and strengthen the privileges and immunities of members of parliament in the face of politically motivated prosecutions, in particular when they concern statements made by politicians in the exercise of their political mandate;

⁷ Application no. 14305/17, judgment (GC) of 22.12.2020.

⁸ Balkan Insight, Hamdi Firat Buyuk, "Turkish opposition holds mass rally to demand justice, 21 May 2022", at: <https://balkaninsight.com/2022/05/21/turkish-opposition-holds-mass-rally-to-demand-justice/>

⁹ Human Rights Watch World Report 2022, Türkiye, available at: <https://www.hrw.org/world-report/2022/country-chapters/Türkiye>.

21. According to the most recent communication I received on this issue,¹⁰ the situation regarding privileges and immunities of MPs is worsening as well. On 2 March 2022, HDP deputy Ms. Semra Güzel's immunity was lifted and a legal case was launched against her. She may soon lose her parliamentary seat.

22. Mr Türmen, at our hearing on 29 April 2022, also recalled the still unresolved issue of the mass revocation of the immunities of 139 mainly opposition MPs in 2016, to which I referred in the 2021 report. Quoting judgments of the European Court of Human Rights in cases against Spain and Hungary,¹¹ he stressed the importance of the freedom of speech of politicians, which must be protected by parliamentary immunity (non-liability for political speech and inviolability of MPs, as normally guaranteed in Article 83 of the Turkish constitution). In line with the Venice Commission's Opinion on this issue, Mr Türmen explained that the ad hoc constitutional amendment enabling the mass withdrawal of parliamentary immunity violated the MPs' freedom of speech (as confirmed by the Strasbourg Court in the Demirtaş judgment) and effectively disenfranchised millions of Turkish voters.

23. The Strasbourg Court found in several rulings that the 2016 lifting of MPs immunity had violated their freedom of expression, as in the cases of former PACE member Filiz Kerestecioğlu Demir¹² and former HDP leader Selahattin Demirtaş,¹³ whose immediate release the Court demanded at the end of 2020, and forty other HDP MPs.¹⁴

10.2.6 recognise as elected the six mayoral candidates who received the highest number of votes at the local elections of 31 March 2019 but have been denied the mayoral mandate, and reinstate the three mayors who were suspended by the decision of the Supreme Election Council of 11 April 2019, or implement an alternative solution which respects the will of the voters, as recommended by the European Commission for Democracy through Law (Venice Commission) in its opinion "Türkiye – The replacement of elected candidates and mayors" adopted on 18 June 2020 and in line with Assembly Resolution 2347 (2020) "New crackdown on political opposition and civil dissent in Türkiye: urgent need to safeguard Council of Europe standards";

24. Mr Türmen, during our hearing on 29 April 2022, noted that altogether 47 elected mayors were removed from office in south-eastern Türkiye and replaced by unelected persons without even allowing the municipal councils to elect another mayor themselves. He noted that millions of Turkish voters were thereby disenfranchised, in violation of the fundamental rules of local democracy.

10.2.7 refrain from discriminating against political opponents when deciding on early releases from detention prompted by the need to reduce prison overcrowding due to the Covid-19 pandemic;

25. Even before the adoption of my report, I called on both Spain and Türkiye to include politicians in early prison releases prompted by Coronavirus.¹⁵ The Turkish parliament passed an early parole law on 14 April 2020 to reduce the prison population in view of the pandemic. But the law excluded all those convicted under Türkiye's broadly worded counter-terrorism laws. As feared, the application of this law excluded precisely the non-violent and often elderly (and thus particularly vulnerable) politicians, lawyers, academics etc. convicted under these laws. In a detailed report published on 2 May 2021, the NGO "Stockholm Center for Freedom" described precisely the type of discrimination the Assembly warned against in its resolution.¹⁶

10.2.8 promote a culture of open debate in the political sphere, on all issues, including sensitive ones, without the use or threat of criminal sanctions against politicians who are peacefully exercising their political mandates and to treat even fundamental opposition as a necessary and welcome part of a living democracy;

26. In the beginning run-up to the next general (presidential and parliamentary) elections in June 2023, strong rhetoric and accusations by President Erdogan and many of his supporters in the AK Party seem to

¹⁰ See above, para. 17;

¹¹ *Castells v. Spain*, Application no. [11798/85](#) judgment of 23 April 1992; *Karacsony and Others v. Hungary*, Application no. 42461/13, judgment (GC) of 17.5.2016.

¹² *Kerestecioğlu Demir c. Turquie*, no 68136/16, § 31, 4 May 2021.

¹³ *Selahattin Demirtaş v. Turquie* (no 2) ([GC], Application no [14305/17](#), 22 December 2020.

¹⁴ *Encu c. Turquie* Application no [56543/16](#) and 39 other applications (in French only).

¹⁵ COVID-19: Rapporteur calls on Spain and Türkiye to include politicians in early prison releases prompted by Coronavirus, 2 April 2020, at: <https://pace.coe.int/en/news/7837>.

¹⁶ "Left behind to die: COVID-19 in Turkish prisons and discrimination against political prisoners", at: <https://stockholmcf.org/left-behind-to-die-covid-19-in-turkish-prisons-and-discrimination-against-political-prisoners/>; see also Amnesty International, Urgent Actin 31 March 2020, Prisoners' release law must not discriminate, at: <https://www.amnesty.org.uk/files/2020-04/UA04320.pdf?VersionId=FZFcvDn9CVfrG2xqkhlqmW7j1D0qefOF>.

target a broad range of opposition, not only politicians who are fundamentally opposed to the existing system of government or who favour greater autonomy for the regions with predominantly Kurdish population. The excessively wide definition of the notion of “terrorism” or “support for terrorism”, which the Assembly has condemned before,¹⁷ turns any criticism of current government policies potentially into a serious crime. Even criticism of the government’s economic and monetary policies, which have led to runaway inflation¹⁸ and the collapse of the Turkish Lira, has been termed “*economic terrorism*” by President Erdogan.¹⁹

10.2.9 sign and ratify the Framework Convention for the Protection of National Minorities (ETS No. 157) and co-operate with its monitoring mechanism;

27. This has not yet been done.²⁰

28. In sum, the Turkish authorities have failed to implement any of the recommendations addressed to them by the Assembly. The only positive element is the fact that the Turkish Constitutional Court has found violations of the freedom of speech and assembly of politicians in a small number of cases, though even these judgments have not really provided much relief to the persons concerned.

3. Recommendations addressed to the Spanish authorities

The Assembly invited the Spanish authorities to:

10.3.1 reform the criminal provisions on rebellion and sedition so that they cannot be interpreted in such a way as to invalidate the decriminalisation of the organisation of an illegal referendum, as intended by the legislature when it abolished this specific crime in 2005, or lead to disproportionate sanctions for non-violent transgressions;

29. While at the time of the adoption of [Resolution 2381 \(2021\)](#) the need to reform the criminal provisions on rebellion and sedition was widely recognized in Spanish politics, and a bill to reform the Penal Code in this respect was reportedly under preparation by the Spanish government, this topic has unfortunately not as yet been introduced in the legislative agenda. Mr Lamuà pointed out at our follow-up hearing on 29 April 2022 that since the pardoning of the nine politicians and civil society activists who had been convicted for sedition, nobody is currently imprisoned on the basis of these provisions. But the position of the Assembly that these provisions dating back to 1995 should be reformed in line with modern legal and democratic principles remains valid.

10.3.2 consider pardoning or otherwise releasing from prison the Catalan politicians convicted for their role in the organisation of the October 2017 unconstitutional referendum and the related peaceful mass demonstrations, and consider dropping extradition proceedings against Catalan politicians living abroad who are wanted on the same grounds;

30. The Catalan politicians convicted and sentenced to long prison terms for “sedition” for their role in the organization of the unconstitutional referendum in October 2017 were indeed pardoned by the Spanish government on Tuesday 22 June 2021, the very next day after the adoption of [Resolution 2381 \(2021\)](#) on 21 June 2021. I strongly welcome these pardons. The Spanish Prime Minister Pedro Sanchez, when announcing his decision, which has remained controversial in Spain, said that this decision “most closely represents the spirit of coexistence and harmony set out in the Spanish constitution” and called for a new “era of dialogue and understanding”.²¹ The beneficiaries of the pardons are: the former regional vice-president, Oriol Junqueras, the former regional government spokesperson, Jordi Turull; the former Catalan foreign affairs minister, Raül Romeva, territorial minister, Josep Rull, employment minister, Dolors Bassa, interior minister, Joaquim Forn, the former speaker of the Catalan parliament, Carme Forcadell, and two civil society leaders, Jordi Sánchez and Jordi Cuixart. However, those convicted remained banned from public office and the pardons were conditional on their recipients not committing any further serious crimes for the next 3-6 years.

¹⁷ See for example [Resolution 2347 \(2020\)](#).

¹⁸ 70% per annum in early May 2022, see: Türkiye’s inflation hits two-decade high of 70% – CNN (at: <https://edition.cnn.com/2022/05/05/economy/Türkiye-inflation-soars/index.html>).

¹⁹ “There are economic terrorists on social media”, Erdogan told a gathering of Turkish ambassadors at the presidential palace in Ankara, adding that the judiciary and financial authorities were taking action in response”, see <https://www.reuters.com/article/us-Türkiye-currency-security-idUSKBN1KY1R9>.

²⁰ Council of Europe Treaty Office website last accessed on 30 May 2022.

²¹ See “Spanish government pardons nine jailed Catalan leaders”, Guardian 22 June 2021.

31. Most recently, these (partial) pardons have been put into question. On 24 May 2022, the administrative disputes chamber of the Spanish Supreme Court agreed to consider appeals aimed at the reversal of the pardons filed by three political parties (Popular Party, Vox and Ciudadanos) and the NGO Catalan Civic Coexistence. The same chamber, but in a different composition, had previously denied the plaintiffs' standing to appeal the measures of clemency granted by the Spanish Government. The decision was taken by a majority of 3 to 2. In its [initial decision](#) in January 2022, the same chamber had considered that the plaintiffs lacked a legitimate interest, also by a majority of 3 to 2 votes. It has been pointed out that between the two decisions, two changes occurred in the composition of the chamber.²² Whilst a decision on the merits has not yet been made, it would be highly unusual and regrettable if the pardons, once announced and implemented by setting free the nine convicts, were to be cancelled. This shows that the reform of the sedition and rebellion provisions of the criminal code should not be delayed for too long.

32. Furthermore, the Spanish authorities have not yet dropped their extradition proceedings against Catalan politicians living abroad who are wanted on the same grounds. In the latest development, the European Court of Justice (ECJ) provisionally restored the parliamentary immunity of three Catalan MEPs, Mr Carles Puigdemont, Mr Antoni Comin and Ms Clara Ponsati, which the European Parliament had withdrawn from them in March 2021. The ECJ argued that the three politicians still ran a serious risk of arrest as long as the European Arrest Warrants launched against them by the Spanish judiciary are not withdrawn.

33. The relevant recommendations of the Assembly were resolutely rejected by two statements published after the adoption of [Resolution 2381 \(2021\)](#). In the first, dated 21 June 2021, the Spanish Ministry of Foreign Affairs considers that the Assembly does not respect the principle of separation of powers and recalls that the Government cannot interfere with the ongoing judicial proceedings, including the arrest warrants. In the second, dated 23 June 2021, the Permanent Commission of the General Council of the Judiciary also rejects the perceived interference of the Parliamentary Assembly with the independence of the Spanish judiciary. The statement stressed the unconstitutional character of the referendum and explained that in accordance with the rule of law and the equality of all citizens before the law, referred to by the Assembly itself in paragraph 10.3.7, all criminal behaviour must have judicial consequences.

34. In my view, the arrest warrants and extradition requests still do not make sense in light of the pardons granted to the nine Catalans already convicted on the same grounds on which the politicians living abroad are wanted. Their pursuit appears to clash with the "spirit of coexistence and harmony set out in the Spanish constitution" referred to by the Spanish Prime Minister when he announced last year's pardons.

10.3.3 drop the remaining prosecutions also of the lower-ranking officials involved in the 2017 unconstitutional referendum and refrain from sanctioning the successors of the imprisoned politicians for symbolic actions that merely express their solidarity with those in detention;

35. Two detailed reports that I recently received from the Catalan Ombudsman, Mr Rafael Ribo, and the President of "Omnium Cultural", Mr Xavier Antich, list a large number of mostly lower-ranking officials allegedly involved in the events surrounding the 2017 unconstitutional referendum that have either been convicted or whose cases are still pending. These include members of the Bureau or senior collaborators of the Catalan parliament who allowed the debates the Constitutional Court had forbidden to proceed (for example former Minister Meritxell Serret; the current Minister of Culture Natalia Garriga, then Director of the Department of the Vice-Presidency; and the Members of the Catalan parliament MM. Jové and Salvadó, for being involved in organising the demonstration on 1 October 2017).

36. The Catalan Ombudsman²³ points out that the bulk of the proceedings against "second-line" public officials have not been completed. Many are still under investigation. According to Omnium Cultural, more than 700 persons still face criminal charges directly related to the unconstitutional referendum of 1 October 2017.²⁴ From among the steady stream of criminal cases against protesters, a large part finally ended in acquittals or mild sentences.²⁵ Those convicted still have their sentences under review, though there is no politically

²² The reporting judge for the January 2022 ruling, Ángeles Huet was replaced by judge Inés Huerta, and the president of the chamber, judge Segundo Menéndez, who broke the tie in January in favour of rejection of the appeal, retired (see Nuria Casas, "Spanish Supreme Court decides to admit appeals against Catalan prisoner pardons -Change of court membership brings a change of decision, breaking de facto with current Spanish jurisprudence on pardons", *El Nacional.cat*, 24 May 2022.

²³ *Ibid.* page 16.

²⁴ Information for PACE [Resolution 2381 \(2021\)](#) follow-up, page 17.

²⁵ Omnium Cultural strongly criticises the tactics of the public prosecutor's office, which initially requests very severe penalties (between 4 and 9.5 years in prison) and then offers "deals" to the mostly young persons under investigation involving confessions of facts in return for suspended sentences under 2 years. Such "pacts of consent" created a chilling effect on the accused and their friends and relatives, which gradually obstructed the exercise of the right of assembly. This practice, still according to Omnium Cultural, was aided by the "principle of veracity" granted by public prosecutors to police

concerted action to petition for pardons in these cases too. The Ombudsman stresses that the entire police force of the Generalitat of Catalonia (police officers and those politically responsible) were acquitted, as were the members of the Electoral Commission of Catalonia (but for the latter, the prosecution's appeal is still pending). Another group of about 50 people, including a good number of mayors, is still being investigated. A particularly interesting case that is still pending – the so-called Voloh Case (before the Court of Instruction No. 1 of Barcelona) concerns the alleged involvement of the defendants in encouraging the participation of Russia in the Catalan independence process.²⁶ In the discussion in our committee on 29 April, Mr Hispan strongly condemned the attempt by Russia to undermine Spanish democracy by supporting the “coup d'état” of 1 October 2017.

37. In my view, if such potentially treasonous activities can indeed be proven, the Voloh case would be an example of a legitimate criminal case against certain supporters of the Catalan independence movement. I should also like to recall, in line with MM Lamua and Hispan's statements at the hearing on 29 April, that the mere expression of separatist views is not a criminal offense in Spain – contrary to Türkiye, as I must add. Even openly separatist political parties are allowed to legally exist and participate in elections.

10.3.4 ensure that the criminal provision on misappropriation of public funds is applied in such a way that liability arises only when actual, quantified losses to the State budget or assets can be established;

38. Both the Ombudsman's report and that by Omnium Cultural include a long list of cases before different tribunals in which officials involved in any way in the events surrounding the unconstitutional referendum were or are still being prosecuted for misappropriation of public funds. 34 persons who were high-ranking officials of the Generalitat between 2011 and 2017 received an order from the Court of Auditors on 20 April 2021 for “indications of accounting liability”. In July 2021, they were forced to put up a guarantee of € 5.4 million (crowd-funded), to avoid their personal assets being seized. For now, the only lawsuit being processed in court is against 11 former officials.²⁷ Four different cases against the former secretary general of the Public Diplomacy Council of Catalonia (also known as “Diplocat”)²⁸, Mr Albert Royo,²⁹ are still pending trial. He is faced with the demand for the reimbursement (from his personal assets), of most of “Diplocat”'s expenditures over the five years preceding the unconstitutional referendum. In addition, he may be given a long prison term for the alleged embezzlement of this expenditure. The “public diplomacy” activities of “Diplocat”, as described by Mr Royo, seem very similar to those of many other European regions (e.g. German Länder, which – contrary to “Diplocat” – even have representations abroad) and even of many municipalities. They were well known to the public and agreed and overseen by the Board and its Executive Committee and internal and external auditors. It is difficult for me to understand how the secretary general of this body can be required to personally reimburse its expenditures, let alone be prosecuted for the embezzlement of these expenditures.

39. The strangest case I have come across (in the Omnium Cultural report)³⁰ was one against four firefighters from Girona accused of abandoning their duties and embezzlement by sounding the sirens of their fire engines in front of the Guardia Civil barracks the day after the unconstitutional referendum, as an act of protest against the Guardia Civil's perceived violence against peaceful voters.

40. A key actor in the cases on misappropriation of public funds (or assets) is the Spanish Court of Accounts. This body, which is not part of the Spanish judiciary, has been the subject of much criticism for some time, due to the politicized appointments procedure of its councillors and accusations of nepotism and conflicts of

officers, in violation of the presumption of innocence (see Information for PACE [Resolution 2381](#) follow-up, pages 7 and 18).

²⁶ Ibid, page 18; shocking details of the Russian offer to Mr Puigdemont (which he ended up refusing) are revealed in “Fueling Secession, Promising Bitcoins, How a Russian Operator Urged Catalan Leaders to Break with Madrid”, OCCRP, 8 May 2022 (at: [Fueling Secession, Promising Bitcoins: How a Russian Operator Urged Catalan Leaders to Break With Madrid – OCCRP](#)).

²⁷ The former Presidents of the Generalitat, Carles Puigdemont and Artur Mas, the former vice-president Oriol Junqueras and eight former members of the Catalan Government: Dolors Bassa, Toni Comin, Neus Munté, Jordi Turull, Raül Romeva, Clara Ponsati, Lluís Puig and Francesc Homs (some of whom had been convicted of sedition and pardoned on 22 June 2021).

²⁸ A public-private partnership funded in part by the Catalan Generalitat and in part by private sponsors, engaged in “public diplomacy” activities such as networking with foreign elected officials and with potential investors, image cultivation etc., under the supervision of a board. Diplocat's 40-strong membership includes the Generalitat of Catalonia, the councils of all four provinces of Catalonia, the main trade unions, all Universities located in Catalonia, the leading banks and chambers of commerce and even FC Barcelona.

²⁹ Mr Royo sent me a detailed note explaining the background of the different proceedings pending against him, since 2017.

³⁰ «Information for PACE [resolution 2381](#) follow-up, page 13

interest. A proposal last year by Catalan parliamentarians for an amnesty law for the benefit of all those prosecuted and convicted before the Court of Auditors was considered as inadmissible on constitutional grounds and thus not even debated.

41. The report by Omnium Cultural points out that in addition to accusations of embezzlement against individuals, municipal bodies have also been targeted by related administrative and criminal lawsuits.³¹

10.3.5 refrain from requiring the detained Catalan politicians to disown their deeply held political opinions in exchange for a more favourable prison regime or a chance of pardon; they may however be required to pledge to pursue their political objectives without recourse to illegal means;

42. As confirmed by the Catalan Ombudsman's report, those convicted of sedition have been pardoned by the Spanish Government on 22 June 2021 and "are today living in freedom. In order to be granted a pardon, they did not have to give up their political convictions."³² The Ombudsman points out that the (obligatory but not binding) report by the Supreme Court issued before the pardons calling for "remorse" of the convicted persons for their actions, which were of a political nature, goes in the opposite direction.³³ But the Government did not follow this report and I am therefore pleased to state that recommendation 10.3.5. was fully implemented.

10.3.6 enter into an open, constructive dialogue with all political forces in Catalonia, including those opposing independence, in order to strengthen the quality of Spanish democracy through the authority of the rule of law, good governance and total respect of human rights, without recourse to criminal law, but in full respect of the constitutional order of Spain and reach a compromise that enables Spain, a strong European democracy, to settle political differences, including on sensitive issues;

43. Mr Lamuà stated at the hearing on 29 April 2022 that an open and constructive dialogue between the Spanish Government and the Generalitat of Catalonia had indeed begun. His party, the Socialist Party of Catalonia, had also proposed a round table with the participation of all political forces in the Catalan parliament, which the Catalan government has not taken up. The Prime Minister's statement announcing the pardons for the nine imprisoned Catalans clearly went in this direction. The Catalan Ombudsman also confirmed that a "round table" has been initiated between the governments of Spain and of the Generalitat of Catalonia. He criticised that this dialogue process is moving forward very slowly, with only two formal meetings so far, and it lacked a structure and clear planning. This negative assessment is shared by Omnium Cultural.³⁴

44. I prefer not to enter into the party-political background of the discussions held within the governing coalitions in Madrid and Barcelona and between the national and regional governments and the opposition parties. The media reaction to our above-mentioned hearing shows that the issue is still highly emotional and controversial, on both sides. The only comment I dare make as a neutral outsider is that it would indeed be desirable for Spain as a living European democracy, if political differences, including on sensitive issues, could be settled by way of compromise, without recourse to criminal law, but in full respect of the constitutional order – as recommended by the Assembly last June.

10.3.7 implement these recommendations according to the principles of the rule of law as defined by the Council of Europe, paying due attention to the principle of equality of all citizens before the law.

45. For the representatives of the Spanish delegation at our hearing on 29 April 2022, respect for the rule of law and equality of all citizens before the law implies first and foremost the execution of all judgments of the courts, including those of the Constitutional Court finding the 2017 referendum unconstitutional, thus placing outside the realm of the law all activities of Catalan officials aimed at enabling or in any way promoting this referendum. For the Spanish Government, the principle of the rule of law should take special account of the principles of the separation of powers, the independence of the judiciary and the principles of legality and equality before the law, as well as other principles highlighted by the Venice Commission.

³¹ Information for PACE [Resolution 2381](#) follow-up, page 13; these included over 300 complaints for not raising the Spanish flag, having approved motions against the monarchy or having decreed the municipality "free and sovereign Catalan territory". The prosecutor's office is also suing more than 100 municipalities for paying a membership fee to the AMI (Association of Municipalities for Independence).

³² Ibid, page 22

³³ See Omnium, "Information for PACE", page 14 with a detailed critique of the Supreme Court report.

³⁴ "Information for PACE", page 15;

46. The Catalan Ombudsman, referring to an earlier report of the Parliamentary Assembly endorsing the Venice Commission's "Rule of Law Checklist"³⁵ helpfully recalls the essential elements of the rule of law as defined by the Council of Europe, namely: (1) legality, including a transparent, accountable and democratic law-making process, (2) legal certainty, (3) the prohibition of arbitrariness, (4) access to justice before independent and impartial tribunals, including for the review of administrative proceedings, (5) respect for human rights and (6) equality and non-discrimination before the law. He further recalls that the Assembly has warned against a formalistic interpretation of the rule of law.³⁶

47. Having grown up in the former Soviet Union and having observed the nefarious effects of the then prevailing formalistic view of the rule of law (also known as "dictatorship of the laws"), I strongly support the Assembly's substantive and value-based approach to the rule of law, based on the Venice Commission's "checklist". I do not know the Spanish judiciary well enough to agree or disagree with the Ombudsman's observation that the Spanish judiciary has taken a more formalistic view of the rule of law that was based primarily on the duty which the Constitution placed on the judges to protect the "undissolvable unity of the Spanish Nation", together with all other powers of the State.³⁷

48. I much prefer to believe that Spain will be able to continue moving away from the "crisis mode", which led to the excessively harsh punishments imposed on the nine Catalan leaders and the over-zealous prosecution of their successor and of hundreds of lower-ranking officials and civil society activists. The pardons of 22 June 2022 and the acquittals of many other Catalan officials and demonstrators show that the movement is going in the right direction. It would appear that the so-called "Catalangate" scandal surrounding the use of the "Pegasus" espionage software against numerous Catalan politicians and civil society activists still pertains to the "crisis mode" period in the run-up to the unconstitutional referendum in 2017. In my view, a proper investigation of the revelations by the Toronto-based "Citizen Lab" by parliament would help restore trust in the Spanish institutions, also in Catalonia. It is therefore desirable that the proposal to set up a parliamentary committee of inquiry on this topic shall soon be adopted.³⁸

49. In sum, the Spanish authorities have implemented some particularly important recommendations of [Resolution 2381](#) – the nine imprisoned Catalan politicians were indeed pardoned, without having to disown their deeply held political opinions. But numerous criminal cases against other Catalan officials or former officials related to the events surrounding the unconstitutional referendum in 2017 are still pending, as are the arrest warrants against several politicians living abroad. Also, the pardons are now challenged in court. This shows that reconsideration of the provisions on sedition and rebellion remains crucial for ensuring compliance with Council of Europe standards.

³⁵ [Resolution 2187 \(2017\)](#)

³⁶ [Resolution 1594 \(2007\)](#)

³⁷ See Ombudsman report, *ibid.*, page 23, quoting from the inaugural address of the President of the Supreme Court for the 2017 judicial year.

³⁸ A specific report on the abuse of "Pegasus" and other similar spyware is currently under preparation by our colleague Pieter Omtzigt (Netherlands/EPP), see his "introductory memorandum" [AS/Jur \(2022\) 04](#) .

Appendix – Dissenting Opinion by Mr Antonio Gutiérrez Limones (Spain, SOC), Mr Marc Lamuà (Spain, SOC) and Mr Sergio Gutiérrez Prieto (Spain, SOC)

1. The Follow up report is based on the same mistaken assumption reflected in the report and the resolution, namely, treating Spain and Turkey jointly when the realities and political and constitutional traditions are entirely different. As it has been already pointed out, a differentiated approach would have been more adjusted and, in any case, as we shall explain the following paragraph, Spain should not have been included.
2. The report notes that as stated in [Resolution 2381](#), “the Assembly recognizes that Spain is a living democracy, with a culture of free and open public debate, and that the mere expression of pro-independence views is not a ground for criminal prosecution.”, adding that “But statements should not be confounded with actions and these need to be examined further”. According to this statement, politicians are not prosecuted in Spain for the views expressed in the exercise of their mandates and, hence, once again, bearing in mind that this is the conclusion of the report Spain should not appear in the final resolution and the follow up report.
3. Regarding the following statement “it noted with regret that numerous criminal cases against other Catalan officials or former officials related to the events surrounding the unconstitutional referendum in 2017 are still pending, as are the arrest warrants against several politicians living abroad”, the content of the prior dissenting opinion must be reiterated, as well as the position of the Judiciary as regards the separation of powers inherent to the Rule of Law. Thus, with this exhortation, the PACE is clearly interfering with the competencies of the Spanish judiciary. Only judges may make decisions regarding the prosecution of crimes. The invitation also contradicts the principle of equality before the law, since it implies that some offences should be prosecuted while others should not. Moreover, it would contradict the principles of the Council of Europe.
4. As regards the appeal to reform the provisions on sedition and rebellion, it must be stressed that this competence falls upon the Parliament. In this sense, although the Government has committed itself to promoting the initiative, it is incumbent upon the Parliament, by absolute majority, to conduct the reform. The current composition of the Parliament clearly shows the plural character of Spanish society, hence the need to conduct any reform with large agreements. However, this reason makes it particularly more difficult, since there are divergent views on this matter which go from the total repeal to its maintenance, including as well its partial or total reform.