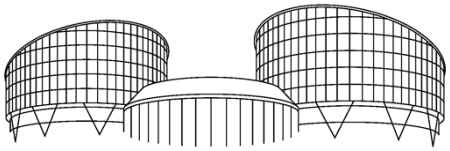

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SELAHATTİN DEMİRTAŞ v. TURKEY (No. 2)

(Application no. 14305/17)

JUDGMENT

Art 10 • Freedom of expression • Unforeseeable lifting member of parliament's immunity and pre-trial detention on terrorist charges for political speeches • Failure of domestic authorities to examine whether speeches were protected by parliamentary non-liability • Misuse of the constitutional amendment procedure targeting opposition • Interpretation and application of terrorism offences so broad as to not afford adequate protection against arbitrary interferences
Art 3 P1 • Free expression of the opinion of the people • Stand for election • Member of parliament excluded from parliamentary proceedings as a result of his prolonged pre-trial detention without sufficient justification • Art 3 P1 encompassing right to sit as a member of parliament once elected • Detention of a member of parliament incompatible with Art 10 entailing a breach of Art 3 P1 • Domestic courts' failure to balance all relevant interests, and to determine whether charges had a political basis • No exploration of alternative measures to detention
Art 18 (+ Art 5) • Restrictions for unauthorised purposes • Pre-trial detention pursuing the ulterior motive of stifling pluralism and limiting freedom of political debate
Art 5 § 1 • Art 5 § 3 • Lack of reasonable suspicion of applicant having committed an offence and lack of reasonableness of pre-trial detention • Compensation claim under Article 141 § 1 (a) and (d) of the Code of Criminal Procedure not an effective remedy for such complaints
Art 5 § 4 • Speediness of review • Review of application taking thirteen months before the Constitutional Court not a violation in the specific circumstances of the case, particularly the court's exceptional caseload during state of emergency

STRASBOURG

22 December 2020

This judgment is final but it may be subject to editorial revision.

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

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Ksenija Turković, *President*,
Linos-Alexandre Sicilianos,
Yonko Grozev,
Vincent A. De Gaetano,
Helen Keller,
Aleš Pejchal,
Krzysztof Wojtyczek,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Alena Poláčková,
Pauliine Koskelo,
Tim Eicke,
Péter Paczolay,
Lado Chanturia,
Gilberto Felici,
Erik Wennerström,
Saadet Yüksel, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 18 September 2019 and 12 November 2020,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 14305/17) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Selahattin Demirtaş ("the applicant"), on 20 February 2017.

2. The applicant was represented by Mr M. Karaman, Ms A. Demirtaş Gökalp, Ms B. Molu, Mr R. Demir and Mr K. Altıparmak, lawyers practising in Diyarbakır, in Istanbul and in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that his pre-trial detention had breached Articles 5, 10 and 18 of the Convention and Article 3 of Protocol No. 1 to the Convention.

4. On 29 June 2017 the Government were given notice of the application.

5. A Chamber of the Second Section, composed of Robert Spano, President, Ledi Bianku, Işıl Karakaş, Paul Lemmens, Valeriu Griţco, Jon Fridrik Kjølbro, Ivana Jelić, judges, and also of Stanley Naismith,

Section Registrar, delivered a judgment on 20 November 2018. It unanimously declared admissible the applicant's complaints concerning Article 5 § 1 (as to the alleged lack of reasonable suspicion), Article 5 § 3, Article 5 § 4 (as to the alleged lack of a speedy review before the Constitutional Court) and Article 18 of the Convention and Article 3 of Protocol No. 1. It declared further complaints under Article 5 § 1 inadmissible by a majority, and under Article 5 § 4 inadmissible unanimously. The Chamber found, unanimously, that there had been no violation of Article 5 § 1 and of Article 5 § 4 of the Convention and that there had been a violation of Article 5 § 3 of the Convention and of Article 3 of Protocol No. 1. It held by six votes to one that there had been a violation of Article 18 of the Convention in conjunction with Article 5 § 3. It also found, unanimously, that there was no need to examine separately the admissibility and merits of the applicant's complaint under Article 10 of the Convention. Lastly, the Chamber held, unanimously, that the respondent State had not failed to comply with its obligations under Article 34 of the Convention and that it was to take all necessary measures to put an end to the applicant's pre-trial detention. The partly dissenting opinion of Judge Karakaş was annexed to the judgment.

6. On 19 February 2019 both the Government and the applicant requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention, and the panel of the Grand Chamber accepted the requests on 18 March 2019.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court. During the second deliberations, Vincent A. De Gaetano, whose term of office had expired in the course of the proceedings, continued to deal with the case (Article 23 § 3 of the Convention and Rule 24 § 4). Ksenija Turković succeeded Linos-Alexandre Sicilianos as President of the Grand Chamber (Rules 10 and 11). In addition, Pauliine Koskelo, Yonko Grozev, Péter Paczolay and Lado Chanturia replaced Angelika Nußberger, André Potocki, Armen Harutyunyan and Egidijus Kūris, who were unable to take part in the further consideration of the case (Rule 24 § 3).

8. The applicant and the Government each filed observations on the admissibility and merits of the case.

9. The Council of Europe Commissioner for Human Rights ("the Commissioner for Human Rights") exercised her right to intervene in the proceedings and submitted written comments (Article 36 § 3 of the Convention and Rule 44 § 2).

10. The Section President had given leave to the Inter-Parliamentary Union (IPU) and to two non-governmental organisations acting jointly, Article 19 and Human Rights Watch ("the intervening NGOs"), to intervene under Article 36 § 2 of the Convention and Rule 44 § 3, and their written comments were included in the file.

11. The Government and the applicant each replied to the intervening parties' comments.

12. A hearing took place in public in the Human Rights Building, Strasbourg, on 18 September 2019.

There appeared before the Court:

(a) *for the Government*
Mr Hacı Ali AÇIKGÜL, *co-Agent*,
Ms Betül Nas GÜLOL,
Mr Mehmet Ali TUNCER, *judge rapporteurs*,
Mr İbrahim Hakkı BEYAZIT,
Mr Abdulhaluk KURNAZ,
Mr Stefan TALMON, *Advisers*;

(b) *for the applicant*
Mr Mahsuni KARAMAN,
Ms Benan MOLU,
Mr Kerem ALTIPARMAK,
Mr Ramazan DEMIR, *Counsel*,
Ms Başak ÇALI,
Ms Aygül DEMIRTAŞ GÖKALP, *Advisers*;

(c) *for the Council of Europe Commissioner for Human Rights*
Ms Dunja MIJATOVIĆ, *Commissioner for Human Rights*,
Mr Giancarlo CARDINALE*, Deputy to the Director, Office of the Commissioner for Human Rights,*
Mr Hasan BERMEK*, adviser to the Commissioner*.

The Court heard addresses by Ms Çalı, Mr Altıparmak, Mr Demir, Ms Molu, Mr Açıkgül, Mr Talmon and Ms Mijatović, and the replies by Ms Çalı, Mr Altıparmak and Mr Talmon to questions put by the judges.

13. On various dates between 19 November 2019 and 14 July 2020, the Government and the applicant submitted additional observations.

THE FACTS

14. The applicant was born in 1973. On the date of lodging his application, he was detained in Edirne.

I. THE APPLICANT'S POLITICAL CAREER

15. At the material time, the applicant was one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party. From 22 July 2007 onwards he was a member of the Turkish Grand National

Assembly ("the National Assembly"). Following the parliamentary elections on 1 November 2015, he was re-elected as a member of the National Assembly for the HDP and held office until the parliamentary elections on 24 June 2018, in which he did not stand as a candidate.

16. In the presidential election of 10 August 2014 the applicant received 9.76% of the vote. He also stood in the presidential election on 24 June 2018 and obtained 8.32% of the vote.

II. EVENTS OF 6-8 OCTOBER 2014

17. In September and October 2014, members of the armed terrorist organisation Daesh (Islamic State of Iraq and the Levant) launched an offensive on the Syrian town of Kobani (*Ayn al-Arab* in Arabic), some 15 km from the Turkish border town of Suruç. Armed clashes took place between Daesh forces and the YPG (People's Protection Units, founded in Syria and regarded as a terrorist organisation by Turkey on account of its links with the PKK (Workers' Party of Kurdistan, an armed terrorist organisation)).

18. Following the outbreak of the clashes in Syria, the Turkish government opened the country's borders to thousands of refugees, the majority of whom were Kurdish women, children and elderly people who had gathered at the Turkish/Syrian border. However, it closed the same border in the direction of Syria in order to prevent volunteers from leaving to fight in Kobani. From 2 October 2014 onwards, a large number of demonstrations were held in Turkey and several non-governmental organisations at local and international level published statements calling for international solidarity with Kobani against the siege by Daesh. In particular, they urged the government to allow fighters to pass through to Syria.

19. On 5 October 2014 a tweet was posted on a Twitter account apparently controlled by one of the PKK leaders, reading as follows:

> "We call upon all the young people, women and everyone from 7 to 70 to stand up for Kobani, to protect our honour and dignity and to occupy the metropolitan areas." ("*Gençleri kadınları 7'den 70'e herkesi Kobane'ye sahip çıkmaya onurumuzu namusumuzu korumaya metropolleri işgal etmeye çağırıyoruz.*")

20. On 6 October 2014 the following three tweets were posted on the official HDP Twitter account, @HDPgenelmerkezi:

> – "Urgent call to our people! Urgent call to our people from the HDP central executive board, currently in session! The situation in Kobani is extremely dangerous. We urge our people to join and support those protesting in the streets against Daesh attacks and the AKP [Justice and Development Party] government's embargo over Kobani." ("*Halklarımıza acil çağrı! Şuanda toplantı halinde olan HDP MYK'dan halklarımıza acil çağrı! Kobane'de duruş son derece kritiktir. IŞİD saldırılarını ve AKP iktidarının Kobané'ye ambargo tutumunu protesto etmek üzere halklarımızı sokağa çıkmaya ve sokağa çıkmış olanlara destek vermeye çağırıyoruz.*")
>
> – "We call upon all our people, from 7 to 70, to [go out into] the streets, to [occupy] the streets and to take action against the attempted massacre in Kobani." ("*Kobané'de*

yaşanan katliam girişimine karşı 7 den 70 e bütün halklarımızı sokağa, alan tutmaya ve harekete geçmeye çağırıyoruz.")

– "From now on, everywhere is Kobani. We call for permanent resistance until the end of the siege and brutal aggression in Kobani." ("*Bundan böyle her yer Kobane'dir. Kobane'deki kuşatma ve vahşi saldırganlık son bulana kadar süresiz direnişe çağırıyoruz*.")

21. On the same day, a statement from an organisation known as the KCK (*Koma Civakên Kurdistan* – "Kurdistan Communities Union"), regarded by the Court of Cassation as a terrorist organisation and the "urban wing" of the PKK, was published on the website www.firatnews.com. The statement read as follows:

"The wave of revolution that started in Kobani must spread throughout Kurdistan, and on that basis we call for an uprising by the Kurdish youth ... All those among our people who can make it to Suruç must go there immediately without wasting a second, and every inch of Kurdistan must rise up for Kobani ... We call upon all our people, from 7 to 70, to make life unbearable for Daesh and their collaborators the AKP wherever they are, and to take a stand against these gangs [responsible for] massacres by fostering rebellion [*Serhildan* in Kurdish] up to the highest level." ("*Kobani ile başlayan devrim dalgası tüm Kürdistan'a yayılmalı ve Bu temelde Kürt gençliğinin ayaklanması çağrısında bulunuyoruz... Bütün halkımız Suruç'a gidebilecekler hemen bir saniye zaman kaybetmeden gitmeli ve Kürdistan'ın her karış toprağı Kobanê için ayağa kalkmalıdır... Tüm halkımızı yediden yetmişe bulunduğu her yerde yaşamı IŞİD ve işbirlikçisi AKP'ye dar etmeye ve serhıldanı en üst düzeyde geliştirerek bu katliamcı çetelere karşı durmaya çağırıyoruz*.")

22. On 7 October 2014 the following statement by the KCK Executive Council was published on the same website:

"Our people must carry on the resistance they have started against this terrible and insidious massacre, by spreading it everywhere and at all times. Our people in the North [in the region of south-eastern Turkey] must give the Daesh gangs and their supporters no chance of survival. All the streets must be turned into the streets of Kobani and the strength and organisation of this historic and unique resistance must be developed further. From now on, millions of people must take to the streets and the crowds must flood to the border. All Kurds and all honourable people, friends and groups who are sympathetic [to our cause] must take action. Now is the time to develop and amplify the act of resistance. On this basis, we call upon our people, all groups that are sympathetic [to our cause] and our friends to embrace and amplify the Kobani resistance and we call upon all young people, particularly the Kurdish youth, to join the ranks of freedom in Kobani and to intensify the resistance." ("*Halkımız bu çirkin ve sinsi katliam karşısında başlattığı mücadeleyi her yere, her zamana taşıyarak süreklileştirmelidir. Kuzey halkımız İŞİD çetelerine, uzantılarına ve destekçilerine hiçbir yerde yaşam şansı tanımamalıdır. Tüm sokaklar Kobani sokaklarına dönüştürülmeli, tarihin bu eşsiz direnişine denk bir direniş gücü ve örgütlülüğü geliştirilmelidir. Bu saatten itibaren milyonlar sokaklara akmalı, sınır insan seline dönüşmelidir. Her Kürt ve onurlu her insan, dostlar, duyarlı kesimler bu andan itibaren eyleme geçmelidir. An direniş eylemini geliştirme ve büyütme anıdır. Bu temelde tüm halkımızı, duyarlı kesimleri, dostlarımızı Kobani direnişini sahiplenerek büyümeye, başta Kürt gençleri olmak üzere tüm gençleri Kobani de özgürlük saflarına katılarak direnişi yükseltmeye çağırıyoruz.*")

23. From 6 October 2014 onwards, demonstrations (see paragraph 18 above) became violent. Clashes took place between different groups, and the security forces intervened forcibly. Following the escalation of violence, the governors of a number of towns imposed curfews on unspecified dates.

24. In two statements made on 7 and 9 October 2014 the applicant emphasised that he was opposed to the use of violence during the demonstrations. He stated that his party was prepared to cooperate with the government but that the latter first needed to identify the agitators behind the violence.

25. According to the figures mentioned in the Constitutional Court's judgment of 21 December 2017 (no. 2016/25189) on an individual application by the applicant, the violence on 6 and 8 October 2014 caused the death of fifty people and injured a further 772, including 331 members of the security forces. No fewer than 1,881 vehicles and 2,558 buildings, including hospitals and schools, suffered damage. In the course of the subsequent criminal investigations by the competent prosecuting authorities, 4,291 people were arrested and 1,105 of them were placed in pre-trial detention (see paragraph 30 of the Constitutional Court's judgment). According to the public prosecutors, the acts of violence had been prompted by calls posted on the HDP Twitter account (see paragraph 20 above).

26. On 9 October 2014 the applicant gave a speech at the HDP offices in Diyarbakır. The relevant parts of the speech read as follows:

> "We issued the calls in question [the tweets posted on the HDP Twitter account] because we had found out that Daesh had reached the border at Mürşitpınar. People went out into the streets and there was no violence anywhere. We did not tell anyone to resort to violence. We called for political struggle. What aggravated the violence was not the call issued by the HDP, or the demonstrations by the people. It is the government's responsibility to find those who provoked [the demonstrations]. There should be no acts of violence. There is no need for intervention in demonstrations [held] in support of Kobani ..." ("*DAEŞ örgütünün Mürşitpınar sınır kapısına dayandığını öğrendiğimiz için bahsi geçen çağrıları yaptık, insanlar sokağa çıktı hiçbir yerde şiddet kullanılmadı. Şiddet kullanılsın demedik. Siyasi mücadele amaçlı bir çağrı yaptık. Şiddeti büyüten HDP'nin çağrısı değil, halkın gösterileri değil. Tahrik edenleri bulmak hükümetin görevidir. Şiddet eylemleri olmamalı. Kobane'yi sahiplenme eylemlerine müdahale edilmemeli ...*")

27. In an interview published on 13 October 2014 in the daily newspaper *Evrensel*, the applicant was quoted as follows:

> "It is directly linked to Kobani. It is not for us to calm down the anger. We do not have so much influence over the people, nor is it necessary. We believe that the practical measures the government could take to drive Daesh out of Kobani will end this anger. Of course, I am not talking about acts of violence. We have not encouraged acts of violence such as the use of weapons, arson, destruction [and] robbery. We have not incited or organised [such acts]. But we have called for the people's anger to be channelled into an ongoing protest, day and night, everywhere, on the squares, in homes, in the streets, in cars. We still stand behind that call." ("*Doğrudan Kobaniyle bağlantılıdır. Öfkeyi yatıştırabilecek olan biz değiliz. Bizim halk üzerinde ne böyle bir gücümüz vardır ne de buna gerek vardır. Yani halk IŞİD'e karşı durmasın sempati*

duysun diye uğraşacak değiliz. Biz hükümetin atacağı pratik adımların IŞİD'in Kobani'den püskürtülmesiyle sonuçlanmasının bu öfkeyi durduracağını düşünüyoruz. Elbette ki bundan kastettiğim şiddet olayları değil. Biz silah kullanma, yakıp yıkma, yapmalama gibi şiddet eylemlerini teşvik etmedik, tahrik etmedik, örgütlemedik ama halkın öfkesinin alanlarda, meydanlarda, gece gündüz evinde, sokakta, arabasında elindeki bütün imkanlarla bir protestoya dönüşmesinin çağrısını yaptık. O çağrının da halen arkasındayız.")

III. THE "SOLUTION PROCESS" AND ITS END

28. On 11 October 2011 the applicant, who at the time was co-chair of the Peace and Democracy Party ((BDP), a left-wing pro-Kurdish political party), gave a speech at a meeting of his party's parliamentary group. The relevant parts of the speech read as follows:

"He [Abdullah Öcalan] is not a person being detained in İmralı, he is the future of Turkey as far as freedom and peace are concerned. For that reason, the government should move him to house arrest as soon as possible. This is a serious proposal. Look, for years we said 'go to İmralı and meet [him]', [and] you attacked [us], you insulted [us], you said 'is that possible?' Yet you went there and met [him]. You did well. You stopped the bloodshed after years; you managed [to agree] a ceasefire. Is that a bad thing? Who knows how many lives have been saved, how many young people have been saved, how many mothers have been spared suffering? Our proposal was appropriate [and] correct, we insisted and it became a reality. Now, Turkey must also discuss our current proposal, in a common-sense, rational manner. We are showing the right, rational, realistic path which we know [and] believe in. No other path leads to the solution [of the Kurdish question]. By planting flags, trying to plant flags here and there, you will only cause bloodshed, you will only put off the question for decades, you will only amplify the question. If you try to lynch those who show you rational paths, there will be no one to talk to and negotiate with. This lynching attitude towards us, this insulting approach to our proposals is the most serious and problematic behaviour that is obstructing the solution to the question. We have to discuss openly, what is wrong with house arrest? Is there a Kurdish question in this case? Yes. Are we faced with a historical question that we inherited from the Ottoman [Empire]? Yes. Do we have to solve this question? Yes. Has this question led to twenty-nine uprisings? Yes. What is the latest uprising? Who is its leader? Abdullah Öcalan. Where is he? In İmralı." ("*İmralı'da tutulan bir şahıs değildir, Türkiye'nin özgürlüğe, barışa dair geleceğidir. O nedenle ev hapsini kısa vadede hemen uygulamaya koymalıdır hükümet, bu öneri ciddi bir öneridir. Bakın yıllarca, "gidin İmralı'da görüşme yapın" dedik, saldırdınız, hakaretler ettiniz "böyle şey mi olur" dediniz. Bunu söylerken bile gidip görüştünüz. İyi de yaptınız. Görüştüğünüz yıllarda akan kanı durdurdunuz, ateşkesleri sağladınız. Fena mı oldu? Kim bilir kaç bin insanın canı kurtuldu, kaç bin gencin canı kurtuldu, kaç bin ananın acısını önlediniz fena mı oldu? Önerimiz yerindeydi, doğruydu, ısrar ettik gerçekleşti. Şimdi bu yaptığımız öneriyi de sağduyuyla sağlıklı, akılcı bir şekilde Türkiye tartışmak durumundadır. Bildiğimiz, inandığımız, doğru, akılcı, gerçekçi yolu gösteriyoruz. Bunun dışındaki hiçbir yol çözüm yolu değildir. Şuraya buraya bayrak dikmekle, bayrak dikmeye çalışmakla sadece kan dökersiniz, sadece sorunu on yıllarca ertelersiniz, sorunu büyütürsünüz. Ama akılcı yolları gösterenleri linç etmeye çalışırsanız ortada görüşebileceğiniz, ortada konuşabileceğiniz hiç kimse kalmayacaktır. Bize yönelik bu linç tutumu, bizim önerilerimize karşı bu hakaretvari yaklaşım çözümün önünü tıkayan en ciddi, en sıkıntılı anlayıştır. Açıkça tartışılsın, ev hapsinin neyi yanlıştır? Ortada bir Kürt sorunu var mı ? Var. Osmanlı'dan*

devraldığımız tarihi bir sorunla karşı karşıya mıyız ? Evet. Bu sorunu çözmek zorunda mıyız ? Evet. Bu sorun 29 isyana konu olmuş mu ? Evet. Son isyan hangisi ? Bu isyan, bu isyanın lideri kim ? Abdullah Öcalan. O nerede ? İmralı'da.")

29. Towards the end of 2012, a peace process known as the "solution process" was initiated with a view to finding a lasting, peaceful solution to the Kurdish question. A series of reforms aimed at improving the protection of human rights in Turkey were implemented. A delegation of members of parliament, including the applicant, made several visits to İmralı island, the site of the prison holding Abdullah Öcalan, the leader of the PKK, who had been convicted in 1999 of carrying out acts designed to bring about the secession of part of Turkey's territory and forming and leading a terrorist organisation for that purpose, and who had also called in 2013 for an end to the armed struggle. On 28 February 2015 the delegation, together with the then Deputy Prime Minister, presented the "Dolmabahçe consensus", a ten-point reconciliation declaration. The then Prime Minister stated that the consensus meant that significant steps were being taken towards halting terrorist activities in Turkey. However, shortly after the announcement, the President of Turkey said that it was out of the question that the government would reach an agreement with a terrorist organisation. That statement appears to have marked the end of the consensus. Subsequently, several weeks before the parliamentary elections of 7 June 2015, the Deputy Prime Minister made the following statement to the press: "If the HDP exceeds the threshold [for representation in Parliament] and the AKP government loses power, there will be no solution process."

30. On 5 June 2015 a terrorist attack apparently carried out by Daesh caused the death of two people in Diyarbakır following two explosions of unknown origin at the HDP's final election rally. More than 100 other people were injured in the blasts.

31. Parliamentary elections were held on 7 June 2015, and for the first time a pro-Kurdish party passed the threshold for representation in the National Assembly. The HDP received 13.12% of the vote and became the second-largest opposition party. In addition, the AKP lost its majority in Parliament for the first time since 2002.

32. On 20 July 2015 a terrorist attack apparently carried out by Daesh took place in Suruç, leaving thirty-four people dead and more than 100 others injured.

33. On 22 July 2015, in another terrorist attack, two police officers were murdered at their homes in Ceylanpınar, allegedly by PKK members. The perpetrators of the murders, which resulted *de facto* in the end of the "solution process", have yet to be identified.

34. The day after that attack, armed clashes resumed between the security forces and the PKK. The PKK's leaders urged the people to arm themselves and to build underground systems and tunnels that could be used during armed clashes. They also called for the proclamation of a political system of

self-governance. In addition, they announced that all civil servants in the region would now be considered accomplices of the AKP and as a result would risk being targeted.

35. On 28 July 2015 the President of Turkey gave a statement to the press insisting that the HDP leaders would have to "pay the price" for the acts of terrorism. The relevant part of the statement reads as follows:

> "I do not approve of dissolving political parties. But I say that the leaders of that party [the HDP] must pay the price. Personally and individually." ("*Ben parti kapatılması olayını doğru bulmuyorum. Fakat bu partinin yöneticilerinin bu işin bedelini ödemeleri gerekir diyorum. Fert fert, birey birey.*")

36. On the same day, the applicant gave a speech at a meeting of his party's parliamentary group, stating the following:

> "We will not allow the murder of anyone who is in the mountains [image used to refer to PKK members], or in the army, or in the police; we will not view that as normal. They must not pay the price. We have taken the reins of power from our people to pay the price; they voted for us for that purpose. We are ready to pay any price, but those who fight us and those who are hostile to us should be as brave as we are. Otherwise, they will lose, they will lose. We will all see this together. They will be defeated by this resistance. The feeling of peace in Turkey will triumph. The free future of Turkey will triumph, provided that we do not forget the HDP principle that we united around." ("*Biz, ne dağdakinin, ne askerdekinin, ne polisin öldürülmesine izin vermeyeceğiz, hiçbirini normal karşılamayacağız. Onlar bedel ödemesin. Biz bedel ödemek için halkımızdan yetki aldık, bize bunun için oy verdiler. Ne bedel ödenecekse, biz hazırız. Ama bizimle mücadele edenler de, bize düşmanlık yapanlar da en az bizim kadar cesur olmalılar. Yoksa kaybederler, kaybedecekler. Bunu hep birlikte göreceğiz. Onlar bu direniş karşısında yenilecekler. Türkiye'nin barış duygusu kazanacak. Türkiye'nin özgür yarınları, özgür geleceği kazanacak. Yeter ki, nasıl bir HDP ilkesi etrafında birleştiğimizi tek bir dakika bile unutmayalım*.")

37. Between 10 and 19 August 2015 self-governance was proclaimed in nineteen different towns in Turkey, the vast majority of them in the south-eastern region.

38. Members of the YDG-H (Patriotic Revolutionary Youth Movement), regarded as the PKK's youth wing, dug trenches and put up barricades in several towns in eastern and south-eastern Turkey, including Cizre, Silopi, Sur, İdil and Nusaybin, to prevent the security forces from entering. According to the security forces, members of the YDG-H had brought a large number of weapons and explosives into the region.

39. In August 2015, local governors imposed curfews in various towns in south-eastern Turkey. The stated aim of such measures was to clear the trenches that had been dug by members of terrorist organisations, to remove any explosives planted there, and to protect civilians from acts of violence. The security forces carried out operations in the areas where the curfew was in place, using heavy weapons.

40. On 19 August 2015 eight soldiers were killed in a terrorist attack in Siirt carried out by members of the PKK.

41. On 6 and 8 September 2015, sixteen soldiers and thirteen police officers were killed in two terrorist attacks carried out by the PKK.

42. Following the imposition of a curfew in Sur, the applicant gave a statement to the press in Lice on 13 September 2015. He stated:

> "Our people want self-governance, their own assemblies and municipalities where responsibility lies with elected officials rather than appointees. Our people have the power to resist against pressure and massacre policies everywhere. We have the power to protect ourselves against any attack. We will show that we are not despairing; we will resist together; we will achieve salvation without forgetting our motherland and our history and by defending our rights." ("*Halkımız atananların değil seçilmişlerin yetkili olduğu kendi meclisleri ile belediye ile kendini yönetmek istiyor. Halkımız her yerde baskı politikalarına katliam politikalarına karşı direnebilecek güçtedir. Bütün saldırılara karşı kendimizi koruyacak gücümüz var. Çaresiz olmadığımızı gösteriyoruz, birlikte direneceğiz, kendi ana vatanımızı da tarihimizi de unutmadan haklarımızı da savunarak hep birlikte kurtuluşa gideceğiz.*")

43. On 10 October 2015 a terrorist attack, generally considered to have been the deadliest one ever committed in the history of Turkey, was carried out by Daesh in Ankara. More than 100 people were killed and more than 500 others injured. Most of the victims were demonstrators who had answered the call of several non-governmental organisations, including the HDP, to express their discontent at the surge of violence in Turkey.

44. Following the failure of negotiations aimed at forming a coalition government, early elections were held on 1 November 2015, in which the HDP polled 10.76% of the vote. The AKP won the elections and regained its majority in the National Assembly.

45. In a statement to the press on 18 December 2015 the applicant stated:

> "Everywhere you carry out [security] operations is filled with an atmosphere of enthusiasm rather than fear and panic. Do you know why? [Because] these people are absolutely certain that they will triumph from the very first day. They are the defenders of an honourable, noble and dignified cause. We will not let cruelty and fascism win any more; this resistance will triumph. Those who try to downplay it by calling it [resistance of] ditches and holes should look back at history. There are tens of millions of heroes and brave people resisting against this coup. You are waging a war against the people. The people are resisting and will resist everywhere. Next week, on 26 and 27 December, we will attend the extraordinary meeting of the Democratic Society Congress [DTK] in Diyarbakır. We will have intensive discussions and take important decisions concerning the processes of self-governance and autonomy and their operation in the political arena. We will implement them all." ("*Bugün operasyon yaptığınız her yerde korku ve panik havası değil coşku havası hakim. Neden biliyor musunuz ? O insanlar daha ilk günden kazandıklarından o kadar eminler ki. Onurlu, şerefli, haysiyetki bir davanın savunucularıdır. Bir kez daha zulmün, faşizmin kazanmasına izin vermeyeceğiz, bu direniş kazanacaktır. Öyle hendek, çukur diye küçümsemeye çalışanlar da dönüp tarihe baksınlar. On milyonlarca kahraman, yiğit bu darbeye karşı direnen insan var. Sen halka karşı savaş açmışsın. Halk her yerde direnir, direnecektir. Önümüzdeki haftasonu 26-27 Aralık'ta Diyarbakır'da Demokratik Toplum Kongresi'nin olağanüstü kongresine bizler de katılacağız. Öz yönetimin, özerkliğin inşası ve içinin doldurulması sürecinn siyasi zeminde daha güçlü yönetilmesi*

için çok yoğun tartışmalar yapacağız, önemli kararlar alacağız. Bunların hepsini hayata geçireceğiz.")

46. On 22 December 2015, in a statement to the National Assembly, the applicant said the following:

"Look at Sarajevo. For four years Sarajevo was under siege, four years. Neighbourhood by neighbourhood, [there was a] blockade. The people who are now enthusiastically praised as heroes – what did they do against policies of massacre and genocide? They dug trenches, put up barricades, hung up curtains so the snipers did not kill them, dug tunnels to escape the siege and tried to set up an underground transport system to find food and water. Today, Davutoğlu is imposing the same thing on the districts of his own country. If the military operations end, the police operations stop, the curfews are lifted, if the government says 'What is self-governance? What is autonomy? Let's go and listen', what does the government have to lose?" ("*Saraybosna'ya bakın. 4 yıl boyunca Saraybosna'da bir kuşatma yaşandı, 4 yıl. Mahalle mahalle ablukaya aldılar. Ne yaptı oradaki insanlar? Bugün övgüyle, coşkuyla, kahramanlık öyküsüyle anlattığımız Saraybosna'da o katliam, soykırım politikalarına karşı ne yaptı insanlar; hendek kazdılar, barikat kurdular, perde astılar keskin nişancılar vurmasın diye, yeraltına tüneller kazdılar ablukayı kırmak için, kendilerine yemek ve su bulabilmek için yeraltından ulaşım sağlamaya çalıştılar. Aynı şeyi bugün Davutoğlu kendi ülkesinde ilçelere dayatıyor. Askeri operasyonlar son bulsa, polis operasyonları son bulsa, şu sokağa çıkma yasakları kaldırılsa, « özyönetim nedir, özerklik nedir, bunu bir dinleyelim, gelin, müzakere edelim » dese bir hükümet, ne kaybedecek ?*")

47. On 26 December 2015 the applicant attended the extraordinary meeting of the DTK. He gave a speech in which he defended self-governance and the resistance. He stated that barricades had been put up and trenches dug to thwart the Ankara authorities' plans for a massacre. The DTK's closing declaration included a call for the creation of autonomous regions.

48. On 29 December 2015 the President of Turkey stated to the press that the applicant's speeches amounted to "clear provocation and treason".

49. In a statement to the press on 2 January 2016, the President of Turkey said the following:

"The statements by the two co-chairs clearly amount to crimes against the Constitution. They are both currently the subject of proceedings initiated by public prosecutors. These matters deserve to be followed up. Closing down the party should not even be on the agenda. But there may be members of parliament, mayors or other people who have committed offences. They must pay for it. The investigations initiated by the Diyarbakır and Ankara chief public prosecutors should also be seen against this background. I believe that the process that will start with the lifting of [parliamentary] immunity will also have a positive impact on the atmosphere in our country in terms of combating terrorism. We cannot accept messages intended to divide the country. We can never accept a State within the State. We must take steps by providing the necessary responses to these problems, by applying sanctions and by setting the judicial [authorities] in motion. There are over 160 files with the National Assembly. When they have been examined, [their contents] will be laid on the table and steps will be taken accordingly." ("*İki eşbaşkanın yaptığı açıklamalar kesinlikle anayasa suçu. Haklarında cumhuriyet başsavcılıklarının başlattıkları süreçler var. Bu konular takip edilmeli. Parti kapatma olayı gündeme dahi gelmemeli. Ama suçu irtikap eden milletvekili, belediye başkanı veya başkaları olabilir. Bunlar bunun bedelini ödemek durumundadır.*

Diyarbakır ve Ankara başsavcılıklarının başlattığı soruşturmaları da bu çerçevede değerlendirmek lazım. Dokunulmazlıklarının kaldırılması suretiyle başlayacak süreç, inanıyorum ki terörle mücadele açısından ülkemizdeki havayı da olumlu yönde etkileyecektir. Ülkeyi parçalayıp bölmeye yönelik mesajları kabul etmemiz mümkün değil. Devlet içinde devleti kabul etmemiz asla mümkün değil. Bunlara karşı gerekli cevabın verilmesi, müeyyide uygulanması, yargı mekanizmasının devreye girmesi suretiyle atılması gereken adımlar var. Meclis'te 160'ı aşkın dosyaları var. Bunlar gözden geçirildiği zaman neyi kapsıyor, masaya yatırılacak ve ona göre adım atılacaktır.")

50. On 12 January 2016, at a meeting of his party's group within the National Assembly, the applicant gave a speech in which he once again defended self-governance and praised the "resistance". The relevant parts of his speech read as follows:

"Dear friends, believe me, if powers are delegated to local authorities, not only municipalities run by the HDP, but also those run by the AKP, the MHP [Nationalist Movement Party] and the CHP [Republican People's Party] will work better. We want [this] so local authorities can work better, and not to divide or break up the country. We want power to belong to the local [authorities], we want them to take their own decisions, to be open to public scrutiny when adopting their own budgets or [implementing] their own practices, to be transparent and strong; that is what we call self-governance, this is what we call autonomy. I say that, *inshallah*, our country will one day regain that administrative model, rather than dictatorship. I wish success this week to all my friends in Parliament and all party officials and members. I want to convey our affection and greetings to our people [and] all our friends resisting in Cizre, Silopi and Sur." ("*İnanın ki değerli arkadaşlar, bizim arzu ettiğimiz yerel yönetimlere yetki devri de yapılsa, sadece HDP'li belediye değil, AKP'li belediyeler de dahi iyi çalışacak, MHP'li belediyeler de, CHP'li belediyeler de daha iyi çalışacak. Biz yerel yönetimler daha iyi çalışsın istiyoruz, ülke bölünsün, parçalansın değil. Yerelde yetki olsun, kendi kararlarını, bütçelerini, uygulamalarını yaparken, halkın denetimine açık, şeffaf, güçlü yerel yönetimler olsun istiyoruz; özyönetim dediğimiz budur, özerklik dediğimiz budur. İnşallah ülkemiz bir gün o yönetim modeline kavuşacak, diktatörlüğe değil diyorum. Bu hafta içerisinde hem milletvekili arkadaşlarıma, hem bütün Parti görevlilerine, çalışanlarımıza ben başarılar diliyorum. Cizre'ye, Silopi'ye, Sur'a da, bütün halkımıza, direnen bütün arkadaşlarımıza da buradan bir kez daha sevgi, selamlarımızı iletiyorum*.")

51. On 9 February 2016, at a meeting of his party's group within the National Assembly, the applicant stated the following:

"To keep silent on the subject of Cizre [and] Sur and all these atrocities is to capitulate to the AKP's policies of polarisation and division, which are causing a civil war. We are in the streets, demonstrating, because we object to this." ("*Cizre'ye, Sur'a ve yaşanan bütün bu vahşete sessiz kalmak işte bu AKP'nin kutuplaştırıcı, ayrıştırıcı ve iç savaşı giderek tetikleyen politikalarına teslim olmak demektir. Biz buna itiraz ettiğimiz için yollardayız, yürüyüşlerdeyiz*.")

52. On 23 February 2016 the applicant gave a speech at a meeting of his party's group within the National Assembly. The relevant parts of the speech read as follows:

"Will the Kurdish question be resolved when you lift the curfew in Cizre in three to five days? Will the Kurdish question be resolved when you massacre some

200 civilians, including women [and] children, who are now putting up resistance in Sur [and,] as you did in Cizre, [when] you act barbarically by pouring petrol onto their corpses [so] their families cannot recognise them, [so] they cannot hold funerals?" ("*Örneğin siz, Cizre'de üç-beş gün sonra sokağa çıkma yasağını kaldırdığınızda, Kürt sorunu çözülmüş mü olacak? Sur'da şu anda sıkıştırmaya çalıştığınız 200'e yakın sivil, kadın, çoluk çocuk, direnişti, onları katlettiğinizde örneğin, Cizre'deki gibi yapıp, cenazelerine bile benzin döküp, "Aileleri tanıyamasın, cenaze törenleri bile yapılamasın" barbarlığıyla yaklaştığınız uygulamalarla sonuç aldığınızda Kürt sorunu çözülmüş mü olacak ?*")

53. In a speech on 26 March 2016 the applicant drew a distinction between war, which he described as illegitimate, and resistance, which in his view was a legitimate response to the fascist policies of those in power, who accused millions of people of being terrorists.

54. On 4 October 2016, at a meeting of his party's group within the National Assembly, the applicant stated the following:

"I am issuing a further call. Taking to the streets is legitimate. Resistance to cruelty is legitimate, [it is a] right. It's legitimate for you [Recep Tayyip Erdoğan], but it isn't legitimate for us? It is legitimate for those who take to the streets to protest against the coup of 15 July, but it isn't legitimate for those who take to the streets to protest against [the appointment of governors in place of elected mayors], against the pre-trial detention of a member of parliament? Everyone's wishes deserve to be respected. The people have the right to express their democratic reaction peacefully anywhere and we will never give up. They will say [things like] 'oh, but the streets are dangerous'; don't believe them. The streets are one of the most legitimate areas of democracy." ("*Tekrar çağırıyorum. Sokak meşrudur. Zulme karşı direniş meşrudur, haktır. Sana meşrudur da, bize meşru değil mi? 15 Temmuz darbesine karşı sokağa çıkana meşrudur da, kayyuma karşı, vekil tutuklanırsa sokağa çıkacaklar gayrimeşru mudur? Herkesin iradesi saygındır. Halk demokratik tepkisini her yerde barışçıl çerçevede gösterme hakkını, hukukuna sahiptir ve asla vazgeçmeyeceğiz. Aman aman, bunlar, « efendim sokak tehlikelidir » falan filan diyecekler, kanmayın bunlara. Sokak demokrasinin en meşru alanlarından biridir*.")

IV. CONSTITUTIONAL AMENDMENT CONCERNING PARLIAMENTARY IMMUNITY

55. On 16 March 2016 the President of Turkey gave a speech to village and neighbourhood mayors (*muhtars*) at the presidential complex. The relevant parts of the speech read as follows:

"We must immediately settle the issue of immunity. Parliament must move forward quickly. [We cannot discuss whether to lift the immunity of just] one or two people. We need to adopt a principle. What is this principle? Those who cause the death of fifty-two people by urging my Kurdish brothers to pour into the streets will show up in Parliament, those who say that the PKK, the PYD [Democratic Union Party] and the YPG are behind them will have clean hands, is that it? If Parliament does not take the necessary action, this nation and history will hold it accountable." ("*Dokunulmazlıklar meselesini süratle neticelendirmeliyiz. Parlamento adımını süratle atmalıdır. Bir kişi mi olsun, iki kişi mi ? Biz ortaya ilkeyi koymalıyız. Nedir bu ilke? Benim Kürt kardeşlerimi sokağa dökerek 52 kişinin ölümüne yol açan kişiler yargılanmayacak da parlamentoda boy gösterecek, arkasında PKK'nin, PYD'nin, YPG'nin olduğunu*

söyleyenler temiz olacak öyle mi? Parlamento gereğini yapmazsa, bu millet, tarih bu parlamentodan hesabını sorar.")

56. On 20 May 2016 the National Assembly passed a constitutional amendment entailing the insertion of a provisional Article in the 1982 Constitution. Pursuant to the amendment, parliamentary immunity, as provided for in the second paragraph of Article 83 of the Constitution, was lifted in all cases where requests for the lifting of immunity had been transmitted to the National Assembly prior to the date of adoption of the amendment in question. The relevant parts of the explanatory memorandum on the constitutional amendment read as follows:

> "At a time when Turkey is waging the strongest and most intensive campaign against terrorism in its history, certain members of parliament, whether before or after their election, have made speeches voicing moral support for terrorism, have provided *de facto* support and assistance to terrorism and terrorists [and] have called for violence; [these actions] have aroused public indignation. The Turkish public are of the view that members of parliament who support terrorism and the terrorist[s] and call for violence are abusing their [parliamentary] immunity, and they are urging the Turkish Grand National Assembly to ensure that anyone carrying out such activities can be brought to justice. In the face of such a demand, it is inconceivable that the Assembly should remain silent." ("*Türkiye, tarihinin en büyük ve en kapsamlı, terörle mücadelesini yürütürken, bazı milletvekillerinin seçilmeden önce ya da seçildikten sonra yapmış oldukları teröre manevi ve moral destek manasındaki açıklamaları, bazı milletvekillerinin teröre ve teröristlere fiili manada destek ve yardımları, bazı milletvekillerinin ise şiddet çağrıları kamuoyunda büyük infial meydana getirmektedir. Türkiye kamuoyu milletvekillerinden, her şeyden önce, terörü ve teröristi destekleyen, şiddete çağrı yapan milletvekillerinin dokunulmazlığı istismar ettiğini düşünmekte, bu tür fiilleri olanların yargılanmasına Meclis tarafından izin verilmesini talep etmektedir. Böyle bir talep karşısında, Meclis'in sessiz kalması düşünülemez.*")

57. The constitutional amendment affected a total of 154 of the 550 members of the National Assembly at that time, including fifty-nine from the CHP, fifty-five from the HDP, twenty-nine from the AKP and ten from the MHP. It also concerned one independent member of parliament.

58. On various dates, fourteen members of parliament from the HDP, including the applicant, and one from the CHP were placed in pre-trial detention as the subject of criminal investigations.

59. On an unknown date, seventy members of parliament applied to the Constitutional Court for a review of the constitutional amendment. Their main argument was that the amendment should be treated as a "parliamentary decision" under Article 83 of the Constitution lifting the immunity attaching to their status as members of parliament. They contended that the Constitutional Court should review the constitutionality of that "decision" in accordance with Article 85 of the Constitution.

60. In judgment no. 2016/117, delivered on 3 June 2016, the Constitutional Court unanimously rejected the application. It observed that the case before it concerned a constitutional amendment in the formal sense of the term, which could not be treated as a parliamentary decision to lift the

members' immunity. It further noted that the amendment in question could be reviewed in accordance with the procedure laid down in Article 148 of the Constitution. However, under that procedure, only the President of Turkey or one-fifth of the 550 members of the National Assembly could apply for a review. Finding that this condition was not satisfied in the case before it, the Constitutional Court rejected the application by the members of parliament concerned.

61. On 8 June 2016 the constitutional amendment was published in the Official Gazette. It came into force on the same day.

V. THE APPLICANT'S PRE-TRIAL DETENTION AND PROSECUTION

62. During the applicant's successive terms as a member of parliament, ninety-three investigation reports (*fezleke*) were drawn up in respect of him by the competent prosecuting authorities, the vast majority concerning terrorism-related offences. The prosecutors applied to the National Assembly to have the applicant's parliamentary immunity lifted. Forty-five of these investigation reports were drawn up between 2007 and 2014. In 2015 and 2016, a total of forty-eight investigation reports were submitted to the National Assembly.

63. Following the entry into force of the constitutional amendment concerning the lifting of parliamentary immunity (see paragraph 56 above), the Diyarbakır public prosecutor ("the public prosecutor") decided to join thirty-one separate criminal investigations in respect of the applicant together as a single case. There are currently seven other sets of criminal proceedings pending against the applicant in the national courts. However, as the investigations and proceedings concerned do not form part of the present application – since the applicant did not raise any complaints about them in his application form – all references below to "the criminal investigation" will relate to the investigation being conducted by the Diyarbakır public prosecutor's office.

64. Between July and October 2016 the competent public prosecutors issued six separate summonses for the applicant to give evidence in connection with the criminal investigation in respect of him. However, the applicant did not appear before the investigating authorities, having stated in a speech at a meeting of his party's parliamentary group in April 2016 that no HDP member of parliament would give evidence voluntarily.

65. On 9 September 2016 the Diyarbakır Magistrate's Court ordered restrictions on the right of the applicant's lawyers to inspect the contents of the investigation file or to obtain copies of documents in the file. On an unspecified date, the applicant lodged an objection against that decision, which was dismissed on 19 November 2016.

66. On 3 November 2016, at the public prosecutor's request, the Diyarbakır Magistrate's Court ordered a search of the applicant's home.

67. Subsequently, on 4 November 2016 the security forces carried out operations against twelve HDP members of parliament, including the applicant, who were arrested and taken into police custody.

68. On the same day, the applicant, assisted by three lawyers, appeared before the Diyarbakır public prosecutor. He maintained that he had been arrested and taken into police custody on the orders of the President of Turkey because of his political activities and refused to answer any questions relating to the accusations against him.

69. Afterwards, the Diyarbakır public prosecutor asked the Diyarbakır 2nd Magistrate's Court to place the applicant in pre-trial detention for membership of an armed terrorist organisation (Article 314 § 1 of the Criminal Code) and public incitement to commit an offence (Article 214 § 1 of the Criminal Code).

70. On the same day, the applicant was brought before the Diyarbakır 2nd Magistrate's Court. His lawyer submitted, in particular, that his client could not be the subject of a criminal investigation and could therefore not be deprived of his liberty since he was entitled to immunity from criminal liability under the first paragraph of Article 83 of the Constitution. After hearing the submissions of the applicant's lawyers, the magistrate ordered the applicant's pre-trial detention. The following reasons were given for the decision:

> "...
>
> The suspect Selahattin Demirtaş appeared before [the] magistrate to be questioned in connection with [alleged] offences of public incitement to commit an offence and membership of an armed terrorist organisation; the suspect is still a member of parliament but is nevertheless not entitled to parliamentary immunity in relation to the offences [dating from] before 20 May 2016, on account of the amendment made to the second paragraph of Article 83 of the Constitution by Law no. 6718 of the same date; [as established below,] there is concrete evidence giving rise to a strong suspicion [that the suspect] committed offences:
>
> (a) On 5 October 2014 at 12.07 a.m., a tweet was posted from the '@murat_karayilan' Twitter account, apparently belonging [to a] member of the 'executive board' of the PKK/KCK terrorist organisation; the tweet read as follows: 'We call upon all the young people, women and everyone from 7 to 70 to stand up for Kobani, to protect our honour and dignity and to occupy the metropolitan areas.' On 6 October 2014, the 'firatnews.com' website, which is reputed to publish information in favour of the PKK/KCK terrorist organisation, posted the following statement [on behalf of] the Komalen Ciwan coordination: 'As we already know, for twenty-three days, Daesh fascism has been unfurling its barbarity in the centre of Kobani. Faced with this situation, Kurdistan's bravest young [women and men] are resisting [and] we honour the memory of those who perished in this unique episode of resistance, which will be engraved in gold letters in history, [and] we want to say that we will pursue their struggle. In this connection, we call on the Kurdish youth to follow the path of Arin Mirkan [a YPJ (Women's Protection Units) fighter who was blown up among Daesh members in the battle of Kobani] to the glory of the souls of our martyr comrades Jiyan,

Gerilla and Militan'. Following that publication, at 10.20 a.m., the central executive board of the Peoples' Democratic Party, the HDP (including the suspect, who was among the members [present at the meeting] of the executive board on 6 October 2014), posted the following tweet: 'Urgent call to our people! Urgent call to our people from the HDP central executive board, currently in session! The situation in Kobani is extremely dangerous. We urge our people to join and support those protesting in the streets against Daesh attacks and the AKP government's embargo over Kobani.' At 10.51 a.m. the HDP Twitter account confirmed the post. A further tweet was then posted by the same account: 'We call upon all our people, from 7 to 70, to [go out into] the streets, to [occupy] the streets and to take action against the attempted massacre in Kobani.' In addition, [the following tweet was published]: 'From now on, everywhere is Kobani. We call for permanent resistance until the end of the siege and brutal aggression in Kobani.' Following the publication of those tweets, on 6, 7 and 8 October 2014, during incidents in sixteen towns in Turkey, the offences ... were committed. It was found that during the commission of the offences [in question], 50 people had died, including 12 in Diyarbakır, 678 people had been injured and 1,113 buildings (including hospitals, schools, banks and town halls) had been rendered unfit for use. The [above-mentioned] statements by the suspect give rise to suspicion on the basis of concrete indications that he committed, simultaneously with members of the PKK/KCK terrorist organisation, the offence of public incitement to commit an offence.

(b) On 9 October 2014, in the presence of several television channels, the suspect gave a statement to the media in the HDP offices in Diyarbakır, [in which he stated] as follows:

'We issued the calls in question [the tweets posted by the HDP Twitter account] because we had found out that Daesh had reached the border at Mürşitpınar';

'If no call had been issued, the events could not have been prevented in the region';

'People went out into the streets and there was no violence anywhere. We did not tell anyone to resort to violence';

'On 7 October 2014 a young man was murdered by the security forces in Varto (Muş)';

'In Batman, unidentified civilians opened fire on the demonstrators';

'People were not satisfied with [the pursuit of] the peace process, which was not leading to any conclusion; they were in a bad mood';

'There should be no acts of violence. There is no need for intervention in demonstrations [held] in support of Kobani ...'

On 13 September 2015 the suspect gave the following statement to the press in Lice about the declaration of a curfew in Sur by the Diyarbakır governor's office: 'Our people want self-governance, their own assemblies and municipalities where responsibility lies with elected officials rather than appointees. Our people have the power to resist against pressure and massacre policies everywhere. We have the power to protect ourselves against any attack. We will show that we are not despairing; we will resist together; we will achieve salvation without forgetting our motherland and history and by defending our rights.'

On 18 December 2015 the suspect gave a statement to the press with Kamuran Yüksek, Selma Irmak and Ertuğrul Kürkçü. [He stated the following:] 'Everywhere you carry out [security] operations is filled with an atmosphere of enthusiasm rather than fear and panic. Do you know why? [Because] these people are absolutely certain that they will triumph from the very first day. They are the defenders of an honourable,

noble and dignified cause. We will not let cruelty and fascism win any more; this resistance will triumph. Those who try to downplay it by calling it [resistance of] ditches and holes should look back at history. There are tens of millions of heroes and brave people resisting against this coup. You are waging a war against the people. The people are resisting and will resist everywhere. Next week, on 26 and 27 December, we will attend the extraordinary meeting of the Democratic Society Congress in Diyarbakır. We will have intensive discussions and take important decisions concerning the processes of self-governance and autonomy and their operation in the political arena. We will implement them all.'

On 26, 27 and 28 October 2007 the suspect took part, together with mayors and members of the DTP [Party for a Democratic Society, a left-wing pro-Kurdish political party] in the 'First General Meeting' of the DTK (Democratic Society Congress), which was founded and operates in accordance with the Third Part of the KCK Agreement.

On 26 December 2015 the suspect made the [following] statements to the DTK: 'The barricades and trenches are not the result of the Kurdish people's desire for self-governance; they were put up because the people who made plans for a massacre in Ankara began implementing those plans. What trench, what barricade? We can't play down the question. The resistance in the trenches and barricades [is driven by the same motive as] the resistance against fascism and massacres: the right to an honourable life. If one day someone refuses to accept this and discuss it and says he will lock up and bring to their knees anyone who thinks in this way ... 'Oh, they have put up barricades, but that's not much – what else can they do?' They criticise us because that's what people say. If we, the politicians, NGOs, workers' organisations, women's organisations, youth organisations, local authorities, can support self-governance, if we can achieve it step by step, we will solve this historic problem. This resistance will lead to victory. My thanks go to all our friends [, who are not letting us down], who are resisting, who are not crumbling, [and] all our comrades who, despite everything, are remaining by the people's side during this time. Once again, I repeat my promise of loyalty and affection towards our friends, their families and the martyrs from 7 to 70 who have put their lives at risk.'

On 26 March 2016, in the theatre hall at Yenişehir Municipality Building, the suspect gave a speech [in which he stated]: 'Not claiming a corpse is dishonourable; leaving a corpse on the ground is dishonourable. We are looking at [what is happening] with shame; we are truly ashamed. [They are saying:] 'Oh, you went to [express] your condolences', 'no, it was a member of parliament [from your party] who went', 'no, the other one went...'. Can there be fifteen million terrorists in a country? If you [accuse] everyone of terrorism, in particular if you [accuse] the Kurds, who are claiming [their] rights and freedoms, [and] if you say you are going to take the necessary action, [this] fifteen-million-strong people will resist against your fascist practices by all available means. [Against this background], resistance becomes legitimate. Otherwise, war is not legitimate, there is no legitimacy [in] war. Resistance is legitimate. The people will be obliged to pay a higher price, our young people will be obliged to pay a higher price [and] we, the politicians, can only look at what is happening with sorrow when our dearest [friends] are murdered before our eyes. Against this background, I trust that the Democratic Society Congress will revive the enthusiasm [from] the time of its creation.'

Furthermore, having regard to the decision by the Diyarbakır public prosecutor's office to join the [following] investigation files to our [investigation] file: investigation no. 2016/29478 on the commission of offences on behalf of a terrorist organisation without being a member of it, investigation no. 2016/24008 on the commission of offences on behalf of a terrorist organisation without being a member of it, investigation no. 2016/29479 on the commission of offences on behalf of a terrorist organisation

without being a member of it, investigation no. 2016/24950 on disseminating propaganda in favour of a terrorist organisation and membership of a terrorist organisation, investigation no. 2016/29476 on the commission of offences on behalf of a terrorist organisation without being a member of it, investigation no. 2016/24946 on the commission of offences on behalf of a terrorist organisation without being a member of it, investigation no. 2016/35438 on public incitement to hatred and hostility, investigation no. 2016/35211 on organising, conducting and participating in unlawful public meetings and demonstrations, disseminating propaganda in favour of a terrorist organisation and praising crime and criminals, investigation no. 2016/35237 on organising, conducting and participating in unlawful public meetings and demonstrations and disseminating propaganda in favour of a terrorist organisation, investigation no. 2016/35447 on public incitement to hatred and hostility, praising crime and criminals and disseminating propaganda in favour of a terrorist organisation, investigation no. 2016/23921 on disseminating propaganda in favour of a terrorist organisation, investigation no. 2016/23920 on public incitement to hatred and hostility [and] disseminating propaganda in favour of a terrorist organisation, investigation no. 2016/24617 on public incitement to commit an offence [and] disseminating propaganda in favour of a terrorist organisation, investigation no. 2016/29488 on disseminating propaganda in favour of a terrorist organisation, investigation no. 2016/29489 on disseminating propaganda in favour of a terrorist organisation, investigation no. 2016/24542 on praising crime and criminals, and investigation no. 2016/35454 on organising, conducting and participating in unlawful public meetings and demonstrations [and] disseminating propaganda in favour of a terrorist organisation,

it has been found that there is a suspicion, based on concrete evidence, that the suspect committed the offence of membership of a terrorist organisation.

(c) There is 'concrete evidence giving rise to a strong suspicion [as to the commission] of an offence' referred to in Article 100 § 1 of the CCP (no. 5271) in respect of the suspect Selahattin Demirtaş, specific persuasive information and evidence for our court in view of the strong indications (suspicion) referred to in Article 19 § 3 of the Constitution, and a reasonable suspicion within the meaning of in Article 5 § 1 (c) of the [European] Convention [on Human Rights]. (It should be reiterated that, in accordance with Article 5 § 1 (c) of the Convention, a person may be detained only in the context of criminal proceedings, for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence (see *Jėčius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX; *Włoch v. Poland*, no. 27785/95, §108, ECHR 2000-XI; and *Poyraz v. Turkey* (dec.), no. 21235/11, § 53, 17 February 2015). The 'reasonableness' of the suspicion on which a detention order must be based forms an essential part of the safeguard laid down in Article 5 § 1 (c) of the Convention. Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as reasonable will, however, depend on all the circumstances (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182; *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X; *Korkmaz and Others v. Turkey*, no. 35979/97, § 24, 21 March 2006; *Süleyman Erdem v. Turkey*, no. 49574/99, § 37, 19 September 2006; and *Çiçek v. Turkey* (dec.), no. 72774/10, § 62, 3 March 2015).

Having regard to the nature of the suspect's alleged offence of forming and leading an armed terrorist organisation, since it is among those listed in Article 100 § 3 (a) (11) of the CCP (no. 5271), and to the above-mentioned indications of the existence of concrete evidence giving rise to a strong suspicion, there is a strong suspicion [*sic*] of

the commission of the offence in question, and therefore a ground for detention in accordance with Article 100 § 3 (a) (11) of the CCP.

As pointed out in the Constitutional Court's decisions of 27 October 2011 (nos. E. 2010/71 and K. 2011/143) and 27 December 2012 (nos. E. 2012/35 and 2012/203), the proportionality principle comprises the principles of 'appropriateness', 'necessity' and 'proportionality' [*sic*]. In view of the nature of the suspect's alleged offence, the lower and upper limit of the prison sentence prescribed by law, the importance of the case and the anticipated penalty and security measure, the pre-trial detention [of the suspect] is proportionate to the aim pursued. Certain grounds dictate that [the suspect] must be detained; consequently, [while there are risks linked to the suspects' detention,] it has nevertheless been deemed necessary to impose the measure of detention. The aim cannot be achieved by applying judicial supervision measures; following an assessment of the provisions on judicial supervision measures, [they are] deemed insufficient. For these reasons, the detention order will satisfy the proportionality principle set forth in Article 13 of the Constitution and Article 100 § 1 of the CCP (no. 5271). In view of all the above considerations, judicial supervision measures are insufficient. There is concrete evidence giving rise to a strong suspicion against the suspects. There is a ground for detention and [that measure] is proportionate. There are grounds for detention in the light of Article 19 of the Constitution, Article 5 of the [Convention] and Article 100 of the CCP (no. 5271). Furthermore, the deprivation of liberty is lawful for the purposes of Article 5 § 1 of the [Convention and] is compatible with the principle of the rule of law enshrined in the provisions of the [Convention] and Article 100 of the CCP. [Accordingly], the suspect's pre-trial detention is ordered on the basis of Articles 100 et seq. of the CCP.

..."

71. On the same day, eight other HDP members of parliament were placed in pre-trial detention by the competent magistrates in various towns.

72. On 8 November 2016 the applicant lodged an objection against the order for his pre-trial detention.

73. In a decision of 11 November 2016 the Diyarbakır 3rd Magistrate's Court dismissed the objection. The decision stated that the applicant was being detained for the following offences: membership of an armed terrorist organisation and public incitement to commit an offence.

74. On 1 December 2016 the Diyarbakır 2nd Magistrate's Court examined the question of the applicant's continued detention, of its own motion and on the sole basis of the case file. The magistrate ordered the applicant's continued detention, finding that it was justified by: the nature of the alleged offences and the fact that they were among those listed in Article 100 § 3 of the CCP; the existence of a reasonable suspicion that the applicant had committed a criminal offence within the meaning of Article 5 of the Convention; the strong suspicion against the applicant for the purposes of Article 19 of the Constitution; and the factual evidence giving rise to a strong suspicion that he had committed an offence for the purposes of Article 100 of the CCP. Taking into account the severity of the sentences prescribed by law for the offences in question, the magistrate held that the applicant's continued pre-trial detention was proportionate and that alternative measures to detention appeared insufficient.

75. On 5 December 2016 the applicant lodged an objection, seeking his release.

76. In a decision of 6 December 2016 the Diyarbakır 1st Magistrate's Court dismissed the objection and specified that the applicant was being detained solely for membership of an armed terrorist organisation.

77. On 12 December 2016 the applicant lodged a further objection against his continued pre-trial detention. He submitted, *inter alia*, that under Article 83 of the Constitution, he enjoyed parliamentary immunity, meaning that he could not be held liable for any opinions he had expressed in the course of parliamentary proceedings. On an unknown date his objection was dismissed. The parties have not provided a copy of that decision.

78. On 11 January 2017 the public prosecutor filed a bill of indictment with the Diyarbakır Assize Court in respect of the applicant, running to 501 pages (not including the appendices). He charged the applicant with forming or leading an armed terrorist organisation (Article 314 § 1 of the Criminal Code), disseminating propaganda in favour of a terrorist organisation (fifteen counts – section 7(2) of the Prevention of Terrorism Act), public incitement to commit an offence (Article 214 § 1 of the Criminal Code), praising crime and criminals (four counts – Article 215 § 1 of the Criminal Code), public incitement to hatred and hostility (two counts – Article 216 § 1 of the Criminal Code), incitement to disobey the law (Article 217 § 1 of the Criminal Code), organising and participating in unlawful meetings and demonstrations (three counts – section 28(1) of the Meetings and Demonstrations Act (Law no. 2911)), and not complying with orders by the security forces for the dispersal of an unlawful demonstration (section 32(1) of Law no. 2911). The public prosecutor sought a sentence of between forty-three and 142 years' imprisonment for the applicant.

79. The charges brought against the applicant by the public prosecutor may be summarised as follows.

(i) In a speech given in the BDP offices in Batman on 27 October 2012, the applicant had disseminated propaganda in favour of the PKK terrorist organisation by urging people to close their shops and not to send their children to school as a protest aimed at securing the release of the PKK leader.

(ii) On 13 November 2012 two demonstrations had been held in Nusaybin and Kızıltepe in protest against the conditions of the PKK leader's detention, and the applicant had made the following comments in Kızıltepe:

"They said you couldn't put up the poster of Öcalan. Those who said it ... Let me speak clearly. We are going to put up a sculpture of President Apo. The Kurdish people have now risen up. With their leader, their party, their elected representatives, their children, their young and old, they are one of the greatest peoples of the Middle East." ("*Demişler ki Öcalan posteri asamazsınız. Onu diyenlere açıkça sesleniyorum... Biz başkan Apo'nun heykelini dikeceğiz heykelini. Kürt halkı artık ayağa kalkmış bir halktır. Önderiyle, partisiyle, seçilmişiyle, çocuğuyla, genciyle, yaşlısıyla*

Ortadoğu'nun en büyük halklarından biridir.") According to the bill of indictment, these comments amounted to propaganda in favour of a terrorist organisation.

(iii) In a speech he had given in the BDP offices in Diyarbakır on 21 April 2013, the applicant had stated the following: "The Kurdish movement used to see the war as a legitimate war of self-defence. Nowadays, if you have enough experience to resist [and] prevail using non-violent methods, it is not morally [and] politically right to use weapons. Today, those who criticise us also say that the Kurdish people would not exist, at least in Turkish Kurdistan, without the PKK movement. You could not speak of the existence of Kurds in Turkish Kurdistan. Without the coup in 1984 [the year of the first PKK attacks], without the guerrillas, no one today could speak of the existence of the Kurdish people; the Kurds had no other choice. At the time of the initial resistance in Şemdinli [and] Eruh [the first terrorist attacks by the PKK, carried out in the Şemdinli district in Hakkari and the Eruh district in Siirt on 15 August 1984], no one was aware of what was happening but the resistance has today created [the] reality of the [Kurdish] people. We have gained our identity." *("Kürt hareketi savaşı meşru müdafaa savaşı olarak ele aldı. Şimdi eğer elinizde silah dışında yöntemlerle güçle, mekanizmayla direnebilecek, başarabilecek yeteri kadar birikim varsa siz buna rağmen silahı kullanırsınız birincisi bu ahlaki olmaz ikincisi de siyasi olarak da doğru bir tercih olmaz. Kürt halkı evet bugün biz sadece söylemiyoruz, bizi eleştirenler de söylüyordu, PKK hareketi olmasaydı bugün Kürt halkı diye bir şey Türkiye Kürdistan'ı için en azından olmayacaktı. Türkiye Kürdistanı'nda Kürtlerin varlığından söz edilmeyecekti. 1984 hamlesi olmasaydı, gerilla savaşı olmasıydı, kimse bugün Kürt halkının varlığından söz edemezdi, çünkü Kürtlerin başka çaresi yoktu. ... Şemdinli'de Eruh'ta ilk direniş sergilendiğinde kimse ne olduğunun farkında değildi ama o direniş bugün büyük bir halk gerçeği yarattı. Kimliğimizi kazandık*.")

(iv) Following the proclamations of self-governance and the operations conducted by the security forces, the applicant had stated on several occasions that the operations in question were massacres carried out by the national authorities and had described certain acts attributed to members of the PKK as acts of resistance.

(v) The applicant had actively worked to set up the DTK organisation, founded according to the public prosecutor in order to raise public awareness of the PKK's views, and had given speeches at meetings organised by the DTK.

(vi) The applicant was in charge of the political wing of the KCK, an illegal organisation; in that connection, the public prosecutor presented evidence including the following:

– two documents, entitled "*documento*" and "*ikram ark*", discovered on a hard drive seized from the home of a certain A.D., who at the time had been the mayor of Sur, a district of Diyarbakır, and had been sentenced in 2017 to

eighteen years' imprisonment for leading a terrorist organisation; according to those documents, S.O., the presumed KCK leader in Turkey, had given instructions to several people, including the applicant, to visit the relatives of İ.E., who had been mistakenly murdered by the PKK;

– the records of intercepted telephone conversations between S.O. and K.Y., who was co-chair of the Democratic Regions Party (a left-wing pro-Kurdish political party) and had subsequently been sentenced to twenty-one years' imprisonment for leading a terrorist organisation, and between K.Y. and the applicant. According to those records, S.O. had given instructions to several people, including the applicant, to take part in certain meetings abroad, including in Strasbourg.

- A transcript of the relevant parts of the conversation on 4 December 2008 between the applicant and K.Y. reads as follows:

"K.Y.: Given the importance of the programme, he says that you and G. have to take part in the Council [of Europe] meeting, which will last two days. He thinks [it] is very important.

[The applicant]: That's three or four times he has come calling.

K.Y.: Well, that's where they have got to. I haven't worried about it too much; I told [him] that our friends [were trying] to find a solution [but they have not managed]. Now he says that we absolutely have to, that there is no other solution and that it's a difficult situation for [them]. On that subject, [he says that] he has explained things a bit but that it would be good for [you to go there]. As for the master, he [also] says it would be good for him to come.

[The applicant]: I'll have a word.

K.Y.: He says there is a two-day programme, that you absolutely have to take part. As for the master, he [also] says it would be good for him to come, that there are things he needs to speak about with him."

- A transcript of the relevant parts of the conversation on 4 December 2008 between K.Y. and S.O. reads as follows:

"S.O.: They called F., my friend. They said they couldn't come to Italy.

K.Y.: [They told me] we had said that S. and B. could be there, I've just had it confirmed now.

S.O.: But it's not a visit to a neighbour, [it is] a meeting at the Council of Europe. It's unbelievable – it's just not serious. Why don't you say [that]?

K.Y.: It's not yet set in stone.

S.O.: But [how are we going to] arrange meetings, from now on, on behalf of the party?

K.Y.: Yes.

S.O.: Both of them will come, my friend. They will have to leave their work behind and [go there].

K.Y.: OK.

S.O.: Selahattin [the applicant] and G., both of them have absolutely got to come.

K.Y.: They said they had found a solution with F. [I said OK, if they have found a solution].

S.O.: There is no solution, my friend. F. has just told me so.

K.Y.: All right."

- Also on 4 December 2008 the applicant and K.Y. had a further telephone conversation, of which the following is a transcript of the relevant parts:

"K.Y.: Thank you, [tell me], after seeing F., you found a solution, didn't you?

[The applicant]: I met F., and then passed [the matter] on to S., who was supposed to find and has found [a solution].

K.Y.: They found one?

[The applicant]: Yes.

K.Y.: It's better for you to know I gave his name.

[The applicant]: OK, I'll call [and] see. I'm working [on] it.

K.Y.: Yes, [it is on] the 11th, [I hope that's right, but yes], it's on 11 January.

[The applicant]: [In] Strasbourg, no?

K.Y.: Yes, Strasbourg.

[The applicant]: All right, I'll [have a closer look] and get back to you tomorrow.

K.Y.: OK, I have given [his] name."

(vii) The applicant, through his speeches and statements (the relevant parts of which are summarised in paragraphs 26-27 above) had incited the acts of violence that had taken place between 6 and 8 October 2014.

80. On 1 February 2017 the applicant lodged a further objection against his continued detention and sought to be released. In that connection, he submitted in particular that in accordance with the first paragraph of Article 83, he was entitled to parliamentary non-liability, meaning that members of parliament could not be punished for opinions they expressed within the National Assembly and repeated outside. He maintained that the accusations brought against him, forming the basis for his pre-trial detention, were linked to his political speeches, the content of which was protected by the first paragraph of Article 83 of the Constitution. On an unknown date, the objection was dismissed. The parties have not provided a copy of that decision.

81. On 2 February 2017 the Diyarbakır Assize Court accepted the bill of indictment filed by the public prosecutor. On the same day, it contacted the Ministry of Justice, asking it to take the necessary steps to transfer the venue of the applicant's trial on public-safety grounds. Also on the same day, it ordered the continuation of the applicant's pre-trial detention.

82. On 1 March 2017 the Diyarbakır Assize Court examined of its own motion the question of the applicant's continued detention. Having regard to

the number and nature of the charges against the applicant and the concrete evidence giving rise to a strong suspicion that he had committed an offence, and bearing in mind that he had yet to provide his defence submissions, that he had refused to appear before the investigating authorities during the investigation, that the alleged offences were among those listed in Article 100 § 3 of the CCP and that the grounds for keeping him in detention remained unchanged, the Diyarbakır Assize Court ordered his continued pre-trial detention. In view of the severity of the sentences prescribed by law for the offences in question, it held that the application of alternative measures to detention would be insufficient.

83. On an unspecified date the applicant lodged a further objection against the decision to continue his pre-trial detention. In a decision of 14 March 2017 the Diyarbakır Assize Court dismissed the objection on the basis of the nature of the alleged offences, the state of the evidence, the period that the applicant had spent in detention, the strong suspicion that he had committed the offences in question and his refusal to appear before the investigating authorities during the investigation.

84. On 22 March 2017, at the request of the Ministry of Justice, the Court of Cassation, finding that a change of venue for the applicant's trial was appropriate in order to avoid threats to public safety, transferred the case to the Ankara Assize Court.

85. On 6 April 2017 the Diyarbakır Assize Court forwarded the file to the Ankara Assize Court.

86. On 22 June 2017 the Ankara 19th Assize Court, examining the matter of its own motion, ordered the applicant's continued detention. In so doing, it had regard firstly to the existence of concrete evidence giving rise to a strong suspicion that he had committed the alleged offences, and to the upper and lower limits of the sentences prescribed for those offences. Next, it found that the prevention of disorder and of further offences constituted valid grounds for pre-trial detention in the light of Article 5 of the Convention and the Court's case-law. Taking into account the period that the applicant had spent in pre-trial detention, it also held that there was a risk of his absconding and tampering with evidence. For the same reasons, it concluded that the application of alternative measures to pre-trial detention would be insufficient.

87. On 3 October 2017, 103 days after its previous decision, the Ankara 19th Assize Court again examined the question of the applicant's continued pre-trial detention. Having regard to the number and nature of the charges against him, the existence of concrete evidence giving rise to a strong suspicion that he had committed the offences in question and the upper and lower limits of the sentences prescribed for those offences, and bearing in mind that he had yet to provide his defence submissions, that he had refused to appear before the investigating authorities and that the grounds for keeping him in detention remained unchanged, it ordered the extension of his pre-trial

detention. It also noted that in view of the prospect of the applicant's conviction for the alleged offences, the application of alternative measures to pre-trial detention would be insufficient.

88. On 16 November 2017 the applicant lodged a compensation claim with the Diyarbakır Assize Court under Article 141 of the CCP. In a judgment of 11 July 2018 the court found partly in his favour and awarded him 10,000 Turkish liras (TRY – approximately 1,890 euros (EUR)) in compensation on account of the fact that the courts had not examined of their own motion the question of the lawfulness of his detention between 21 July and 3 October 2017.

89. On 7 December 2017 the Ankara 19th Assize Court held its first hearing in the case.

90. During the trial, the applicant argued that he had been detained for expressing critical views about the policies pursued by the President of Turkey, and denied having committed any criminal offence. He maintained that his initial and continued pre-trial detention were unlawful. In particular, he asserted that the aim of depriving him of his liberty had been to silence members of the political opposition.

91. On 3 April 2018 the applicant filed a petition with the Ankara 19th Assize Court, in which he stated that he had been charged on the basis of speeches he had given between 2008 and 2016 while a member of parliament. He submitted that he could not be held liable for the speeches, given that Article 83 of the Constitution provided for parliamentary non-liability. On that account, he asked the Assize Court to examine the speeches he had given during parliamentary proceedings and to compare their content with that of the speeches in issue. He asked the court to instruct an expert to determine whether the speeches were protected in view of his parliamentary non-liability. It appears that the Ankara Assize Court did not accept that request.

92. During the investigation and the trial, the applicant lodged several objections against his continued pre-trial detention. Until 2 September 2019 the domestic courts on each occasion ordered his continued detention on the following grounds: the existence of concrete evidence giving rise to a strong suspicion that he had committed the offences of which he was accused; the number and nature of the alleged offences and the fact that they were among those listed in Article 100 § 3 of the CCP; the severity of the sentences prescribed by law for the offences concerned; the finding that alternative measures to detention appeared insufficient; the applicant's refusal to appear before the investigating authorities; the fact that the applicant's defence submissions had not yet been obtained; the state of the evidence; the period spent in detention; and the risk of absconding and of tampering with evidence.

93. On 2 September 2019, having regard to the fact that the applicant had finished filing his defence submissions, the Ankara Assize Court decided to release him from pre-trial detention on condition that he was not detained or

convicted in separate proceedings. It also decided that he should be banned from travelling abroad.

94. On an unknown date, the Ankara public prosecutor lodged an objection against the decision to release the applicant. On an unspecified date, the Ankara Assize Court dismissed the objection.

95. The criminal proceedings are currently pending before the Ankara 19th Assize Court.

VI. THE FIRST INDIVIDUAL APPLICATION TO THE CONSTITUTIONAL COURT

96. It appears from the case file that the applicant has lodged several applications with the Constitutional Court, one of which is currently pending. For the purposes of the present case, the application lodged on 17 November 2016 (no. 2016/25189), mainly concerning the applicant's detention, is summarised below. The Constitutional Court gave its ruling in a judgment of 21 December 2017, declaring the application inadmissible.

97. The applicant complained that he had been arrested, taken into police custody and placed in pre-trial detention on account of political speeches he had given as a member of parliament and co-chair of a political party. He argued that the statements he had made should be examined from the standpoint of his right to freedom of expression. He further submitted that there had been no evidence giving rise to a reasonable suspicion that he had committed a criminal offence. In addition, he submitted that a person deprived of his liberty should be brought promptly before a judge and that the duration of the deprivation of liberty should not exceed a reasonable time. He also contended that the reasons given by the domestic courts to justify his detention had been insufficient. He further submitted that the severity of the potential sentence could not form a basis for establishing any risk of absconding. He complained that no alternative measure to detention had been applied in his case and that there had been no specific grounds justifying his detention. In addition, he alleged that he had had no access to the investigation file in order to challenge his pre-trial detention. Lastly, he maintained that in view of his status as a member of parliament, his pre-trial detention amounted to a violation of his right to free elections.

98. With regard to the complaint concerning the lawfulness of the applicant's arrest and detention in police custody, the Constitutional Court held that he should have brought a compensation claim under Article 141 § 1 (a) of the CCP but had omitted to do so. Furthermore, it noted that he had not lodged an objection under Article 91 § 5 of the CCP against his detention in police custody. Accordingly, it declared the complaint inadmissible for failure to exhaust the appropriate remedies.

99. As regards the complaint about the lawfulness of his pre-trial detention, the applicant argued firstly that he still enjoyed parliamentary

immunity and that his pre-trial detention was therefore in breach of the Constitution. The Constitutional Court observed, however, that the constitutional amendment of 20 May 2016 had made it possible to grant the requests for the lifting of the applicant's parliamentary immunity that had been referred to the National Assembly before the adoption of the amendment. Accordingly, it dismissed the applicant's argument that his initial and continued pre-trial detention had no basis in law.

100. Next, the Constitutional Court considered whether there had been a strong presumption that the applicant had committed an offence. In that context, it noted at the outset that, bearing in mind the number of deaths and injuries during the events of 6 to 8 October 2014, a causal link could be established between the calls issued by the HDP central executive board, which was co-chaired by the applicant, and the acts of violence in question. Furthermore, with regard to the "trench events", the Constitutional Court held that, bearing in mind the statements made by the applicant, the places where he had made them and his position as co-chair of the HDP, his pre-trial detention in connection with a terrorism-related offence was not devoid of justification. In the same vein, having regard to the content of the two speeches given by the applicant on 13 November 2012 and 21 April 2013 (see paragraph 79 above), it held that there was undeniably an indication that an offence had been committed. Lastly, taking into account the content of the conversations among presumed senior officials of the PKK and between them and the applicant (see paragraph 79 above), it found that it had been legitimate to consider that the applicant might have acted in accordance with the instructions of the leaders of a terrorist organisation. It therefore held that these factors were sufficient grounds for a strong suspicion that the applicant had committed an offence.

101. The Constitutional Court then considered whether the applicant's pre-trial detention had pursued a legitimate aim. It observed in that connection that, after establishing that there was a strong suspicion that the applicant had committed the alleged offences, the Diyarbakır 2nd Magistrate's Court had ordered his pre-trial detention on the grounds that the offences in question were among those listed in Article 100 § 3 of the CCP and were punishable by heavy sentences. The Constitutional Court added that the severity of the potential sentence was a factor to consider when assessing the risk of absconding. It added that the applicant had refused to appear before the investigating authorities and had stated that no member of parliament from his party would give evidence voluntarily. Those aspects were sufficient in the court's view to conclude that there was a flight risk. The Constitutional Court therefore found that the applicant's pre-trial detention had pursued a legitimate aim.

102. The Constitutional Court then considered whether the applicant's pre-trial detention was proportionate to the aim pursued. In that context, the applicant had alleged that his detention had prevented him from carrying out

political activities. Referring to several Constitutional Court judgments concerning the pre-trial detention of members of parliament, he had argued that his detention was disproportionate to the aim pursued, in view of his status as a member of parliament. In that connection, the Constitutional Court stated firstly that, contrary to what the applicant had maintained, it had never given a judgment in which it had found that the pre-trial detention of a member of parliament whose immunity had been lifted amounted in itself to a breach of the Constitution. The Constitutional Court further noted that as the applicant had been placed in pre-trial detention a long time after the alleged offences had been committed, it had to examine whether or not his pre-trial detention could have been regarded as necessary. In that context, it pointed out that, in accordance with Article 83 of the Constitution, the applicant could not have been placed in pre-trial detention while he enjoyed parliamentary immunity. It observed that the investigation reports concerning him had been sent to the competent public prosecutors after the entry into force of the constitutional amendment introducing an exception to parliamentary immunity, and that he had been placed in pre-trial detention some five months afterwards. It was therefore clear from the evidence in the case file that the investigating authorities had not remained inactive during that period. The Constitutional Court added that it was unable to conclude that the applicant's pre-trial detention had been disproportionate and arbitrary, notably in view of the severity of the sentence prescribed for the offences in question. For those reasons, it declared this part of the application inadmissible as being manifestly ill-founded.

103. From the standpoint of Article 5 § 3 of the Convention, the Constitutional Court observed that in his application form, the applicant had not complained of the lack of relevant and sufficient reasons to justify his continued pre-trial detention (see paragraph 118 of the Constitutional Court's judgment). It pointed out that he had first alleged such a violation when responding to the observations of the Ministry of Justice. Adding that the applicant could lodge a fresh individual application with it, the Constitutional Court thus decided not to examine this part of the application.

104. With regard to the complaint under Article 18 of the Convention, in view of its conclusion concerning the lawfulness of the applicant's pre-trial detention, the Constitutional Court held that it was unnecessary to examine that complaint separately.

105. Concerning the applicant's complaint that he had had no access to the investigation file, the Constitutional Court held that he had had sufficient means available to prepare his defence to the charges against him and to challenge his pre-trial detention, in view of the contents of the investigation reports submitted to the National Assembly by the public prosecutors. Accordingly, it declared this complaint inadmissible as being manifestly ill-founded.

106. Lastly, regarding the complaints relating to the right to freedom of expression and the right to be elected and to carry out political activities, the Constitutional Court, having regard to its conclusion in relation to the applicant's complaint as to the lawfulness of his pre-trial detention, declared them inadmissible as being manifestly ill-founded.

107. In his dissenting opinion, Mr Engin Yıldırım, the judge in the minority, observed, like the majority, taking into account the evidence in the file, that there was a strong indication that the applicant had committed an offence; however, referring to the principles deriving from the Court's case-law, in particular *Buzadji v. the Republic of Moldova* ([GC], no. 23755/07, 5 July 2016), he submitted that the applicant's detention was not proportionate, in so far as it had not been shown that there were relevant and sufficient reasons to justify it. In his opinion, the reasons why the application of an alternative measure to detention would have been insufficient had not been explained by the judicial authorities. Turning to the risk of absconding, he noted firstly that two main reasons had been put forward to substantiate that risk, namely the severity of the sentences prescribed by law for the offences in question and the fact that the applicant had refused to appear before the investigating authorities. In the dissenting judge's view, however, the severity of a sentence could not *per se* justify a person's pre-trial detention. Similarly, it could not be concluded that the applicant's refusal to appear before the investigating authorities could form a basis for establishing such a risk, since the applicant had continued to carry out his political activities without demonstrating the slightest intention of absconding. The dissenting judge added that between the entry into force of the amendment to the Constitution lifting the applicant's parliamentary immunity and the date of his initial pre-trial detention, the applicant had travelled abroad more than ten times and had never attempted to flee. For these reasons, he was of the view that there had been a violation of Article 19 of the Constitution in the applicant's case. Noting in addition that the applicant was a member of parliament and co-chair of a political party that had obtained more than five million votes, the dissenting judge considered that his pre-trial detention without relevant and sufficient reasons also amounted to a breach of the right to be elected and to carry out political activities as safeguarded by Article 67 of the Constitution.

VII. CRIMINAL PROCEEDINGS IN THE ISTANBUL ASSIZE COURT

108. On an unknown date, the Istanbul public prosecutor's office opened a criminal investigation in respect of the applicant, who was accused of disseminating propaganda in favour of a terrorist organisation.

109. At the end of those criminal proceedings, in a judgment of 7 September 2018 the Istanbul Assize Court sentenced the applicant to four years and eight months' imprisonment for disseminating propaganda in

favour of a terrorist organisation, an offence provided for by section 7(2) of the Prevention of Terrorism Act, on account of a speech he had given at a rally in Istanbul on 17 March 2013.

110. In a judgment delivered on 4 December 2018, the Istanbul Court of Appeal upheld with final effect the first-instance judgment convicting the applicant.

111. On 7 December 2018 the applicant began serving his sentence of four years and eight months' imprisonment.

112. On 24 October 2019 Law no. 7188 amending certain provisions of the CCP was published in the Official Gazette. Section 29 of the Law provided for the right to appeal on points of law in the case of a number of offences linked to freedom of expression, such as disseminating propaganda in favour of a terrorist organisation as punishable under section 7 of the Prevention of Terrorism Act (Law no. 3713). Where convictions had already become final, the Law provided for the possibility of an appeal on points of law within fifteen days of its entry into force.

113. On 31 October 2019, further to a request by the applicant, the Istanbul Assize Court stayed the execution of his sentence of four years and eight months' imprisonment and ordered his release on condition that he was not detained in separate proceedings.

VIII. THE APPLICANT'S RETURN TO PRE-TRIAL DETENTION

114. Following the Ankara Assize Court's decision of 2 September 2019 to release the applicant (see paragraph 93 above), his lawyers applied to the Istanbul Assize Court to have the days he had spent in pre-trial detention during the criminal proceedings in the Ankara Assize Court deducted from the final sentence imposed in the criminal proceedings in the Istanbul Assize Court.

115. On 20 September 2019, two days after the hearing before the Court in the present case, the Istanbul 26th Assize Court allowed the request.

116. On the same day, notwithstanding the criminal proceedings pending before the Ankara Assize Court, the Ankara public prosecutor's office applied to the Ankara Magistrate's Court to have the applicant and Ms Figen Yüksekdağ (former co-chair of the HDP) placed in pre-trial detention in the context of a separate criminal investigation initiated in 2014 (no. 2014/146757) in relation to the events of 6 to 8 October 2014, on suspicion of the following offences:

(i) undermining the unity and territorial integrity of the State;

(ii) incitement to commit murder in order to conceal an offence or evidence of another offence or to avoid arrest;

(iii) incitement, together with more than one other person, to commit robbery at night in order to assist a criminal organisation;

(iv) incitement to deprive another person of his liberty by means of threats, violence and deception; and

(v) incitement to attempted murder in order to conceal an offence or evidence of another offence or to avoid arrest.

117. On 20 September 2019, on the basis of Article 100 of the CCP, the Ankara 1st Magistrate's Court ordered the pre-trial detention of the applicant and Ms Figen Yüksekdağ, having regard to the following:

(a) the nature of the offences of which they were accused;

(b) the existence of evidence giving rise to a strong suspicion that the accused had committed the alleged offences;

(c) the severity of the sentences prescribed by law for the offences in question;

(d) the presence of the conditions for ordering the accused's pre-trial detention under Article 19 of the Constitution and Article 5 of the Convention; and

(e) the fact that alternative measures to detention appeared insufficient.

118. After the applicant's return to pre-trial detention, the President of Turkey made the following statement to the press on 21 September 2019:

> "If you are looking for a killer in this country, there is no need to search for the address. They have even infiltrated Parliament. This nation does not and will not forget those who called people out into the streets and then killed our fifty-three children in Diyarbakır. We are following this matter and we will follow it through to the end. We cannot let them [the applicant and Figen Yüksekdag] go. If we let [them] go, our martyrs will hold us to account in the eternal realm. These lands are not just any lands." ("*Bu ülkede katil aranıyorsa bunların adresini aramaya gerek yok. Bunlar, parlamentoya kadar sızmışlar. Sokağa insanları çağırıp ondan sonra Diyarbakır'da 53 evladımızı öldürenleri bu millet unutmuyor ve unutmayacaktır da. Sonuna kadar bu işin takipçisiyiz, takipçisi olacağız. Bunları bırakamayız. Eğer biz bırakırsak ebedi alemde şehitlerimiz bize bunun hesabını sorar. Bu topraklar rastgele topraklar değil*.")

119. Subsequently, on 23 September 2019, the following statement by Mr Kemal Kılıçdaroğlu, the leader of the CHP, the main opposition party, was published in the national press:

> "Everybody knows that there is no justice in Turkey, that there is political pressure on judges. Selahattin Demirtaş should have been released, but his return to detention at the urging of the political authorities is actually a legal disaster." ("*Türkiye'de adaletin olmadığını, siyasal baskıların yargıçlar üzerinde de sürdürüldüğünü herkes biliyor. Selahattin Demirtaş'ın tahliye edilmesi gerekirken siyasal iktidarın talebi üzerine tekrar tutuklanması aslında bir hukuk faciasıdır*.")

IX. THE SECOND INDIVIDUAL APPLICATION TO THE CONSTITUTIONAL COURT

120. On 26 November 2017 and 29 May, 18 June, 27 November and 11 December 2018 the applicant lodged five further individual applications with the Constitutional Court, which deemed it appropriate to examine the applications together as case no. 2017/38610 in view of their similar subject

matter; it gave judgment on 9 June 2020. For practical reasons, the Court will refer to these five individual applications as "the second individual application".

121. In its judgment the Constitutional Court held, unanimously, that there had been a violation of Article 19 § 7 of the Constitution (corresponding to Article 5 § 3 of the Convention) on account of the length of time the applicant had spent in pre-trial detention. In that connection, it stated firstly that the applicant had been kept in pre-trial detention for two years, one month and three days on a terrorism-related criminal charge. It noted that the question whether the length of pre-trial detention had exceeded a reasonable time could be determined primarily with reference to the reasons set out in the decision ordering the detention. The reasoning of such decisions had to demonstrate the existence of a strong indication of criminal guilt – a precondition for detention – as well as the grounds for detention and the proportionality of such a measure.

122. The Constitutional Court pointed out that it had already found in its decision of 21 December 2017 that there had been a "strong suspicion" that the applicant had committed an offence. Consequently, his initial detention had been in accordance with the Constitution. It then went on to examine the decisions ordering the applicant's continued detention in terms of the grounds for the detention and its proportionality.

123. The Constitutional Court noted that it had already considered the matter of the excessive detention of applicants who were members of parliament. It held that it was appropriate to examine not only the restriction resulting from the measure of detention on the right to liberty and security of person as guaranteed by Article 19 of the Constitution, but also the impact of the detention, in the event of its extension, on the right to elect, stand for election and carry out political activities as guaranteed by Article 67 of the Constitution. In the Constitutional Court's view, when ordering the continued detention of a member of parliament, the courts had to show, on the basis of concrete facts, that there was an interest prevailing over the interest in the exercise of the right to liberty and security of person and of the right to elect, stand for election and carry out political activities.

124. The Constitutional Court observed that the fact that the person whose detention had been ordered was a member of parliament did not automatically mean that detention was a disproportionate measure. In that connection, the extension of a member of parliament's detention could be ordered as long as it could be shown that there were grounds necessitating continued detention during an investigation or criminal proceedings. When giving decisions on detention, the courts should demonstrate which public interest justified an extension of detention notwithstanding the impact of that measure on the right to liberty and security of person and the right to stand for election and carry out political activities, and how the extension of detention prevailed over the rights in question. In other words, the grounds set out in the decisions ordering

continued detention should cover not only the objective aspects of the case but also the specific considerations relating to the position of the member of parliament being detained – that is, the grounds should be personalised.

125. Returning to the particular features of the case before it, the Constitutional Court held that the competent magistrates and assize courts had not assessed the applicant's allegations that his continued detention was unreasonable on account of his status as a member of parliament, the co-chair of a political party and a candidate in the presidential election, and that the measure in question had also imposed an excessive restriction on his right to stand for election and carry out political activities. It found that the applications for release which the applicant had lodged in the course of the proceedings had been rejected on the basis of formulaic reasons. On that account, it concluded that the decisions on his continued detention had not contained relevant and sufficient reasons. That being so, the Constitutional Court held that there had been a violation of the applicant's right to liberty and security within the meaning of Article 19 § 7 of the Constitution.

126. The applicant's other complaints were either declared inadmissible (in particular, those relating to Article 5 §§ 1 and 4 of the Convention), or the Constitutional Court held that there was no need to examine them separately (among other complaints, those relating to Article 18 of the Convention and Article 3 of Protocol No. 1).

127. Having regard to its finding of a violation, the Constitutional Court held that the applicant was to be awarded TRY 50,000 (approximately EUR 6,500) in respect of non-pecuniary damage and TRY 4,436.30 (approximately EUR 575) in respect of costs and expenses.

128. As regards the applicant's current pre-trial detention, which began on 20 September 2019 (see paragraph 117 above), the Constitutional Court noted that on 7 November 2019 he had lodged a further individual application, which was still pending before it. Nevertheless, the Constitutional Court did not rule on that detention. Accordingly, the judgment of 9 June 2020 had no effect on the personal situation of the applicant, who remains in prison.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Constitution

129. Article 14 of the Constitution reads as follows:

> "None of the fundamental rights and freedoms set out in the Constitution shall be exercised with a view to undermining the territorial integrity of the State and the unity of the nation or abolishing the democratic and secular Republic founded on human rights.

No provision of this Constitution shall be interpreted in a manner that would grant the State or individuals the right to engage in activities intended to destroy the fundamental rights and freedoms embodied in the Constitution or to restrict them beyond what is permitted by the Constitution.

The penalties to which persons who engage in activities that contravene these provisions are liable shall be determined by law."

130. The relevant parts of Article 19 of the Constitution read as follows:

"Everyone has the right to personal liberty and security.

...

Individuals against whom there are strong presumptions of guilt may be detained only by order of a judge and for the purposes of preventing their absconding or the destruction or alteration of evidence, or in any other circumstances provided for by law that also necessitate their detention. No one shall be arrested without an order by a judge except when caught *in flagrante delicto* or where a delay would have a harmful effect; the conditions for such action shall be determined by law.

...

A person who has been arrested or detained shall be brought before a judge within forty-eight hours at the latest or, in the case of offences committed jointly with others, within four days, not including the time required to convey the person to the nearest court to the place of detention. No one shall be deprived of his or her liberty after the expiry of the aforementioned periods except by order of a judge. These periods may be extended during a state of emergency or a state of siege or in time of war.

...

Anyone who has been detained shall be entitled to request a trial within a reasonable time and to apply for release during the course of the investigation or criminal proceedings. Release may be conditioned by a guarantee to ensure the person's appearance throughout the trial, or the execution of the court sentence.

Everyone who is deprived of his or her liberty for any reason whatsoever shall be entitled to apply to a competent judicial authority for a speedy decision on his or her case and for his or her immediate release if the detention is not lawful.

..."

131. Article 26 of the Constitution provides:

"Everyone has the right to express and disseminate his or her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive or impart information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing.

The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a State secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented.

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

132. The relevant parts of Article 67 of the Constitution read as follows:

"Citizens shall have the right to vote, to stand for election, to engage in political activities independently or as members of a political party and to take part in referendums in accordance with the rules laid down by law.

...

The exercise of these rights shall be regulated by law.

..."

133. Article 80 of the Constitution provides:

"Members of the Grand National Assembly of Turkey shall not represent their own constituencies or constituents, but the nation as a whole."

134. Article 83 of the Constitution, concerning parliamentary immunity, reads as follows:

"Members of the Turkish Grand National Assembly shall not be liable for their votes and statements in the course of the Assembly's work, for the views they express before the Assembly or for repeating or disseminating such views outside the Assembly, unless the Assembly decides otherwise at a sitting held on a proposal by the Bureau.

A member who is alleged to have committed an offence before or after election shall not be arrested, questioned, detained or tried unless the Assembly decides otherwise. This provision shall not apply in cases where a member is caught in the act of committing a crime punishable by a heavy penalty and in cases falling under Article 14 of the Constitution, provided that an investigation has been initiated before the election. However, in such situations the competent authority shall notify the Turkish Grand National Assembly immediately and directly.

The execution of a criminal sentence imposed on a member of the Turkish Grand National Assembly either before or after his or her election shall be suspended until he or she ceases to be a member; the statute of limitations shall not apply during the term of office.

The investigation and prosecution of a re-elected member shall be subject to a fresh decision by the Assembly to lift immunity.

Political party groups in the Turkish Grand National Assembly shall not hold debates or take decisions regarding parliamentary immunity."

135. Article 85 of the Constitution provides:

"If the parliamentary immunity of a member of parliament has been lifted ..., the member in question or another member may, within seven days from the date of the decision of the plenary National Assembly, apply to the Constitutional Court for the decision to be set aside on the grounds that it is contrary to the Constitution, the law or the rules or procedure [of the National Assembly]. The Constitutional Court shall decide on the application within fifteen days."

136. Article 87 of the Constitution reads as follows:

"The duties and powers of the Grand National Assembly of Turkey are to enact, amend, and repeal laws; to debate and adopt the budget bills and final accounts bills; to decide to issue currency and declare war; to approve the ratification of international treaties, to decide with the majority of three-fifths of the Grand National Assembly of Turkey to proclaim amnesty and pardon; and to exercise the powers and carry out the duties envisaged in the other articles of the Constitution."

137. Provisional Article 20 of the Constitution, as adopted by the National Assembly on 20 May 2016, reads as follows:

"On the date when this Article is adopted by the Grand National Assembly of Turkey, the provision of the first sentence of the second paragraph of Article 83 of the Constitution shall not be applied to members who are the subject of requests for the lifting of immunity which have been submitted by the authorities with the power to investigate or grant leave for an investigation or prosecution, the public prosecutor's office or the courts to the Ministry of Justice, to the Prime Minister's Office, to the Office of the President of the Grand National Assembly of Turkey and to the chair of the Joint Committee comprising the members of the Constitutional Committee and the Justice Committee.

Within fifteen days of the entry into force of this Article, any files with the chair of the Joint Committee comprising the members of the Constitutional Committee and the Justice Committee, the Office of the President of the Grand National Assembly of Turkey, the Prime Minister's Office and the Ministry of Justice concerning the lifting of parliamentary immunity shall be returned to the competent authority so that it can take the necessary action."

B. Relevant provisions of the Criminal Code

138. Article 214 § 1 of the Criminal Code is worded as follows:

"Anyone who publicly incites another to commit an offence shall be sentenced to a term of imprisonment of six months to five years."

139. Article 215 § 1 of the same Code reads as follows:

"Anyone who publicly praises a crime that has been committed or a person for committing a crime shall, where a clear and present danger to public order arises on that account, be punishable by a sentence of up to two years' imprisonment."

140. Article 216 § 1 provides:

"Anyone who publicly provokes hatred or hostility in one section of the public against another section with different characteristics based on social class, race, religion, sect or regional origin, such as to create a clear and present danger to public safety, shall be sentenced to a term of imprisonment of one to three years."

141. Article 217 § 1 is worded as follows:

"Anyone who publicly incites the population to disobey the law shall be sentenced to a term of imprisonment of six months to two years or a judicial fine, provided that such incitement is capable of posing a threat to public order."

142. Article 220 of the Criminal Code provides:

"Anyone who forms or leads organisations established to carry out acts defined by law as criminal offences shall be sentenced to a term of imprisonment of four to eight years, provided that the structure of the organisation, the number of its members, and its tools and equipment are found to be appropriate for the commission of an offence. However, for an organisation to exist there must be at least three members.

Anyone who becomes a member of an organisation established for the purpose of committing a criminal offence shall be sentenced to a term of imprisonment of two to four years.

If the criminal organisation is armed, the sentence to be imposed in accordance with the above paragraphs shall be increased by between one-quarter and one-half.

Where an offence is committed in the course of an organisation's activities, the perpetrator shall also be punished for the offence.

The leaders of the criminal organisation shall also be punished for any offences committed in the course of the organisation's activities.

Anyone who commits an offence on behalf of a criminal organisation without being a member of it shall also be punished for being a member of the organisation. The sentence to be imposed for being a member of the organisation may be reduced by up to half. This paragraph shall be applicable only to armed organisations.

Anyone who knowingly and willingly provides assistance to a criminal organisation, while not being part of the organisation's hierarchical structure, shall be punished as though he or she were a member of the organisation. The sentence to be imposed for membership of the organisation may be reduced by up to one-third depending on the nature of the assistance provided.

Anyone who disseminates propaganda by praising or legitimising the use of methods involving force, violence or threats by the criminal organisation, or by inciting the use of such methods, shall be sentenced to a term of imprisonment of one to three years. The sentence to be imposed shall be increased by half where this offence is committed by the press and broadcast media."

143. Article 314 reads as follows:

"1. Anyone who forms or leads an armed organisation with the purpose of committing the offences listed in the fourth and fifth parts of this chapter shall be sentenced to a term of imprisonment of ten to fifteen years.[1]

2. Anyone who joins an organisation referred to in the first paragraph of this Article shall be sentenced to a term of imprisonment of five to ten years.

3. The other provisions governing the forming of an organisation for criminal purposes shall also apply in this context."

C. The Prevention of Terrorism Act

144. Section 1 of the Prevention of Terrorism Act defines terrorism as follows:

[1] The fourth and fifth parts in question provide respectively for "offences against State security" and "offences against the constitutional order and its functioning".

"Terrorism denotes any act attempted by one or more persons belonging to an organisation with the aim of changing the characteristics of the Republic as defined in the Constitution, its political, legal, social, secular and economic system, undermining the territorial integrity of the State and the unity of the nation, endangering the existence of the Turkish State and Republic, weakening, destroying or usurping the authority of the State, eliminating fundamental rights and freedoms, or undermining the internal and external security of the State, public order or public health through the use of terror, force and violence by means of pressure, intimidation, oppression or threat."

145. Section 2 of the Act is worded as follows:

"Any member of an organisation founded to attain the aims defined in section 1 who commits a crime in furtherance of these aims, individually or together with others, or any member of such an organisation, even if he or she does not commit such a crime, shall be deemed to be a terrorist offender.

Persons who are not members of a terrorist organisation, but commit a crime in the name of the organisation, shall also be deemed to be terrorist offenders."

146. Section 3 of the Act reads as follows:

"The offences defined in Articles 302, 307, 309, 311, 312, 313, 314, 315 and 320 of the Turkish Criminal Code (no. 5237) are terrorist offences."

147. Section 7(2) of the Act provides:

"Anyone who disseminates propaganda in favour of a terrorist organisation by legitimising or condoning methods used by such organisations entailing coercion, violence or threats or incites others to use such methods shall be sentenced to a term of imprisonment of one to five years. ..."

D. The Meetings and Demonstrations Act (Law no. 2911)

148. Section 28(1) of the Meetings and Demonstrations Act (Law no. 2911) is worded as follows:

"Anyone who organises, leads or participates in unlawful demonstrations shall be punishable by a term of imprisonment of one year and six months to three years, unless the acts in question constitute an offence punishable by a heavier sentence."

149. Section 32(1) of the same Act provides:

"Anyone who participates in an unlawful meeting or demonstration and anyone who persists in not complying with orders by the security forces to disperse shall be punishable by a term of imprisonment of six months to three years. If the offence is committed by the organisers of the meeting or demonstration, the sentence prescribed in this subsection shall be increased by half."

E. Relevant provisions of the Code of Criminal Procedure ("the CCP")

150. Pre-trial detention is governed by Articles 100 et seq. of the CCP. Article 100 § 1 provides that a person may be placed in pre-trial detention where there is factual evidence giving rise to a strong suspicion that the

person has committed an offence and where the detention is justified on one of the grounds laid down in the Article in question.

151. Article 100 § 2 of the CCP reads as follows:

> "In the cases specified below, grounds for detention may be deemed to exist:
>
> (a) if there are specific facts giving rise a suspicion of [a risk of] absconding ...;
>
> (b) if the conduct of the suspect or accused gives rise to a suspicion
>
> (1) of a risk that evidence might be destroyed, concealed or tampered with;
>
> (2) of an attempt to put pressure on witnesses, victims or other individuals ..."

152. For certain offences listed in Article 100 § 3 of the CCP, there is a statutory presumption of the existence of grounds for detention. Article 100 § 3 of the CCP reads as follows:

> "3. If there are facts giving rise to a strong suspicion that offences listed below have been committed, it can be presumed that there are grounds for detention:
>
> (a) for the following crimes provided for in the Criminal Code (no. 5237 of 26 September 2004):
>
> ...
>
> (11) crimes against the constitutional order and against the functioning of the constitutional system (Articles 309, 310, 311, 313, 314 and 315);
>
> ..."

153. Article 101 of the CCP provides that pre-trial detention is ordered at the investigation stage by a magistrate at the request of the public prosecutor and at the trial stage by the competent court, whether of its own motion or at the prosecutor's request. An objection may be lodged with another magistrate or another court against decisions ordering or extending pre-trial detention. Such decisions must include legal and factual reasons.

154. Pursuant to Article 108 of the CCP, during the investigation stage a magistrate must review a suspect's pre-trial detention at regular intervals not exceeding thirty days. Within the same period, the detainee may lodge an application for release. During the trial stage, the question of the accused's detention is reviewed by the competent court at the end of each hearing, and in any event at intervals of no more than thirty days.

155. Article 141 § 1 (a) and (d) of the CCP provides:

> "1. In the context of an investigation or a trial concerning a criminal offence, anyone:
>
> (a) who has been arrested or taken into or kept in detention under conditions or in circumstances not complying with the law;
>
> ...
>
> (d) who, even if he or she was detained lawfully during the investigation or trial, has not been brought before a judicial authority within a reasonable time and has not obtained a judgment on the merits within a reasonable time;
>
> ...

may claim compensation from the State for any pecuniary and non-pecuniary damage."

156. Article 142 § 1 of the CCP reads as follows:

"The claim for compensation may be lodged within three months after the person concerned has been informed that the decision or judgment has become final, and in any event within one year after the decision or judgment has become final."

157. According to the case-law of the Court of Cassation, it is not necessary to wait until the conclusion of the criminal proceedings before ruling on a compensation claim lodged under Article 141 of the CCP on account of the excessive length of pre-trial detention (decisions of 16 June 2015, E. 2014/21585 – K. 2015/10868 and E. 2014/6167 – K. 2015/10867).

F. Case-law of the Constitutional Court

158. In a judgment delivered on 4 December 2013 (no. 2012/1272) concerning the detention of a member of parliament, the Constitutional Court ruled on a complaint relating to the right to be elected in conjunction with a complaint concerning the length of pre-trial detention. The case concerned the pre-trial detention of Mr Balbay, who had been elected as a member of the National Assembly following the parliamentary elections held on 12 June 2011. On 5 August 2013, while his application was still pending before the Constitutional Court, Mr Balbay had been sentenced to sixteen years' imprisonment. In its judgment, the Constitutional Court found not only a violation of the right to liberty, but also a violation of the right to be elected on account of the excessive duration of Mr Balbay's pre-trial detention following his election (more than two years and one month, out of a total duration of four years and five months). The Constitutional Court held as follows:

"132. In the present case, the criminal investigation in respect of the applicant had been initiated long before the parliamentary elections. While the applicant was in pre-trial detention, he was elected as a member of parliament in the parliamentary elections held on 12 June 2011. In that respect, neither the applicant's prosecution nor his pre-trial detention constituted an obstacle to his election as a member of parliament ... Since he was not provisionally released after his election, the applicant was unable to take the oath or to sit in Parliament. It is beyond doubt that the detention in question, which made it impossible to perform his parliamentary duties, constituted an interference with [the applicant's] right to be elected, because [the measure in issue] hindered all political activity and [the performance of his duties] as a member of parliament.

133. ... [T]he applications for provisional release submitted by the applicant after his election were dismissed by the competent courts. [It should be reiterated that in the examination of the compatibility of the pre-trial detention with Article 19 of the Constitution, an equivalent provision to Article 5 of the Convention], it was concluded that the dismissal of the applications for provisional release submitted by the applicant after his election did not strike a fair balance between his right to be elected and the interest of society in the continued pre-trial detention of a person charged with a criminal offence. Having been unreasonably kept in pre-trial detention, the applicant

was unable to take part in legislative activities. In view of the duration of the applicant's pre-trial detention after his election, it cannot be concluded that this severe interference with the right to carry out political activities was proportionate and compatible with the requirements of a democratic society."

II. RELEVANT INTERNATIONAL MATERIAL

A. General material

Non-liable? Inviolable? Untouchable? The Challenge of Parliamentary Immunities. An Overview, published by the European Parliament's Office for Promotion of Parliamentary Democracy

159. In October 2012 the Office for Promotion of Parliamentary Democracy of the European Parliament published a study on parliamentary immunity, the relevant parts of which read:

"...

Non-liability

The scope of non-liability normally covers protection against all kinds of public penalties for acts committed in the performance of members' duties or, more popularly formulated, deals with members' freedom of speech. In general, parliamentarians are not liable in civil or criminal terms for the acts encompassed within this form of immunity. Non-liability is also referred to as 'substantive immunity', 'absolute immunity', or 'parliamentary immunity'.

...

With regard to the acts covered by non-liability, these include votes cast and opinions expressed. 'Substantive immunity extends to all the forms which parliamentary activity may take, whether in writing parliamentary documents, or in speeches and votes in all their forms, in parliamentary assemblies and committees.'

The scope of the protection afforded as regards 'opinions' stated is one of the most controversial aspects of non-liability. The majority of constitutional texts make use of the concept of opinions expressed 'in the exercise of duties'. This permits a somewhat broad interpretation, so that it makes the protection applicable to certain statements made outside Parliament. ...

Unlike inviolability, non-liability has an absolute quality, in that the protection afforded is maintained even after the parliamentarian's mandate has come to an end.

...

Inviolability

In general, this form of immunity is such that, unless parliament gives its authorisation, members may not be arrested or prosecuted for acts not carried out as part of their parliamentary functions.

The scope of inviolability varies according to the degree of protection afforded to parliamentarians. It may thus be the case that, unless the house concerned has given its prior authorisation, parliamentarians are protected only from arrest or, in addition, from enforcement of particular measures such as searches or, more widely still, from a court summons or indeed any form of criminal proceedings.

... [M]ost parliaments consider that, in the case of *in flagrante delicto*, inviolability must be waived. The term *in flagrante delicto* refers to cases where a person is caught in the very act of wrongdoing. Generally, it is for judges to determine whether an offence falls under the heading of *in flagrante delicto*. Still, according to some constitutions, in order to remove immunity without delay, it is not sufficient that *in flagrante delicto* be verified, the offence in question must also be a serious one.

As regards the duration of the inviolability, it can be seen that, while in some parliaments it has effect throughout the duration of the parliamentary term, in others it refers only to the periods during which parliament is in session.

...

Unlike non-liability, inviolability is effective only during the period of the parliamentary mandate and ceases to have effect after this has expired. Legal action is thus only postponed and not permanently prevented.

Waiving parliamentary immunity

...

How do Member State parliaments arrive at their decisions to grant or reject requests to waive parliamentary immunity? Among the guiding principles on which parliaments appear to base their decisions, we find in particular the following:

- Verify the facts: a proper investigation may reveal the true purpose of the intended incrimination, namely to persecute unfairly the parliamentarian and to threaten their freedom and independence in carrying out their mandate;
- Ascertain whether allegations made refer to criminal offences or appear to be of a more political nature;
- Determine whether the alleged grounds for the accusation should be taken seriously or whether these are frivolous.

..."

B. Country-specific material

1. *Opinion of the European Commission for Democracy through Law (Venice Commission) on Articles 216, 299, 301 and 314 of the Turkish Criminal Code*

160. On 11 and 12 March 2016, at its 106th plenary session, the Venice Commission adopted its opinion on Articles 216, 299, 301 and 314 of the Turkish Criminal Code. The relevant parts of the opinion read as follows (footnotes omitted):

"...

E. Article 314 (armed organisation)

95. Article 314 of the [Criminal] Code criminalises the establishment and command of, as well as the membership in an armed organisation that engages in offences listed in parts four and five of Chapter IV of the [Criminal] Code (Offences against State and Nation).

...

1. Membership of an armed organisation (Article 314)

98. The [Criminal] Code does not contain a definition of an armed organisation or an armed group. In its judgment E. 2006/10-253 K. 2007/80 of 3 April 2007, the General Criminal Board of the Court of Cassation listed the main criteria that a criminal organisation – for the purposes of Article 220 of the [Criminal] Code – should display. The group has to have at least three members; there should be a tight or loose hierarchical connection between the members of the group and an 'abstract link' between the members is not sufficient; the members should have a common intention to commit crimes (even though no crime has yet been committed); the group has to present continuity in time; and the structure of the group, the number of its members, tools and equipment at the disposal of the group should be sufficient/appropriate for the commission of the envisaged crimes.

...

100. There is a rich case-law of the Court of Cassation in which the high court developed the criterion of 'membership' in an armed organisation. The Court of Cassation examined different acts of the suspect concerned, taking account of their 'continuity, diversity and intensity' in order to see whether those acts prove that the suspect has any 'organic relationship' with the organisation or whether his or her acts may be considered as committed knowingly and wilfully within the 'hierarchical structure' of the organisation. In case E. 2010/2839, K. 2012/1406 of 6 February 2012, the suspects who were constantly providing shelter to new candidates willing to become members of a terrorist organisation, providing them with falsified identity cards and introducing them to the organisation and looking for other new members for the organisation, were convicted for being members of an armed organisation. Acquiring a code name (within the organisation) in order to hide his/her real identity and hiding in his/her apartment a bomb delivered by the members of a terrorist organisation; giving courses on the aims and structure of the organisation to the new members, contacting again the organisation after having been released from prison and trying to collect money for the organisation and to find new members, delivering his/her 'CV report' to the organisation in order to become its member or driving new comers willing to become members of the organisation, to the camping place of the organisation, collecting money for the organisation under the guise of collecting tax for the organisation or organising the medical treatment of the new members before they were sent to the camping place of the organisation, etc. were all considered by the Court of Cassation as proving the membership of the defendant to an armed organisation under Article 314 of the [Criminal] Code, as the continuity, diversity and intensity of the acts attributed to the defendants showed that they were acting knowingly and willingly within the hierarchical structure of the armed organisation.

...

102. According to non-governmental sources, in the application of Article 314, the domestic courts, in many cases, decide on the membership of a person in an armed organisation on the basis of very weak evidence, which would raise questions as to the 'foreseeability' of the application of Article 314. Similarly, Freedom House in its 2015 Report on Freedom of Press in Turkey noted that '*Article 314 of the [Criminal] Code, with its broad definition of ... membership in an armed organization, continued to be invoked against journalists, especially Kurds and those associated with the political left*'. Also, Amnesty International, in its 2013 Report on Turkey, considered that conduct, which is not in itself criminal, as for instance an activity related to the exercise of the rights to freedom of assembly, association and expression, is considered as evidence of membership of the defendants in an armed organisation. The reason for this

approach, according to the Report, is that the prosecution services perceive those activities as having the same overall objective as a terrorist group and as a result, '*individuals have been prosecuted for membership of terrorist organisation on charges relating solely to their engagement in peaceful and, in themselves, lawful pro-Kurdish activities*'. The examples of concrete cases provided by Amnesty International in which the evidence was considered to link the defendants to a terrorist organisation included, attendance at six different demonstrations allegedly organised by a terrorist organisation and a speech made at one of those demonstrations, or, in another case, the participation of the defendant in the 'Political Academy' organised by the Peace and Democracy Party (BDP – a recognised pro-Kurdish political party) and his diverse activities in the framework of this Academy.

...

106. In conclusion, the Venice Commission recommends, first, that the established criteria in the case law of the Court of Cassation that acts attributed to a defendant should show 'in their continuity, diversity and intensity', his/her 'organic relationship' to an organisation or they should prove that he/she acted knowingly and willingly within the 'hierarchical structure' of the organisation, should be applied strictly. The loose application of these criteria may give rise to issues concerning in particular the principle of legality within the meaning of Article 7 ECHR.

107. Second, the expression of an opinion in its different forms should not be the only evidence before the domestic courts to decide on the membership of the defendant in an armed organisation. Where the only evidence consists of forms of expression, the conviction for being a member of an armed organisation, would constitute an interference with the right of the defendants to freedom of expression, and that the necessity of this interference on the basis of the criteria as set forth in the case-law of the ECtHR, in particular the criteria of 'incitement to violence', should be examined in the concrete circumstances of each case.

...

123. The Venice Commission ... concludes that the progress made is clearly insufficient. All articles subject to the present opinion provide for excessive sanctions and have been applied too widely, penalising conduct protected under the ECHR, in particular its Article 10 and the related case-law as well as conduct protected under Article 19 ICCPR.

124. All four articles have to be applied in a radically different manner to bring their application fully in line with Article 10 ECHR and Article 19 ICCPR. The Commission underlines that prosecution of individuals and convictions in particular by lower courts, which have a chilling effect on the freedom of expression, must cease. This is not sufficient if individuals are in some cases finally acquitted by the Court of Cassation after having been subject of criminal prosecution for several years. Moreover, the Commission underlines the importance of States' positive obligation to create a favourable environment where different and alternative ideas can flourish.

...

128. With respect to **Article 314 (Membership [of] an armed organisation)**, the established criterion in the case law of the Court of Cassation that acts attributed to a defendant should show 'in their continuity, diversity and intensity' his/her 'organic relationship' to an armed organisation or whether his/her acts may be considered as committed knowingly and wilfully within the 'hierarchical structure' of the organisation, should have a strict application. ..."

2. Opinion of the Venice Commission on the suspension of the second paragraph of Article 83 of the Constitution

161. On 14 and 15 October 2016, at its 108th plenary session, the Venice Commission adopted its opinion on the constitutional amendment by which the principle of parliamentary inviolability was not applicable to cases against members of parliament which were pending on the date when the amendment was adopted. The relevant passages of this opinion read as follows:

> "48. The General Preamble to the Amendment explains that its purpose is to address public indignation about '*statements of certain deputies constituting emotional and moral support to terrorism, the de facto support and assistance of certain deputies to terrorists and the calls of violence of certain deputies*'. Statements by Members of Parliament, which may be interpreted as supporting terrorism, may indeed be punishable under criminal law but such statements will normally have a political character and therefore the question whether they should be covered by parliamentary non-liability is particularly relevant.
>
> ...
>
> 80. The constitutional amendment of 12 April 2016 was an *ad hoc*, 'one shot' *ad homines* measure directed against 139 individual deputies for cases that were already pending before the Assembly. Acting as the constituent power, the Grand National Assembly maintained the regime of immunity as established in Articles 83 and 85 of the Constitution for the future but derogated from this regime for specific cases concerning identifiable individuals while using general language. This is a misuse of the constitutional amendment procedure.
>
> 81. The argument that dealing one by one with the cases against these deputies would have taken too long and would have unduly burdened the agenda of the Grand National Assembly is not convincing. Instead of simplifying the procedure of lifting immunity, the complex system was maintained but it was derogated for 139 deputies. The heavy workload of the Grand National Assembly does not justify singling out the cases relating to these deputies from all other cases brought before it before and after the adoption of the Amendment. This violates the principle of equality. In the opinion of the Commission, the system of parliamentary immunity in Turkey should not be weakened, but reinforced, in particular in order to ensure the freedom of speech of Members of Parliament.
>
> ..."

3. Opinion of the Venice Commission on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and submitted to a national referendum on 16 April 2017

162. On 10 and 11 March 2017, at its 110th plenary session, the Venice Commission adopted its opinion on the draft legislation amending the Turkish Constitution, entailing a transition from a parliamentary to a presidential system. The relevant parts of the opinion reads as follows (footnotes omitted):

> "21. First, the debates took place in the absence of a significant number of deputies from the opposition. Indeed, following a constitutional amendment enacted on 20 May 2016, published in the Official [Gazette] on 8 June 2016 and entered into force the same day, the parliamentary immunity of several MPs was lifted. On 4 November 2016, the

President of the second-largest opposition party HDP (Selahattin Demirtaş) and 8 other HDP MPs were taken into detention on remand. There are currently 13 members of HDP who are still in detention, despite the Venice Commission's recommendation to restore parliamentary immunity in Turkey.

...

119. The Commission finds that the proposed composition of the CJP [Council of Judges and Prosecutors] is extremely problematic. Almost half of its members (4+2=6 out of 13) will be appointed by the President. It is important to stress once again in this respect that the President will no more be a *pouvoir neutre*, but will be engaged in party politics: his choice of the members of the CJP will not have to be politically neutral. The remaining 7 members would be appointed by the Grand National Assembly. If the party of the President has a three-fifths majority in the Assembly, it will be able to fill all positions in the Council. If it has, as is almost guaranteed under the system of simultaneous elections, at least two-fifths of the seats, it will be able to obtain several seats, forming a majority together with the presidential appointees. That would place the independence of the judiciary in serious jeopardy, because the CJP is the main self-governing body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors. Getting control over this body thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice. In this context it seems significant that the draft amendments provide for elections to the CJP within 30 days following the entry into force of the amendments and that the political forces supporting the amendments control more than three-fifths of the seats in the TGNA, enabling them to fill all seats in the CJP.

..."

4. Venice Commission opinion on the duties, competences and functioning of criminal magistrates' courts

163. On 13 March 2017, at its 110th plenary session, the Venice Commission) published an opinion (no. 852/2016) on the duties, competences and functioning of the "criminal peace judgeships" (magistrates' courts). The relevant parts of the opinion read as follows (footnotes omitted):

"76. The length of pre-trial detention remains a serious problem in Turkey. The Ministry of Justice provided statistics showing that the rate of detained persons as compared to the number of convicted persons was reduced from 50 per cent to 14 per cent between 2007 and 2014, before the establishment of the peace judges. However, this rate remained stable until the coup. These statistics thus show that the establishment of peace judgeships and the system of horizontal appeals between peace judgeships of the same level has not succeeded in reducing the problem of the length of pre-trial detention.

78. ... [D]etentions ordered by peace judgeships are problematic due to the system of horizontal appeals. Furthermore, for persons who remain under detention in the investigation phase and who have been detained by peace judgeships on the basis of insufficiently reasoned decisions ... [, the p]rosecution should request their release as soon as possible.

94. ... [T]he way of establishment of the peace judgeships and the system of functioning examined above are conducive to insufficient motivation of their decisions.

Individual examples are thus very likely to be indicative of a wider problem. The fact that the decisions of peace judgeships can be appealed to the Constitutional Court does not remedy this structural problem.

95. To sum up, there are numerous instances where peace judges did not – and probably were not even able to due to their workload – sufficiently reason decisions which have a drastic impact on human rights of individuals."

5. Memorandum by the Council of Europe Commissioner for Human Rights following his visits to Turkey in 2016

164. On 15 February 2017 the Commissioner for Human Rights published a memorandum on freedom of expression and media freedom in Turkey. The relevant parts of the memorandum read as follows (footnotes omitted):

"*Use of judicial harassment to restrict parliamentary debate*

59. While critical journalists are the most obvious victims of this situation ..., many other sectors and groups were also directly targeted. A particularly disturbing manifestation of this situation is the lifting of the immunities of parliamentarians. In a move that the Venice Commission described as an *ad hoc*, 'one shot' and '*ad homines*' measure, as well as a misuse of the constitutional amendment procedure, the majority in the Turkish Parliament lifted the immunities of 139 of its members who were subject to pending prosecution requests submitted to the Parliament. One of the most worrying aspects of this measure was the fact that the majority of impugned acts concerned statements made by these MPs, for example for insulting the President or other public officials, terrorist propaganda or incitement to hatred. The preamble of the constitutional amendment itself stated that its purpose was to address public indignation about, *inter alia*, 'statements of certain deputies constituting emotional and moral support to terrorism'. As the Venice Commission highlighted, nearly all MPs of a particular opposition party, the HDP, were concerned by the measure. As a result of this measure, prosecutions are on-going against a large number of opposition MPs. Several members of HDP, including its co-Chairs, were arrested in November 2016. The Turkish authorities have stated that the reason of the arrests was the refusal of the MPs to comply with the order to personally appear before the prosecutor. However, even after having forcibly been made to give evidence, 11 MPs are still in prison and cannot carry out their parliamentary mandate at a crucial juncture.

60. The ECtHR made it very clear that '[w]hile 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 ... call for the closest scrutiny on the part of the Court.' The Commissioner also recalls the ECtHR's judgment concerning DTP, a precursor party of the HDP, which was unduly closed, mainly for statements of its members which were protected under Article 10. The Commissioner notes, in particular, that these statements were very similar to the statements which were used as justification for the lifting of the immunities in the present case.

61. The Commissioner draws the authorities' attention particularly to the conclusion of the Court that the mere fact that there are parallels between the principles defended by the DTP and those of the PKK did not suffice to conclude that the party approved of the use of force in order to implement its policies. If a political group was considered to be supporting terrorism, merely by advocating those principles, that would reduce the possibility of dealing with relate[d] issues in the context of a democratic debate and

would allow armed movements to monopolise support for the principles in question. In the current climate, the Commissioner considers that the lifting of the immunities of MPs and their subsequent arrest and detention not only disenfranchised millions of voters, but sent an extremely dangerous and chilling message to the entire Turkish population, and significantly reduced the scope of democratic debate, including on human rights."

6. Decision adopted by the Governing Council of the Inter-Parliamentary Union (IPU)

165. On 18 October 2017, at its 201st session in St Petersburg, the IPU Governing Council adopted its decision concerning fifty-six HDP members of parliament, including the applicant. It stated in particular:

"...

5. *Recalls* its long-standing concerns over freedom of expression and association related to anti-terrorist legislation and the offence of membership of a criminal organization and *reiterates* its prior recommendations to the Turkish authorities to urgently address these concerns in an appropriate manner; *urges* the Turkish authorities to share the information requested on the specific facts and evidence adduced to support the charges and convictions against the concerned parliamentarians, including relevant excerpts of all court decision; *also wishes* to be kept informed of new developments in the proceedings, particularly when verdicts are delivered;

6. *Cautions* that recent developments and the lack of progress towards resolution of the case seem to lend significant weight to fears that the ongoing proceedings may be aimed at depriving the People's Democratic Party (HDP) of effective representation in parliament, at weakening the opposition parties in parliament and in the broader political arena, and therefore at silencing the populations they represent; *reaffirms its concerns* that the limited possibility of parliamentary representation for the populations affected may contribute to further deterioration of the political and security situation prevailing in south-eastern Turkey, as well as weaken the independence of the institution of parliament as a whole;

..."

7. Amnesty International 2017/18 report on the state of the world's human rights

166. The relevant parts concerning Turkey of Amnesty International's 2017/18 annual report on the state of the world's human rights read as follows:

"**Turkey**

...

An ongoing state of emergency set a backdrop for violations of human rights. Dissent was ruthlessly suppressed, with journalists, political activists and human rights defenders among those targeted. ...

Background

...

After having been remanded in prison detention in 2016, nine parliamentarians from the Kurdish-rooted leftist Peoples' Democracy Party (HDP), including the party's two leaders, remained in prison during the whole year. Sixty elected mayors of the Democratic Regions Party, the sister party of the HDP, representing constituencies in the predominantly Kurdish east and southeast of Turkey, also remained in prison. The unelected officials who replaced them continued in office throughout 2017. ...

Freedom of expression

Civil society representatives, as well as the general population, widely practised self-censorship, deleting social media posts and refraining from making public comments for fear of dismissal from their jobs, closure of their organizations or criminal prosecution. Thousands of criminal prosecutions were brought, including under laws prohibiting defamation and on trumped-up terrorism-related charges, based on peoples' peaceful exercise of their right to freedom of expression. Arbitrary and punitive lengthy pre-trial detention was routinely imposed. Confidential details of investigations were frequently leaked to government-linked media and splashed across the front pages of newspapers, while government spokespeople made prejudicial statements regarding cases under investigation. Prosecutions of journalists and political activists continued, and prosecutions of human rights defenders sharply increased. International journalists and media were also targeted.

Criticism of the government in the broadcast and print media largely disappeared, with dissent mainly confined to internet-based media. The government continued to use administrative blocking orders, against which there was no effective appeal, routinely, to censor internet content. ..."

THE LAW

I. SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

167. The Court reiterates that the content and scope of the case referred to the Grand Chamber are delimited by the Chamber's decision on admissibility (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 88, 18 December 2018). The Grand Chamber therefore cannot examine complaints which have been declared inadmissible. Consequently, the applicant's complaints that he had been unlawfully arrested and taken into police custody, and that his initial and continued pre-trial detention were not in compliance with domestic law, must be excluded from the scope of the case, each of these complaints having been declared inadmissible by the Chamber (see, respectively, paragraphs 127-30 and 142-50 of the Chamber judgment).

168. As for the applicant's complaint under Article 3 of Protocol No. 1 to the Convention that he had had to conduct his presidential election campaign while in pre-trial detention, he raised this for the first time in his observations of 16 May 2019 before the Grand Chamber. As this complaint was not included in the Chamber's decision on admissibility, the Court cannot examine it at this stage of the proceedings (see, among many other authorities, *Rooman v. Belgium* [GC], no. 18052/11, § 123, 31 January 2019).

169. Regarding the applicant's complaint under Article 10, the Court notes that the Chamber found it unnecessary to rule separately on its admissibility or merits. Therefore, it was neither declared admissible nor inadmissible. In accordance with its case-law on this matter (see *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 167-78, 21 November 2019), the Court finds that this complaint is within the scope of the case.

170. In the light of the above, the present case encompasses the applicant's complaints under Article 5 § 1 (alleged lack of reasonable suspicion of having committed an offence), Article 5 § 3, Article 5 § 4 (alleged lack of a speedy judicial review by the Constitutional Court), Article 10, Article 18 in relation to Article 5 and Article 3 of Protocol No. 1 (in relation to the right to stand for election to Parliament and to engage in political activities as a parliamentarian).

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

171. The Government raised five preliminary objections.

A. Preliminary objection under Article 35 § 2 (b) of the Convention

1. The parties' submissions

(a) The Government

172. The Government stated that in June 2016 the HDP had lodged a complaint with the Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union ("the IPU Committee") on behalf of fifty-five HDP members of parliament, including the applicant. The complaint had subsequently been amended with the addition of grievances relating to the pre-trial detention of the members of parliament concerned, and included allegations of violations of their human rights. They had complained above all of an infringement of their parliamentary immunity; they had also alleged a violation of their right to freedom of expression and freedom of association on account of the criminal investigations and proceedings instituted in respect of them, and had complained that some of them had been placed in pre-trial detention and that the criminal proceedings had been unfair. Subsequently, the IPU Committee had drawn up a number of reports and the IPU Governing Council had adopted decisions relating to the case. In particular, in April 2019 the IPU Governing Council had also asked the IPU Committee to continue examining the case on a regular basis in order to address the latest developments and concerns, and to report back to it in due course. The Government indicated that the applicant's case was still pending before the IPU Committee.

173. The Government contended that the applicant had thereby submitted his complaints to another procedure of international investigation or

settlement within the meaning of Article 35 § 2 (b) of the Convention, namely the IPU Committee. They argued that the IPU was an "international organization" as indicated by Article 1 of its Statutes, and submitted that the Chamber had been mistaken in dismissing their objection in the light of the decision in *Lukanov v. Bulgaria* (no. 21915/93, Commission decision of 12 January 1995, Decisions and Reports 80-A, p. 108), given that it had not taken into account the IPU's current legal status, which had changed after 1995. In that context, referring to two academic opinions, the Government submitted that the IPU was now generally recognised as an international governmental organisation.

174. The Government asserted that the procedure established by the IPU for examining alleged violations of the human rights of parliamentarians involved quasi-judicial proceedings similar to those set up by the Convention and thus corresponded to "another procedure of international investigation or settlement" within the meaning of Article 35 § 2 (b) of the Convention. In that connection, they argued that there were many similarities between that procedure and the procedures followed by the United Nations (UN) Human Rights Council's Working Group on Arbitrary Detention and the International Labour Organization's Committee on Freedom of Association, both of which, according to well-established case-law of the Court, corresponded to "another procedure of international investigation or settlement".

(b) The applicant

175. Referring to *Gürdeniz v. Turkey* ((dec.), no. 59715/10, 18 March 2014), the applicant asserted that the procedure established by the IPU did not correspond to the definition of "another procedure of international investigation or settlement". This procedure did not involve judicial or quasi-judicial proceedings similar to those set up by the Convention. In that connection, he added that the reports by the IPU were drawn up in response to complaints by the members of parliament concerned but did not deal with their individual circumstances. The reports therefore did not amount to a decision capable of affording effective redress.

176. The applicant submitted that the seventy-one-page report adopted by the IPU Committee in response to the complaint by the HDP members of parliament contained evaluations, suggestions and recommendations relating not only to Turkey, but also to other countries. The situation of the Turkish members of parliament was addressed on pages 49 to 56 of the report. The passages in question covered not only the applicant's situation but also that of all the HDP members of parliament, some former members of parliament, and some from the CHP. They provided an overall assessment of the lifting of parliamentary immunity, freedom of expression and association and the judiciary in Turkey. The applicant submitted that the decisions adopted by the UN Human Rights Committee or the Working Group on Arbitrary

Detention were different in form and content from the IPU report and that the latter did not provide a basis for a legal determination of a violation of the relevant rights. The report in his case had criticised the Government for not allowing the IPU to visit the members of parliament in pre-trial detention, had also been critical of the prison sentences they had received and, noting that half of the members of parliament who had been detained and four of the five who had been removed from office were women, had highlighted the IPU's concerns that this state of affairs might weaken the representation of women within the National Assembly.

177. In the applicant's submission, the report by the IPU Committee and the decision by the IPU Governing Council constituted a political finding by that institution, aimed at exerting political pressure on the government. They did not address all the allegations of human rights violations made by him in the present application, or provide a remedy for them.

2. The Chamber judgment

178. The Chamber endorsed the conclusion reached by the European Commission of Human Rights ("the Commission") in *Lukanov* (cited above), to the effect that the IPU did not constitute "another procedure of international investigation or settlement" since it was a non-governmental organisation bringing together parliamentarians from all over the world. Accordingly, it dismissed the Government's objection.

3. The Grand Chamber's assessment

179. In the present case, the Court is called upon, for the first time since the decision given by the Commission in *Lukanov* (cited above), to examine from the standpoint of Article 35 § 2 (b) of the Convention whether a complaint to the IPU Committee may be regarded as "another procedure of international investigation or settlement".

180. The Court observes at the outset that what is in issue is the second part of Article 35 § 2 (b) of the Convention, which reflects the principle of *lis pendens*. Its purpose is to avoid a situation where several international bodies are simultaneously dealing with applications which are substantially the same; this would be incompatible with the spirit and the letter of the Convention, which seeks to avoid a plurality of international proceedings relating to the same cases (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 119, 20 March 2018).

181. As regards the first limb of this criterion, the Court reiterates that an application is considered to be "substantially the same" when the facts, the parties and the complaints are identical (see *Gürdeniz*, cited above, § 41).

182. Regarding the second limb, that is, whether a matter raised in an individual application has already been submitted to "another procedure of international investigation or settlement" within the meaning of those terms

as stipulated by Article 35 § 2 (b), the Court reiterates that its examination is not limited to a formal verification but extends, where appropriate, to ascertaining whether the nature of the supervisory body, the procedure it follows and the effect of its decisions are such that the Court's jurisdiction is excluded by that provision (see *Decision on the competence of the Court to give an advisory opinion* [GC], § 31, ECHR 2004-VI). In that context, the main purpose of the Court's examination is to determine whether the procedure before that body may be treated as similar, in its procedural aspects and potential effects, to the right of individual application provided for in Article 34 of the Convention. The Court further reiterates that one of its functions in dealing with applications lodged under Article 34 is to render justice in individual cases and, if necessary, to afford just satisfaction.

183. The Court has defined criteria in this sphere in *Greek Federation of Bank Employee Unions v. Greece* ((dec.), no. 72808/10, §§ 32-45, 6 December 2011). It held that the procedure in question had to entail a number of features and guarantees affording effective protection to the applicant. In addition to being capable of establishing liability on the State's part (see *Peraldi v. France* (dec.), no. 2096/05, 7 April 2009) and bringing the alleged violation to an end by offering appropriate redress (see *Mikolenko v. Estonia* (dec.), no. 16944/03, 5 January 2006), such a mechanism must also be public, international, and judicial or quasi-judicial.

184. In *Lukanov* (cited above), the Commission held that the term "*another* procedure" referred to judicial or quasi-judicial proceedings similar to those set up by the Convention, and that the term "*international* investigation or settlement" denoted institutions and procedures set up by States, thus excluding non-governmental organisations. The Commission also found that Article 27 § 1 (b) of the Convention (equivalent to the present-day Article 35 § 2 (b)) referred to intergovernmental institutions and procedures. Therefore, the Commission clarified that the mechanisms set up by non-governmental organisations were clearly excluded from the scope of Article 35 § 2 (b) of the Convention. That said, however, even if a given mechanism has not been set up by a non-governmental organisation, that does not automatically mean that it qualifies as "another procedure of international investigation or settlement". After all, the question the Court is called upon to answer in such situations is whether that mechanism provides for "judicial or quasi-judicial proceedings similar to those set up by the Convention" in the light, *inter alia*, of the criteria set forth in *Greek Federation of Bank Employee Unions* (cited above) and the institutional and procedural safeguards it must afford.

185. In this connection, the mechanism in question and its members must be independent and impartial in accordance with Article 6 of the Convention (see *Peraldi*, cited above, and *Greek Federation of Bank Employee Unions*, cited above, §§ 35-37). As far as procedural safeguards are concerned, the Court considers that a judicial or quasi-judicial body must offer an adversarial

procedure enabling each party to be informed of and to reply to the other party's submissions. The parties must also be informed of the measures and decisions taken. A body of this kind must also respect the parties' right to participate in the proceedings, for example by submitting observations. In addition, the body must respond to individual applications by making its decisions public and stating reasons for them (compare *Mikolenko*, cited above, and *Celniku v. Greece*, no. 21449/04, § 40, 5 July 2007). Furthermore, it must be able to determine the State's responsibility under the legal instrument on which its examination is based and to afford legal redress capable of putting an end to the alleged violation (compare *Mikolenko*, cited above, and *Karoussiotis v. Portugal*, no. 23205/08, §§ 59-76, ECHR 2011 (extracts)).

186. The Court further considers that the requirement of judicial or quasi-judicial proceedings similar to those provided for by the Convention necessarily implies that the examination carried out by the body in question is clearly defined in scope and is limited to certain rights and standards based on a legal instrument or a "framework" by which States have authorised the body to consider and determine complaints brought against them. This is especially relevant in the context of analysing the similarities between such a mechanism and the Court as it is the Court's task, by virtue of Article 32 of the Convention, to interpret and apply the provisions of the Convention and, as provided in Article 19, to ensure the observance of the engagements undertaken by the Contracting States in the Convention. In the absence of a legal instrument that effectively delimits the powers of a particular body, it would be more difficult for the Court to ascertain the nature and functions of that body and the member States' obligations.

187. Turning back to the circumstances of the present case, the Government argued in particular that the IPU's legal status had changed since the Commission's decision in *Lukanov* (cited above), and that, in their view, it should now be regarded as an "international governmental organisation" falling within the ambit of Article 35 § 2 (b). Even assuming that the status of the IPU in the above-mentioned dichotomy in *Lukanov* has changed since the date of that decision, the Court considers that it does not need to resolve that issue for the purposes of its examination under Article 35 § 2 (b) in the present case. Instead, the Court will focus its examination on whether the procedure before the IPU Committee is similar, in terms of its particular features and potential effects, to individual applications lodged under Article 34 of the Convention. To that end, it will carry out an assessment of the nature of the procedure before the IPU Committee in order to decide whether it satisfies the criteria set out above.

188. In that connection, it is not the role of the IPU Committee to adjudicate on disputes between an individual and a State on the basis of a legal instrument by which States have agreed to recognise its authority to do so in respect of certain clearly defined rights. In fact, as is indicated in the

Rules and Practices of the IPU Committee, adopted in February 1989 and revised in May 2007, March 2014, April 2015 and April 2017, the IPU Committee's objective is to defend the human rights of current and, in certain circumstances, former members of parliament generally whenever their rights are at risk or appear to have been violated. Its aims are to prevent possible violations, put an end to ongoing violations, and/or promote State action to offer effective redress for violations by doing "everything possible to foster a dialogue with the authorities of the countries concerned, first and foremost their parliament, in the pursuit of a satisfactory settlement". As a consequence, the IPU Committee does not seek to review the observance of a State's obligations under a specific legal instrument. The IPU Committee cannot therefore be said to offer a judicial or quasi-judicial procedure similar to the one set up by the Convention.

189. In the light of that conclusion, the Court considers it unnecessary to examine separately whether the present application is "substantially the same" as the complaint brought before the IPU Committee.

190. Having regard to the foregoing considerations, the Government's objection under Article 35 § 2 (b) of the Convention must be dismissed.

B. Preliminary objection of failure to lodge an individual application with the Constitutional Court

1. The parties' submissions

(a) The Government

191. The Government referred to the Court's case-law to the effect that the requirement for applicants to exhaust domestic remedies was normally assessed with reference to the date of the application to the Court. They stated that the applicant had applied to the Court barely three months after lodging his individual application with the Constitutional Court, which at the time had still been pending before that court. He had therefore used the proceedings before the Court as an additional or alternative remedy rather than a subsidiary one. That being so, the Court should reject the application for failure to exhaust domestic remedies with reference to the date on which the application had been lodged with it.

(b) The applicant

192. The applicant contested the Government's argument. He submitted that if the Court were to accept the Government's argument, that would mean that a complaint alleging arbitrary deprivation of liberty could only be examined after the final domestic decision, thus rendering the individual application to the Court ineffective.

2. The Grand Chamber's assessment

193. The Court reiterates that an applicant's compliance with the requirement to exhaust domestic remedies is normally assessed with reference to the date on which the application was lodged with the Court. However, the Court's well-established case-law shows that it allows the last stage of a particular remedy to be reached after the application has been lodged but before its admissibility has been determined (see *Karoussiotis*, cited above, § 57; *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 107, 20 March 2018; *Şahin Alpay v. Turkey*, no. 16538/17, § 86, 20 March 2018; *Molla Sali v. Greece* [GC], no. 20452/14, §§ 90-91, 19 December 2018; and *A.M. v. France*, no. 12148/18, § 66, 29 April 2019).

194. The applicant in the present case lodged his application with the Court on 20 February 2017. The individual application which he had lodged with the Constitutional Court on 17 November 2016 was declared inadmissible on 21 December 2017, before the Court's decision on admissibility. This objection by the Government must therefore be dismissed.

C. Preliminary objection of non-exhaustion of domestic remedies (concerning the complaints under Article 5 § 3 and Article 18 of the Convention and Article 3 of Protocol No. 1)

1. The parties' submissions

(a) The Government

195. The Government asserted that the applicant had not raised his complaints under Article 5 § 3 and Article 18 of the Convention and Article 3 of Protocol No. 1 in his initial application to the Constitutional Court. It was only in his later applications that he had alleged a violation of those provisions. Moreover, the applications in question were still pending before the Constitutional Court. Accordingly, the Government submitted that these parts of the application should be declared inadmissible for non-exhaustion of domestic remedies.

(b) The applicant

196. The applicant maintained that he had exhausted domestic remedies. He stated that he had indeed lodged two other individual applications with the Constitutional Court. The first concerned the right to be brought before a judge, which the authorities had failed to observe for more than a year after his initial pre-trial detention, and the second concerned the rejection by the Assize Court of his request for release during the presidential election campaign. The outcome of those applications could not have a bearing on the substance of the present case, given that on 21 December 2017 the Constitutional Court had already rejected his complaints or declined to examine them.

2. The Grand Chamber's assessment

197. The Court notes firstly that it can be seen from the first judgment of the Constitutional Court that in his initial application form the applicant complained that he had been arrested, taken into police custody and placed in pre-trial detention on account of political speeches that he had given as a member of parliament and co-chair of a political party. He also argued that, having regard to his status as a member of parliament, his being held in pre-trial detention constituted a violation of his right to free elections (see paragraph 97 above). Accordingly, the Court considers that the applicant did raise his complaints under Article 18 of the Convention and Article 3 of Protocol No. 1 in his first individual application to the Constitutional Court.

198. The Constitutional Court did, however, state that the applicant's initial form had not included his complaint under Article 5 § 3 of the Convention as to the lack of relevant and sufficient reasons to justify his continued pre-trial detention (see paragraph 118 of the Constitutional Court's judgment). It noted that he had first alleged a violation on that account when responding to the observations of the Ministry of Justice. Accordingly, pointing out in addition that the applicant could lodge a fresh individual application with it, the Constitutional Court decided not to examine this part of the application. However, the Court observes from the copy of his initial form that has been included in the case file that in paragraphs 21-30 of it the applicant expressly raised a complaint under Article 5 § 3 of the Convention. In the relevant part, he first of all cited Article 5 § 3 of the Convention (paragraph 21). He then submitted that a person deprived of his liberty should be brought promptly before a judge and that the duration of his deprivation of liberty should not exceed a reasonable time (paragraph 22). He further contended that the severity of the potential sentence could not form the basis for establishing any risk of absconding (paragraph 28). In addition, he complained that no alternative measure to pre-trial detention had been applied (paragraph 29). Lastly, he complained that no specific reasons had been given to justify his pre-trial detention (paragraph 30). In those circumstances, the Court considers that the applicant's initial application set forth his complaints under Article 5 § 3 of the Convention and those under Article 18 of the Convention and Article 3 of Protocol No. 1. Contrary to the conclusions of the Constitutional Court, his subsequent observations therefore related not to a fact that had not been mentioned in his initial application, but to factual developments in the context of his continued pre-trial detention, (see, *mutatis mutandis*, *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, § 78, 22 May 2014).

199. Furthermore, in accordance with Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 60, 15 November 2018).

200. In the present case, in their observations of 24 November 2017 before the Chamber, the Government raised an objection of non-exhaustion of domestic remedies, arguing that the applicant's individual application to the Constitutional Court was still pending – a similar objection to the one examined in paragraphs 193-194 above. Moreover, on 4 January 2018, some two weeks after the Constitutional Court's judgment, the Government submitted additional observations, in which they pointed out that the Constitutional Court had ruled on the applications brought by the applicant and another member of parliament from his party, Mr Ayhan Bilgen. After summarising the judgments in question, the Government submitted that the Court should declare the application by Mr Bilgen inadmissible as he had lost his victim status. However, in their additional observations they did not raise any objection of non-exhaustion in relation to the applicant. In other words, the Government did not raise a preliminary objection of this kind in their observations before the Chamber's decision on the admissibility of the application. Yet there was nothing to prevent the Government from raising their plea of inadmissibility concerning Article 5 § 3 and Article 18 of the Convention and Article 3 of Protocol No. 1 before the Chamber, which ruled on the admissibility and merits of the application on 20 November 2018, more than eleven months after the Constitutional Court's decision. The Court therefore considers that the Government are in any event estopped from raising this objection at this stage of the proceedings (see *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 82, ECHR 2014 (extracts), and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 109, 6 November 2018).

201. Accordingly, the Court dismisses this objection by the Government.

D. Objection of failure to use the remedy of a compensation claim (concerning the complaints under Article 5 §§ 1 and 3 of the Convention)

1. The parties' submissions

(a) The Government

202. Referring in particular to *Demir v. Turkey* ((dec.), no. 51770/07, §§ 22-26, 16 October 2012), *Paşa Bayraktar and Aydınkaya v. Turkey* ((dec.), no. 38337/12, §§ 24-31, 16 May 2017) and *A.Ş. v. Turkey* (no. 58271/10, §§ 85-95, 13 September 2016), the Government objected that the applicant had failed to exhaust domestic remedies, pointing out that Article 141 § 1 (a) and (d) of the CCP provided for an award of compensation to anyone who had been unlawfully arrested or unjustly detained. Since the applicant's pre-trial detention had ended following his conviction in separate criminal proceedings, he could and should have brought a compensation claim on the basis of those provisions. In that context, the Government submitted that

according to the well-established case-law of the Court of Cassation, it was not necessary to wait for a final decision on the merits of the case before ruling on a compensation claim lodged under Article 141 of the CCP on account of the excessive length of pre-trial detention.

(b) The applicant

203. The applicant contested the Government's argument. Firstly, as he considered that he was still deprived of his liberty for the purposes of Article 5 § 1 (c) of the Convention, he submitted that the remedy provided for in Article 141 of the CCP could not be viewed as capable of ending his pre-trial detention. Next, referring to the Court's approach in the cases of *Lütfiye Zengin and Others v. Turkey* (no. 36443/06, 14 April 2015) and *Mustafa Avci v. Turkey* (no. 39322/12, 23 May 2017), he argued that a compensation claim could not lead to an acknowledgment that he had been arbitrarily deprived of his liberty.

2. The Chamber judgment

204. The Chamber reiterated that for a remedy in respect of the lawfulness of an ongoing deprivation of liberty to be effective, it had to offer a prospect of release. Noting that the applicant was still detained for the purposes of Article 5 § 1 (c) of the Convention and that the remedy provided for in Article 141 of the CCP was not capable of ending his pre-trial detention, it dismissed the Government's objection.

3. The Grand Chamber's assessment

205. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after the exhaustion of those domestic remedies that relate to the breaches alleged and are also available and sufficient. The Court also reaffirms that it is incumbent on the Government pleading non-exhaustion to satisfy it that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see, in particular, *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V; *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II; *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 74, 25 March 2014; and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 85, 9 July 2015). Once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances exempting him or her from this requirement (see *Akdivar and Others v.*

Turkey, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV, and *Molla Sali*, cited above, § 89).

206. In this context the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies. Furthermore, an applicant who has availed himself of a remedy capable of redressing directly, and not merely indirectly, the situation complained of is not required to have recourse to other remedies which might be available but whose effectiveness is questionable (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 52, ECHR 2013 (extracts)).

207. For a remedy in respect of the lawfulness of an ongoing deprivation of liberty to be effective, it must offer a prospect of release (see *Mustafa Avci*, cited above, § 60). In other words, a remedy that does not afford a possibility of release cannot be regarded as an effective remedy for the purposes of Article 5 of the Convention while the deprivation of liberty is ongoing. The Court reaffirms its case-law according to which preventive and compensatory remedies have to be complementary (see, *mutatis mutandis*, *Ulemek v. Croatia*, no. 21613/16, §§ 72-74, 31 October 2019).

208. However, the position may be different where the deprivation of liberty has ended (see *Cüneyt Polat v. Turkey*, no. 32211/07, § 49, 13 November 2014, and *Paşa Bayraktar and Aydınkaya*, cited above, § 28). As regards deprivation of liberty, the Court has already had occasion to rule on many such cases (see, among other authorities, *Kolevi v. Bulgaria* (dec.), no. 1108/02, 4 December 2007; *Rahmani and Dineva v. Bulgaria*, no. 20116/08, § 66, 10 May 2012; *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 41, 6 November 2008; and *Dolenec v. Croatia*, no. 25282/06, § 184, 26 November 2009). The Court's case-law in this area indicates that where the applicant complains that he or she was detained in breach of domestic law and where the detention has come to an end, a compensation claim capable of leading to an acknowledgment of the alleged violation and an award of compensation is in principle an effective remedy which needs to be pursued if its effectiveness in practice has been convincingly established.

209. In this context, in the cases cited above the Court carried out a careful examination of whether the unlawfulness or impropriety of a deprivation of liberty had been acknowledged at the domestic level. In *Rahmani and Dineva* (cited above, § 68), for example, the domestic courts had expressly acknowledged that the applicant's detention had breached both domestic law and Article 5 § 1 (f) of the Convention. In *Kolevi* (cited above) it had been established by a superior court that the applicant's detention had been unlawful from the outset. In *Gavril Yosifov* (cited above, § 43) the Court took into account the fact that the applicant had been partially acquitted, thus creating an opportunity for him to claim compensation. In *Dolenec* (cited above, § 185) a domestic court had expressly acknowledged that the statutory

time-limit for the applicant's detention had already expired and that his continued detention beyond that time-limit was in breach of domestic law.

210. In the present case, however, the applicant's complaints as to the lawfulness of his pre-trial detention were initially raised before the first-instance courts, namely the Diyarbakır magistrates' courts, the Diyarbakır Assize Court and the Ankara Assize Court, and subsequently before the Constitutional Court. None of those bodies explicitly or implicitly acknowledged that his detention was improper or unlawful. His requests for release were repeatedly rejected. Accordingly, in the light of the decisions given by the national courts, in particular the Constitutional Court, which held that the applicant's pre-trial detention was compatible with the Constitution, the Court considers that a compensation claim under Article 141 § 1 (a) of the CCP would have been bound to fail (see, to similar effect, *Lütfiye Zengin and Others*, cited above, § 65).

211. While the Government have referred to the *Paşa Bayraktar and Aydınkaya* decision (cited above), the applicants in that case alleged that they had been held in police custody beyond the statutory maximum duration and that they had not been brought "promptly" before a judge. In the specific circumstances of that case, the Court found that the applicants had been required to apply to the domestic courts under Article 141 § 1 (b) of the CCP, which provides for the possibility for anyone who has not been brought before a judge within the statutory permissible duration of police custody to claim compensation for the damage sustained. However, such a complaint has not been raised by the present applicant.

212. With regard to the remedy provided for in Article 141 § 1 (d) of the CCP, the Court notes that its first leading decision on this subject, *Demir* (cited above), related solely to the length of pre-trial detention, approximately seven years in the case in question. In that case, the applicant had not challenged the lawfulness of his detention and had not complained of a lack of reasons that could be said to have been "relevant" and "sufficient" to justify his initial and continued pre-trial detention. The Court further notes that it found in *Lütfiye Zengin and Others* (cited above) that the provision in question introduced a remedy solely in respect of the duration of deprivation of liberty (see, to similar effect, *A.Ş. v. Turkey*, cited above, § 94).

213. In the present case the applicant's complaint does not solely concern the length of his pre-trial detention. Under Article 5 § 3 of the Convention, he alleged first and foremost that the domestic courts had not provided relevant and sufficient reasons to justify his initial and continued pre-trial detention. In this connection, the Court observes that the wording of Article 141 § 1 (d) of the CCP does not provide for a right to compensation on account of the insufficiency of the grounds given to justify pre-trial detention. Furthermore, the Government have not produced any domestic decisions indicating that, in circumstances similar to those of the present case,

a claim under Article 141 § 1 (d) of the CCP has succeeded in respect of such a complaint.

214. The Court therefore considers that a compensation claim under Article 141 § 1 (a) and (d) of the CCP cannot be regarded as an effective remedy in respect of either the alleged lack of reasonable suspicion that an individual has committed an offence, or the alleged lack of relevant and sufficient reasons to justify pre-trial detention for the purposes of Article 5 §§ 1 and 3 of the Convention. This objection of non-exhaustion by the Government must therefore be dismissed.

E. The applicant's victim status

1. The parties' submissions

(a) The Government

215. In their additional observations, received on 24 June 2020, the Government submitted that the Constitutional Court's judgment of 9 June 2020 (see paragraphs 120-128 above) had acknowledged that there had been a violation of the applicant's right to liberty and security under Article 19 § 7 of the Turkish Constitution. They added that he had been awarded appropriate and sufficient compensation. Accordingly, they asked the Court to reject the application on the grounds that the applicant could no longer claim to be the victim of a violation of the Convention.

(b) The applicant

216. The applicant contested the Government's argument. He maintained that he still had victim status notwithstanding the Constitutional Court's judgment of 9 June 2020.

2. The Grand Chamber's assessment

217. The Court reiterates that it falls first to the national authorities to redress any violation of the Convention and that in assessing whether an applicant can claim to be a genuine victim of an alleged violation, account should be taken not only of the formal position at the time when the application was lodged with the Court but of all the circumstances of the case in question, including any developments prior to the date of the examination of the case by the Court (see *Tănase v. Moldova* [GC], no. 7/08, § 105, ECHR 2010).

218. A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 179-80, ECHR 2006-V; *Gäfgen v. Germany* [GC],

no. 22978/05, § 115, ECHR 2010; *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 259, ECHR 2012 (extracts); and *Cristea v. the Republic of Moldova*, no. 35098/12, § 25, 12 February 2019). Only where both these conditions have been satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of the application (see *Rooman*, cited above, § 129).

219. The Court has referred above to its case-law to the effect that for a remedy in respect of the lawfulness of an ongoing deprivation of liberty to be effective, it must offer a prospect of release (see paragraph 207 above). However, where the detention has already ended, it must be ascertained whether the person concerned had access to a remedy that could have led, firstly, to an acknowledgment that the detention was unlawful and, secondly, to an award of compensation on the basis of that finding.

220. In the instant case, the applicant's pre-trial detention for the purposes of the present application has already ended (for a detailed examination of the period he spent in pre-trial detention in this context, see paragraphs 290-297 below). It must therefore determine, firstly, whether there has been an acknowledgment by the national authorities, at least in substance, of a violation of a right protected by the Convention and, secondly, whether the redress afforded may be regarded as appropriate and sufficient (see, for example, *Vedat Doğru v. Turkey*, no. 2469/10, § 37, 5 April 2016).

221. As regards the question of an "acknowledgment", the Court notes firstly that the Constitutional Court did not find a violation, even in substance, of the rights guaranteed by Article 5 §§ 1 and 4, Articles 10 and 18 of the Convention and Article 3 of Protocol No. 1 in the applicant's case. It therefore considers that the applicant's victim status in relation to his complaints under these provisions cannot be called into question on this basis.

222. Turning next to the complaint under Article 5 § 3, the Court observes that the applicant argued before it that the judicial decisions ordering his initial and continued pre-trial detention had contained no reasons other than mere citation of the grounds for pre-trial detention provided for by law and had been worded in abstract, repetitive and formulaic terms. In that connection, the Constitutional Court held that the decisions on the applicant's continued detention had contained insufficient reasons. However, the Constitutional Court did not find that the initial decision on the applicant's pre-trial detention had contravened Article 5 § 3, or indeed the corresponding provision in the 1982 Constitution. That being so, the Court concludes that there has been no acknowledgment by the Constitutional Court of the alleged violation of the right protected by Article 5 § 3 of the Convention. In that context, the Court reiterates its case-law to the effect that the requirement for the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion that the arrested person has committed an offence – already applies at the time of the first decision ordering pre-trial detention, that is to say "promptly" after the arrest

(see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 102, 5 July 2016).

223. Having regard to the foregoing, the applicant can also claim to be the victim of a violation of Article 5 § 3 of the Convention, notwithstanding the judgment delivered by the Constitutional Court on 9 June 2020, since his grievance before the Court is that the decisions on his initial and continued pre-trial detention were in breach of the Convention from the time he was first deprived of his liberty.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

A. The Chamber judgment

224. Having regard to all the findings it had reached, the Chamber considered it unnecessary to rule separately on either the admissibility or the merits of the complaint under Article 10 of the Convention.

B. The parties' submissions

1. The applicant

225. The applicant complained of an infringement of his right to freedom of expression as guaranteed by Article 10 of the Convention. He submitted that he had been deprived of his liberty on account of political speeches he had made which could not be regarded as a call for the use of violence or as hate speech. He maintained that all the accusations against him concerned his political statements, which should be examined in terms of his right to freedom of expression.

226. The applicant argued that his detention and the charges against him amounted to an interference with his right to freedom of expression and that the interference had not been prescribed by law. In that connection, he submitted that neither the constitutional amendment lifting his parliamentary immunity nor the basis for his pre-trial detention and the criminal proceedings instituted against him satisfied the "quality of the law" requirement defined in the Court's case-law. He argued that he could not reasonably have foreseen that such a procedure to amend the Constitution would be carried out during his term as a member of parliament. In that connection, he emphasised that the first paragraph of Article 83 of the Constitution provided for two types of immunity for MPs: non-liability and inviolability. The first paragraph of Article 83 related to non-liability of members of parliament, meaning that they could not be punished for opinions they expressed in Parliament. This protection also covered situations where members of parliament repeated and disseminated the content of their opinions outside Parliament. The constitutional amendment had not altered the first paragraph of Article 83 of the Constitution. Pointing out that many of the accusations against him had

concerned political speeches, the content of which was protected under the first paragraph of Article 83 of the Constitution, he submitted that his initial and continued pre-trial detention could not be regarded as having been prescribed by law within the meaning of Article 10 of the Convention.

227. In addition, the applicant argued that the provisions of the Criminal Code, and especially the anti-terrorism legislation, on the basis of which he had been charged and detained, did not satisfy the "quality of the law" requirements. The judicial authorities had treated his political activities as proof of his membership or leadership of a terrorist organisation, without providing any specific evidence. They had applied the relevant provisions broadly. However, such a broad interpretation of the legal rules could not be justified in the absence of specific evidence of links with a terrorist organisation.

228. The applicant further maintained that his pre-trial detention had not pursued a legitimate aim within the meaning of paragraph 2 of Article 10 of the Convention. The purpose of his initial and continued pre-trial detention had been to punish him for his critical opinions and to silence dissent, rather than to combat terrorism. Such an approach had, in his view, created a chilling effect on dissent and freedom of expression in Turkey.

229. As to the necessity of the interference in a democratic society, the applicant submitted that the fact that some groups used violence to achieve an aim did not justify restrictions on legitimate demands. One of his most frequently voiced demands had been for an end to State violence, and a person who criticised the State's use of violence or methods of combating terrorism was not necessarily disseminating terrorist propaganda. The voicing of political criticism in general and criticism against the State in particular should be afforded the widest possible protection in a democratic society. In that connection, a distinction should be made between political expression and statements that encouraged violence. His particular comments had not constituted a call for violence or incitement to hatred. That being so, his initial and continued pre-trial detention had therefore amounted to a violation of Article 10 of the Convention.

2. The Government

230. The Government submitted, firstly, that the applicant could not claim to be the victim of a violation of Article 10 of the Convention. He had not been prevented from expressing his opinions and had not received any sentence from a criminal court for expressing them. There was therefore no proof of any "chilling effect" on the applicant's desire to express his opinions on matters of public concern. Indeed, the applicant had carried on his political activities even while in pre-trial detention. Moreover, given that the criminal proceedings against the applicant were still ongoing, his complaint under Article 10 should be rejected as he did not have victim status and had not exhausted domestic remedies.

231. Should the Court accept that there had been interference with the applicant's exercise of his right to freedom of expression on account of his pre-trial detention, the Government submitted that the interference had been prescribed by Articles 100 and 101 of the CCP and had pursued the legitimate aims of combating terrorism and protecting national security and public safety.

232. With regard to the applicant's allegation that the speeches to which the criminal proceedings had related were in fact covered by the first paragraph of Article 83 of the Constitution, the Government submitted that he had not raised that argument in the national courts.

233. As to whether the interference had been necessary in a democratic society, the Government submitted that the speeches by the applicant that had given rise to the accusations should be assessed in the context in which they had been given. Referring to the volatile and at times violent situation in south-eastern Turkey, they maintained that in the offending speeches the applicant had called, in particular, for self-governance. He had also described the PKK's terrorist acts as a legitimate "war of self-defence" and as acts of "resistance". Furthermore, the applicant had referred to the first terrorist attacks by the PKK as the "coup in 1984" and the "resistance in Şemdinli [and] Eruh". On the other hand, he had criticised the operations by the security forces by describing them as "massacres". In addition, the applicant had stated that he wished to display a sculpture of the leader of the PKK terrorist organisation. He had also called on people to occupy metropolitan areas, to take to the streets and to support those protesting against attacks by Daesh and by the ruling party. In that connection, the Government drew attention to the violent demonstrations and armed clashes that had taken place in certain regions of south-eastern Turkey. Those examples showed that the applicant had disseminated views which the judicial authorities could reasonably have considered likely to exacerbate the security situation in south-eastern Turkey, where serious disturbances had been raging between the security forces and the PKK terrorists, involving very heavy losses of life in the region.

234. The Government further submitted that in view of the content of the applicant's offending statements, the present case did not involve a contribution to political debate but incitement to and glorification of violence by an armed terrorist organisation. In such a context the content of the applicant's statements and the tweets posted by the HDP had to be seen as capable of inciting further violence by stirring up an irrational hatred towards those responsible for the alleged "massacres". The applicant's clear intention had been to stigmatise the other party to the conflict by the use of labels such as "fascism", "resistance" and "massacres". The statements in issue could be construed as tacit support for terrorism and as calls for the use of violence. Accordingly, the Government argued that the applicant's pre-trial detention for terrorism-related offences had been necessary in a democratic society and

that the national courts had established that there was a pressing social need to keep him in detention.

C. The third parties

1. The Commissioner for Human Rights

235. The Commissioner for Human Rights saw the applicant's detention as part of a broader pattern of repression against various groups expressing criticism of official policy in Turkey. She submitted that many HDP members of parliament had faced judicial proceedings and pre-trial detention on terrorism-related charges on account of their legitimate exercise of the right to freedom of expression.

236. The Commissioner for Human Rights noted that it was increasingly common in Turkey for the evidence used to justify detention to be solely limited to statements and acts that were manifestly non-violent and should in principle be protected by Article 10 of the Convention. Turkish prosecutors and courts systematically omitted to perform an appropriate contextual analysis and to filter the relevant evidence in the light of the Court's well-established case-law concerning Article 10.

237. The Commissioner for Human Rights criticised the lifting of parliamentary immunity outside the standard procedure provided for in the Constitution. She pointed out in that connection that the amendment had been viewed by the Venice Commission as a misuse of the constitutional amendment procedure. The resulting criminal proceedings had affected nearly all of the HDP's members of parliament and some from the CHP, and the public prosecutors had been excessively active in opening investigations in respect of them, mainly focusing on their statements as terrorist propaganda, incitement to hatred or insulting the President. In that connection, the preamble to the constitutional amendment stated that its purpose was to address public indignation about statements by certain members of parliament constituting emotional and moral support to terrorism. In the Commissioner's view, this situation gave the impression that the criminal proceedings against the members of parliament had from the outset been tainted by serious irregularities and had been aimed at silencing them as parliamentarians.

2. The IPU

238. Emphasising the importance of parliamentarians' freedom of expression, the IPU criticised the criminal proceedings instituted against HDP members of parliament, some of whom had been placed in pre-trial detention for carrying out peaceful and lawful political activities, relating in particular to the situation in south-eastern Turkey.

3. The intervening NGOs

239. Relying on the Court's well-established case-law concerning freedom of expression, the intervening NGOs submitted that the pre-trial detention of an opposition politician attracted the protection of Article 10 of the Convention. As opposed to the wide margin of appreciation enjoyed by governments in the sphere of implied limitations under Article 3 of Protocol No. 1, the margin of appreciation under Article 10 was especially narrow since the essence of democracy was at stake in the event of interference with an opposition politician's right to free speech.

D. The Grand Chamber's assessment

1. Admissibility

240. As regards the objection of inadmissibility on the grounds of lack of victim status (see paragraph 230 above), the Court considers that it raises issues that are closely linked to the examination of the merits of the applicant's complaint. It will therefore analyse this question in the context of its examination of the merits (see *Mehmet Hasan Altan*, cited above, § 194, and *Şahin Alpay*, cited above, § 164).

241. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Freedom of expression of members of parliament

242. The Court reiterates that it has consistently emphasised in its case-law the importance of freedom of expression for members of parliament, this being political speech *par excellence*. In *Castells v. Spain* (23 April 1992, § 42, Series A no. 236), which concerned the conviction of a senator for insulting the government in a press article, the Court held:

> "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 ... call for the closest scrutiny on the part of the Court."

243. These principles have been confirmed in a number of cases concerning the freedom of expression of members of national or regional parliaments (see, among other authorities, *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 137, 17 May 2016; *Jerusalem v. Austria*, no. 26958/95, § 36, ECHR 2001-II; *Féret v. Belgium*, no. 15615/07, § 65, 16 July 2009; and *Otegi Mondragon v. Spain*, no. 2034/07, § 50, ECHR 2011), as well as in a series of cases concerning restrictions on the right of access to a court stemming from the operation of parliamentary immunity

(see *A. v. the United Kingdom*, cited above, § 79; *Cordova v. Italy (no. 1)*, no. 40877/98, § 59, ECHR 2003-I; *Cordova v. Italy (no. 2)*, no. 45649/99, § 60, ECHR 2003-I; *Zollmann v. the United Kingdom* (dec.), no. 62902/00, ECHR 2003-XII; *De Jorio v. Italy*, no. 73936/01, § 52, 3 June 2004; *Patrono, Cascini and Stefanelli v. Italy*, no. 10180/04, § 61, 20 April 2006; and *C.G.I.L. and Cofferati v. Italy*, no. 46967/07, § 71, 24 February 2009).

244. In that regard, there can be no doubt that parliamentary speech enjoys an elevated level of protection (see *Karácsony and Others*, cited above, § 138). In particular, the rule of parliamentary immunity attests to this high level of protection particularly where it protects the parliamentary opposition. The Court attaches importance to protection of the parliamentary minority from abuse by the majority (ibid., § 147).

245. However, freedom of political debate is undoubtedly not absolute in nature (see *Castells*, cited above, § 46). The Court has already indicated that some regulation may be considered necessary in order to prevent forms of expression such as direct or indirect calls for violence (see *Karácsony and Others*, cited above, § 140). In verifying that freedom of expression remains secured, the Court's scrutiny in this context should be stricter (see *Pastörs v. Germany*, no. 55225/14, § 38, 3 October 2019).

(b) Whether there has been an interference

246. In the present case, under the constitutional amendment of 20 May 2016, the members of parliament affected lost the constitutional protection provided for by the second paragraph of Article 83 of the Constitution in relation to requests for the lifting of immunity submitted to Parliament before the amendment. As stated in the explanatory memorandum on the constitutional amendment, it was brought forward because "at a time when Turkey [was] waging the strongest and most intensive campaign against terrorism in its history, certain members of parliament, whether before or after their election, [had] made speeches voicing moral support for terrorism", which had "aroused public indignation" (see paragraph 56 above). The aim of the constitutional amendment was therefore to limit the political speech of the members of parliament in question, including the applicant. Following the amendment, the Diyarbakır public prosecutor decided to merge thirty-one criminal investigations in respect of the applicant into a single case. The applicant was then arrested, on 4 November 2016. In its order given on the same day for the applicant's pre-trial detention, the Diyarbakır 2nd Magistrate's Court relied mainly on the following evidence: the tweets published on behalf of the HDP central executive board and the events of 6 to 8 October 2014; the speeches in which the applicant had described certain acts by PKK members, such as digging trenches and putting up barricades in towns, as "resistance"; and the fact that he had participated in activities of the Democratic Society Congress (see paragraph 70 above). As for the proceedings which started on 11 January 2017 (see paragraph 78 above), and

which are still pending, nearly all of the evidence presented consists of speeches by the applicant.

247. In the light of the foregoing, the Court considers it undeniable that the combination of all these measures, namely the lifting of the applicant's parliamentary immunity by the constitutional amendment of 20 May 2016, his initial and continued pre-trial detention, and the criminal proceedings brought against him on the basis of the above-mentioned evidence comprising his political speeches, constituted an interference with the exercise of his right to freedom of expression under Article 10 of the Convention. It therefore dismisses the objection of lack of victim status raised by the Government.

248. Such interference must be "prescribed by law", pursue one or more of the legitimate aims listed in paragraph 2 of Article 10, and be "necessary in a democratic society" (see *Karácsony and Others*, cited above, § 121).

(c) Whether the interference was prescribed by law

(i) General principles

249. The Court refers to its well-established case-law to the effect that an impugned measure must have some basis in domestic law and also be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and is inherent in all its Articles. In particular, it would be contrary to the rule of law for the discretion granted to the competent authorities to be expressed in terms of an unfettered power. The law must therefore indicate the scope of any such discretion conferred on them and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see *Roman Zakharov v. Russia* [GC], no. 47143/06, §§ 228 and 230, ECHR 2015; *Malone v. the United Kingdom*, 2 August 1984, § 67, Series A no. 82; *Olsson v. Sweden (no. 1)*, 24 March 1988, § 61, Series A no. 130; and *Navalnyy*, cited above, § 115). In that context, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among other authorities, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I, and *Karácsony and Others*, cited above, § 123). The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Korbely v. Hungary* [GC], no. 9174/02, § 72, ECHR 2008). The expression "prescribed by law" in the second paragraph of Article 10 also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects (see, among many other authorities, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 140, ECHR 2012; *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 108, ECHR 2015; and *Delfi AS v. Estonia* [GC], no. 64569/09, § 120, ECHR 2015).

250. One of the requirements flowing from the expression "prescribed by law" is foreseeability. In the Court's view, a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 of the Convention unless it is formulated with sufficient precision to enable people to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. While certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice (see, for example, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-IV; *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 141; and *Delfi AS*, cited above, § 121). The criterion of foreseeability cannot be interpreted as requiring that all detailed conditions and procedures governing the application of a law should be laid down in the text of the law itself; it may be satisfied if points which cannot be satisfactorily resolved on the basis of domestic law are set out in enactments of lower rank than statutes. A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, § 94, 20 January 2020).

251. The Court reiterates in this context that it is not for it to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 184, 8 November 2016).

252. The Court also confirms that in cases originating in an individual application under Article 34 of the Convention its task is not to review domestic law in the abstract but to determine whether the way in which it was applied to the applicant gave rise to a breach of the Convention (see *Magyar Kétfarkú Kutya Párt*, cited above, § 96).

253. The Court considers that a degree of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that a legal provision is capable of more than one construction mean that it fails to meet the requirement of "foreseeability". The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 65, ECHR 2004-I). At the same time, the Court is aware that there must come a day

when a given legal norm is applied for the first time (see *Magyar Kétfarkú Kutya Párt*, cited above, § 97).

254. As to the notion of foreseeability, its scope depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 142; *Delfi AS*, cited above, § 122; and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 144, 27 June 2017). Nevertheless, quality of the law implies that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 117, ECHR 2014 (extracts), and *Güler and Uğur v. Turkey*, nos. 31706/10 and 33088/10, § 47, 2 December 2014).

(ii) Application of the above principles in the present case

255. In the present case, the Court observes firstly that the parties agreed that, at the time the applicant was placed in pre-trial detention, all of the legal provisions applied in the case were accessible, that is to say the Constitution, the constitutional amendment, the CCP and the legislation on the basis of which the public prosecutor sought the applicant's conviction. It is not in dispute that following the constitutional amendment of 20 May 2016, the applicant was placed in pre-trial detention on the basis of Articles 100 et seq. of the CCP. The question to which the parties' arguments and differing positions relate is whether the constitutional amendment in question and the provisions of the Criminal Code on membership of and/or leading an armed terrorist organisation can in this instance be considered to satisfy the "quality of the law" requirement. The Court must therefore determine whether, in both of the above regards, the interference with the applicant's right to freedom of expression can be said to have been "prescribed by law". In particular, the Court will examine whether the domestic law, as interpreted and applied in the present case, was foreseeable at the time of the speeches by the applicant that led to his prosecution.

(α) Parliamentary immunity

256. The Court reiterates that it has held that the inherent characteristics of the system of parliamentary immunity and the resulting derogation from the ordinary law pursue the aim of allowing free speech for representatives of the people and preventing partisan complaints from interfering with parliamentary functions (see *Kart v. Turkey* [GC], no. 8917/05, § 88, ECHR 2009 (extracts)).

257. The Court observes firstly that most of the member States of the Council of Europe confer, as does Article 83 of the 1982 Constitution, two

types of parliamentary immunity on members of parliament: non-liability and inviolability (see *Kart*, cited above, §§ 42 and 85; *Karácsony and Others*, cited above, §§ 138-40; and *Pastörs*, cited above, § 38).

258. The first paragraph of Article 83 of the Constitution concerns the non-liability of members of parliament, which protects their freedom of expression since they cannot be subject to judicial proceedings on account of votes cast and views expressed within the National Assembly or the repetition or dissemination of such views outside the Assembly, unless the Assembly decides otherwise at a sitting held on a proposal by the Bureau (see paragraph 134 above).

259. The Court observes that parliamentary non-liability is absolute, permits of no exception, does not allow any investigative measures, and, as the parties submitted at the hearing, continues to protect members of parliament even after the end of their term of office. As both parties also stated at the hearing, it is clear that repeating a political speech outside the National Assembly cannot be construed as being limited to repeating the same words that were used in Parliament.

260. Provisional Article 20 of the Constitution (see paragraph 137 above), as adopted by the National Assembly on 20 May 2016, did not amend the first paragraph of Article 83 of the Constitution. In other words, the 154 members of parliament affected by the constitutional amendment have continued to enjoy legal protection on account of parliamentary non-liability as defined in the first paragraph of Article 83 of the Constitution. In the absence of a decision to the contrary by the National Assembly, they cannot therefore be held liable in the criminal courts for votes they have cast and statements they have made during parliamentary proceedings or for their repetition or dissemination outside the National Assembly.

261. In the present case, the Government asserted that in the impugned speeches the applicant defended self-governance, described the terrorist acts allegedly committed by PKK members as a legitimate "war of self-defence" and as acts of "resistance", and criticised the operations by the security forces by describing them as "massacres". The Government added that the applicant had praised the leader of the PKK and had called on the people to take to the streets. The applicant, for his part, submitted that he had given similar speeches during proceedings of the National Assembly and that the speeches in question were therefore protected by the first paragraph of Article 83 of the Constitution. On this issue, the Court considers that it was the task of the national authorities, and in particular the domestic courts, to determine first of all whether the speeches on account of which the applicant was charged and placed in pre-trial detention were covered by parliamentary non-liability as provided for in the first paragraph of Article 83 of the Constitution. In this connection, the Court reiterates that the national authorities have a procedural obligation to perform a judicial review to prevent any abuse of power (see

Karácsony and Others, cited above, §§ 133-36, and the authorities cited therein).

262. In the present case, the Government stated that the applicant had never argued before the national courts that the speeches for which he had been prosecuted were protected under the first paragraph of Article 83 of the Constitution. However, on the contrary, the applicant argued from the start of his pre-trial detention that in the light of the first paragraph of Article 83, he could not be deprived of his liberty. Indeed, this was one of his main arguments (see, in particular, paragraph 70 above). In that context, he lodged several objections with a view to securing his release (see, in particular, paragraphs 77 and 80 above). Furthermore, on 3 April 2018 he asked the Ankara 19th Assize Court to examine the speeches he had given in the course of parliamentary proceedings and to compare their content with that of the impugned speeches. To that end, he also requested that an expert be appointed to determine whether those speeches were protected under the first paragraph of Article 83 of the Constitution (see paragraph 91 above). However, it appears from the documents produced by the parties that no such examination was carried out. When ordering the applicant's pre-trial detention, the Diyarbakır 2nd Magistrate's Court quite simply observed that the constitutional amendment had had the effect of lifting the applicant's parliamentary immunity for the offences in question. The Constitutional Court similarly observed that the constitutional amendment of 20 May 2016 had made it possible to grant the requests for the lifting of the applicant's parliamentary immunity that had been referred to the National Assembly before the adoption of the amendment. Nevertheless, the magistrates who ordered the applicant's initial and continued pre-trial detention, the prosecutors who instituted the criminal proceedings against him, the assize court judges who decided to keep him in pre-trial detention and, lastly, the Constitutional Court judges did not carry out any examination of whether the speeches in issue were protected on account of the applicant's parliamentary non-liability. The Court is struck by the lack of any kind of analysis of the applicant's argument on this point.

263. The Court considers that the applicant argued plausibly that, in terms of their content, the speeches referred to by the Government were similar to speeches he had given in proceedings of the National Assembly (see, in particular, paragraphs 28, 36, 46, 50-52 and 54 above). However, despite the plausibility of that argument, and notwithstanding the safeguard enshrined in the first paragraph of Article 83 of the Constitution, the judicial authorities placed him in pre-trial detention and prosecuted him mainly on account of his political speeches, without any assessment of whether his statements were protected by parliamentary non-liability.

264. Moreover, even assuming that the impugned speeches were not covered by the protection afforded under the first paragraph of Article 83 of the Constitution, the Court considers that the constitutional amendment of

20 May 2016 in itself raises an issue in terms of foreseeability. The second paragraph of Article 83 of the Constitution, in its unamended form, provides for parliamentary inviolability, shielding elected representatives from any arrest, detention or prosecution during their term of office without the consent of the National Assembly. Such protection is only temporary, which means that criminal proceedings can follow their normal course once the member of parliament's term of office has ended (see *Kart*, cited above, § 69).

265. The second paragraph of Article 83 of the Constitution provides for only two exceptions to the principle of parliamentary inviolability: (i) where a member of parliament is caught *in flagrante delicto*; and (ii) cases falling under Article 14 of the Constitution, provided that a criminal investigation has been initiated before the election. As the situation of the applicant did not come within either exception, without the constitutional amendment the national authorities would have had to request the lifting of his parliamentary immunity in order to be able to bring criminal proceedings against him.

266. The Turkish Constitution provides for procedural safeguards against applications to lift a member of parliament's immunity. In accordance with the second paragraph of Article 83 of the Constitution, a member of parliament can only be arrested, questioned, detained or tried where the National Assembly takes the decision to lift parliamentary immunity. To that end, the National Assembly must examine the individual circumstances of the case and the situation of the member concerned, thereby ensuring that they have the opportunity to defend themselves before Parliament. Furthermore, under Article 85 of the Constitution, the member of parliament concerned or another member may appeal to the Constitutional Court against a decision by the National Assembly to lift immunity, within seven days of the date of the decision. The Constitutional Court must decide on the appeal within fifteen days. It may set aside Parliament's decision if it finds that it is contrary to the Constitution, the law or the rules of procedure of the National Assembly.

267. In accordance with the constitutional amendment, the provision in the first sentence of the second paragraph of Article 83 of the Constitution, to the effect that a member of parliament who is alleged to have committed an offence before or after election may not be arrested, questioned, detained or tried unless the Assembly decides otherwise, does not apply in the case of the members concerned, including the applicant. They are therefore subject to the ordinary legislative framework, without any preferential status compared with ordinary citizens. Thus, as the Constitutional Court held in its judgment no. 2016/117 of 3 June 2016, the members of parliament concerned have no right of appeal against the amendment, the constitutionality of which can only be reviewed by means of the procedure set out in Article 148 of the Constitution.

268. The general preamble to the constitutional amendment explains that its purpose is to address public indignation about statements by certain

members of parliament constituting emotional and moral support for terrorism, the support and assistance provided by certain members of parliament to members of terrorist organisations and the calls for violence issued by certain members of parliament. Moreover, in its opinion on the suspension of the second paragraph of Article 83 of the Constitution, the Venice Commission stated that following the amendment, political statements by members of parliament had become punishable under criminal law, without the constitutional safeguards under Articles 83 and 85 of the Constitution being available to the members concerned. As a result of the amendment, the National Assembly was no longer required to perform an individual assessment of the situation of each of the members of parliament concerned, to the detriment of their rights as secured under the Constitution. In the Court's view, the amendment created a situation that was not foreseeable for the members of parliament concerned.

269. In addition, the Court considers, again sharing the view of the Venice Commission, that this was a one-off *ad homines* amendment that was unprecedented in Turkish constitutional tradition. As stated in its explanatory memorandum, the constitutional amendment was aimed expressly at specific statements by members of parliament, particularly those of the opposition. In this connection, the Court has already held that laws which are directed against specific persons are contrary to the rule of law (see *Baka v. Hungary* [GC], no. 20261/12, § 117, 23 June 2016). After the adoption of the amendment, the National Assembly maintained the regime of immunity as established in Articles 83 and 85 of the Constitution, while at the same time making it inapplicable to certain identifiable members of parliament on the basis of general and objective wording. In this context, the Court fully subscribes to the Venice Commission's clear finding that this was a "misuse of the constitutional amendment procedure". In the Court's view, bearing in mind Turkish parliamentary practice and tradition, a member of parliament could not reasonably expect that such a procedure would be introduced during his term of office, thereby undermining the freedom of expression of members of the National Assembly.

270. The Court's case-law indicates that the foreseeability requirement is satisfied where the individual can know from the wording of the relevant legislation, and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see, among other authorities, *Güler and Uğur*, cited above, § 50, and *Kudrevičius and Others*, cited above, § 108). In the present case, having regard to the wording of the first two paragraphs of Article 83 of the Constitution and the interpretation, or rather lack thereof, of that provision by the national courts, the Court considers that the interference with the exercise of the applicant's freedom of expression was not "prescribed by law" in that it did not satisfy the requirement of foreseeability, since in defending a political viewpoint, the applicant could legitimately expect to enjoy the benefit of the constitutional

legal framework in place, affording the protection of immunity for political speech and constitutional procedural safeguards (see, *mutatis mutandis*, *Lykourezos v. Greece*, no. 33554/03, §§ 54-56, ECHR 2006-VIII).

(β) The terrorism-related offences: Article 314 §§ 1 and 2 of the Criminal Code

271. On 4 November 2016, the Diyarbakır public prosecutor asked the Diyarbakır 2nd Magistrate's Court to place the applicant in pre-trial detention on suspicion of two offences: membership of an armed terrorist organisation, punishable under Article 314 § 1 of the Criminal Code, and public incitement to commit an offence, punishable under Article 214 § 1 of the same Code.

272. On the same day, the Diyarbakır 2nd Magistrate's Court noted first of all, having regard to the tweets posted on the HDP Twitter account and the violent events of 6 to 8 October 2014, that there was a strong suspicion that the applicant had publicly incited others to commit an offence (see Article 214 § 1 of the Criminal Code). Next, taking into account a number of speeches by the applicant and the fact that he was the subject of several criminal investigations being carried out by the competent prosecuting authorities for terrorism-related offences (see paragraph 70 above), the magistrate concluded that there was a strong suspicion that the applicant had committed the offence of membership of an armed terrorist organisation (Article 314 § 2 of the Criminal Code). Furthermore, in view of the nature of the offence of forming and leading an armed terrorist organisation – of which the applicant was not accused until 11 January 2017, when the indictment was filed – and the fact that it featured among the offences listed in Article 100 § 3 of the CCP, the magistrate found that there was also a strong suspicion regarding the commission of that offence (Article 314 § 1 of the Criminal Code). Accordingly, the decision given on 4 November 2016 by the Diyarbakır 2nd Magistrate's Court does not give a clear indication of which offence(s) formed the basis for the applicant's detention. This uncertainty was exacerbated by the decisions on the extension of his pre-trial detention. In its decision of 11 November 2016, the Diyarbakır 3rd Magistrate's Court stated that the applicant was being detained in connection with two offences: membership of a terrorist organisation and public incitement to commit an offence. Yet the Diyarbakır 1st Magistrate's Court stated in a decision of 6 December 2016 that the applicant was being detained only on suspicion of membership of an armed terrorist organisation.

273. In an indictment filed on 11 January 2017, the Diyarbakır public prosecutor sought a sentence of between forty-three and 142 years' imprisonment for the applicant for the following offences: forming or leading an armed terrorist organisation, disseminating propaganda in favour of a terrorist organisation, public incitement to commit an offence, praising crime and criminals, incitement to hatred and hostility, incitement to disobey the law, organising and participating in unlawful meetings and demonstrations, and refusing to comply with orders by the security forces for the dispersal of

an unlawful demonstration (see paragraph 78 above). Until 2 September 2019, at the end of each hearing the assize courts ordered the applicant's continued detention without specifying the offence(s), referring simply to all the evidence against him.

274. In any event, it is clear that the applicant's pre-trial detention was ordered and extended on the basis of his speeches for terrorism-related offences, in particular those provided for by Article 314 §§ 1 and 2 of the Criminal Code, namely forming or leading an armed terrorist organisation and membership of such an organisation (see paragraphs 143-146 above).

275. The Court is mindful of the difficulties linked to preventing terrorism and formulating anti-terrorism criminal laws. The member States inevitably have recourse to somewhat general wording, the application of which depends on its practical interpretation by the judicial authorities. In that context, when interpreting the law, the national courts must give the individual adequate protection against arbitrary interference.

276. The Court recently held in two judgments against Turkey that criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting an armed terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings (see *Mehmet Hasan Altan*, cited above, § 211, and *Şahin Alpay*, cited above, § 181).

277. The Court observes, in line with the Venice Commission's findings in its opinion on Articles 216, 299, 301 and 314 of the Criminal Code, that the Code does not define the concepts of an "armed organisation" and an "armed group". The qualifying criteria for a criminal organisation have been set out in the case-law of the Court of Cassation: such an organisation has to have at least three members; there should be a hierarchical connection between the members; they should have a common intention to commit crimes; the group has to display continuity in time; and the structure of the group, the number of its members, its tools and its equipment should be appropriate for the commission of the crimes envisaged. Regarding "membership of an armed organisation", the Court of Cassation takes into account the continuity, diversity and intensity of the acts attributed to the suspects in order to determine whether those acts prove that the suspect had an "organic relationship" with the organisation or whether the acts may be considered to have been committed knowingly and willingly within the "hierarchical structure" of the organisation (see paragraph 160 above).

278. In the present case, the national judicial authorities, including the public prosecutors who conducted the criminal investigation and charged the

applicant, the magistrates who ordered his initial and/or continued pre-trial detention, the assize court judges who decided to extend his pre-trial detention, and lastly the Constitutional Court judges, adopted a broad interpretation of the offences provided for in Article 314 §§ 1 and 2 of the Criminal Code. The political statements in which the applicant expressed his opposition to certain government policies or merely mentioned that he had taken part in the Democratic Society Congress – a lawful organisation – were held to be sufficient to constitute acts capable of establishing an active link between the applicant and an armed organisation. The national courts do not appear to have taken into account the "continuity, diversity and intensity" of the applicant's acts or to have examined whether he had committed offences within the hierarchical structure of the terrorist organisation in question, as required by the case-law of the Court of Cassation.

279. In this connection, the Commissioner for Human Rights pointed out that it was increasingly common in Turkey for the evidence used to justify detention to be solely limited to statements and acts that were manifestly non-violent and should in principle be protected by Article 10 of the Convention. She viewed this as a systematic omission on the part of Turkish prosecutors and courts to perform an appropriate contextual analysis and to filter the evidence in the light of the Court's well-established case-law concerning Article 10 of the Convention.

280. Furthermore, in its above-mentioned opinion, the Venice Commission stated that in applying Article 314 of the Criminal Code, the domestic courts often tended to decide on a person's membership of an armed organisation on the basis of very weak evidence (see paragraph 160 above). The present case appears to bear out that observation. The range of acts that may have justified the applicant's pre-trial detention in connection with serious offences punishable under Article 314 of the Criminal Code is so broad that the content of that Article, coupled with its interpretation by the domestic courts, does not afford adequate protection against arbitrary interference by the national authorities. In the Court's view, such a broad interpretation of a provision of criminal law cannot be justified where it entails equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link.

(γ) Conclusion

281. Having established that the interferences with the applicant's freedom of expression did not comply with the requirement of the quality of law, the Court finds that there has been a violation of Article 10 of the Convention on account of the failure to consider the application of the first paragraph of Article 83 of the Constitution and in view of the constitutional amendment, as well as the interpretation and application in the applicant's case of the provisions governing terrorism-related offences.

282. That conclusion makes it unnecessary to examine whether the interferences pursued one or more of the legitimate aims listed in paragraph 2 of Article 10 and were "necessary in a democratic society".

IV. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 3 OF THE CONVENTION

283. The applicant submitted firstly that there had been no evidence giving rise to a reasonable suspicion that he had committed a criminal offence necessitating his pre-trial detention. He also complained that the judicial decisions ordering and extending his detention had contained no reasons other than a mere statement of the grounds for pre-trial detention provided for by law and had been worded in abstract, repetitive and formulaic terms. He alleged a violation of Article 5 §§ 1 and 3 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

284. The Government contested the applicant's argument.

A. Period to be taken into consideration

1. The parties' submissions

(a) The applicant

285. The applicant stated that in the context of the criminal proceedings before the Ankara Assize Court, he had been placed in pre-trial detention on 4 November 2016 and that his detention during those proceedings had lasted until 2 September 2019, when the Assize Court had ordered his release. He submitted that on 4 December 2018 the Istanbul Court of Appeal had upheld the Istanbul Assize Court's judgment with final effect and added that, notwithstanding that final judgment, his *de jure* status had not changed, such

that his deprivation of liberty still fell within the scope of Article 5 § 1 (c) of the Convention.

286. In that context, the applicant observed that even after his conviction with final effect in the criminal proceedings in Istanbul, the question of his continued pre-trial detention had continued to be reviewed at regular intervals by the Ankara Assize Court. In particular, in a decision of 13 December 2018, that court had ordered his continued pre-trial detention in view of a strong suspicion that he had committed the offences of which he was accused. It had also held that his continued pre-trial detention was necessary and proportionate and that alternative measures to detention appeared insufficient. The same reasons had been repeated in all subsequent decisions until 2 September 2019. Furthermore, at the hearings he had been described as a person in "pre-trial detention". Those decisions showed that despite his conviction with final effect in the criminal proceedings in Istanbul, his current status in relation to the facts of the present case did not fall within the scope of Article 5 § 1 (a) of the Convention as far as the period prior to 2 September 2019 was concerned.

287. Furthermore, the applicant asserted that during that period he had always been treated as a person in "pre-trial detention" within the prison where he was being held. He had, for example, had contact with his lawyers and his family while in prison, in accordance with the statutory provisions applicable to a person in "pre-trial detention".

(b) The Government

288. In their written observations, the Government argued that the applicant's legal status had changed following the judgment of 4 December 2018 upholding his conviction and sentence of four years and eight months' imprisonment. They submitted in that context that the execution of that sentence had begun on 7 December 2018. On that account they emphasised that since 7 December 2018 the applicant's status had no longer been that of a pre-trial detainee but that of a person convicted of another offence unconnected to the present application. Accordingly, his detention since that date had been covered by Article 5 § 1 (a) of the Convention.

289. At the hearing on 18 September 2019, the Government stated that the applicant's pre-trial detention for the purposes of Article 5 § 1 (c) of the Convention had ended on 7 September 2018, the date of the Istanbul Assize Court's judgment convicting him on account of a speech he had given on 17 March 2013 at a rally in Istanbul.

2. The Court's assessment

290. The Court reiterates that one of the most common types of deprivation of liberty in connection with criminal proceedings is detention pending trial. Such detention constitutes one of the exceptions to the general

rule stipulated in Article 5 § 1 that everyone has the right to liberty and is provided for in sub-paragraph (c) of Article 5 § 1 of the Convention. The period to be taken into consideration starts when the person is arrested (see *Tomasi v. France*, 27 August 1992, § 83, Series A no. 241-A) or remanded in custody (see *Letellier v. France*, 26 June 1991, § 34, Series A no. 207), and ends when he or she is released and/or the charge is determined, even if only by a court of first instance (see, among other authorities, *Wemhoff v. Germany*, 27 June 1968, p. 23, § 9, Series A no. 7, and *Buzadji*, cited above, § 85).

291. In the present case, on 4 November 2016 the applicant was arrested and taken into police custody. On the same day, the Diyarbakır Magistrate's Court ordered his pre-trial detention. During the criminal proceedings conducted initially in Diyarbakır and subsequently in Ankara, the competent assize courts continued to extend his pre-trial detention, until 2 September 2019. Furthermore, in a judgment of 7 September 2018 the Istanbul Assize Court sentenced the applicant to four years and eight months' imprisonment for disseminating propaganda in favour of a terrorist organisation, but did not order his detention. Following the judgment delivered on 4 December 2018 by the Istanbul Court of Appeal, the applicant's conviction became final. As a result, he began serving his sentence of four years and eight months' imprisonment on 7 December 2018. In that connection, the Court observes that from 7 December 2018 the applicant was deprived of his liberty in the context of two separate sets of criminal proceedings.

292. The parties have not disputed the applicability of Article 5 §§ 1 (c) and 3 of the Convention to the period between 4 November 2016, the date when the applicant was first placed in pre-trial detention, and 7 September 2018, the date on which he was convicted at first instance in separate criminal proceedings, or indeed 7 December 2018, the date on which he began serving the sentence imposed on him in those proceedings. The question of the applicability of Article 5 §§ 1 (c) and 3 of the Convention arises, however, in relation to the period starting on 7 September or 7 December 2018, during which it could be argued that the applicant's deprivation of liberty was covered by both sub-paragraphs (a) and (c) of Article 5 § 1.

293. In this connection, where the pre-trial detention of a convicted person has been ordered or extended in a separate set of criminal proceedings, the Court determines whether the person began serving the prison sentence while in "pre-trial detention". For example, in *Piotr Baranowski v. Poland* (no. 39742/05, §§ 45-46, 2 October 2007) the applicant had been in pre-trial detention from 18 December 2001 and had remained there until 18 December 2004, the date of the first-instance judgment convicting him. While in pre-trial detention, he had been given a prison sentence in separate criminal proceedings. He had served that sentence from 30 July 2002 until 26 January 2004. For the purposes of Article 5 § 3 of the Convention, the Court held that it could not take into account the period between 30 July 2002 and 26 January

2004, on the grounds that during that period the applicant's pre-trial detention had coincided with his detention after conviction. It held that the deprivation of liberty in question was therefore not covered by Article 5 § 1 (c) of the Convention.

294. In another case, *Dervishi v. Croatia* (no. 67341/10, §§ 124-25, 25 September 2012), the applicant, who had been convicted in criminal proceedings while in pre-trial detention in the context of separate proceedings, had asked the Municipal Court to let him start serving his prison sentence. He had not been allowed to do so, since he was already in pre-trial detention. Accordingly, the Court held that there was no causal connection between the applicant's conviction and his deprivation of liberty and that his conviction had had no influence on his pre-trial detention.

295. Furthermore, in the case of *Borisenko v. Ukraine* (no. 25725/02, §§ 41-42, 12 January 2012) the applicant was deprived of his liberty in the context of two different sets of criminal proceedings. In a judgment of 30 December 1999, he had been given a four-year prison sentence which was due to be completed on 18 July 2003. While serving his sentence, he had been charged in a separate set of criminal proceedings, and on 1 February 2001 he had been placed in pre-trial detention. As to whether Article 5 § 3 was applicable to the period between 1 February 2001 and 18 July 2003, the Court observed that there were no objective grounds for considering that during the period in question, the applicant had stopped serving his prison sentence. Accordingly, the Court found that the applicant's detention during that period fell under Article 5 § 1 (a) of the Convention.

296. Returning to the circumstances of the present case, in the light of the principles established in *Dervishi* (cited above), the Court notes firstly that there was no causal link between the applicant's conviction on 7 September 2018 and his detention until 7 December 2018. It therefore considers that during this period, the applicant's detention still fell under Article 5 § 1 (c) of the Convention. On 7 December 2018, however, the applicant started serving the sentence imposed following the criminal proceedings conducted in Istanbul. Accordingly, in the light of the *Piotr Baranowski* judgment (cited above), despite the fact that the applicant was kept in "pre-trial detention" during the criminal proceedings in the Ankara Assize Court (until 2 September 2019), after 7 December 2018, when he started serving the prison sentence finally imposed on him, his deprivation of liberty was covered not by Article 5 § 1 (c) of the Convention, but by Article 5 § 1 (a) instead.

297. In the light of the foregoing, the period to be taken into consideration with respect to the present complaints began on 4 November 2016, the date of the applicant's arrest, and ended on 7 December 2018, when he started serving the final prison sentence imposed following the criminal proceedings in Istanbul. The applicant's pre-trial detention thus lasted two years, one month and three days.

B. Alleged lack of reasonable suspicion that the applicant committed a criminal offence (Article 5 § 1 of the Convention)

1. The Chamber judgment

298. Finding it appropriate to conclude that the applicant could be said to have been arrested and detained on "reasonable suspicion" of having committed a criminal offence, within the meaning of sub-paragraph (c) of Article 5 § 1, the Chamber held that there had been no violation of Article 5 § 1 of the Convention. In its judgment, the Chamber set out the following reasoning:

> "168. The Court observes that in the present case the applicant was deprived of his liberty on suspicion of having committed several offences, some of which were terrorism-related. In that context, it notes that the public prosecutor alleged that the applicant had declared, among other things, that he intended to display a sculpture of the leader of a terrorist organisation ... In addition, it observes that, according to the indictment, in a speech given in the BDP offices in Diyarbakır on 21 April 2013, the applicant stated that the Kurdish people in Turkey owed its existence to the armed struggle led by the PKK. In that regard, it was alleged that the applicant had referred to the first terrorist attacks by the PKK as the 'coup in 1984' and the 'resistance in Şemdinli [and] Eruh' ... Moreover, the public prosecutor asserted that the applicant was in charge of the political wing of the KCK, an illegal organisation. In this connection, the Court notes that evidence such as records of conversations among PKK leaders and between those leaders and the applicant had been obtained by the public prosecutor prior to the applicant's arrest on suspicion of having committed the criminal offence of which he was accused ... It further notes that, having regard to the content of those conversations, the national authorities, in particular the first-instance courts and the Constitutional Court, found that it was possible to conclude that the applicant had been acting in accordance with the instructions of the leaders of a terrorist organisation.
>
> 169. The Court observes that a large proportion of the accusations brought against the applicant relate directly to his freedom of expression and his political opinions. However, in the context of the present application, it is not for the Court to determine whether the applicant is guilty of the offences of which he has been accused. That is the task of the national courts. The Court's function in the present case is to examine whether the applicant was deprived of his liberty on reasonable suspicion of having committed a criminal offence. In relation to that question, having regard to the requirements of Article 5 § 1 of the Convention as to the level of factual justification needed at the stage of suspicion, the Court finds that there was sufficient information in the criminal case file to satisfy an objective observer that the applicant might have committed at least some of the offences for which he had been prosecuted."

2. The parties' submissions

(a) The applicant

299. The applicant alleged that he had been placed in pre-trial detention on account of his political opinions. He submitted that there were no facts or information that could satisfy an objective observer that he had committed the offences of which he was accused. Accordingly, his detention had not been justified at any time by a reasonable suspicion.

300. In that context, the applicant submitted that in its initial decision of 4 November 2016 on his pre-trial detention, the Diyarbakır 2nd Magistrate's Court had referred to nine specific grounds for reasonable suspicion justifying the applicant's detention. Six of the grounds had concerned political speeches made by the applicant as an active member of the National Assembly and co-chair of the second largest opposition party in Turkey. The seventh ground was his participation in a lawful public assembly. The eighth ground was a tweet published by the HDP calling for demonstrations against the attack by Daesh in Kobani. The last ground related to the fact that several criminal investigations were ongoing in respect of the applicant. He maintained that none of those grounds could give rise to a reasonable suspicion that he had committed an offence. In his view, his pre-trial detention had pursued a hidden agenda.

301. The applicant criticised the Constitutional Court's judgment of 21 December 2017 and that of the Chamber for not carrying out a close examination of the reasons given by the Diyarbakır 2nd Magistrate's Court. He further contended that the Constitutional Court, of its own motion, had referred to new grounds for concluding that there was a reasonable suspicion that he had committed a criminal offence. The "invention" of new reasons for that purpose ran counter to the fundamental principles of the system of individual application to the Constitutional Court, and to Article 5 § 1 (c) of the Convention.

302. Nevertheless, should the Court consider taking into account the evidence that had not been mentioned by the Diyarbakır 2nd Magistrate's Court, the applicant argued that that evidence could not give rise to a suspicion capable of justifying his pre-trial detention. In that connection, the Constitutional Court had quoted from a speech he had given in 2012, in which he had stated that a sculpture of Abdullah Öcalan would be displayed. What he had meant in that speech was that those who were bringing about peace through the solution process deserved to have their success highlighted. The speech had therefore been political in nature and as such protected by Article 10 of the Convention.

303. The applicant further submitted that the Constitutional Court had concluded that there was sufficient evidence to suspect him of having acted in accordance with the instructions of the leaders of a terrorist organisation, on account of the contents of the documents seized and the records of telephone conversations. In that connection, the public prosecutor had stated in the indictment that the applicant had handed over a letter from a certain İ.E. to the latter's family, on the instructions of the PKK. However, in the applicant's submission, the first-instance court had established that this evidence was fabricated. As regards the records of his telephone conversations, he stated that all his requests to have the authenticity of the recordings verified had been rejected by the Assize Court and that accordingly, he had serious doubts as to whether they actually existed. In

those circumstances, the evidence in question could on no account justify depriving him of his liberty.

(b) The Government

304. The Government submitted that the applicant had been placed in pre-trial detention during a criminal investigation initiated in connection with the fight against terrorism, and more specifically against the PKK and the KCK. From the evidence gathered during the criminal investigation in his case and included in the case file, it had been objectively possible to entertain a reasonable suspicion that the applicant had committed the offences of which he was accused. On the strength of the evidence obtained during the investigation, criminal proceedings had been brought against the applicant and were still ongoing in the domestic courts. The Government also referred to the conclusions by the Constitutional Court and the Chamber that the applicant could be said to have been arrested and detained on "reasonable suspicion" of having committed a criminal offence.

305. The Government stated that the Court's task was to determine whether the conditions laid down in Article 5 § 1 (c) of the Convention, including the pursuit of the prescribed legitimate purpose, were fulfilled in the case brought before it. In this context they noted that it was not normally for the Court to substitute its own assessment of the facts for that of the domestic courts, which were better placed to assess the evidence adduced before them. The question of the applicant's pre-trial detention had been examined by thirty-nine first-instance judges and sixteen Constitutional Court judges, all of whom had found that there were sufficient grounds for a strong suspicion that the applicant had committed the offences of which he was accused. The Government asserted in that connection that the applicant had not demonstrated in any way that the national courts' assessment had been arbitrary or manifestly unreasonable. They accordingly submitted that there had been no violation of Article 5 § 1 of the Convention.

3. The third parties

(a) The Commissioner for Human Rights

306. The Commissioner for Human Rights noted that the reason cited by the national authorities for the initial detention of the HDP members of parliament had been their refusal to appear in person before the investigating bodies. However, even after having been forcibly made to give evidence to the public prosecutor and a judge, a number of those members of parliament had been placed and kept in pre-trial detention.

307. The Commissioner for Human Rights identified a more general problem in decisions by magistrates ordering pre-trial detention and its extension. Such decisions were often devoid of any reference to credible

evidence giving rise to a reasonable suspicion and often justified detention by referring to statements and acts that were manifestly non-violent.

(b) The intervening NGOs

308. The intervening NGOs stated that since the attempted military coup of 15 July 2016, 1,482 members of the HDP, including several members of parliament, had been placed in pre-trial detention. A large proportion of them had been detained for making political speeches. Emphasising the importance of public debate in a democratic society, they criticised the use of measures arbitrarily depriving HDP members of parliament of their liberty.

309. They noted that the Chamber had found that there was sufficient information in the criminal case file to satisfy an objective observer that the applicant might have committed a criminal offence. In their view, the Chamber's conclusion lowered the "reasonableness" standard to a minimal level, thus paving the way for justifying arbitrary detention based on the political opinions of the persons concerned.

4. The Grand Chamber's assessment

(a) Admissibility

310. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

(i) General principles

311. The Court reiterates firstly that Article 5 of the Convention guarantees a right of primary importance in a "democratic society" within the meaning of the Convention, namely the fundamental right to liberty and security (see *Assanidze v. Georgia* [GC], no. 71503/01, § 169, ECHR 2004-II). Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount (see *Buzadji*, cited above, § 84). Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 461, ECHR 2004-VII).

312. All persons are entitled to the protection of that right, that is to say, not to be deprived, or to continue to be deprived, of their liberty (see *Weeks v. the United Kingdom*, 2 March 1987, § 40, Series A no. 114), save in accordance with the conditions specified in paragraph 1 of Article 5 of the Convention. Three strands of reasoning in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly, and which do not allow for the

broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls (see *Buzadji*, cited above, § 84, and *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 73, 22 October 2018).

313. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. This primarily requires any arrest or detention to have a legal basis in domestic law (see *Mooren v. Germany* [GC], no. 11364/03, § 72, 9 July 2009, with further references).

314. The Court further reiterates that under the first limb of Article 5 § 1 (c) of the Convention, a person may be detained, in the context of criminal proceedings, only for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence (see *Jėčius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX; *Włoch v. Poland*, no. 27785/95, § 108, ECHR 2000-XI; and *Poyraz v. Turkey* (dec.), no. 21235/11, § 53, 17 February 2015). The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard laid down in Article 5 § 1 (c). Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as reasonable will, however, depend on all the circumstances (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182; *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X; *Çiçek v. Turkey* (dec.), no. 72774/10, § 62, 3 March 2015; *Mehmet Hasan Altan*, cited above, § 124; and *Şahin Alpay*, cited above, § 103).

315. The Court has also held that Article 5 § 1 (c) of the Convention does not presuppose that the investigating authorities have obtained sufficient evidence to bring charges at the time of arrest. The purpose of questioning during detention under Article 5 § 1 (c) is to further the criminal investigation by confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A; *Yüksel and Others v. Turkey*, nos. 55835/09 and 2 others, § 52, 31 May 2016; and *Alparslan Altan v. Turkey*, no. 12778/17, § 127, 16 April 2019).

316. The Court's task is to determine whether the conditions laid down in Article 5 § 1 (c) of the Convention, including the pursuit of the prescribed legitimate purpose, were fulfilled in the case brought before it. In this context it is not normally for the Court to substitute its own assessment of the facts

for that of the domestic courts, which are better placed to assess the evidence adduced before them (see *Mergen and Others v. Turkey*, nos. 44062/09 and 4 others, § 48, 31 May 2016, and *Mehmet Hasan Altan*, cited above, § 126).

317. As a rule, problems with the "reasonableness of suspicion" arise at the level of the facts. The question then is whether the arrest and detention were based on sufficient objective elements to justify a "reasonable suspicion" that the facts at issue had actually occurred (see *Włoch*, cited above, §§ 108-09). In addition to its factual side, the existence of a "reasonable suspicion" within the meaning of Article 5 § 1 (c) requires that the facts relied on can be reasonably considered to fall under one of the sections of the law dealing with criminal behaviour. Thus, there could clearly not be a "reasonable suspicion" if the acts or facts held against a detained person did not constitute a crime at the time when they occurred (see *Kandzhov v. Bulgaria*, no. 68294/01, § 57, 6 November 2008; *Mammadli v. Azerbaijan*, no. 47145/14, § 52, 19 April 2018; *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, § 152, 20 September 2018; and *Kavala v. Turkey*, no. 28749/18, § 128, 10 December 2019).

318. Further, it must not appear that the alleged offences themselves were related to the exercise of the applicant's rights under the Convention (see *Kavala*, cited above, § 129).

319. As it has consistently held, when assessing the "reasonableness" of a suspicion, the Court must be able to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) has been secured. Consequently, the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence (see *Fox, Campbell and Hartley*, cited above, § 34 *in fine*; *O'Hara*, cited above, § 35; *Ilgar Mammadov*, cited above, § 89; and *Alparslan Altan*, cited above, § 129).

320. While reasonable suspicion must exist at the time of the arrest and initial detention, it must also be shown, in cases of prolonged detention, that the suspicion persisted and remained "reasonable" throughout the detention (see *Ilgar Mammadov*, cited above, § 90). Furthermore, the requirement for the judge or other judicial officer to give relevant and sufficient reasons in support of detention – in addition to the persistence of reasonable suspicion – already applies at the time of the first decision ordering pre-trial detention, that is to say "promptly" after the arrest (see *Buzadji*, cited above, § 102, and *Alparslan Altan*, cited above, § 130).

321. The subsequent gathering of evidence in relation to a particular charge may sometimes reinforce a suspicion linking an applicant to the commission of terrorism-related offences. However, it cannot form the sole basis of a suspicion justifying detention. In any event, the subsequent gathering of such evidence does not release the national authorities from their obligation to provide a sufficient factual basis that could justify a person's initial detention. To conclude otherwise would defeat the purpose of Article 5

of the Convention, namely to prevent arbitrary or unjustified deprivations of liberty (see *Alparslan Altan*, cited above, § 139).

(ii) Application of the above principles in the present case

322. When examining a complaint alleging a lack of reasonable suspicion that an applicant has committed an offence, the Court must have regard to all the relevant circumstances in order to determine whether there was any objective information showing that the suspicion against the applicant was "reasonable" at the time of his initial detention (ibid., § 133).

323. The Court has already found, in *Fox, Campbell and Hartley* (cited above, § 32), that in view of the difficulties inherent in the investigation and prosecution of terrorism-related offences, the "reasonableness" of the suspicion justifying deprivation of liberty cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, in the Court's view the exigencies of combating terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 § 1 (c) of the Convention is impaired (ibid., § 32). The Court's task in the present case is therefore to ascertain whether at the time of the applicant's initial detention there were sufficient elements to satisfy an objective observer that he could have committed the offences of which he was accused by the prosecuting authorities (see paragraph 271 above). In so doing, it must assess whether the measure in question was justified on the basis of information and facts available at the relevant time which had been submitted to the scrutiny of the judicial authorities that ordered the measure.

324. On 4 November 2016 the Diyarbakır public prosecutor asked the Diyarbakır 2nd Magistrate's Court to place the applicant in pre-trial detention for membership of an armed terrorist organisation and public incitement to commit an offence. On the same day, the applicant was brought before the Diyarbakır 2nd Magistrate's Court, which ordered his pre-trial detention. In making that order, the magistrate observed firstly that the constitutional amendment had had the effect of lifting the applicant's parliamentary immunity in relation to the offences concerned. He then observed that during the escalation of clashes between Daesh and the PYD in Syria in October 2014, the PKK leaders had issued several calls for people to take to the streets. He added that almost simultaneously, three tweets had been posted on behalf of the HDP central executive board, of which the applicant was a member and co-chair, likewise urging people to go out into the streets. The magistrate further noted that during the events of 6 to 8 October 2014, PKK supporters had committed a number of offences, and in particular had caused the death of fifty people, injuries to 678 others and damage to 1,113 buildings. In the magistrate's view, the tweets posted on the HDP Twitter account established a strong suspicion that the applicant had committed the offence of public incitement to commit an offence, in discharging his duties within the party in

question. The magistrate further observed that the applicant had given several speeches in which he had described certain acts by PKK members, such as digging trenches and putting up barricades in towns, as "resistance", and had participated in activities of the Democratic Society Congress. He added that the applicant was the subject of several ongoing criminal investigations by the public prosecutor's office, some of which concerned terrorism-related offences. In the magistrate's view, those facts were a sufficient basis for a strong suspicion that the applicant had committed the offence of membership of an armed terrorist organisation. The magistrate also noted that the offence of forming and leading an armed terrorist organisation – in connection with which the applicant had not been questioned – was among the offences listed in Article 100 § 3 of the CCP. Lastly, taking into account the significance of the case and the severity of the sentences prescribed by law for the offences in question, he held that the measure of pre-trial detention was necessary and proportionate and that alternative measures to detention appeared insufficient.

325. In its examination of the lawfulness of the applicant's pre-trial detention, the Constitutional Court, after outlining the events of 6 to 8 October 2014, found that a causal link could be established between the calls issued by the HDP central executive board and the acts of violence in question. Next, with regard to the "trench events", the Constitutional Court held that, bearing in mind the statements made by the applicant, the places where he had made them and his position as co-chair of the HDP, his pre-trial detention in connection with a terrorism-related offence was not devoid of justification. Thus, referring to the content of two speeches given by the applicant on 13 November 2012 and 21 April 2013, the Constitutional Court observed that there was an indication that an offence had been committed in the case before it. Lastly, having regard to the documents seized during the search of A.D.'s home and the content of the conversations among presumed senior officials of the PKK and between them and the applicant, it found that it had been legitimate to consider that the applicant might have acted in accordance with the instructions of the leaders of an armed terrorist organisation. It therefore held that those factors were sufficient grounds for a strong suspicion that the applicant had committed an offence.

326. In determining whether there was a strong suspicion that the applicant had committed an offence, the Constitutional Court referred to a number of items of evidence that were not mentioned in the order of 4 November 2016 for his pre-trial detention. In that connection, the Court notes in particular that the speeches given by the applicant on 13 November 2012 and 21 April 2013 were not among those cited by the Diyarbakır 2nd Magistrate's Court as justifying his detention. Furthermore, the magistrate did not refer to the telephone conversations mentioned by the Constitutional Court as a ground for the applicant's pre-trial detention and did not take into account the documents seized during the search of another

individual's home. Those items of evidence were not presented to the courts until after the indictment had been filed on 11 January 2017, more than two months after the applicant's initial pre-trial detention. Accordingly, it is unnecessary to examine the items of evidence in question in order to establish whether the suspicion giving rise to the initial order for the applicant's pre-trial detention was reasonable, given that they had no bearing on the decision issued on 4 November 2016 by the Diyarbakır 2nd Magistrate's Court. They can only be taken into account in the examination of the persistence or apparent existence of reasonable suspicion in the context of the applicant's continued detention pending trial.

327. The Diyarbakır 2nd Magistrate's Court initially justified the applicant's pre-trial detention by referring to the tweets posted on the HDP Twitter account. In the three tweets in question, the HDP called for solidarity with the people of Kobani, who at the time were faced with a military offensive launched by members of the armed terrorist organisation Daesh. The Court is prepared to take into account the difficulties faced by Turkey on account of the threat posed by terrorist attacks, particularly in the aftermath of the crisis in Syria. During October 2014, the internal conflict in Syria posed a threat to national security in Turkey. It was against that sensitive background that the HDP posted the tweets in question, calling on the people to take to the streets. Such calls undoubtedly created a difficult situation, particularly in south-eastern Turkey. Indeed, a series of extremely violent incidents occurred after the calls were issued (see paragraphs 23 and 25 above). The Court nevertheless considers that these calls remained within the limits of political speech, in so far as they cannot be construed as a call for violence. The acts of violence that took place between 6 and 8 October 2014, regrettable though they were, cannot be seen as a direct consequence of the tweets in question and cannot justify the applicant's pre-trial detention in relation to the offences in question.

328. Next, the Diyarbakır 2nd Magistrate's Court referred to certain political statements in which the applicant had expressed his view on the events of 6 to 8 October 2014 and the "trench events", or more generally on the Kurdish question. The content of the applicant's speeches can be viewed as a very harsh attack on government policy. His opinions on matters such as the "trench events" and his use of concepts such as "resistance" may be regarded as insulting by the State or a sector of the population. They may also offend, shock or disturb them. However, in the speeches in issue the applicant did not call for the use of violent methods and his statements certainly did not amount to terrorist indoctrination, praise for the perpetrator of an attack, the denigration of victims of an attack, a call for funding for terrorist organisations or other similar behaviour (see, for example, *Yavuz and Yaylalı v. Turkey*, no. 12606/11, § 51, 17 December 2013, and *Güler and Uğur*, cited above, § 52). In the Court's view, the speeches would not satisfy an objective observer that the applicant may have committed the offences for which he

was placed in pre-trial detention, unless other grounds and evidence justifying his detention were put forward. The notion of "reasonable suspicion" cannot be interpreted so extensively as to impair the applicant's right to freedom of expression under Article 10 of the Convention.

329. The applicant's participation in the general meeting of the Democratic Society Congress was used as a ground justifying his pre-trial detention. However, the applicant maintained that this was a lawful public gathering. In this connection, the Government have not submitted any specific evidence to refute that contention. The Court therefore considers that the applicant's participation in a peaceful assembly and the fact that he gave a speech there are likewise incapable of satisfying an objective observer that he might have committed one of the offences in question (see paragraph 69 above). The applicant's alleged acts in this respect were linked to the exercise of his rights under the Convention, in particular Articles 10 and 11.

330. The Diyarbakır 2nd Magistrate's Court found that the number of ongoing criminal investigations in respect of the applicant for terrorism-related offences made it possible to conclude that there was a strong suspicion that he had committed the offence of membership of an armed terrorist organisation. In the Court's view, a vague and general reference to other investigations being carried out by public prosecutors can on no account be deemed sufficient justification of the reasonableness of the suspicion on which the applicant's pre-trial detention was supposed to have been based.

331. In the light of the foregoing, the Court observes that no specific facts or information giving rise to a suspicion justifying the applicant's detention were mentioned or produced during the initial proceedings, which nevertheless concluded with the adoption of such a measure depriving him of his liberty. It therefore considers that at the time of his initial pre-trial detention, there were no facts or information that could satisfy an objective observer that he had committed the alleged offences.

332. The Court must next determine whether the other grounds taken into account by the Constitutional Court may demonstrate the existence of a reasonable suspicion that the applicant committed the offences in issue, such as to justify his pre-trial detention from 4 November 2016. In doing so, the Court will examine three categories of evidence which the Constitutional Court found in the indictment, namely the speeches which the applicant gave on 13 November 2012 and 21 April 2013, the documents seized during the search of A.D.'s home, and the conversations among presumed senior PKK officials and between them and the applicant.

333. At a demonstration held on 13 November 2012, the applicant stated, among other things, that a sculpture of Abdullah Öcalan would be put up. Whatever the reason for this statement may have been, the Court accepts that it could be regarded as offensive, shocking, disturbing or polemical by a large proportion of the Turkish population. In this connection, it has previously found that the particular extent and impact of the terrorist activities of the

PKK, led by Abdullah Öcalan, in south-eastern Turkey had undoubtedly created a "public emergency threatening the life of the nation" (see *Aksoy v. Turkey*, 18 December 1996, § 70, *Reports* 1996-VI). However, as the applicant maintained, the comments were made in a specific context, namely the "solution process", during which the national authorities had initiated negotiations with PKK leaders, including Abdullah Öcalan, with a view to finding a lasting, peaceful solution to the Kurdish question. The applicant explained that in making the statements in question, he had intended to say that those who were bringing about peace through the solution process deserved to have their success highlighted. In this connection, until the end of the "solution process", no significant steps were taken against the applicant on account of those comments. Only after the end of the process, more than four years after the speech in question, did the judicial authorities find that it constituted a sufficient basis to justify the applicant's pre-trial detention, without seeking to ascertain what his intention had been. In the absence of any other grounds and evidence warranting such a measure, the Court is accordingly not persuaded that the speech given by the applicant on 13 November 2012 could justify a reasonable suspicion that he had committed the offences in question.

334. In his speech on 21 April 2013, the applicant expressed his opinion on the Kurdish movement. On that occasion, he stated first of all that that movement had seen the war as a war of self-defence. Next, he stated that it was wrong to use weapons, since it was possible to resist and succeed using non-violent methods. He added that without the PKK movement, the Kurdish people would not exist in Turkey. The applicant's statements show that he believed that the Kurdish people in Turkey owed its existence partly to the armed struggle led by that terrorist organisation. This comment may be understood as a description of historical facts linked to the Kurdish question in Turkey, as interpreted by the applicant. It is true that in his speech the applicant referred to the "coup in 1984" and the "resistance in Şemdinli [and] Eruh" as acts that had created the reality of the Kurdish people. Indeed, as the public prosecutor suggested (see paragraph 79 above), it is not unreasonable to say that the applicant described the first terrorist attacks by the PKK as the "coup in 1984" and the "resistance in Şemdinli [and] Eruh". The Court considers, however, that this speech must likewise be set against the general background of the "solution process", during which Turkish society openly discussed the origins of the Kurdish question. In the Court's view, the statements in issue can be seen as the applicant's assessment of the armed clashes in Turkey rather than as an incitement to violence and glorification of terrorism. Taken as a whole, they cannot be regarded as capable of encouraging the pursuit of violence or exacerbating the security situation in a particular region of Turkey.

335. The Diyarbakır public prosecutor accused the applicant of being in charge of the political wing of the KCK, an illegal organisation. In that

connection, he first presented two documents which had been found on a hard drive seized during the search of another individual's home, and which showed, according to the prosecutor, that the applicant had handed a letter from a certain İ.E. to the latter's family, on the instructions of the PKK. However, the applicant argued that the Assize Court had established that this evidence was fabricated. The Court observes that the Government have been unable to provide any evidence to refute the applicant's contention in that respect. In view of the doubts surrounding the authenticity of these documents, in the Court's view, they cannot provide the basis on which an objective observer could conclude that there was a reasonable suspicion in support of the accusations against the applicant.

336. In addition, in support of the charges, the Diyarbakır public prosecutor presented records of intercepted telephone conversations between S.O. and K.Y., and between K.Y. and the applicant (see paragraph 79 above). According to the prosecutor, the records in question indicated that S.O. had given instructions to the applicant to take part in certain meetings abroad, including at the Council of Europe. The applicant disputed the authenticity of these records. He submitted in that connection that all his requests to have the authenticity of the recordings verified had been rejected by the Assize Court. With regard to the interception of telephone calls, the Court is aware of the importance of such evidence in the fight against organised crime. Nevertheless, when an accused person challenges its authenticity, the judicial authorities are under an obligation to demonstrate its credibility (see, *mutatis mutandis*, *Gäfgen*, cited above, § 164, and *Allan v. the United Kingdom*, no. 48539/99, § 43, ECHR 2002-IX). This applies all the more where a person's pre-trial detention is being extended on the basis of such evidence. In the present case, however, the domestic courts do not appear to have sought to verify the authenticity of the records presented by the public prosecutor. However, even assuming that the records are trustworthy, the Court considers that it cannot ascertain from the material in the case file whether the applicant did indeed obey the "instructions" in question. Nor can it see how participation in a programme organised within the Council of Europe in 2008 could constitute a fact justifying the suspicion in question and the applicant's pre-trial detention several years later.

337. The Court has already found under Article 10 of the Convention that the present case confirms the tendency of the domestic courts to decide on a person's membership of an armed organisation on the basis of very weak evidence (see paragraph 280 above). It concluded under that head that the range of acts that could have justified the applicant's pre-trial detention under Article 314 of the Criminal Code was so broad that the content of that provision, coupled with its interpretation by the domestic courts, did not afford adequate protection against arbitrary interference by the national authorities. On that account, it found that the terrorism-related offences at issue, as interpreted and applied in the present case, were not "foreseeable".

In the Court's view, this consideration is equally valid as regards the charges relating to the applicant's speeches. It finds that the statements he made as co-chair of the second largest opposition party cannot be deemed sufficient justification of the reasonableness of the suspicion on which his pre-trial detention was supposed to have been based.

338. For the reasons set out above, the Court considers that none of the decisions on the applicant's initial and continued pre-trial detention contain evidence that could indicate a clear link between his actions – mainly his political speeches and his participation in certain lawful meetings – and the offences for which he was detained.

339. In the present case, the Government have not demonstrated that the evidence purportedly available to the Ankara Assize Court met the standard of "reasonable suspicion" that is required by Article 5 of the Convention, such as to satisfy an objective observer that the applicant could have committed the offences for which he was detained. Not only were the charges against the applicant based essentially on facts that could not be reasonably considered criminal conduct under domestic law, they related mainly to the exercise by him of his Convention rights (see *Kavala*, cited above, § 157).

340. The Court therefore concludes that there has been a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion that the applicant had committed an offence.

C. Complaint under Article 5 § 3 of the Convention

341. The applicant complained that the duration of his pre-trial detention was excessive and that the judicial decisions ordering and extending it had contained no reasons other than a mere statement of the grounds for detention provided for by law and had been worded in abstract, repetitive and formulaic terms. On that account he alleged a violation of Article 5 § 3 of the Convention, which provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

342. The Government contested that argument.

1. The Chamber judgment

343. Observing that there was concrete evidence grounding a strong suspicion that the applicant had committed an offence, the Chamber held that the suspicions against him could have accounted for his initial placement in pre-trial detention. It observed that the existence of such evidence was a *sine qua non* for the lawfulness of detention, but was not sufficient justification in itself. It therefore ascertained whether there had been other relevant and

sufficient grounds in the applicant's case to justify his pre-trial detention. Bearing in mind the reasons given by the domestic courts, the Chamber found that the judicial authorities had extended the applicant's detention on grounds that could not be regarded as "sufficient" to justify its duration, and that there had been a violation of Article 5 § 3 of the Convention.

2. The parties' submissions

(a) The applicant

344. The applicant submitted that his initial pre-trial detention had been in breach of Article 5 § 3 of the Convention. He noted that in accordance with the Court's case-law, the national courts were required to give relevant and sufficient grounds to justify pre-trial detention from the time of the initial detention order. In that context, he noted that the domestic courts had examined the question of his detention more than sixty times, and following each examination, until 2 September 2019, they had ordered its continuation. However, those decisions had contained no reasons other than a mere statement of the grounds for pre-trial detention provided for by law and had been worded in abstract, repetitive and formulaic terms.

345. With regard to the allegation of a flight risk, the applicant submitted that between 11 November 2016 and 24 January 2017 the Diyarbakır magistrates' courts had examined the question of his detention on nine occasions and had never mentioned any risk of his absconding as a ground for keeping him in detention. That ground had first been mentioned on 1 March 2017 – some four months after he had first been placed in pre-trial detention – by the Diyarbakır Assize Court, which had taken the view that his failure to appear before the investigating authorities was a sufficient indication of a flight risk. However, the applicant maintained that his attitude had been a political response to criminal investigations that had been initiated for political reasons. Furthermore, the domestic courts had never taken into account the fact that he had travelled abroad on several occasions and had always returned to his home country without demonstrating the slightest intention to flee. His failure to appear before the prosecuting authorities could therefore not have been seen as proof of a flight risk.

346. The applicant further submitted that the risk of tampering with evidence had scarcely been substantiated in the sixty or so decisions ordering and extending his pre-trial detention. Indeed, the accusations against him had largely been based on public speeches he had given as a political leader. On that account, it had not been possible for him to tamper with the evidence.

347. In addition, the applicant asserted that none of the decisions given by the domestic courts had explained why the imposition of alternative measures to detention would have been insufficient.

(b) The Government

348. The Government stated that the domestic courts, namely the Diyarbakır magistrates' courts, the Diyarbakır and Ankara Assize Courts and the Constitutional Court, had satisfied their obligation to provide relevant and sufficient grounds to justify the applicant's pre-trial detention. In particular, they had established that there was a risk of the applicant's absconding. In that connection, the Government submitted that several HDP members of parliament whose immunity had been lifted and who were under criminal investigation had fled abroad. On that account, and also in view of the potential prison sentence faced by the applicant (between forty-three and 142 years), it had not been unreasonable for the domestic courts to find that there was a flight risk. For example, the applicant had refused to appear before the investigating authorities despite the summonses issued by the competent public prosecutors. Moreover, since the start of the criminal investigation, the applicant had sought to obstruct the procedure, in particular by refusing to give evidence. He had attempted to slow down the criminal proceedings. Furthermore, in extending the applicant's pre-trial detention, the domestic courts had also taken into account the seriousness of the offences of which he had been accused.

349. The Government submitted that the applicant's pre-trial detention had begun on 4 November 2016 and had ended either on 4 September 2018, when he had been convicted at first instance, or on 7 December 2018, when he had started serving his sentence of four years and eight months' imprisonment. The legitimacy of an accused's continued detention had to be assessed in each case according to its specific features. In the applicant's case, the judicial authorities had displayed special diligence in conducting the proceedings, and had not been responsible for any inactivity or delays. Specifically, the public prosecutor had filed the bill of indictment approximately three months after the applicant's arrest, and the first hearing had been held on 7 December 2017, thirteen months after he had first been placed in pre-trial detention. The delays in the proceedings, which had resulted in prolonging the applicant's deprivation of liberty, had been caused by the transfer of the trial for security reasons, procedural issues linked to the merging of several criminal investigations, the applicant's requests for an extension of the time allowed to file defence submissions, his requests for judges to withdraw and his refusal to give evidence. Bearing in mind the complexity of the case, in which thirty-one separate criminal investigations in respect of the applicant had been merged together into a single case, the length of the applicant's pre-trial detention did not appear unreasonable to the Government in the context of a major terrorism-related criminal trial.

3. The third parties

(a) The Commissioner for Human Rights

350. The Commissioner for Human Rights noted that the initial reason cited by the Turkish authorities to justify the pre-trial detention of the HDP members of parliament had been their refusal to appear in person before the investigating authorities. Even after having forcibly been made to give evidence to the public prosecutor, a number of members of parliament, including the applicant, had been placed in detention. The reasons cited by the national courts to justify the pre-trial detention of the members of parliament concerned could not be regarded as "relevant" or "sufficient".

(b) The IPU

351. The IPU stated that, in accordance with the case-law of the Court and the Constitutional Court, a reasonable suspicion that a person had committed an offence was not sufficient to justify pre-trial detention. Further justification was also required on grounds such as the risk of the accused's absconding, tampering with evidence, exerting pressure in connection with the judicial proceedings or committing a further offence. In the case of members of parliament, the national courts should first have recourse to alternative measures to detention ensuring that the persons concerned took part in the criminal proceedings.

4. The Grand Chamber's assessment

(a) Admissibility

352. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

353. The Court refers to the general principles under Article 5 § 3 of the Convention concerning the justification of detention, as set out in *Buzadji* (cited above, §§ 87-91) and *Merabishvili v. Georgia* ([GC], no. 72508/13, §§ 222-25, 28 November 2017).

354. In the present case, the Court has already found that no specific facts or information that could give rise to a suspicion justifying the applicant's pre-trial detention were put forward by the national courts at any time during his detention (see paragraphs 338-339 above) and that there was therefore no reasonable suspicion that he had committed an offence.

355. The Court reiterates that the persistence of a reasonable suspicion that the detainee has committed an offence is a *sine qua non* for the validity of his or her continued detention (see *Merabishvili*, cited above, § 222, with

further references). In the absence of such suspicion, the Court considers that there has also been a violation of Article 5 § 3 of the Convention.

356. In those circumstances, it is not necessary to ascertain whether the competent national authorities gave relevant and sufficient grounds to justify the applicant's pre-trial detention, or whether they displayed "special diligence" in the conduct of the proceedings.

V. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

357. The applicant submitted that the proceedings he had brought before the Constitutional Court with a view to challenging the lawfulness of his pre-trial detention had not complied with the requirements of the Convention, in that the Constitutional Court had failed to observe the requirement of "speediness". On that account he alleged a violation of Article 5 § 4 of the Convention, which reads as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

358. The Government contested the applicant's argument.

A. The Chamber judgment

359. After observing that the period to be taken into consideration was thirteen months and four days, the Chamber concluded that although this period could not be described as "speedy" in an ordinary context, in the specific circumstances of the case there had been no violation of Article 5 § 4 of the Convention. In reaching that conclusion it pointed out that the applicant's application to the Constitutional Court had been a complex one, being one of the first of a series of cases raising complicated issues concerning the pre-trial detention of a member of parliament following the lifting of parliamentary immunity. In addition, the Chamber took into account the Constitutional Court's exceptional caseload following the declaration of the state of emergency in July 2016 (see *Mehmet Hasan Altan*, cited above, § 165, and *Şahin Alpay*, cited above, § 137).

B. The parties' submissions

1. The applicant

360. The applicant submitted that the proceedings before the Constitutional Court, which had lasted thirteen months and four days, had entailed a violation of the right to a speedy determination of the lawfulness of detention for the purposes of Article 5 § 4 of the Convention. He stated firstly that although the number of cases pending before the Constitutional Court might at first sight appear high, it had forwarded 72,134 of those

applications to the commission for the review of measures taken in connection with the state of emergency, without considering them on the merits. Accordingly, on 17 November 2016, when he had lodged his application, there had been only 64,630 applications pending before the Constitutional Court. This figure could not be viewed as exceptionally high.

361. Next, the applicant submitted that in the past – in 2013 and 2014 – the Constitutional Court had taken less time to deal with cases concerning the detention of members of parliament.

362. Lastly, the applicant noted that the Constitutional Court had a priority policy for urgent cases but had not carried out a prompt judicial review of his case, even though it belonged to that category.

2. The Government

363. The Government referred to the Court's case-law to the effect that where the original detention order was made following a procedure offering appropriate guarantees of due process, and where the domestic legal system provided for an appeal, the Court would tolerate longer periods of review in proceedings before a second-instance court and a constitutional court.

364. In the present case, the Government noted that during the period of thirteen months and four days when the applicant's case was before the Constitutional Court, the question of his pre-trial detention had been examined twenty-three times by the domestic courts. Relying on statistics concerning the Constitutional Court's caseload, the Government stated that since the attempted military coup of 15 July 2016, there had been a dramatic increase in the number of applications to that court. Moreover, 24,000 of those applications were priority cases, like the applicant's case. In addition, the application lodged by the applicant had raised complex legal issues. That being so, it was impossible to find a violation of Article 5 § 4 of the Convention, even though the period of thirteen months and four days might not appear brief.

C. The Commissioner for Human Rights

365. The Commissioner for Human Rights submitted that the duration of proceedings before the Constitutional Court concerning applications lodged by detained members of parliament was unreasonably long.

D. The Grand Chamber's assessment

1. Admissibility

366. It has already been established in *Mehmet Hasan Altan* (cited above, § 159) and *Şahin Alpay* (cited above, § 131) that Article 5 § 4 of the

Convention is applicable to proceedings before the Turkish Constitutional Court.

367. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

368. The Court would refer at the outset to the relevant principles established in its case-law concerning the "speediness" requirement under Article 5 § 4 of the Convention, as summarised, *inter alia*, in *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, §§ 251-56, 4 December 2018) and *Kavala* (cited above, §§ 176-84). It also refers to the findings it reached in *Mehmet Hasan Altan* (cited above, §§ 161-67) and *Şahin Alpay* (cited above, §§ 133-39) concerning the length of proceedings in the Turkish Constitutional Court following the attempted coup of 15 July 2016.

369. The Court refers to the following findings in the Chamber judgment:

> "214. [The Court] further notes that in [*Mehmet Hasan Altan* and *Şahin Alpay*] it observed that in the Turkish legal system, anyone in pre-trial detention had the opportunity to apply for release at any stage of the proceedings and could lodge an objection if the application was rejected. It also noted that the question of a suspect's continued detention was automatically reviewed at regular intervals of no more than thirty days ... It therefore found it acceptable that the Constitutional Court's review might take longer. However, in the *Mehmet Hasan Altan* and *Şahin Alpay* cases ..., the periods to be taken into consideration before the Constitutional Court had amounted to fourteen months and three days and sixteen months and three days respectively. Bearing in mind the complexity of the applications and the Constitutional Court's caseload following the declaration of a state of emergency, the Court found that this was an exceptional situation. Accordingly, although periods of fourteen months and three days and sixteen months and three days before the Constitutional Court could not be described as 'speedy' in an ordinary context, in the specific circumstances of those cases the Court found that there had been no violation of Article 5 § 4 of the Convention.
>
> 215. The Court considers that those conclusions are also valid in the context of the present case. It notes in that connection that the applicant's application to the Constitutional Court was a complex one, being one of the first of a series of cases raising complicated issues concerning the pre-trial detention of a member of parliament whose parliamentary immunity had been lifted. In addition, the Court finds it necessary to take into account the Constitutional Court's exceptional caseload following the declaration of the state of emergency in July 2016 ... In the present case it observes that the applicant lodged an individual application with the Constitutional Court on 17 November 2016, and that that court's final judgment was given on 21 December 2017. It notes that the period to be taken into consideration thus amounted to thirteen months and four days.
>
> 216. In the light of the foregoing, although the duration of thirteen months and four days before the Constitutional Court could not be described as 'speedy' in an ordinary context, in the specific circumstances of the case the Court considers that there has been no violation of Article 5 § 4 of the Convention."

370. The Grand Chamber subscribes to the Chamber's reasoning and conclusion. It therefore concludes there has been no violation of Article 5 § 4 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION

371. The applicant complained that his pre-trial detention amounted to a violation of Article 3 of Protocol No. 1 to the Convention, which provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

372. The Government contested that argument.

A. The Chamber judgment

373. The Chamber observed that the applicant had been unable to take part in the work of the National Assembly for one year, seven months and twenty days of his term of office. After referring to its conclusion under Article 5 § 3 of the Convention that the domestic courts had not given sufficient reasons for extending his pre-trial detention, it found that they had also paid insufficient regard to the fact that he was not only a member of parliament but also one of the leaders of an opposition party, whose performance of parliamentary duties required a high level of protection. It therefore found that there had been a violation of Article 3 of Protocol No. 1.

B. The parties' submissions

1. The applicant

374. The applicant alleged that his pre-trial detention had pursued a political purpose and breached Article 3 of Protocol No. 1. He submitted that what was protected by the right to free elections was not only the right to be elected as a member of parliament; the Article in question also covered the right to engage in political activities in that capacity. That being so, the right to stand as a candidate in parliamentary elections would be illusory if a person could be arbitrarily deprived of it at any time. In particular, from 4 November 2016, the starting-point of his pre-trial detention, he had been denied the opportunity to participate in the activities of the National Assembly as he had been deprived of his liberty.

2. The Government

375. As their main submission, the Government argued that the applicant could not claim to be the victim of a violation of Article 3 of Protocol No. 1.

That Article guaranteed the individual's right to stand for election and, once elected, to sit as a member of parliament. In that connection, they noted that throughout the applicant's term of office, he had been able to retain his status as a member of parliament and had thus received his salary and been entitled to the rights enjoyed by members of parliament, which did not require physical presence within the National Assembly. In that context, the Government submitted, for example, that he had been able to submit written questions to the Council of Ministers, as he had done on 17 April 2018. He had thus been able to continue performing an important function in terms of scrutiny of the executive. The fact that it had become more difficult, if not impossible, for the applicant to exercise his rights as a member of parliament should be regarded as an unintended consequence of his pre-trial detention, and not as interference with the exercise of his right to sit in Parliament.

376. As to the merits of this complaint, the Government stated that should the Court find that there had been an interference with the exercise of the applicant's rights under Article 3 of Protocol No. 1, such interference should be held to have been justified. The rights enshrined in Article 3 of Protocol No. 1 to the Convention were not absolute. In particular, that Article did not preclude either the prosecution or the pre-trial detention of a member of parliament. The Government also reiterated their argument that the applicant's pre-trial detention had not been arbitrary. On the contrary, the question of his pre-trial detention had been examined on a total of twenty-three occasions between 17 November 2016 and 21 December 2017 in proceedings affording appropriate judicial safeguards against arbitrariness. The detention had had a legal basis and had pursued the legitimate aim of preventing the applicant from absconding. It had therefore been proportionate, bearing in mind the nature of his alleged offences. In that connection, the Government noted that the domestic courts, including the Constitutional Court, had held that the applicant's pre-trial detention was necessary after weighing up his interests as safeguarded by Article 3 of Protocol No. 1 against the interests of the proper administration of justice. In addition, following their balancing exercise, the national courts had found that alternative measures to detention appeared insufficient.

C. The third parties

1. The Commissioner for Human Rights

377. The Commissioner for Human Rights emphasised the key role performed by members of parliament in democratic systems. The pre-trial detention of opposition parliamentarians had had a significant negative impact on the right to free elections safeguarded by Article 3 of Protocol No. 1.

2. The IPU

378. The IPU stated that the applicant's pre-trial detention had made it impossible for him to devote himself meaningfully to his parliamentary responsibilities.

3. The intervening NGOs

379. The intervening NGOs submitted that the pre-trial detention of opposition members of parliament for expressing critical views amounted to unjustified interference with the rights enshrined in Article 3 of Protocol No. 1.

D. The Grand Chamber's assessment

1. Admissibility

380. As regards the Government's plea of inadmissibility regarding the applicant's victim status, the Court considers that it raises issues that are closely linked to the examination of the merits of the applicant's complaint. It will therefore address this question in the context of its examination of the merits.

381. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

382. The Court reiterates that democracy constitutes a fundamental element of the "European public order", and that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see *Karácsony and Others*, cited above, § 141, and *Mugemangango v. Belgium* [GC], no. 310/15, § 67, 10 July 2020).

383. It has previously held, in *Mathieu-Mohin and Clerfayt v. Belgium* (2 March 1987, § 47, Series A no. 113) and *Lingens v. Austria* (8 July 1986, §§ 41-42, Series A no. 103), that free elections and freedom of expression, in particular freedom of political debate, form the foundation of any democracy (see also *Tănase*, cited above, § 154). Thus, the Convention establishes a close nexus between an effective political democracy and the effective operation of Parliament. Accordingly, there can be no doubt that the effective functioning of Parliament is a value of key importance for a democratic society (see *Karácsony and Others*, cited above, § 141).

384. In cases concerning freedom of expression, the Court has stated:

> "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 ... call for the closest scrutiny on the part of the Court." (see *Castells*, cited above, § 42)

As the Court has already noted (see paragraph 243 above), it has confirmed these principles on many subsequent occasions. While the freedom of expression of representatives of the people is not of an absolute nature, it is particularly important to protect statements made by them, in particular if they are members of the opposition. In this connection, the Court accepts, however, that there may be limits, in particular to prevent direct or indirect calls for violence. That said, the Court will always conduct a strict review to verify that freedom of expression remains secured.

385. Article 3 of Protocol No. 1 differs from the other rights guaranteed in the Convention and its Protocols, as it is phrased in terms of the obligation for the High Contracting Party to hold elections under conditions which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. Having regard to the preparatory work on Article 3 of Protocol No. 1 and the interpretation of that provision in the context of the Convention as a whole, the Court has established that it also implies individual rights, including the right to vote and to stand for election (see *Ždanoka v. Latvia* [GC], no. 58278/00, § 102, ECHR 2006-IV).

386. The Court reaffirms that the object and purpose of the Convention require its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory but practical and effective (see, for example, *Grosaru v. Romania*, no. 78039/01, § 47, ECHR 2010, with further references). However, the rights guaranteed by Article 3 of Protocol No. 1, which are inherent in the concept of a truly democratic system, would be merely illusory if elected representatives or their voters could be arbitrarily deprived of them at any moment (see *Lykourezos*, cited above, § 56). Furthermore, the Court reiterates that it has consistently held that Article 3 of Protocol No. 1 guarantees the individual's right to stand for election and, once elected, to sit as a member of parliament (see *Sadak and Others v. Turkey (no. 2)*, nos. 25144/94 and 8 others, § 33, ECHR 2002-IV; *Ilıcak v. Turkey*, no. 15394/02, § 30, 5 April 2007; *Sılay v. Turkey*, no. 26733/02, § 27, 29 November 2007; *Kavakçı v. Turkey*, no. 71907/01, § 41, 5 April 2007; *Sobacı v. Turkey*, no. 26733/02, § 26, 29 November 2007; and *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, § 141, 13 October 2015). The Court notes in this connection that the rule of parliamentary immunity, present in most of the Contracting States including Turkey, is crucial to this guarantee.

387. The Court further reiterates that the rights enshrined in Article 3 of Protocol No. 1 to the Convention are not absolute (see *Etxeberria and Others v. Spain*, nos. 35579/03 and 3 others, § 48, 30 June 2009). There is room for

"implied limitations", and the Contracting States have a wide margin of appreciation in this sphere (see *Mathieu-Mohin and Clerfayt*, cited above, § 52; *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II; *Sadak and Others*, cited above, § 31; and *Kavakçı*, cited above, § 40). However, it is for the Court to finally determine whether the requirements of Article 3 of Protocol No. 1 have been complied with. It has to satisfy itself that the limitations imposed on the exercise of the rights under Article 3 of Protocol No. 1 do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, cited above, § 52).

388. The concept of "implied limitations" means that the traditional tests of "necessity" or "pressing social need" which the Court uses in the context of its analyses under Articles 8 to 11 of the Convention are not applied in cases concerning Article 3 of Protocol No. 1. Rather, the Court first sets out to ascertain whether there has been arbitrary treatment or a lack of proportionality. Next, it examines whether the limitation has interfered with the free expression of the opinion of the people (see *Mathieu-Mohin and Clerfayt*, cited above, § 52, and *Ždanoka*, cited above, § 115).

389. As regards situations where members of parliament have been deprived of their liberty, the Court has yet to rule on a complaint under Article 3 of Protocol No. 1 concerning the effects of the pre-trial detention of an elected member of parliament on the performance of his or her parliamentary duties. In this connection, Article 3 of Protocol No. 1 does not preclude the imposition of a measure depriving a member of parliament or a candidate in parliamentary elections of his or her liberty. In other words, the imposition of such a measure does not automatically constitute a violation of that Article. Nevertheless, in view of the importance in a democratic society of the right to liberty and security of a member of parliament, the domestic courts must show, while exercising their discretion, that in ordering a person's initial and/or continued pre-trial detention, they have weighed up the relevant interests, in particular those of the person concerned as safeguarded by Article 3 of Protocol No. 1 against the public interest depriving that person of his or her liberty where required in the context of criminal proceedings. An important element in this balancing exercise is whether the charges have a political basis (see *Uspaskich v. Lithuania*, no. 14737/08, § 94, 20 December 2016). The Court's role is then to review the decisions of the national courts from the standpoint of the Convention, without taking the place of the relevant domestic authorities.

(b) Application of the above principles in the present case

390. The applicant in the present case saw his pre-trial detention as a political measure that in reality was aimed at preventing him from sitting as a member of parliament. Having regard to the repercussions of his detention

on the effective performance of his parliamentary duties, the Court must first determine whether there has been an interference with the exercise of his rights under Article 3 of Protocol No. 1 to the Convention.

391. In this connection, the Court cannot accept the Government's argument that the applicant's complaint under Article 3 of Protocol No. 1 should be declared inadmissible for lack of victim status. As the Chamber pointed out, the right to free elections is not restricted simply to the opportunity to take part in parliamentary elections; the person concerned is also entitled, once elected, to sit as a member of parliament. In the present case, between 4 November 2016 and 24 June 2018, the applicant was unable to participate in the proceedings of the National Assembly as a result of his pre-trial detention. In other words, he was prevented from taking part in the activities of the legislature for one year, seven months and twenty days. Although he retained his seat in Parliament and had the opportunity to put questions in writing, the Court accepts that the applicant's pre-trial detention amounts to an interference with the exercise of his rights under Article 3 of Protocol No. 1. It therefore dismisses the objection raised by the Government.

392. The Court reiterates that the rights under Article 10 of the Convention and Article 3 of Protocol No. 1 are interrelated and operate to reinforce each other (see *Bowman v. the United Kingdom*, 19 February 1998, § 42, *Reports* 1998-I). This interdependence is particularly pronounced in the case of democratically elected representatives who have been kept in pre-trial detention for expressing their political opinions. Members of parliaments represent their electorate and their freedom of expression therefore requires increased protection. In view of the importance it attaches to the freedom of expression of members of parliament, especially those from opposition parties, in line with the requirements of pluralism, tolerance and broadmindedness, the Court considers that where the detention of a member of parliament cannot be deemed compatible with the requirements of Article 10 of the Convention, it will also breach Article 3 of Protocol No. 1.

393. Moreover, the Court has held that the detention of an individual constitutes such a serious interference with the exercise of fundamental rights that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 143, ECHR 2012). Indeed, pre-trial detention is a temporary measure and its duration must be as short as possible. Those considerations apply *a fortiori* to the detention of a member of parliament. In a democracy, Parliament is an essential forum for political debate, of which the performance of parliamentary duties forms part (see, *mutatis mutandis*, *Cordova (no. 1)*, cited above, § 59). While serving their term of office, members of parliament represent their electorate, draw attention to their concerns and defend their interests.

394. In the present case, the Court refers to its above findings of a violation of Article 10 and Article 5 § 1 of the Convention. It has already held under Article 10 that the interference with the exercise of the applicant's freedom of expression, in the form of his pre-trial detention for expressing his views as a politician, was not "prescribed by law" in that it did not satisfy the requirement of foreseeability. It has found, in particular, that the domestic courts did not carry out any examination of whether the speeches in issue were covered by the applicant's parliamentary non-liability as enshrined in the first paragraph of Article 83 of the Constitution. It has also found that there was no reasonable suspicion that the applicant had committed an offence, as required by Article 5 § 1 of the Convention. These findings are equally relevant for the purposes of Article 3 of Protocol No. 1. Indeed, the Court reiterates that parliamentary immunity is a privilege granted not to members of parliament on an individual basis but to the institution of Parliament, to guarantee its smooth operation (see *Kart*, cited above, § 53). In that context, if a State provides for parliamentary immunity from prosecution and from deprivation of liberty, the domestic courts must first ensure that the member of parliament concerned is not entitled to parliamentary immunity for the acts of which he or she has been accused. In the present case, however, although the applicant asked the Assize Court to examine whether the impugned speeches were protected under the first paragraph of Article 83 of the Turkish Constitution, the domestic courts did not carry out any such examination, thus failing to comply with their procedural obligations under Article 3 of Protocol No. 1 (see paragraphs 70, 77, 80 and 91 above).

395. In addition, where a member of parliament is deprived of his or her liberty, the judicial authorities ordering that measure are required to demonstrate that they have weighed up the competing interests. As part of this balancing exercise, they must protect the freedom of expression of political opinions by the member of parliament concerned. In particular, they must ensure that the alleged offence is not directly linked to his or her political activity. In this connection, the member States' legal systems must offer a remedy by which a member of parliament who has been placed in detention can effectively challenge that measure and have his or her complaints examined on the merits. In the present case, however, the Government have been unable to show that the domestic courts with competence to review the pre-trial detention of the applicant performed a balancing exercise from the standpoint of Article 3 of Protocol No. 1 when ruling on the lawfulness of his initial and continued pre-trial detention. The Court notes that the Constitutional Court did not examine whether the offences in question were directly linked to the applicant's political activities. In its judgment of 21 December 2017, it rejected as inadmissible the applicant's complaint that, given his status as a member of parliament, his placement in pre-trial detention was in violation of his right to free elections. In its recent judgment

of 9 June 2020, it held that the lower courts had failed to consider the applicant's allegations that his continuing detention was unreasonable given his status as a member of parliament, the co-chair of a political party and a candidate in the presidential election, a finding that, as the Constitutional Court saw it, only concerned his complaint regarding the duration of his pre-trial detention. The Court concludes that the judicial authorities did not effectively take into account the fact that the applicant was not only a member of parliament but also one of the leaders of the political opposition in Turkey, whose performance of his parliamentary duties called for a high level of protection.

396. Furthermore, as indicated in the dissenting opinion of the minority Constitutional Court judge in the decision of 21 December 2017, the reasons why the imposition of an alternative measure to detention would have been insufficient in the applicant's particular case were not explained by the first-instance courts. The Government have been unable to show that the domestic courts genuinely considered the application of alternative measures to pre-trial detention that are provided for by domestic law. The fact is that the national courts systematically found that such measures were insufficient, without providing any specific reasons connected to the applicant's individual case.

397. Having regard to all the foregoing considerations, the Court concludes that although the applicant retained his status as a member of parliament throughout his term of office, the fact that it was effectively impossible for him to take part in the activities of the National Assembly on account of his pre-trial detention constitutes an unjustified interference with the free expression of the opinion of the people and with his own right to be elected and to sit in Parliament. The Court therefore concludes that the applicant's pre-trial detention was incompatible with the very essence of his right under Article 3 of Protocol No. 1 to be elected and to sit in Parliament.

398. It follows that there has been a violation of Article 3 of Protocol No. 1 to the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

399. Relying on Article 18 of the Convention, the applicant alleged that he had been detained for expressing critical opinions about the political authorities. He submitted in that regard that the purpose of his pre-trial detention had been to silence him.

400. The Government contested the applicant's argument. They stated that Article 18 of the Convention did not have an autonomous role and could only be applied in conjunction with other provisions of the Convention. They submitted that the applicant's complaint warranted an examination under Article 5 §§ 1 and 3 of the Convention alone.

401. The Court observes that the applicant's contention in this context is that his pre-trial detention pursued the ulterior purpose of silencing him on account of his role on the political scene in Turkey. It regards this as a fundamental aspect of the case, the essence of which has not been addressed in the examination of the applicant's various complaints above (see *Navalnyy*, cited above, § 164, and *Kavala*, cited above, § 198). It will therefore examine it separately.

402. The Government were not given notice of the applicant's complaint under Article 18 in conjunction with Article 10 of the Convention, and therefore no specific question was put to the parties about it. The Court therefore considers that the applicant's complaint under Article 18 of the Convention may be considered only in conjunction with Article 5, this being the complaint of which notice was given. Article 18 provides:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

A. The Chamber judgment

403. In the light of its finding that the applicant's pre-trial detention had complied with Article 5 § 1 (c) of the Convention at all times, the Chamber analysed whether the evidence before it established beyond reasonable doubt that the predominant purpose of his continued detention had been to remove him from the political scene. To that end, the Chamber referred to its reasoning under Article 5 § 3 of the Convention and Article 3 of Protocol No. 1 and to the socio-political background to the events of recent years in Turkey, as outlined by the parties and the intervening third parties. Following this contextual examination, it held that the applicant's continued pre-trial detention had also pursued a political purpose. In so holding, it had regard in particular to the applicant's political role, the tense political situation in Turkey, the speeches targeting the applicant and his party, including those by the President of Turkey, the timing of his continued detention (coinciding with an important constitutional referendum and the presidential election) and the alleged emergence of a systemic trend of "gagging" dissenting voices. It went on to find that this political purpose had been predominant. It adopted the following reasoning:

> "270. In the present case, the Court notes that several criminal investigations in respect of the applicant had been ongoing for years, but no significant steps had been taken until the end of the 'solution process' to initiate a procedure for the lifting of his parliamentary immunity. In this connection, the Court observes that although the investigation in respect of the applicant was not initiated in response to the speeches by the President of Turkey, it was at least accelerated after he had given those speeches and stated that 'the deputies of that party [the HDP] must pay the price' ... On 16 March 2016 the President accused the HDP members of parliament, including the applicant, of having caused the death of fifty-two people.

271. Thus, although the Court cannot accept the applicant's argument that the whole legal machinery of the respondent State was misused *ab initio* and that from beginning to end the judicial authorities acted in bad faith and in blatant disregard of the Convention ..., it appears from the reports and opinions by international observers, in particular the observations by the Commissioner for Human Rights, that the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency. In that context, concordant inferences drawn from this background support the argument that the judicial authorities reacted harshly to the applicant's conduct, bearing in mind his position as one of the leaders of the opposition, and to the conduct of other HDP members of parliament and elected mayors, as well as to dissenting voices more generally. In this regard, the Court notes that the Government have not put forward any serious argument that could satisfy it that such allegations might be unfounded.

272. In addition, the Court reiterates that in order to determine which purpose is predominant in a given case, bearing in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law, it must also take into consideration factors such as the nature and degree of reprehensibility of the alleged ulterior purpose ... In this connection, the Court observes that the applicant does not see himself solely as an individual victim of a violation. His contention is that he has been kept in pre-trial detention chiefly on account of his position as one of the leaders of the political opposition. The Court considers that in such an eventuality, it is not only the applicant's rights and freedoms as an individual that could be said to be under threat but the whole democratic system itself. In the Court's opinion, an ulterior purpose of that kind would undoubtedly pose a serious problem for democracy.

273. Having regard to the foregoing, and in particular the fact that the national authorities have repeatedly ordered the applicant's continued detention on insufficient grounds consisting simply of a formulaic enumeration of the grounds for detention provided for by law, the Court finds that it has been established beyond reasonable doubt that the extensions of the applicant's detention, especially during two crucial campaigns, namely the referendum and the presidential election, pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society ..."

B. The parties' submissions

1. The applicant

404. The applicant asserted that his initial and continued pre-trial detention on account of the political views he had expressed as a member of parliament and co-chair of Turkey's second largest opposition party had ultimately been aimed at punishing and silencing him. He argued that the real reason for his detention had been the severity of his criticism of the policies pursued by the government and the President of Turkey. In that connection, at a rally held on 7 March 2015, several months before the elections of 7 June 2015, the President of Turkey had stated: "[G]ive me 400 members of parliament and everything will be settled peacefully", comments which the applicant saw as a call by the President for a change to the country's constitutional system. In response, on 18 March 2015, at a meeting of his

party's parliamentary group, the applicant had given a brief speech in which he had said: "Dear Recep Tayyip Erdoğan, we will not make you President, we will not make you President, we will not make you President." In the applicant's submission, this speech had quickly gone viral and had influenced the overall political climate in the run-up to the June 2015 elections, becoming a key HDP slogan and positioning the party and himself in direct opposition to the President. In that regard, the applicant submitted that the crackdown against members of his party had become more visible, notably after he had stated that he would never support a presidential system with Mr Erdoğan as president.

405. The applicant added that a series of significant reforms, such as the adoption of a presidential system in place of the parliamentary system, had been carried out while he himself – the co-chair of the second largest opposition party represented in the National Assembly – had been in pre-trial detention for his political statements. In the applicant's submission, his detention had also been aimed at preventing him from carrying out his political activities so that he would be unable to campaign against the adoption of the new constitutional system.

406. The applicant stated that following the lifting of parliamentary immunity, the competent prosecuting authorities had initiated criminal investigations in respect of fifty-five out of the fifty-nine HDP members of parliament. Furthermore, on 4 November 2016 several members of parliament from his party had been arrested in different towns and had all been taken into police custody. In addition, several sets of criminal proceedings were currently pending against him, all of them relating to his political activities. However, no criminal investigations had been instituted in respect of any AKP or MHP members of parliament, even though their parliamentary immunity had likewise been lifted. The criminal investigations – which in his view were political in nature – had intensified following the end of the "solution process". In that connection, the applicant noted that he had been the subject of forty-eight criminal investigations between 2007 and 2014 but that from 2014 until the lifting of his parliamentary immunity, a further forty-eight criminal investigations had been initiated in respect of him. The number of these investigations had to be viewed alongside the number of criminal investigations in respect of other members of parliament from his party. In that connection, according to statistics provided by the Ministry of Justice, as at 15 December 2015 a total of 330 investigation reports had been submitted to Parliament, including 182 relating to HDP members of parliament. Following the speech given by the President of Turkey on 2 January 2016 (see paragraph 49 above), the number of investigation reports submitted to the National Assembly in respect of HDP members of parliament had almost tripled, with the result that as at 20 May 2016, the date on which the constitutional amendment had been adopted, there had been a total of 510 investigation reports relating to HDP members of parliament. The

number of criminal investigations had thus increased following the speeches by the President, who had openly targeted HDP members of parliament as terrorist collaborators.

407. The applicant submitted that all the decisions concerning his initial and continued pre-trial detention had pursued an ulterior purpose. Even the decision of 2 September 2019 to release him had to be viewed as a political decision, having been adopted only a few days prior to the hearing before the Court on 18 September 2019 in the present case. Similarly, just two days after the hearing, a magistrate had ordered the applicant's return to pre-trial detention in the context of a separate criminal investigation concerning the same events that formed the background to the criminal proceedings in the present case. In that connection, the applicant noted that on 21 September 2019, the day after his return to pre-trial detention, the President of Turkey had stated in a speech that the HDP co-chairs could not be let go. This was a clear indication that the applicant's detention had been ordered by the ruling authorities in order to remove him from the political scene.

2. The Government

408. The Government reiterated their view that no separate examination of the applicant's complaint under Article 18 of the Convention was necessary. They pointed out in that connection that in many cases where the arguments put forward by the parties concerning a particular Article of the Convention had been the same as those examined in the context of another Article, the Court had held that it was not necessary to examine the second complaint separately.

409. In the Government's submission, although the applicant's pre-trial detention had taken place against a background of political tensions between the HDP and the ruling party, his allegations could not be regarded as sufficient proof that his continued detention had pursued the purpose of preventing him from taking part in political matters, rather than ensuring the proper conduct of the criminal proceedings against him.

410. The Government reiterated their argument that the complaint under Article 5 should be declared inadmissible. However, they added that should it be declared admissible, a finding of no violation of Article 18 should be reached in this case. In that connection, they submitted that the system for the protection of fundamental rights and freedoms under the Convention rested on the assumption that the authorities of the High Contracting Parties acted in good faith, and added that there could only be a violation of Article 18 of the Convention if a very high threshold was crossed. The applicant had been placed in pre-trial detention during a criminal investigation initiated in connection with the fight against terrorism, and his detention had been solely aimed at ensuring the proper conduct of the criminal proceedings against him and had pursued no other predominant ulterior purpose. Accordingly, the domestic courts' reason for ordering the applicant's continued detention had

not been to stifle pluralism and limit freedom of political debate. In that connection, the Government emphasised that the Convention did not secure the right not to be prosecuted.

411. The Government noted that the Chamber had held that in view of the applicant's position on the Turkish political scene, the tense political climate in Turkey since 2014 and the speeches by his political opponents, among them the President of Turkey, it was understandable that an objective observer might suspect that the extension of his pre-trial detention had been politically motivated. Noting that the Chamber had stated that it attached "considerable weight" to the political context in the country, although this did not constitute sufficient proof *per se*, the Government asserted that the Chamber had in fact relied exclusively on the political context. The Chamber's approach was inconsistent with the principles laid down in *Merabishvili* (cited above), in which the Court had found that "[t]he factors deriving from the broader political context in which the criminal case was brought against the applicant [were] not sufficient proof in that respect".

412. In the Government's submission, although the institution of criminal investigations in respect of a number of HDP members of parliament in November 2016 might suggest the aim of silencing the leaders of the party in question, the investigations could also reflect an intention to prosecute members of parliament with suspected links to a terrorist organisation, who previously could not have been held liable because of their parliamentary immunity. Contrary to what the applicant had alleged, the Government stated that the HDP members of parliament were not the only ones to have been convicted in criminal proceedings, and that five members from the AKP, nine from the CHP and one from the MHP had also been convicted after their parliamentary immunity had been lifted.

413. The Government referred to the Chamber's position that the mere fact that politicians had been prosecuted or placed in pre-trial detention, even during an election campaign or a constitutional referendum, did not automatically indicate that the aim pursued had been to restrict political debate. Moreover, although it was natural that the applicant might have suspicions as to the real reasons for his continued detention on account of his role on the political scene, such suspicions could not suffice for the Court to conclude that the judiciary had been misused *ab initio* and that the domestic courts had consistently acted in bad faith and in blatant disregard of the Convention. The same applied to the statements by the President of Turkey and by the leaders of the ruling party concerning the applicant; such statements could not be regarded as proof of the existence of an ulterior purpose underlying a judicial decision unless it was established that the courts had not been sufficiently independent from the executive. However, no evidence had been produced in the present case to substantiate any such allegations, and the Chamber judgment had not corroborated them either, instead simply stating that the tense political climate in Turkey during recent

years had created an environment capable of influencing the national courts. The Government, moreover, contested the Chamber's conclusion on this point. In their submission, the contention that the judicial authorities had reacted harshly to the applicant's conduct had scarcely been substantiated. On the contrary, in November 2017 and January 2018 the applicant had been acquitted following three sets of criminal proceedings instituted against him for incitement to hatred and hostility on account of insults directed at the government or the President and the Minister of the Interior. Furthermore, in a judgment of 11 July 2018 the court in Diyarbakır had awarded the applicant compensation under Article 141 of the CCP, finding that the courts had not examined of their own motion the question of his detention between 31 July and 3 October 2017. In addition, only eight of the fifteen HDP members of parliament who had been placed in pre-trial detention in November 2016 were still being detained.

414. The Government further observed that ninety-three investigation reports had been drawn up in respect of the applicant by nine different prosecutors' offices, which had applied to the National Assembly to have his parliamentary immunity lifted. More than half of the reports had been transmitted to Parliament before the leaders of the ruling party had purportedly begun targeting their political opponents in July 2015. Furthermore, most of the investigations had been conducted by prosecutors who, following the coup attempt of 15 July 2016, had been dismissed on suspicion of being members of, affiliated to or linked to a terrorist organisation.

415. The Government contested the applicant's argument that his return to pre-trial detention on 20 September 2019 had been based on the same events that had formed the background to the criminal proceedings forming the subject matter of the present case, specifying that the current deprivation of his liberty related to different offences. In their view, the criminal proceedings that had started on 11 January 2017 were broader than the investigation in the context of which the applicant had been detained on 20 September 2019. In this connection, the Government pointed out that the criminal proceedings falling within the scope of the present case not only concerned the incidents which had taken place between 6 and 8 October 2014, but also included acts and incidents referred to in several other investigation reports.

416. The Government further noted that the Constitutional Court and the Chamber had held that the applicant could be said to have been arrested and detained on "reasonable suspicion" of having committed a criminal offence. In their submission, there had been no procedural irregularity and the courts had not applied the law arbitrarily.

417. Accordingly, the Government submitted that all those factors were not sufficient to show that the applicant's situation crossed the high threshold of Article 18 of the Convention.

C. The third parties

1. The Commissioner for Human Rights

418. Relying on the findings of a number of international bodies, including the Venice Commission, the Commissioner for Human Rights stated that upholding the right to freedom of expression was currently all the more difficult as a result of the marked erosion of the independence and impartiality of the judiciary in Turkey. In that connection, she noted that there had been numerous instances of criminal proceedings unduly restricting freedom of expression and the right to liberty and security not only of members of parliament but also of mayors, academics, journalists and human rights defenders who had expressed criticism of official policy, notably in relation to the situation in south-eastern Turkey. Laws and criminal proceedings were currently being used to silence dissenting voices.

2. The intervening NGOs

419. The intervening NGOs submitted that following the attempted military coup on 15 July 2016, the Government had exploited the legitimate concerns prompted by the coup attempt in order to redouble its already significant crackdown on human rights, *inter alia* by placing dissenters in pre-trial detention.

D. The Grand Chamber's assessment

1. Admissibility

420. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

421. The general principles concerning the interpretation and application of Article 18 of the Convention were established in *Merabishvili* (cited above, §§ 287-317) and were subsequently confirmed in *Navalnyy* (cited above, §§ 164-65). The Court considers the following passage from *Merabishvili* to be of particular relevance to its examination of this complaint:

> "287. In a similar way to Article 14, Article 18 of the Convention has no independent existence ...; it can only be applied in conjunction with an Article of the Convention or the Protocols thereto which sets out or qualifies the rights and freedoms that the High Contracting Parties have undertaken to secure to those under their jurisdiction ... This rule derives both from its wording, which complements that of clauses such as, for example, the second sentence of Article 5 § 1 and the second paragraphs of Articles 8 to 11, which permit restrictions to those rights and freedoms, and from its place in the

Convention at the end of Section I, which contains the Articles that define and qualify those rights and freedoms.

288. Article 18 does not, however, serve merely to clarify the scope of those restriction clauses. It also expressly prohibits the High Contracting Parties from restricting the rights and freedoms enshrined in the Convention for purposes not prescribed by the Convention itself, and to this extent it is autonomous ... Therefore, as is also the position in regard to Article 14, there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies ...

290. It further follows from the terms of Article 18 that a breach can only arise if the right or freedom at issue is subject to restrictions permitted under the Convention.

291. The mere fact that a restriction of a Convention right or freedom does not meet all the requirements of the clause that permits it does not necessarily raise an issue under Article 18. Separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case ..."

422. As regard the question of proof for the purpose of its examination under Article 18 of the Convention, the Court has held, again in *Merabishvili* (cited above), that the applicable standard is the ordinary standard of proof:

"309. A perusal of the judgments cited ... in the light of the above clarifications shows that what the Court really meant when it spoke of a stricter standard of proof under Article 18 was that it considered that a purpose prescribed by the Convention was invariably a cover for an ulterior one. But if the two points are clearly distinguished, the questions in relation to proof become simply how it can be established whether there was an ulterior purpose and whether it was the predominant one.

310. In doing this, the Court finds that it can and should adhere to its usual approach to proof rather than special rules ...

311. The first aspect of that approach, first set out in *Ireland v. the United Kingdom* [18 January 1978, Series A no. 25] ... and more recently confirmed in *Cyprus v. Turkey* [[GC], no. 25781/94, ECHR 2001-IV] and in *Georgia v. Russia (I)* [[GC], no. 13255/07, ECHR 2014 (extracts)] ..., is that, as a general rule, the burden of proof is not borne by one or the other party because the Court examines all material before it irrespective of its origin, and because it can, if necessary, obtain material of its own motion. As early as in *Artico v. Italy* [13 May 1980, Series A no. 37] ... the Court stated that that was the general position not only in inter-State cases but also in cases deriving from individual applications. It has since then relied on the concept of burden of proof in certain particular contexts. On a number of occasions, it has recognised that a strict application of the principle *affirmanti incumbit probatio*, that is that the burden of proof in relation to an allegation lies on the party which makes it, is not possible, notably in instances when this has been justified by the specific evidentiary difficulties faced by the applicants ...

312. Indeed, although it relies on the evidence which the parties adduce spontaneously, the Court routinely of its own motion asks applicants or respondent Governments to provide material which can corroborate or refute the allegations made before it. If the respondent Government in question do not heed such a request, the Court cannot force them to comply with it, but can – if they do not duly account for their failure or refusal – draw inferences ... It can also combine such inferences with contextual factors. Rule 44C § 1 of the Rules of Court gives it considerable leeway on that point.

313. The possibility for the Court to draw inferences from the respondent Government's conduct in the proceedings before it is especially pertinent in situations – for instance those concerning people in the custody of the authorities – in which the respondent State alone has access to information capable of corroborating or refuting the applicant's allegations ... That possibility is likely to be of particular relevance in relation to allegations of ulterior purpose.

314. The second aspect of the Court's approach is that the standard of proof before it is 'beyond reasonable doubt'. That standard, however, is not co-extensive with that of the national legal systems which employ it. First, such proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. Secondly, the level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake. The Court has consistently reiterated those points ...

315. The third aspect of the Court's approach, also set out as early as in *Ireland v. the United Kingdom* ..., is that the Court is free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it. In *Nachova and Others* [*v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII] ..., the Court further clarified that point, saying that when assessing evidence it is not bound by formulae and adopts the conclusions supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. It has also stated that it is sensitive to any potential evidentiary difficulties encountered by a party. The Court has consistently adhered to that position, applying it to complaints under various Articles of the Convention ...

316. There is therefore no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18 of the Convention or to apply a special standard of proof to such allegations.

317. It must however be emphasised that circumstantial evidence in this context means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts ... Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court ..."

(b) Application of the above principles in the present case

423. In the present case, the Court reiterates that it has found that the applicant's pre-trial detention was not based on a "reasonable suspicion" within the meaning of Article 5 § 1 (c) of the Convention (see paragraphs 338-339 above). In the Court's view, the finding of a violation of Article 5 § 1 cannot be regarded as sufficient in itself to conclude that Article 18 of the Convention has also been violated (see *Navalnyy*, cited above, § 166). It remains for the Court to determine whether, in the absence of reasonable suspicion, there was an identifiable ulterior purpose from the standpoint of Article 18 of the Convention.

424. The applicant's main grievance is that he was specifically targeted and deprived of his liberty because of his opposition to the government in power in Turkey. In his submission, his initial and continued pre-trial detention was aimed at silencing him. In this connection, in the light of the

memorandum by the Commissioner for Human Rights following his visits to Turkey in 2016, the opinion issued by the Venice Commission on the amendments to the Constitution, the report by Amnesty International and the observations by the intervening third parties, the Court observes that in view of the applicant's role as one of the emblematic leaders of the political opposition in Turkey, the tense political climate since 2014 and the speeches by the applicant's political opponents, among them the President of Turkey, it is understandable that an objective observer might suspect that the applicant's initial pre-trial detention and its extension were politically motivated. However, the Court has previously held that the mere fact that politicians had been prosecuted or detained, even during an election campaign or a referendum, did not automatically indicate that the aim pursued had been to restrict political debate (see *Merabishvili*, cited above, § 323).

425. Having regard to the manner in which the applicant framed his complaint, the Court is called upon to examine whether the predominant purpose of the domestic courts' decisions on his initial and continued pre-trial detention, in breach of Article 5 of the Convention, was in fact to remove him from the political scene in Turkey and to silence him as one of the leaders of the political opposition.

426. In this context, the Court notes firstly that even before 2014, the public prosecutors had submitted several investigation reports in respect of the applicant to the National Assembly. However, no measure had been taken until the end of the "solution process" and until the elections of 7 June 2015, in which the ruling party lost its majority in the National Assembly for the first time since 2002, largely as a result of the success of the HDP. Indeed, until the onset of the political tension between, on the one hand, the HDP and, on the other, the President and the ruling party, the applicant had not been exposed to the risk of being deprived of his liberty. However, after the end of the "solution process" and the speeches by the President, who had, for example, said on 28 July 2015 that "the leaders of that party [the HDP] must pay the price", there was an increase in the number and pace of the criminal investigations in respect of the applicant.

427. The constitutional amendment adopted on 20 May 2016 lifted the parliamentary inviolability of 154 members of parliament. As a result, the HDP, which at the time had fifty-nine members of parliament, found itself in a situation where fifty-five of them were stripped of the parliamentary immunity they enjoyed under the second paragraph of Article 83 of the Constitution. Further to this, fourteen members of parliament from the applicant's party, including both of its co-chairs, were placed in pre-trial detention. The Court observes that, contrary to what the applicant alleged, the Government maintained that the HDP members of parliament were not the only ones to have been convicted in criminal proceedings. In their submission, five members from the AKP, nine from the CHP and one from the MHP had also been convicted after their parliamentary immunity had

been lifted. At the hearing on 18 September 2019, a specific question was put to the parties on this issue of contention. The Government, while repeating their argument, were unable to show that members of parliament belonging to the bloc of the ruling parties, namely the AKP and the MHP, had also been convicted and/or deprived of their liberty. Accordingly, in the absence of any evidence produced to support it, the Court is unable to give any weight to this argument by the Government. It therefore considers it established that members of parliament from the opposition parties, namely the CHP and the HDP, were the only ones to have been detained and/or convicted following the institution of criminal proceedings against them. In other words, members of the National Assembly from the opposition parties were the only ones who were actually affected by the constitutional amendment of 20 May 2016.

428. A number of leading figures and elected mayors from the HDP were also placed in pre-trial detention. Although the Court does not have access to the content of the criminal proceedings against these individuals, it observes that, according to various reports and opinions by international observers, the main reason for the measures depriving them of their liberty lay in their political speeches. In those circumstances, the Court attaches considerable weight to the observations of the intervening third parties, and in particular the Commissioner for Human Rights, who stated that national laws were increasingly being used to silence dissenting voices. The Court therefore considers that the decisions on the applicant's initial and continued pre-trial detention are not an isolated example. On the contrary, they seem to follow a certain pattern.

429. In addition to that, the timing of the applicant's initial and continued pre-trial detention is a further factor to take into account in its examination under Article 18 of the Convention. In this connection, the Court notes that he was deprived of his liberty in particular during two crucial campaigns, that of the referendum of 16 April 2017 and that of the presidential election of 24 June 2018.

430. In this context, the Court observes firstly that the applicant had expressed his firm opposition to any presidential system proposed at the time by President Erdoğan and that this was a matter of significant disagreement between the AKP and HDP leaders. Yet while debate was ongoing among the Turkish public about what was probably one of the most significant constitutional reforms since the proclamation of the Republic of Turkey in 1923, the applicant was in pre-trial detention, in breach of Article 5 §§ 1 and 3, Article 10 and Article 3 of Protocol No. 1. As the Court has held, free elections and freedom of expression, and particularly the freedom of political debate, form the foundation of any democracy (see paragraph 383 above). This applies equally in the context of a constitutional referendum. In the Court's view, the applicant's pre-trial detention undoubtedly prevented him from contributing effectively to the campaign against the introduction of a presidential system in Turkey.

431. Six candidates stood in the presidential election of 24 June 2018, including the applicant, who was in detention. He therefore had to conduct his election campaign from prison, in a more difficult situation than the other candidates. It appears that the applicant's political opponents took advantage of the fact that he was deprived of his liberty.

432. The Court also notes the circumstances surrounding the applicant's return to pre-trial detention (see paragraphs 114 and 118 above). It observes in this connection that on 2 September 2019 the Ankara Assize Court ordered his release. Despite that decision, he remained in detention as a result of his conviction following the criminal proceedings in the Istanbul Assize Court. On 20 September 2019 the Istanbul 26th Assize Court ruled that the days spent by the applicant in pre-trial detention in connection with his trial in the Ankara Assize Court should be deducted from his final sentence. As a result of that decision, the applicant would have been eligible for conditional release. However, later that day and notwithstanding the criminal proceedings pending before the Ankara Assize Court, the Ankara public prosecutor's office applied to the Ankara Magistrate's Court to have the applicant and his fellow co-chair returned to pre-trial detention in connection with a separate criminal investigation initiated in 2014 concerning the events of 6 to 8 October 2014. Also on 20 September 2019, the Ankara Magistrate's Court, granting the public prosecutor's application, ordered the pre-trial detention of the applicant and the other former co-chair of the HDP. The following day, the President of Turkey made a statement to the press in which he accused the applicant of being the "killer" of fifty-three people. He also said that he was following the matter and that the two co-chairs could not be "let go" (see paragraph 118 above). Accordingly, although the Istanbul Assize Court decided on 31 October 2019 to suspend the execution of the applicant's sentence of four years and eight months' imprisonment, he remained deprived of his liberty, this time as a result of his return to pre-trial detention.

433. In this context, the apparent purpose of the applicant's return to pre-trial detention was to investigate the events of 6 to 8 October 2014. However, although the alleged offences were classified differently, this criminal investigation concerned part of the facts forming the basis of the trial that is still ongoing in the Ankara Assize Court, in connection with which the applicant had already been placed in pre-trial detention (see paragraph 70 above). Considering these aspects together with the close temporal links between the applicant's release from detention, ordered by the Ankara Assize Court on 2 September 2019 (see paragraph 114 above) and the Istanbul 26th Assize Court's decision of 20 September 2019 (see paragraph 115 above), his immediate return to pre-trial detention on the same day (see paragraph 117 above) and the speech given by the President immediately afterwards (see paragraph 118 above), the Court is of the view that the domestic authorities do not appear to be particularly interested in the applicant's suspected involvement in an offence allegedly committed between 6 and 8 October

2014, some five years previously, but rather in keeping him detained, thereby preventing him from carrying out his political activities.

434. In addition, the findings of the Venice Commission on the independence of the judicial system in Turkey, and more specifically those concerning the Supreme Council of Judges and Prosecutors ("the Supreme Council"), are also relevant to the Court's examination under Article 18 of the Convention. In opinion no. 875/2017 on amendments to the Constitution, adopted at its 110th plenary session (see paragraph 162 above), the Venice Commission pointed out that under the new constitutional system, the President would have the power to appoint six of the thirteen members of the Supreme Council, the remaining seven members being appointed by the National Assembly. It noted in that connection that the draft amendments provided for elections to the Supreme Council within thirty days following the entry into force of the constitutional reform. The Venice Commission expressed the view that the proposed new composition of the Supreme Council was "extremely problematic". It pointed out that under the new constitutional system, the President was not a neutral branch of power but belonged to a political faction. Furthermore, bearing in mind the prospect of the President's party enjoying a majority in Parliament, which was practically guaranteed under the system of simultaneous elections, the Venice Commission took the view that the composition of the Supreme Council would seriously endanger the independence of the judiciary, because it was the main self-governing body of the judiciary, overseeing appointments, promotions, transfers, disciplinary measures and the dismissal of judges and public prosecutors. It added that "[g]etting control over [the Supreme Council] thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice". The reports and opinions by international observers, in particular the comments by the Commissioner for Human Rights, indicate that the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency, when hundreds of judges were dismissed, and especially in relation to criminal proceedings instituted against dissenters.

435. The Government for their part submitted that in November 2017 and January 2018 the applicant had been acquitted following three sets of criminal proceedings against him. They also indicated that on 11 July 2018 the court in Diyarbakır had awarded the applicant compensation under Article 141 of the CCP on account of the failure by the courts to examine the question of his detention of their own motion. Lastly, they added that only eight of the fifteen HDP members of parliament who had been placed in pre-trial detention in November 2016 were still being detained. In the Court's view, the facts as set out by the Government might indicate that the whole legal machinery of the respondent State was not systematically misused and that the judicial

authorities did not continually act in bad faith and in blatant disregard of the Convention in all cases concerning dissenting voices (see, *mutatis mutandis*, *Năstase v. Romania* (dec.), no. 80563/12, § 109, 18 November 2014). However, the Court finds it hard to see how those facts could have a bearing on its decision on the applicant's pre-trial detention in the circumstances of the present case.

436. In the present case, the concordant inferences drawn from this background support the argument that the judicial authorities reacted harshly to the applicant's conduct as one of the leaders of the opposition, to the conduct of other HDP members of parliament and elected mayors, and to dissenting voices more generally. The applicant's initial and continued pre-trial detention not only deprived thousands of voters of representation in the National Assembly, but also sent a dangerous message to the entire population, significantly reducing the scope of free democratic debate. These factors enable the Court to conclude that the purposes put forward by the authorities for the applicant's pre-trial detention were merely cover for an ulterior political purpose, which is a matter of indisputable gravity for democracy (see *Cebotari v. Moldova*, no. 35615/06, §§ 52-53, 13 November 2007; *Ilgar Mammadov*, cited above, § 143; *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 162, 17 March 2016; and *Mammadli*, cited above, § 104).

437. Having regard to the foregoing, the Court finds that it has been established beyond reasonable doubt that the applicant's detention, especially during two crucial campaigns relating to the referendum and the presidential election, pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society.

438. The Court therefore concludes that there has been a violation of Article 18 of the Convention in conjunction with Article 5.

VIII. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

A. Article 46 of the Convention

439. The applicant requested the Court to order his release from detention. The relevant parts of Article 46 of the Convention read as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
>
> ..."

440. The Court refers to the developments concerning the applicant's return to pre-trial detention on 20 September 2019 (see paragraphs 114-118 above). In this connection, it has already considered that in the light of the

various factual elements and their close temporal and substantive connection, taken as a whole, the authorities associated with the applicant's initial and continued pre-trial detention did not appear to be primarily interested in the investigation of his suspected involvement in an offence allegedly committed in 2014 (see paragraphs 426-433 above). In the Court's view, the ultimate aim of the judicial authorities was to deprive the applicant of his liberty notwithstanding the decision by the Ankara Assize Court ordering his release (see paragraph 93 above).The Government argued that the offences for which the applicant had been placed in pre-trial detention on 20 September 2019 (summarised at paragraphs 116-117 above) were different from those forming the subject matter of the present application because the latter concerned not only the incidents which had taken place from 6 to 8 October 2014, but also included "acts and incidents" indicated in several other investigation reports (see paragraph 415 above). Thus, according to the Government themselves, the detention order of 20 September 2019 also related to the incidents occurring between 6 and 8 October 2014, although it was framed in narrower terms than the charges leading to the applicant's initial detention. However, instituting new criminal investigations in relation to facts previously considered insufficient to justify detention, by means of a new legal classification, would make it possible for the authorities to circumvent the right to liberty.

441. In the present case, therefore, the Court cannot disregard the fact that the applicant was placed in pre-trial detention on the basis of a new legal classification of the "acts and incidents" relating to the period of 6 to 8 October 2014 that had also formed part of the grounds relied on to justify the specific deprivation of liberty raised in his application, which ended on 2 September 2019. In the light of the findings it has reached, in particular its finding of a violation of Article 18 in conjunction with Article 5, the Court emphasises that the execution measures that must now be taken by the respondent State, under the supervision of the Committee of Ministers, as regards the applicant's situation must be compatible with the conclusions and spirit of this judgment (see *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, § 182, 29 May 2019).

442. Where the nature of the violation found is such as to leave no real choice as to the measures required to remedy it, the Court may decide to indicate a specific individual measure, as it did in the cases of *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 202-03, ECHR 2004-II), *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, § 490, ECHR 2004-VII), *Aleksanyan v. Russia* (no. 46468/06, §§ 239-40, 22 December 2008), *Fatullayev v. Azerbaijan* (no. 40984/07, §§ 176-77, 22 April 2010), *Del Río Prada v. Spain* ([GC], no. 42750/09, §§ 138-39, ECHR 2013), *Şahin Alpay v. Turkey* (no. 16538/17, §§ 194-95, 23 March 2018) and *Kavala v. Turkey* (no. 28749/18, § 240, 10 December 2019). For the present applicant, the continuation of his pre-trial detention, on grounds pertaining to the same

factual context, would entail a prolongation of the violation of his rights as well as a breach of the obligation on the respondent State to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention. Accordingly, it considers that the respondent State must take all necessary measures to secure the immediate release of the applicant.

B. Article 41 of the Convention

443. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

444. Before the Chamber the applicant claimed 11,350 euros (EUR) in respect of pecuniary damage and EUR 250,000 in respect of non-pecuniary damage. The Chamber awarded him the sum of EUR 10,000 in respect of non-pecuniary damage.

445. Before the Grand Chamber, the applicant, pointing out that he was a lawyer and had been unable to work on account of his pre-trial detention, firstly claimed EUR 16,020 for loss of income. In addition, he claimed EUR 5,946 in respect of the pecuniary damage alleged, corresponding to the cost of the air tickets paid for by his wife (15,471.47 Turkish liras (TRY), approximately EUR 2,350), his two daughters (TRY 4,133.85 and TRY 3,749.26, approximately EUR 600 and EUR 500 respectively) and his lawyers (TRY 16,637, approximately EUR 2,500) to visit him in prison in Edirne. In support of his claim, he produced the invoices for the air tickets. He also claimed EUR 50,000 in respect of non-pecuniary damage.

446. The Government submitted that the amounts claimed were excessive and incompatible with the Court's case-law.

447. With regard firstly to pecuniary damage, the Court considers that it is for applicants to show that such damage has resulted from the violations alleged. To that end, they must produce documents in support of their claim. In that context, a clear causal connection must be established between the damage alleged and the violation of the Convention that has been found. The Court would point out that a speculative connection is not enough (see *Bykov v. Russia* [GC], no. 4378/02, § 110, 10 March 2009, and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 219, 27 June 2017).

448. In the present case, the findings of a violation of the Convention are mainly the result of the applicant's initial and continued pre-trial detention. In that connection, the Court finds that the expenses incurred by his relatives in visiting him in prison undoubtedly caused him to sustain pecuniary

damage. It therefore considers that the applicant should be awarded EUR 3,500, corresponding to the value of the air tickets purchased by his wife and two daughters. However, the Court does not discern, on the basis of the material submitted to it, any causal link between the violations found and the pecuniary damage alleged by the applicant. The Court therefore rejects this claim.

449. With regard to non-pecuniary damage, the Court considers that the multiple and serious violations of the Convention that it has found have indisputably caused the applicant substantial damage. Accordingly, making its assessment on an equitable basis and taking into account the domestic award (see paragraph 127 above), it finds it appropriate to award him EUR 25,000 in respect of non-pecuniary damage.

2. Costs and expenses

450. Before the Chamber the applicant claimed EUR 40,000 in respect of costs and expenses. The Chamber awarded him EUR 15,000 under that head.

451. Before the Grand Chamber the applicant claimed EUR 25,800 in respect of the costs and expenses incurred before the Court to cover his representatives' expenses. In support of his claim, he produced a copy of the contract he had signed with them and a record of the time they had each spent on the case, namely thirty hours for Mr Karaman, forty-five hours for Ms Molu, thirty-six hours for Mr Altıparmak, thirty-five hours for Mr Demir, thirty-six hours for Ms Çalı and forty hours for Ms Demirtaş Gökalp. He pointed out that the hourly rate charged by his representatives was EUR 150 for Ms Çalı and Mr Altıparmak, and EUR 100 for the others. The applicant also sought TRY 40,332 (approximately EUR 6,100) for translation expenses and produced the corresponding invoices.

452. The Government disputed that those expenses had been necessarily incurred and were reasonable as to quantum.

453. According to the Court's settled case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, having regard to its case-law and the documents in its possession, the Court considers it reasonable to award the sums claimed in full.

3. Default interest

454. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses*, unanimously, the Government's preliminary objection under Article 35 § 2 (b) of the Convention;

2. *Dismisses*, unanimously, the Government's preliminary objection of failure to lodge an individual application with the Constitutional Court;

3. *Dismisses*, unanimously, the Government's preliminary objection of non-exhaustion of domestic remedies in respect of the complaints under Article 5 § 3 and Article 18 of the Convention and Article 3 of Protocol No. 1 to the Convention;

4. *Dismisses*, unanimously, the Government's preliminary objection of failure to bring a compensation claim;

5. *Dismisses*, by a majority, the Government's preliminary objection of lack of victim status with respect to Article 5 § 3 of the Convention;

6. *Dismisses*, unanimously, the Government's preliminary objection of lack of victim status with respect to Article 10 of the Convention and Article 3 of Protocol No. 1 to the Convention;

7. *Declares*, unanimously, the application admissible;

8. *Holds*, by sixteen votes to one, that there has been a violation of Article 10 of the Convention;

9. *Holds*, by fifteen votes to two, that there has been a violation of Article 5 § 1 of the Convention;

10. *Holds*, by sixteen votes to one, that there has been a violation of Article 5 § 3 of the Convention;

11. *Holds*, by sixteen votes to one, that there has been no violation of Article 5 § 4 of the Convention;

12. *Holds*, unanimously, that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

13. *Holds*, by sixteen votes to one, that there has been a violation of Article 18 of the Convention in conjunction with Article 5;

14. *Holds*, by fifteen votes to two, that the respondent State is to take all necessary measures to secure the applicant's immediate release;

15. *Holds*, by sixteen votes to one,

(a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable, in respect of pecuniary damage;
(ii) EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(iii) EUR 31,900 (thirty-one thousand nine hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

16. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French and delivered in writing on 22 December 2020.

Johan Callewaert	Ksenija Turković
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly concurring, partly dissenting opinion of Judge Wojtyczek;
(b) partly dissenting opinion of Judge Chanturia;
(c) partly dissenting opinion of Judge Yüksel joined by Judge Paczolay;
(d) partly concurring, partly dissenting opinion of Judge Yüksel.

K.T.U.
J.C.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE WOJTYCZEK

1. I respectfully disagree with my colleagues' view that Article 5 § 4 of the Convention has not been violated in the instant case. I also have reservations concerning the wording of point 14 of the operative part, as well as certain parts of the reasoning.

2. In paragraph 167 of the reasoning the following view has been expressed:

> "The Court reiterates that the content and scope of the case referred to the Grand Chamber are delimited by the Chamber's decision on admissibility (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 88, 18 December 2018). The Grand Chamber therefore cannot examine complaints which have been declared inadmissible."

As a result, the Grand Chamber therefore cannot examine the complaints which have been declared inadmissible but can declare inadmissible the complaints which have been declared admissible and examined by the Chamber.

I acknowledge that the viewpoint expressed above reflects the established practice in the Grand Chamber (see, for instance, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 78, 21 June 2016; *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 88, ECHR 2010; and *Göç v. Turkey* [GC], no. 36590/97, §§ 36-37, ECHR 2002-V) but I am not convinced that this practice is compatible with the Convention. It is important to remind ourselves here of the wording of the relevant provision of the Convention (emphasis added):

> **Article 43**
> **Referral to the Grand Chamber**
>
> "1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that **the case** be referred to the Grand Chamber.
>
> 2. A panel of five judges of the Grand Chamber shall accept the request if **the case** raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.
>
> 3. If the panel accepts the request, the Grand Chamber shall decide **the case** by means of a judgment."

The Court has rightly expressed the following views when interpreting this provision (see *K. and T. v. Finland* [GC], no. 25702/94, § 140, ECHR 2001-VII):

> "The Court would first note that all three paragraphs of Article 43 use the term 'the case' ('*l'affaire*') for describing the matter which is being brought before the Grand Chamber. In particular, paragraph 3 of Article 43 provides that the Grand Chamber is to 'decide *the case*' – that is the whole case and not simply the 'serious question' or 'serious issue' mentioned in paragraph 2 – 'by means of a judgment'. The wording of

> Article 43 makes it clear that, whilst the existence of 'a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance' (paragraph 2) is a prerequisite for acceptance of a party's request, the consequence of acceptance is that the whole 'case' is referred to the Grand Chamber to be decided afresh by means of a new judgment (paragraph 3). The same term 'the case' ('*l'affaire*') is also used in Article 44 § 2 which defines the conditions under which the judgments of a Chamber become final. If a request by a party for referral under Article 43 has been accepted, Article 44 can only be understood as meaning that the entire judgment of the Chamber will be set aside in order to be replaced by the new judgment of the Grand Chamber envisaged by Article 43 § 3. This being so, the 'case' referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, and not only the serious 'question' or 'issue' at the basis of the referral. In sum, there is no basis for a merely partial referral of the case to the Grand Chamber.".

In the same judgment (ibid., § 141) the Court added the following statement:

> "The Court would add, for the sake of clarification, that the 'case' referred to the Grand Chamber is the application as it has been declared admissible (see, *mutatis mutandis*, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 63, § 157). This does not mean, however, that the Grand Chamber may not also examine, where appropriate, issues relating to the admissibility of the application in the same manner as this is possible in normal Chamber proceedings, for example by virtue of Article 35 § 4 *in fine* of the Convention (which empowers the Court to 'reject any application which it considers inadmissible ... at any stage of the proceedings'), or where such issues have been joined to the merits or where they are otherwise relevant at the merits stage."

The above-quoted clarification is difficult to accept. The main argument used here is the practice in the proceedings before the Commission and the Court before the 1998 Protocol No. 11 entered into force, whereas this reform completely reshaped the whole system.

In my view, the request submitted by a party under Article 43 concerns *the case.* Subsequently the Grand Chamber decides *the case*. The term "case" refers to the whole case, and not only the part of the application which has been declared admissible. There are no limitations upon the scope of the request. Moreover, the "serious question affecting the interpretation or application of the Convention" or "serious issue of general importance" may arise in the context of complaints which have been declared inadmissible. Therefore, the acceptance of the request lodged under Article 43 should mean that the whole Chamber judgment is quashed, and not only the part of the judgment which decides on the merits of the case. There are no grounds for dividing the Chamber judgment into two parts: one which is untouchable and one which is quashed.

Article 19, which defines the mandate of the Court ("to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto"), will be better observed if the Grand Chamber accepts for examination the complaints which have been declared inadmissible by the Chamber.

Moreover, the approach adopted by the Chamber may be seen as an infringement of the principle that all parties should have equal rights. A Government requesting the referral of a case to the Grand Chamber does not face the risk that the complaints that have been declared inadmissible will be examined on the merits, whereas the applicant faces the risk that the complaints declared admissible by the Chamber may be declared inadmissible by the Grand Chamber.

It is also important to note the provisions of the Convention and of the Rules of Court determining when the judgments or decisions of the Court become final. Firstly, Article 44 of the Convention unequivocally establishes when "judgments" *(ergo* rulings on the admissibility and merits of a case) become final. Secondly, when the Rules of Court determine the conditions in which a decision or a judgment is to become final, they do so expressly. In particular, with regard to single-judge and Committee proceedings, Rule 52A § 1 and Rule 53 § 4, sentence 1, state that decisions under Article 27 of the Convention and decisions and judgments under Article 28 of the Convention are final. When dealing with Chamber proceedings, Rule 54 § 3, sentences 1 and 2, expressly provides:

> "In the exercise of the competences under paragraph 2 (b) of this Rule, the President of the Section, acting as a single judge, may at once declare part of the application inadmissible or strike part of the application out of the Court's list of cases. The decision shall be final."

There are no similar provisions concerning Chamber judgments. This is another argument in favour of the view that the parts of the Chamber judgments declaring certain grievances inadmissible should not become final if the case is referred to the Grand Chamber.

The literal, systemic and teleological interpretations all point therefore in the same direction: the scope of the case before the Grand Chamber should not be reduced to the complaints declared admissible by the Chamber.

3. The reasoning in the present case emphasises the status of the applicant as a member of parliament (see paragraphs 242 to 245 of the judgment). There is no doubt that Parliament should be protected by way of parliamentary immunities and other privileges granted to its members because the members of the parliamentary opposition may be targeted by the authorities much more frequently than other persons and also because their speech may fall into the category of official speech, which is protected neither by fundamental constitutional rights nor by the Convention rights (see my concurring opinion appended to the judgment in the case of *Makraduli v. the former Yugoslav Republic of Macedonia*, nos. 64659/11 and 24133/13, 19 July 2018).

At the same time, parliamentary immunities and other privileges are not individual rights. They always protect the public interest and not the parliamentarians' private interests. They shield the parliamentary function, not personal self-fulfilment. The legislature is therefore the master of the immunity of inviolability and may lift it – in accordance with procedures

established by law – when it considers it appropriate. As explained by A. Esmein in his classic textbook:

> "*Les immunités parlementaires, dont nous abordons l'étude, ont l'apparence de véritables faveurs accordées aux membres du Parlement ; mais, en réalité, elles n'ont point ce caractère. Elles n'existent que dans l'intérêt de l'Assemblée elle-même, à laquelle appartiennent ceux qui en profitent, et dans l'intérêt de la nation que représente cette Assemblée. Elles ont pour but d'assurer l'indépendance et le libre fonctionnement de l'Assemblée ; elles sont établies dans l'intérêt public, non dans un intérêt particulier.*" ("Parliamentary immunities, the focus of our study here, take on the appearance of genuine favours granted to members of parliament, but in reality this is not their nature. They exist only in the interests of the Assembly itself, to which those who benefit from them belong, and in the interests of the nation that this Assembly represents. Their purpose is to ensure the independence and free functioning of the Assembly; they are established in the public interest, and not in any private interest.") (A. Esmein, *Éléments de droit constitutionnel français et comparé*, Librairie de la société du Recueil Sirey, Paris, 1914, 6th ed., p. 953)

Moreover, the limits upon the content of "non-official" speech should be the same for all individuals. It is therefore essential to underline that had the applicant not been a member of parliament, the outcome of the instant case should have been exactly the same. The fact that he is no longer a parliamentarian today does not change his status as a right-holder under the Convention.

I note, *en passant*, that the Grand Chamber has endorsed in paragraph 384 the following view expressed in earlier case-law (emphasis added):

> "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 ... (see *Castells*, cited above, § 42)."

This vision of the parliamentary mandate is very problematic. The Turkish Constitution says the exact opposite in Article 80, which provides:

> "Members of the Grand National Assembly of Turkey shall not represent their own constituencies or constituents, but the nation as a whole."

More importantly, in the European constitutional tradition, members of parliament represent the nation or the people, not their electorate. A. Esmein summarises this tradition in the following terms:

> "*Les représentants ne tiennent pas leurs pouvoirs, en droit, du collège électoral qui les a élus, mais de la nation tout, entière. Ils participent, en effet, à l'exercice de la souveraineté. Or, celle-ci « appartient à la nation, aucune section du peuple ni aucun individu ne peut s'en attribuer l'exercice », ni encore moins le déléguer. Cette vérité a été traduite dans la Constitution de 1791 par une formule heureuse, répétée depuis lors par bien des Constitutions : « Les représentants nommés dans les départements ne seront pas représentants d'un département particulier, mais de la nation entière, et il ne pourra leur être donné aucun mandat ». Il résulte de là que le député élu ne saurait être considéré comme le mandataire de ses électeurs.*" ("Representatives derive their powers, in law, not from the electoral college that elected them, but from the nation as a whole. Indeed, they participate in the exercise of sovereignty. And the latter 'appertains to the nation; no section of the people nor any individual may assume the

> exercise thereof', let alone delegate it. This truth was reflected in the 1791 Constitution by felicitous wording that has subsequently been repeated in many constitutions: 'The representatives elected in the *départements* shall not be representatives of a particular *département*, but of the entire nation, and no mandate may be given to them.' It follows that an elected member of parliament cannot be regarded as the proxy of his constituents.") (*op. cit.*, p. 307)

This also shows that the essence of the parliamentary mandate consists in representing the people or the nation, and not in the free exercise of human rights for the purposes of personal self-fulfilment or of asserting private interests which lie at the basis of these rights.

4. I agree nonetheless that Article 10 applies in the instant case because, in my view, the applicant's speech does not fall into the category of official speech (see my dissenting opinions appended to the judgments in the cases of *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, and *Szanyi v. Hungary*, no. 35493/13, 8 November 2016).

I further agree with the general lines of argument developed in paragraphs 271 to 280 of the reasoning, although I also agree with those who consider that finding a violation of Article 10 because of the insufficient quality of domestic law, without waiting for the outcome of the domestic criminal proceedings, is not without posing some problems. At the same time, I have serious reservations concerning the approach adopted in paragraphs 256 to 270.

5. Concerning the non-liability of parliamentarians, the *per curiam* opinion states the following in paragraph 261:

> "The applicant, for his part, submitted that he had given similar speeches during proceedings of the National Assembly and that the speeches in question were therefore protected by the first paragraph of Article 83 of the Constitution. On this issue, the Court considers that it was the task of the national authorities, and in particular the domestic courts, to determine first of all whether the speeches on account of which the applicant was charged and placed in pre-trial detention were covered by parliamentary non-liability as provided for in the first paragraph of Article 83 of the Constitution. In this connection, the Court reiterates that the national authorities have a procedural obligation to perform a judicial review to prevent any abuse of power (see *Karácsony and Others*, cited above, §§ 133-36 and the authorities cited therein)."

I note that the applicant's claim in this respect has not been sufficiently substantiated, either before the domestic courts or before this Court. In particular, the applicant has not corroborated his allegations by verbatim quotations from his earlier statements, made in the course of the National Assembly's work. In his pleadings at the domestic level he vaguely referred to "speeches he had given between 2008 and 2016" (see paragraph 91 of the judgment). It is therefore difficult to agree with the view that the authorities failed to adequately address this issue.

6. In the instant case, the interference with the applicant's freedom of expression consists in criminal prosecution. The very lifting of parliamentary immunity is not *per se* an interference with the freedom of speech of a

parliamentarian. However, as it enables the institution of criminal proceedings, it is closely linked to the impugned interference and may be seen as an non-detachable element of it.

The instant case raises important issues concerning the relationship between the *pouvoir constituant* and the Convention. While the argument that the legislature is in any event the master of the immunity of inviolability may be invoked in defence of provisional Article 20 of the Constitution, I nonetheless agree with the view that this provision, temporarily suspending the application of a constitutional rule in the context of the instant case, is difficult to reconcile with supra-legal (supra-positive) standards of the rule of law and I subscribe to the critical assessments expressed in this respect. At the same time, in my view, it is problematic to try to extract the impugned constitutional reforms from the interference as a whole and to assess separately their compatibility with the requirements of Article 10 § 2 of the Convention as if they were themselves an "isolated" and independent interference with the freedom of speech. More importantly, the nature and scope of the legitimate expectations inferred by the Court from the Turkish Constitution for the purpose of this assessment, as well as the methodology applied for that purpose, may be called into question.

The majority express the following viewpoint in paragraph 269 of the judgment:

> "In the Court's view, bearing in mind Turkish parliamentary practice and tradition, a member of parliament could not reasonably expect that such a procedure would be introduced during his term of office, thereby undermining the freedom of expression of members of the National Assembly."

The view that the impugned reforms have departed from Turkish parliamentary practice and tradition does not seem unfounded, but the categorical assertion quoted above goes much further than that and requires extensive justification. To make such a strong statement about the Turkish constitutional system, it would have been necessary to examine national parliamentary practice and tradition in detail beforehand, starting with their legal status and content. I am not sure that Turkish parliamentary practice and tradition can be sources of legally protected expectations to the extent that such practice and tradition do not overlap with unwritten legal principles recognised as sources of law. It was therefore necessary to examine thoroughly all the written and unwritten constitutional limitations upon the exercise of the *pouvoir constituant* in Turkey, recognised in the domestic legal system. Under the approach adopted, parliamentary practice and tradition become sources of Turkish constitutional law.

The *per curiam* opinion states further in paragraph 270 (emphasis added):

> "The Court's case-law indicates that the foreseeability requirement is satisfied where the individual can know from the wording of the relevant legislation, and, if need be, with the assistance of the courts' interpretation of it, **what acts and omissions will make him criminally liable** (see, among other authorities, *Güler and Uğur*, cited

above, § 50, and *Kudrevičius and Others*, cited above, § 108). In the present case, having regard to the wording of the first two paragraphs of Article 83 of the Constitution and the interpretation, or rather lack thereof, of that provision by the national courts, the Court considers that the interference with the exercise of the applicant's freedom of expression was not 'prescribed by law' in that it did not satisfy the requirement of foreseeability, since **in defending a political viewpoint, the applicant could legitimately expect to enjoy the benefit of the constitutional legal framework in place, affording the protection of immunity for political speech and constitutional procedural safeguards** (see, *mutatis mutandis*, *Lykourezos v. Greece*, no. 33554/03, §§ 54-56, ECHR 2006-VIII)."

This part of the reasoning triggers the following reservations. Firstly, the reasoning very rightly asserts that the Court's case-law indicates that the foreseeability requirement is satisfied where the individual can know from the wording of the relevant legislation, and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. What acts and omissions will make him criminally liable depends upon the substantive law, not upon procedural law and certainly not upon the scope of procedural immunities. The adoption of provisional Article 20 of the Constitution has not changed the acts and omissions which will make the applicant criminally liable.

Secondly, I note in connection with this that parliamentary inviolability operates on the plane of procedural law. It consists of special procedural guarantees, and more precisely, the requirement to obtain authorisation for arresting, questioning, detaining or trying a member of parliament. I am not persuaded that these procedural regulations can be a source of substantive legitimate expectations and a basis for planning how to exercise freedom of expression. I observe in this context that under the case-law on Article 7 of the Convention, procedural rules are relevant and fall under the scope of that Article in so far as they influence the severity of the penalty (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, §§ 110-13, 17 September 2009; *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, § 149, ECHR 2000-VII; and *Previti v. Italy* (dec.), no. 1845/08, §§ 79-85, 12 February 2013).

Thirdly, I am not persuaded the applicant could legitimately expect to enjoy the benefit of the constitutional legal framework in place. The starting-point is the assumption that the *pouvoir constituant* is sovereign and may introduce constitutional changes at any time. Constitutional changes carried out in compliance with the rule of law rarely meet the requirement of foreseeability. The Constitution cannot form the basis for an expectation that the constitutional order will not be changed. The Constitution can only be the basis of a legitimate expectation that unconstitutional amendments to it will not be adopted. These two expectations are not identical.

Fourthly, legitimate private expectations are based mainly upon legal rules protecting private interests. Legal rules protecting public interests have to be continuously assessed and reassessed and may be adjusted in order to better protect those interests. Individuals basing their expectations upon public-

interest rules must take this specificity into account. Therefore, the legitimacy of private expectations based upon public-interest legal rules is necessarily weaker than that of private expectations based upon legal rules protecting private interests. This applies, in particular, to rules on procedural parliamentary immunity granted – as explained above – in order to protect the functioning of Parliament and constitutional democracy in general, and not the personal self-fulfilment or other private interests of parliamentarians. Persons basing their private expectations upon procedural parliamentary immunities must therefore always take into account the fact that the relevant legal rules may be changed.

Fifthly, under the Court's long-standing and well-established case-law, the interpretation of national law is a matter for the national authorities (see, for instance, *Cangı v. Turkey*, no. 24973/15, § 42, 29 January 2019). This principle applies to the determination of legitimate expectations protected by national law and stemming directly from *general* legal rules (as distinct from expectations stemming from individual acts or from other actions or omissions in an *individual* case). The determination of the existence of such types of expectations requires a far-reaching interpretation of domestic law. The Court should therefore refrain from making any independent findings in this respect.

To conclude this part of my *votum separatum*: the approach adopted enters very deeply into the sphere of the interpretation and application of domestic law and assigns a new *telos* to public-interest legal rules by redirecting them, to a large extent, towards the protection of private interests. It entails the privatisation and "*droit-de-l'hommisation*" of parliamentary immunities.

Furthermore, if I understand the reasoning correctly, the unstated underlying assumption is that an unfavourable change in procedural rules concerning an indictment for activities covered by Convention rights is as such an interference with those rights, which should observe the requirement of foreseeability. This issue deserves much deeper consideration in the reasoning.

The essential problem under Article 10 of the Convention lies, however, in Article 314 §§ 1 and 2 of the Criminal Code. The unclear wording of those provisions is a sufficient reason to find a violation of Article 10 of the Convention. The impugned constitutional reforms are certainly an important element of the general background to the instant case (relevant especially under Article 18) but their negative assessment is neither a sufficient nor a necessary ground for finding a violation of Article 10.

7. In paragraphs 369 and 370, the Grand Chamber subscribes to the following view expressed by the Chamber:

> "... the Court finds it necessary to take into account the Constitutional Court's exceptional caseload following the declaration of the state of emergency in July 2016 ...

> In the light of the foregoing, although the duration of thirteen months and four days before the Constitutional Court could not be described as 'speedy' in an ordinary context, in the specific circumstances of the case the Court considers that there has been no violation of Article 5 § 4 of the Convention."

I agree that it is necessary to take into account the Constitutional Court's exceptional caseload following the declaration of the state of emergency in July 2016 but, in my view, the duration of thirteen months and four days of the proceedings before the Constitutional Court is not compatible with the Convention. The authorities should have reacted promptly by enacting legislation ensuring a speedy review of detention decisions. For instance, they could have empowered ordinary courts to examine complaints on this subject.

The Grand Chamber also states the following (see paragraph 366 of the judgment):

> "It has already been established in *Mehmet Hasan Altan* (cited above, § 159) and *Şahin Alpay* (cited above, § 131) that Article 5 § 4 of the Convention is applicable to proceedings before the Turkish Constitutional Court."

It would be more precise to say that Article 5 § 4 of the Convention is applicable in a situation, like that of the applicant, in which a domestic court places someone in pre-trial detention. The authorities have to put in place the guarantees provided by this provision, be it by granting access to the Constitutional Court or to other courts. As the remedy provided under Turkish law is a complaint to the Constitutional Court, this domestic court should therefore comply with the requirement of promptness enshrined in Article 5 § 4.

8. In point 14 of the operative part the Court holds that the respondent State is to take all necessary measures to secure the applicant's immediate release. Point 14 of the operative part has to be read in the context of paragraphs 440-42 of the reasoning, and especially the following important statement in paragraph 442:

> "For the present applicant, the continuation of his pre-trial detention, on grounds pertaining to the same factual context, would entail a prolongation of the violation of his rights as well as a breach of the obligation on the respondent State to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention."

This part of the reasoning explains that there is therefore an implicit *rebus sic stantibus* clause in point 14 of the operative part: the respondent State's obligation to take all necessary measures to secure the applicant's immediate release is not absolute as one cannot exclude exceptional new grounds which may justify the detention of the applicant. On the one hand, the authorities cannot circumvent the judgment by trying to bring new unsubstantiated charges against the applicant, on the other hand the instant judgment cannot be interpreted as granting the applicant immunity from prosecution even if there were fully justified grounds to start criminal proceedings against him and place him in remand custody. The judgment therefore does not exclude

pre-trial detention on sufficient grounds – duly substantiated and justified by the authorities – pertaining to a modified factual context.

Taking into account the problems entailed by the two judgments in the cases of *Ilgar Mammadov v. Azerbaijan* (no. 15172/13, 22 May 2014) and *Ilgar Mammadov v. Azerbaijan (no. 2)* (no. 919/15, 16 November 2017) (see *Ilgar Mammadov v. Azerbaijan (infringement proceedings)* [GC], no. 15172/13, 29 May 2019, with the concurring opinions appended thereto), the Court has rightly considered that it should indicate certain measures to be taken in order to execute the instant judgment. I have voted in favour of point 14 although I have reservations concerning its exact wording as well as certain elements of the reasoning in paragraphs 440-42.

Firstly, in order to avoid interpretative disputes, it would have been preferable, in my view, to include a *rebus sic stantibus* clause in point 14 of the operative part itself. Some important interpretative issues would thus have been clarified in the very wording of the operative part.

Secondly, the *rebus sic stantibus* clause is, in my view, fully justified as such but at the same time is not sufficiently precise. The question arises as to which elements define the relevant "factual context" mentioned in paragraph 442. Moreover, and more importantly, not only would the continuation of the applicant's pre-trial detention, on grounds pertaining to the same factual context, entail a prolongation of the violation of his rights, but a clearly unjustified pre-trial detention on grounds pertaining to a different factual context would also entail such a violation.

Thirdly, as the question whether pre-trial detention continues in violation of the present judgment may raise difficult factual and legal issues, the matter should be determined with all the guarantees of the due process of law in proceedings before an independent and impartial body, preferably in proceedings before this Court. The risk of interference by non-judicial bodies in a sphere covered by guarantees of judicial independence both at the domestic and international level, calls for the utmost caution at the stage of the execution of the instant judgment (see the joint concurring opinion of Judges Yudkivska, Pinto de Albuquerque, Wojtyczek, Dedov, Motoc, Poláčková and Hüseynov appended to the above-mentioned judgment in *Ilgar Mammadov* (infringement proceedings); see also my concurring opinion appended to that judgment).

PARTLY DISSENTING OPINION OF JUDGE CHANTURIA

1. I respectfully disagree with the decision of the majority not to accept the Constitutional Court's judgment of 9 June 2020 finding a violation of Article 19 § 7 of the Turkish Constitution on account of the length of the applicant's pre-trial detention. In that judgment the Constitutional Court acknowledged in substance a violation of the applicant's rights under Article 5 § 3 of the Convention. It held that the decisions on his continued detention had contained insufficient reasons. This is fully in line with the Court's well-established case-law (see paragraph 218 of the judgment), according to which an applicant will be considered to have lost victim status where the national authorities have acknowledged that there has been a breach of the Convention, either expressly or in substance, and have provided the applicant with redress (see *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51).

2. However, it is obvious that a person will not lose victim status simply by reason of some acknowledgment by the respondent State that there has been a violation of the Convention. The second issue which falls under the Court's scrutiny in the present case is whether the Constitutional Court's judgment afforded the applicant appropriate and sufficient redress. Where the national authorities have awarded compensation to an applicant, according to the Court's case-law, the Court should examine the amount of the award. That amount must not be manifestly inadequate in the circumstances of the case under examination (see *Žúbor v. Slovakia*, no. 7711/06, § 63, 6 December 2011). The sums which the applicant was awarded – 50,000 Turkish liras (TRY – approximately 6,500 euros) in respect of non-pecuniary damage and TRY 4,436.30 in respect of costs and expenses – cannot be regarded as disproportionate.

3. Two preconditions developed in the relevant case-law have been met in the present case. Why should the majority not accept this important finding of the national Constitutional Court, knowing that the Court consistently underlines in its case-law the principle of subsidiarity and the necessity of judicial dialogue with the national courts? What message is being sent to the national courts by ignoring the significant principle of international judicial cooperation? What more could the domestic courts have done in such a situation? The majority's conclusion that there has been no acknowledgment by the Constitutional Court of the alleged violation of the right protected by Article 5 § 3 of the Convention (see paragraph 222 of the judgment) simply does not reflect reality. The national authorities' obligation to afford redress for any violation of the Convention was fulfilled in respect of the applicant's complaint under Article 5 § 3.

PARTLY DISSENTING OPINION OF JUDGE YÜKSEL JOINED BY JUDGE PACZOLAY

I. AS REGARDS THE COMPLAINT UNDER ARTICLE 5 § 3 OF THE CONVENTION

1. I am respectfully unable to agree with the majority concerning the applicant's victim status under Article 5 § 3 of the Convention. In the present case, I am of the opinion that the applicant can no longer claim to be the victim of a violation of that provision.

2. The applicant argued before the Court that the judicial decisions ordering his initial and continued pre-trial detention had contained no reasons other than mere citation of the grounds for pre-trial detention provided for by law and had been worded in abstract, repetitive and formulaic terms. In its second judgment, on 9 June 2020, the Constitutional Court found a violation of Article 19 of the Turkish Constitution (equivalent provision to Article 5 § 3 of the Convention), holding that the national courts had failed to provide sufficient reasons in respect of their conclusion. The Constitutional Court also held that the domestic courts had failed to weigh up the competing interests involved, namely (i) the public interest in prolonging the applicant's detention in the context of the criminal proceedings and (ii) his rights as a member of parliament and the co-chair of a political party, such as his right to take part in the legislative activities of the parliament. This balancing exercise between the applicant's right to liberty and his rights as a politician formed part of the Constitutional Court's assessment of the length of the applicant's pre-trial detention.

3. One should bear in mind that the Constitutional Court had already adjudicated on the applicant's initial detention in its first judgment and found it to be in conformity with the Constitution. In this regard, I would like to reiterate that the Chamber also arrived at the same conclusion in so far as the applicant's complaint under Article 5 § 1 (c) of the Convention is concerned. In its second judgment, the Constitutional Court, which was not called upon to examine the applicant's initial detention order again, examined the decisions prolonging his detention. In my view, the Constitutional Court's second judgment, where it found a violation on the basis that the reasons given in the decisions extending the applicant's detention had not been sufficient to justify its duration, demonstrates that there has been an acknowledgment, at least in substance, of a violation of the applicant's rights under Article 5 § 3 of the Convention.

4. The Court therefore had to determine whether the Constitutional Court's judgment afforded the applicant appropriate and sufficient redress. In that connection, it follows from the Court's case-law that where the national authorities have awarded compensation to an applicant by way of redress for the violation found, the Court should examine the amount of the award (see

Hebat Aslan and Firas Aslan v. Turkey, no. 15048/09, § 44, 28 October 2014). In doing so, the Court will have regard to its own practice in similar cases and will consider, on the basis of the material in its possession, what it would have awarded in a comparable situation, although this does not mean that the two amounts must necessarily correspond. It will also take into account the circumstances of the case as a whole, including the type of remedy chosen and the speed with which the national authorities have provided the redress in question, given that it is primarily for those authorities to secure the rights and freedoms set out in the Convention (see *Vedat Doğru v. Turkey*, no. 2469/10, § 40, 5 April 2016). Nevertheless, the amount awarded at national level must not be manifestly inadequate in the circumstances of the case under examination (see *Žúbor v. Slovakia*, no. 7711/06, § 63, 6 December 2011). In the present case, the Constitutional Court held, on the basis of its findings of a violation, that the applicant was to be awarded 50,000 Turkish liras (TRY – approximately 6,500 euros (EUR) at the material time) in respect of non-pecuniary damage and TRY 4,436.30 (approximately EUR 575 at the material time) in respect of costs and expenses. I consider that those amounts cannot be regarded as inadequate and disproportionate. As such, I find it difficult to argue that the Constitutional Court's judgment of 9 June 2020 did not afford him appropriate and sufficient redress.

5. In the light of the foregoing and given the importance of the subsidiarity principle, which lies at the heart of the Convention, it is my belief that the applicant can no longer claim to be the victim of a violation of Article 5 § 3 of the Convention.

II. AS REGARDS ARTICLE 46

6. I note that the core reasoning under Article 46 of the Convention essentially amounts to an examination of both the factual and the legal grounds of the applicant's second pre-trial detention, ordered on 20 September 2019, with the conclusion that the immediate release of the applicant should be secured. I am respectfully not able to agree with the majority and voted against the application of Article 46 of the Convention, where the majority invited the respondent State to secure the immediate release of the applicant on the basis of a rather unorthodox assessment based on a legal question that (i) is pending before the domestic courts, (ii) is disputed between the parties and (iii) does not fall within the scope of the case.

7. The question of the applicant's second detention order is the subject of another individual application that is currently pending before the Constitutional Court (see paragraph 128 of the judgment). Therefore, the correct course of action would be to defer to the authority of the domestic courts in line with the principle of subsidiarity. The refusal to do so could

risk, unfortunately, not only prejudicing the proceedings pending before the Constitutional Court but also placing the Court in the position of a prosecutor in ascertaining the factual basis of the second detention order. Such an approach should have been avoided.

8. It has not been established that both the initial and the present detention orders concern the same criminal proceedings against the applicant involving the same charges stemming from the same facts (see, by contrast, *Ilgar Mammadov v. Azerbaijan* (no. 2), no. 919/15, § 203, 16 November 2017). I cannot share the view of the majority in carrying out an assessment under Article 46 of the Convention based on the assumption that the facts underlying the two detention orders, that is to say the initial detention order giving rise to the present application and the second detention order issued on 20 September 2019, were the same. As can be seen from the judgment, the offences forming the subject of the two detention orders were in fact different (see paragraphs 70 and 116 of the judgment). The fact that there might be a certain overlap in the factual grounds, namely the incidents of 6-8 October 2014 underlying the two detention orders, is not sufficient to conclude that they were issued on account of the same facts. Indeed, this issue was highly disputed between the parties.

9. Moreover, I have strong hesitations in accepting that the applicant's second detention forms part of the case before the Grand Chamber. To the best of my knowledge, this is the first Grand Chamber case in which an applicant's release has been recommended not on the basis of a complaint in respect of which the Grand Chamber finds a violation, but on the basis of a factual issue taken into consideration together with other factual issues under Article 18 of the Convention. In other words, the majority's conclusion under Article 46 of the Convention does not appear to have been aimed at putting an end to a violation that has been found to exist, given that the Grand Chamber was not called upon to examine the applicant's second detention from the point of view of Article 5 of the Convention, a question that is, I repeat, pending before the Constitutional Court. Indeed, an examination of the Grand Chamber cases in which the Court has indicated under Article 46 of the Convention that an applicant should be released shows that in all those judgments, such as *Del Río Prada v. Spain* ([GC], no. 42750/09, §§ 138-39, ECHR 2013), *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, § 490, ECHR 2004-VII) and *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 202-03, ECHR 2004-II), the indication that the applicants were to be released was based on a complaint in respect of which the Court had found a violation (see also, in respect of Chamber judgments, *Aleksanyan v. Russia*, no. 46468/06, §§ 239-40, 22 December 2008, *Fatullayev v. Azerbaijan*, no. 40984/07, §§ 176-77, 22 April 2010, and *Şahin Alpay v. Turkey*, no. 16538/17, §§ 193-95, 20 March 2018). In the instant case, the applicant's second detention ordered in September 2019 is not amongst the complaints in respect of which a violation has been found.

10. In view of the above, I voted against the application of Article 46 of the Convention in the present case.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE YÜKSEL

I agree with the findings of the judgment in the present case in so far as they concern the applicant's complaints under Article 5 § 4 of the Convention and Article 3 of Protocol No. 1 to the Convention. However, I am unable to share the majority's view that there have been violations of Article 5 §§ 1 and 3, Article 10, and Article 18 of the Convention.

That said, while I share the position of the majority with regard to their conclusion that Article 3 of Protocol No. 1 has been violated, I cannot subscribe to certain arguments they have advanced under that provision.

III. AS REGARDS THE COMPLAINT UNDER ARTICLE 10 OF THE CONVENTION

1. In the present case, in concluding that there has been a violation of Article 10 of the Convention, the Grand Chamber opted to examine the foreseeability of the constitutional amendment of 20 May 2016 concerning the lifting of parliamentary immunity and the lawfulness of Article 314 §§ 1 and 2 of the Criminal Code on directing and/or membership of an armed terrorist organisation, as applied in the particular circumstances of the applicant's case. In the majority's view, the interference with the applicant's freedom of expression was not prescribed by law owing to the fact that the constitutional amendment and Article 314 §§ 1 and 2 of the Criminal Code as interpreted and applied did not comply with the requirement of the quality of law under Article 10 of the Convention. I respectfully disagree with the majority on this point, for the following reasons.

2. I believe that the interference observed in the present case was prescribed by law and thus satisfied the requirement of lawfulness (see my dissenting opinion in *Ragıp Zarakolu v. Turkey*, no. 15064/12, 15 September 2020, for the interplay between Articles 5 and 10 of the Convention as regards the issue of lawfulness). Therefore, the interference in the present case fell to be examined by applying the necessity test within the meaning of Article 10 of the Convention, for the reasons I will elaborate upon below (see, in this connection, *Mehmet Hasan Altan v. Turkey*, no. 13237/17, §§ 202-14, 20 March 2018; *Steel and Others v. the United Kingdom*, 23 September 1998, § 110, *Reports of Judgments and Decisions* 1998-VII; and *Kandzhov v. Bulgaria*, no. 68294/01, § 73, 6 November 2008).

3. According to the Court's well-established case-law, a rule is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities (see, among other authorities, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 143, ECHR 2012). Furthermore, a norm must be formulated with sufficient precision in order to enable persons to regulate their conduct. In fact,

individuals need to foresee, to a reasonable degree, the consequences which a given action may entail (see, among other authorities, *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 124, 17 May 2016; *Delfi AS v. Estonia* [GC], no. 64569/09, § 121, ECHR 2015; and *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 141). Foreseeability does not require that all the procedures regarding the application of a norm should be laid down in the text of the norm itself (see *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, § 94, 20 January 2020).

4. It is of the utmost importance that in examining an individual application brought under Article 34 of the Convention, the task of the Court is not to review domestic law in the abstract, but to determine whether the way in which it was applied to the applicant gave rise to a breach of the Convention (ibid., § 96). In my view, although the Grand Chamber eloquently laid down the general principles concerning the "prescribed by law" requirement under Article 10 of the Convention, its assessment based on those principles appears to be an abstract review of the constitutional amendment and Article 314 §§ 1 and 2 of the Criminal Code and, as such, contrary to our established case-law.

5. In view of the above, I will address the following points: (i) the foreseeability of the constitutional amendment, (ii) the question whether Article 314 §§ 1 and 2 of the Criminal Code as interpreted and applied in the applicant's case, satisfied the "quality of law" requirement, and (iii) the question whether the interference with the applicant's rights under Article 10 of the Convention was justified.

(i) As regards the constitutional amendment, I would reiterate at the outset that the Chamber in its judgment of 20 November 2018 has already examined, albeit under Article 5 § 1 of the Convention, the applicant's complaint that the constitutional amendment did not satisfy the "quality of law" requirement and declared that complaint inadmissible as being manifestly ill-founded. I would furthermore like to underline that the constitutional amendment in question was adopted on the basis of a large consensus in Parliament, including members of parliament belonging to opposition parties. Without prejudging and entering into a discussion about the substance of the constitutional amendment, it could be argued that it was a legitimate constitutional amendment adopted pursuant to Article 175 of the Constitution, which emphasises the importance of constituent power. It does not appear that there were any judicial findings showing that the amendment had been carried out in breach of the relevant constitutional and parliamentary procedures.

6. The Grand Chamber's examination regarding the constitutional amendment appears to be based on two pillars. Firstly, the majority held that the domestic courts had unjustifiably refused to examine whether the applicant's speeches were covered by the first paragraph of Article 83 of the Constitution, that is to say, whether the domestic courts' failure to examine

whether the applicant's statements fell within Article 83 § 1 of the Constitution was erroneous.[1] Secondly, the majority came to the conclusion that the constitutional amendment itself had had the effect of depriving the applicant of the protection afforded to him by the second paragraph of Article 83.

7. As regards the first point, which I consider to be inextricably linked to the content of the applicant's speeches, I have to underline that the domestic judicial authorities, namely the public prosecutors and judges, implicitly considered that the applicant could not benefit from the protection of his parliamentary non-liability under Article 83 § 1 of the Constitution. In my view, there was no element capable of providing a basis for finding that the domestic courts disregarded Turkish law and practice.

8. As regards the second point, namely whether the constitutional amendment of 20 May 2016 had the effect of depriving the applicant of the protection afforded to him, I would like to underline that it did not narrow down or alter the definition and general concepts of non-liability or inviolability. The constitutional amendment only amended the procedure governing the lifting of the immunities of members of parliament in respect of whom investigation reports had already been submitted to Parliament by the date of its adoption (see paragraph 137 of the judgment). Thus, it effectively entailed a change in the scope of the procedural safeguards regarding the lifting of immunities of members of parliament. While that fact was acknowledged by the majority, paragraph 268 of the judgment relies on it in order to conclude that "the amendment created a situation that was not foreseeable for the members of parliament concerned". I respectfully do not share the majority's approach in addressing the applicant's inability to benefit from certain procedural safeguards from the perspective of the foreseeability of the constitutional amendment. A distinction should have been made between the conformity of these safeguards with the Convention and the foreseeability of the constitutional amendment.

9. The majority do not appear to have sufficiently considered the issue as to whether the applicant could still have been prosecuted in accordance with Article 83 of the Constitution even in the absence of the constitutional amendment. In fact, the provisions concerning the non-liability and inviolability of members of parliament are still in force.

10. Although I have deep hesitations as to whether the foreseeability of a constitutional amendment can be considered in the same way as that of ordinary law, to my understanding it is difficult, if not impossible, to speak of the foreseeability of constitutional amendments without duly taking into

[1] Paragraph 1 of Article 83 of the Constitution reads as follows: "Members of the Turkish Grand National Assembly shall not be liable for their votes and statements in the course of the Assembly's work, for the views they express before the Assembly or for repeating or disseminating such views outside the Assembly, unless the Assembly decides otherwise at a sitting held on a proposal by the Bureau."

account the case-law criteria referred to above. In that connection, it is equally difficult to discern a causal link between the alleged failure of the domestic courts to examine whether the applicant's speeches were protected under the first paragraph of Article 83 of the Constitution and the foreseeability of the constitutional amendment. I cannot agree that a development – that is to say, the domestic courts' alleged failure to examine the applicant's claims under Article 83 § 1 of the Constitution – which took place after the constitutional amendment could have had an effect on its foreseeability.

11. Under these circumstances, I am respectfully unable to agree with the majority's line of reasoning, which, in my opinion, has lowered the Court's threshold in its examinations concerning the foreseeability of constitutional amendments.

(ii) As regards the question whether the interpretation and application in the applicant's case of the provisions governing terrorism-related offences satisfied the "quality of law" requirement, it transpires from the case file that the applicant did not explicitly maintain before the Grand Chamber his complaint regarding this point under Article 10. Therefore, I do not consider that the separate examination of this question was warranted by the applicant's submissions.

12. It is true that the majority stressed in paragraph 275 of the judgment that they were "mindful of the difficulties linked to preventing terrorism and formulating anti-terrorism criminal laws. The member States inevitably have recourse to somewhat general wording, the application of which depends on its practical interpretation by the judicial authorities." However, I am not sure whether the majority's conclusion in the present application could easily be regarded as being mindful of the difficulties linked to terrorism. The finding that the interpretation and application of terrorism-related offences were not prescribed by law is a profoundly serious one which must be supported by equally serious and convincing reasons, as well as an explicit claim from the applicant, which, in my view, was not the case in the present application.

13. I respectfully disagree with the majority's conclusion that "the interpretation and application in the applicant's case of the provisions governing terrorism-related offences" posed a problem in respect of the quality of the law in question. I believe that it should have been necessary to ascertain the scope of the examination of legality carried out by our Court as referred to above. That brings me to the last part of my examination under Article 10.

(iii) As I explained above, I would prefer to have examined the question whether the interference in the present case was necessary in a democratic society. In that connection, I am prepared to accept that the legitimate aims pursued by the interference were those of combating terrorism and protecting national security and public safety, in pursuance of Article 10. As for necessity, it is true that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of

public interest. In fact, interferences with the freedom of expression of an opposition member of parliament call for the closest scrutiny on the part of the Court (see *Castells v. Spain*, 23 April 1992, § 42, Series A no. 236). However, I harbour doubts that the applicant's impugned speeches cannot be viewed as glorifying and praising the use of violence and can be seen as entirely peaceful and as contributing to a debate in the public interest, regard being had in particular to the tense situation prevailing in the region at the time as a result of the armed clashes between the Turkish security forces and the PKK (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV). At this juncture, I would also like to point out that the criminal proceedings against the applicant are still pending before the domestic courts and, in accordance with the principle of presumption of innocence, I shall exercise caution so as not to prejudice their outcome in any way.

14. In view of the above, I conclude that the interference with the applicant's rights was prescribed by law, as being both foreseeable and compliant with the "quality of law" requirement, and was necessary in a democratic society as corresponding to a pressing social need and proportionate to the legitimate aim pursued.

IV. AS REGARDS THE COMPLAINT UNDER ARTICLE 5 § 1 OF THE CONVENTION

15. The applicant complained of the lack of reasonable suspicion against him, both during the initial period immediately after his arrest and during the subsequent periods when his pre-trial detention had been authorised and extended by the judicial authorities. On this point, I am respectfully not able to follow the majority's conclusion regarding the alleged lack of reasonable suspicion under Article 5 § 1 (c) of the Convention. I see no reason requiring the Grand Chamber to depart from the Chamber's decision on this issue, which was based on the Court's well-established case-law (see, among many other authorities, *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, Series A no. 182; *O'Hara v. the United Kingdom*, no. 37555/97, ECHR 2001-X; and *Çiçek v. Turkey* (dec.), no. 72774/10, § 62, 3 March 2015). I specifically refer to the Court's case-law to the effect that Article 5 § 1 (c) of the Convention does not presuppose that the investigating authorities have obtained sufficient evidence to bring charges at the time of arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A, and *Yüksel and Others v. Turkey*, nos. 55835/09 and 2 others, § 52, 31 May 2016). In this context, the Court must examine, as the Constitutional Court and the Chamber did, all the relevant evidence in the criminal case file that may confirm or dispel the concrete suspicion grounding the initial detention, and

it cannot be bound only by the evidence adduced at first instance (see, *mutatis mutandis*, *Yüksel and Others*, cited above, §§ 51-59, *Tekin v. Turkey* (dec.), no. 3501/09, §§ 55-62, 18 November 2014; and *Metin v. Turkey* (dec.), no. 77479/11, §§ 53-64, 3 March 2015).

16. As to the substance of the complaint under Article 5 § 1 of the Convention, I fully endorse the Chamber's findings in its judgment of 20 November 2018. In this regard, I would like to note three items of evidence in particular, as can be seen from the file: the applicant's statements at a demonstration that they would put up a sculpture of the leader of the PKK and his speech at the offices of a political party on 21 April 2013 in which he referred, *inter alia*, to the first terrorist attacks by the PKK as the "coup in 1984" and the "resistance in Şemdinli [and] Eruh" (see paragraph 79 of the judgment); the transcripts of conversations among leading members of the PKK and between them and the applicant (paragraph 79 of the judgment); and the tweets published from the official HDP Twitter account on 6 October 2014 (see paragraph 20 of the judgment). In the light of the evidence, the facts, and the requirements of Article 5 § 1 of the Convention as to the level of factual justification needed at the stage of suspicion, I consider that the applicant can be said to have been arrested and detained on "reasonable suspicion" of having committed a criminal offence.

17. In the light of the foregoing, I believe that the national authorities had sufficient grounds to conclude that there was a reasonable suspicion that the applicant had committed an offence. Accordingly, I am of the opinion that there has been no violation of Article 5 § 1 of the Convention.

V. AS REGARDS THE COMPLAINT UNDER ARTICLE 5 § 3 OF THE CONVENTION

18. As I am of the opinion that the applicant could no longer claim to be the victim of a violation of Article 5 § 3, I voted against the findings of the majority in relation to the merits of the complaint under that provision.

VI. AS REGARDS THE COMPLAINT UNDER ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION

19. Regarding the applicant's complaint under Article 3 of Protocol No. 1 to the Convention, I concur with the finding that, in the particular circumstances of the present case, there has been a violation of that provision in so far as the competent magistrates and assize courts did not assess the applicant's allegations that his continued detention was unreasonable on account of his status as a member of parliament and the co-chair of a political party. On this point, I agree with the conclusions of the majority, which were also taken into consideration, albeit under Article 5 § 3, by the Constitutional Court in its second judgment.

20. Nevertheless, I respectfully dissociate myself from certain parts of the reasoning, which concern the references made to the findings of violations of Article 10 and Article 5 § 1 of the Convention in the majority's assessment under Article 3 of Protocol No. 1 (see, in particular, paragraph 394 of the judgment).

VII. AS REGARDS THE COMPLAINT UNDER ARTICLE 18 OF THE CONVENTION

21. I voted against the finding of a violation of Article 18 in conjunction with Article 5 of the Convention because I have serious doubts as to whether such a finding is compatible with the Court's case-law (see, in particular, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017), considering the circumstances of the present case.

22. It appears from the Court's case-law that in cases where there is a complaint under Article 18 in conjunction with Article 5, the Court first examines whether the deprivation of liberty of the applicant pursued an aim that is compatible with the Convention (see *Rasul Jafarov v. Azerbaijan*, no. 69981/14, §§ 153-63, 17 March 2016, and *Khodorkovskiy v. Russia*, no. 5829/04, §§ 254-61, 31 May 2011). Second, the Court examines whether there is proof that the authorities' actions were actually driven by improper reasons and it must base its decision on "evidence in the legal sense" in accordance with the criteria laid down by it in the *Merabishvili* judgment (cited above, §§ 309-17), and its own assessment of the specific relevant facts (see my dissenting opinion in *Kavala v. Turkey*, no. 28749/18, 10 December 2019).

23. As regards the first limb, for the reasons set out above, I am of the opinion that the applicant could be said to have been detained on "reasonable suspicion" of having committed a criminal offence. In other words, the applicant was deprived of his liberty for a purpose prescribed by Article 5 § 1 (c) of the Convention. Therefore, I cannot share the majority's view that "the purposes put forward by the authorities for the applicant's pre-trial detention were merely cover for an ulterior political purpose". In that connection, I would first point out that Turkish law has a higher standard of protection concerning the "reasonable suspicion" criterion under Article 5 § 1.[1] In the present case, the national courts, including the Constitutional Court, examined the applicant's detention and held that there were sufficient grounds for a strong suspicion that he had committed an offence. In other

[1] Pursuant to paragraph 3 of Article 19 of the Constitution, individuals may be detained provided that there is a strong suspicion that they have committed an offence. In accordance with Article 100 of the Code of Criminal Procedure, an individual may be placed in pre-trial detention where there is concrete evidence giving rise to a strong suspicion that she or he has committed an offence and where the detention is justified on one of the grounds laid down in the same provision.

words, they ascertained the existence of a higher level of suspicion than that of "reasonable suspicion" required under Article 5 § 1 (c). Secondly, the fact that the majority have reached the aforementioned view after meticulously subjecting the grounds of the applicant's detention to scrutiny implies that those grounds were not devoid of any basis or otherwise fabricated. I would like to point out that the Chamber also carried out an examination of the applicant's detention and concluded that "... there was sufficient information in the criminal case file to satisfy an objective observer that the applicant might have committed at least some of the offences for which he had been prosecuted" (see paragraph 169 of the Chamber judgment). Having regard to these factors, I am not entirely convinced that cogent reasons were put forward to justify a departure from the domestic courts' and Chamber's conclusions as regards the "reasonable suspicion" requirement under Article 5 § 1 (c). These circumstances have led me to conclude that the applicant's detention was in pursuance of a legitimate aim that was prescribed by the Convention. It is thus difficult for me to accept the majority's view that the applicant's detention was a mere cover for an ulterior purpose.

24. As regards the second limb, I consider that improper reasons were not present in the instant case, in view of the following factors.

25. Firstly, the applicant's main complaint is that he and other persons from his party were specifically targeted because of their position in the Turkish political scene. However, it transpires from the materials submitted by the parties that there were members of parliament from other political parties who were also subject to criminal proceedings (see paragraphs 57 and 58 of the judgment). Therefore, it cannot easily be said that the domestic judicial authorities specifically targeted certain members of parliament.

26. Secondly, it primarily falls within the authority of the national judiciary to ensure that, in any given case, the pre-trial detention of an accused person is imposed with the utmost care and in accordance with the requirements of the Convention and the Court's relevant case-law. In this connection, it appears from the case file that the applicant's pre-trial detention was examined on several occasions by the domestic judges, either of their own motion or at the request of the applicant. In fact, the domestic courts examined the question of the applicant's detention regularly and in a speedy manner from 4 November 2016 onwards. Furthermore, in a judgment of 9 June 2020, the Constitutional Court unanimously held that there had been a violation of Article 19 of the Constitution, finding that in extending the applicant's pre-trial detention, the national judicial authorities had failed to put forward relevant and sufficient reasons in respect of his arguments concerning his right to stand for election and to carry out political activities. Nevertheless, the fact that certain aspects of the judicial review of the applicant's detention were found to have disclosed a breach of Article 19 of the Constitution is not sufficient in itself to warrant the conclusion that the applicant was detained for purposes other than those provided for by the

Convention. Moreover, in a judgment of 11 July 2018, the applicant was awarded compensation under Article 141 of the Code of Criminal Procedure. Accordingly, I am unable to conclude that the judicial authorities acted improperly and in blatant disregard of the Convention.

27. Furthermore, I respectfully disagree with the majority when it comes to certain passages in their reasoning under Article 18 of the Convention.

28. Firstly, I must point out that the structure of the Supreme Council of Judges and Prosecutors is irrelevant for the purposes of the Grand Chamber's examination under Article 18 of the Convention (see paragraph 434 of the judgment). In fact, the majority criticise the changes to the structure of that body which were brought about by a referendum which was accepted by a sovereign nation, and they fail to assess how those changes had any bearing on the applicant in the present case or to explain the relevance of this point. In the absence of a causal link between the new structure and the purported ulterior purpose, this point amounts to an *in abstracto* examination of the constitutional amendments laid down in the referendum. Thus, I am not sure whether, in the present case, there was any call for the Grand Chamber to delve into this matter of its own motion.

29. Secondly, whilst the Grand Chamber acknowledged that it did not have access to the content of the criminal proceedings against the other detained members of parliament, it held, in the light of the reports and opinions of international observers, that the main reason for depriving them of their liberty lay in their political speeches, concluding in that respect that the applicant's detention was not an isolated case (see paragraph 428 of the judgment). At this junction, I must underline that the cases of some of those members of parliament are currently pending before our Court. Thus, the line of reasoning accepted by the majority goes, in my humble opinion, beyond the legal questions the Grand Chamber was called upon to examine.

30. In view of the foregoing considerations, I believe that there is no sufficient evidence that is capable of supporting the applicant's allegation that the entire judicial mechanism of Turkey acted in line with the political agenda by instituting criminal investigations in respect of him. Inasmuch as the majority's line of reasoning hinges on the applicant's second detention, which was, in their view, based on "the same factual context", namely the 6-8 October events that had also formed part of the factual grounds for his first detention, I would like to make the following observations (see paragraphs 432-33 and 440-42 of the judgment).

31. Although I have addressed certain aspects of this issue in my separate opinion under Article 46 of the Convention, its importance merits a reiteration of part of that analysis. Firstly, I must point out again that the legal and factual questions regarding the applicant's second detention are the subject of an individual application he lodged with the Constitutional Court; hence this issue is currently pending before the domestic authorities. Secondly, in the present case, the majority assessed the complaint under Article 18 in

conjunction with Article 5 of the Convention. However, under Article 5 of the Convention, the subject of the Grand Chamber's examination was the applicant's first detention, from 4 November 2016 to 7 December 2018, and not his second detention, which was ordered on 20 September 2019 and is still ongoing. Whilst the majority's approach might arguably imply that the applicant's second detention is in effect the continuation of his first detention, given that both detention orders were purportedly based on the same factual context, I am unable to agree with that view for the reasons that I indicated in my separate opinion under Article 46 of the Convention, and also for the following reasons. It is true that circumstantial evidence which is information about the primary facts, or contextual facts or sequences of events, may be taken into account in assessing the general and wider context when the Court examines complaints under Article 18 (see *Merabishvili*, cited above, § 317). However, where the circumstantial evidence takes the form of legal questions relating to the applicant, the Court's approach may be different. Indeed, in *Navalnyy v. Russia* ([GC], nos. 29580/12 and 4 others, § 171, 15 November 2018), the Court took into account the two sets of criminal proceedings contemporaneous to the criminal proceedings against the applicant in its assessment under Article 18 (regarding the general context of the case) by referring to previous judgments in which it had established the relevant facts and determined the legal questions raised in those two sets of proceedings (reference was made to *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, §§ 116-19, 23 February 2016, and to *Navalnyye v. Russia*, no. 101/15, §§ 83-84, 17 October 2017).

32. In the light of the above, the applicant's second detention in the present case is not, from my perspective, merely circumstantial evidence; it is a legal question pending before the domestic courts and does not form part of the Court's examination under Article 5, in conjunction with which the complaint under Article 18 was examined. Under these circumstances, the majority's approach may risk widening the scope of the case before the Grand Chamber in an unprecedented way and I am hesitant to accept that position. In addition to such a novel approach, the majority also went on to examine the grounds of the applicant's second detention not under Article 5 (owing to the fact that the second detention was not included in the scope of its examination under that Article), but under Article 18 of the Convention, only to conclude that "... the domestic authorities do not appear to be particularly interested in the applicant's suspected involvement in an offence allegedly committed between 6 and 8 October 2014, some five years previously, but rather in keeping him detained, thereby preventing him from carrying out his political activities" (see paragraph 433 of the judgment). With all due respect, I remain sceptical as to whether such a finding, stemming from a legal problem that is pending before the domestic courts and not covered by the complaint under Article 5, is in conformity with the principle that the Court

must base its decision on evidence in the legal sense. Therefore, I can neither accept the majority's approach nor their conclusion.

33. For the reasons set out above, I believe that Article 18 of the Convention in conjunction with Article 5 has not been violated in the present case.