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

SECOND SECTION

CASE OF YASAK v. TÜRKİYE

(Application no. 17389/20)

JUDGMENT

Art 7 • *Nullum crimen sine lege* • *Nulla poena sine lege* • Conviction for membership of an armed terrorist organisation on account of activities carried out in secret by the applicant, as a senior officer of the organisation • Case differed from *Yüksel Yalçınkaya v. Türkiye* [GC] • Offence having a foreseeable legal basis when it was committed • Individualised identification by the domestic courts, through solid supporting evidence, of the material and mental elements of the offence • Foreseeable and not expansive interpretation and application of the criminal-law statute in question
Art 3 (substantive) • Applicant's conditions of detention were not inhuman or degrading

Prepared by the Registry. Does not bind the Court.

STRASBOURG

27 August 2024

THIS CASE WAS REFERRED TO THE GRAND CHAMBER WHICH DELIVERED JUDGMENT IN THE CASE ON 05/05/2026

This judgment may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Yasak v. Türkiye,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Arnfinn Bårdsen, *President*,
Jovan Ilievski,
Saadet Yüksel,
Lorraine Schembri Orland,
Frédéric Krenc,
Diana Sârcu,
Gediminas Sagatys, *judges*,
and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the application (no. 17389/20) against the Republic of Türkiye 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 Şaban Yasak (“the applicant”), on 2 April 2020,

the decision to give notice to the Turkish Government (“the Government”) of the complaints concerning Articles 3 and 7 of the Convention and to declare inadmissible the remainder of the application,

the parties’ observations,

Having deliberated in private on 9 July 2024,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the applicant’s conviction for membership of an armed terrorist organisation described by the Turkish authorities as the “Fetullahist Terror Organisation/Parallel State Structure” (*Fetullahçı Terör Örgütü / Paralel Devlet Yapılanması*, hereinafter referred to as “the FETÖ/PDY”). It raises issues under Articles 3 and 7 of the Convention.

FACTS

2. The applicant, Mr Şaban Yasak, is a Turkish national who was born in 1987. On the date that the present application was lodged he was detained in the Çorum L-type prison. He was represented before the Court by Mr İ. Makas, a lawyer practising in Ankara.

3. The Turkish Government (“the Government”) were represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice.

4. The case is one of many sets of criminal proceedings brought against presumed members of the FETÖ/PDY, an organisation considered by the authorities to be behind the coup attempt that took place in Türkiye on 15 July 2016 (for more details about this event and the measures subsequently taken

by the national authorities, see *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, §§ 10-17, 26 September 2023).

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant's prosecution

1. Criminal investigations

5. In 2015 the Çorum prosecutor's office opened a criminal investigation into the activities carried out by the FETÖ/PDY ("the organisation") in Çorum Province. As part of that investigation, a report was drawn up on 11 July 2016 by police officers from the anti-terrorism directorate. The report was based, in particular, on analysis of the HTS ("Historical Traffic Search") records of the GSM line used by E.B., who was suspected of being the head, in Çorum Province, of a secret structure within the organisation, responsible for recruiting and training pupils and students. The report specified that E.B. and his spouse G.B. had been in contact with numerous individuals belonging to this structure, one of whom was the applicant.

6. Following the attempted coup of 15 July 2016, as part of the criminal investigations opened by the Çorum prosecutor's office into the organisation's activities in that province, on 7 December 2016 the police took statements from B.A., who was suspected of membership of the FETÖ/PDY. In recorded statements, given in the presence of his lawyer, B.A. indicated that he wished to benefit from the "active repentance" provision in Article 221 of the Criminal Code, which provides for the possibility of a reduction of sentence in exchange for information. He stated as follows. He had carried out activities within the organisation and, as part of those activities, had known numerous individuals in the secret structure responsible for the organisation's pupils in Çorum Province. He submitted that the organisational hierarchy of this structure was as follows: the most senior individual was the chief regional student supervisor ("*Büyük Bölge Sorumlusu*"); he was responsible for the principal regional student leaders ("*Büyük Bölge Talebe Mesulü"*), who were in turn responsible for the regional student leaders ("*Bölge Talebe Mesulleri*"); lastly, the latter individuals led a network of "older house brothers" ("*Ev abileri*"), referring to residences in which candidates for civil-service entry competitions or students from various universities were housed.

With regard to the applicant, B.A. stated as follows:

> "Recep or Şaban – I know for sure that one of these was his code name. He was 26 or 27, measured 1 m 75 or 1 m 80, had light skin and brown hair, and walked with a slight limp. He was continuing his studies in the economics and administrative sciences faculty, where he had obtained his degree. I know that he came from Kayseri. I learned that he was one of the principal regional student leaders ('*Büyük Bölge Talebe Mesulü*'). At the university residence camp, he was responsible, with the regional student leaders, for 90 to 100 students: he planned the organisation's activities and scheduled the

> conversation meetings (‘*sohbet*’), which were intended to inform students about the organisation’s ideology. I heard it said that in 2010 and 2011 he asked the *imam* (‘responsible’) of the house and my friends about me. I understood that he was thinking about appointing me as an “senior house brother’) (‘*ev abisi*’)...”

7. The identification protocol drawn up by police on 8 December 2016 indicates that B.A. stated that he could identify “Recep or Şaban” from photographs, and that the individual on those photographs was in fact the applicant.

8. On 10 January 2017, still in the context of the criminal investigation by the Çorum prosecutor’s office into the organisation’s secret structure, statements by Y.B., who also enjoyed “active repentance” status, were recorded in the presence of his lawyer by the public prosecutor. Y.B. stated that he had had ties to the organisation since 2007 and provided very detailed information about its hierarchical structure, and about its activities in Çorum Province to recruit and train pupils in line with the organisation’s ideology. He stated, in particular, that he had initially been appointed as a house imam (“*ev imamı*”, a house leader). He added that between 2010 and 2014 he had stayed in Çorum; in 2010 and 2011 he had been a regional leader with responsibility for six student houses belonging to the organisation, before being appointed as a main regional student leader. In this connection, he noted that there had been four other regional student leaders, including the applicant. He also stated that he had been responsible for certain students in the police and army academies. He had begun working in the Çorum private tutoring company (*Çorum Eğitim Hizmetleri Anonim Şirketi*) in October 2014, but while employed there his real task had been to look after the covert structure responsible for the organisation’s pupils. He also stated that he had used applications such as ByLock and Kakao Talk to communicate with other members of the organisation. He had been appointed as leader with responsibility for judges in 2015 and 2016 for Konya Province and had been responsible for eleven judges and prosecutors in the so-called T4 and T5 groups. He claimed to have cut his ties with the organisation after the attempted coup of 15 July 2016. He also stated that he had not been aware that the organisation was planning the attempted coup on 15 July 2016, but that during the week in question he had received prayers frequently via the messaging application ByLock and been urged to recite them.

9. The identification protocol drawn up by police on 13 January 2017 indicates that Y.B. stated that he could identify the applicant in photographs.

10. On 3 February 2017, again in the context of the same criminal investigations, the police took statements from A.B. in the presence of his lawyer. A.B., who was suspected of membership of the organisation, also benefited from the “active repentance” provision. He in turn provided very detailed information about the hierarchical structure to which he had belonged and the activities conducted in Çorum Province to recruit and train pupils. With specific regard to the applicant, A.B. indicated that he used the

code name "Recep" and had the following responsibilities: initially a house imam in Çorum Province before 2011, he had then been appointed regional student leader in 2011-2012; he became a principal regional leader in 2012-2013; lastly, he had been appointed as a regional student supervisor in 2013-2014, and was responsible for between 20 and 25 houses belonging to the organisation. According to A.B., he had assumed this latter responsibility jointly with the applicant in in 2013 and 2014 and, with him, had carried out activities for the organisation under the authority of a certain Çetin (pupil adviser within the organisation); at the end of 2014, Çetin had asked him to go to Ankara to prepare the civil-service entrance examination. He added that his social-security contributions had been paid between 2013 and 2015 by the Çorum private tutoring company and that, on the instructions of his hierarchical superior within the organisation, he had paid 10,000 Turkish lira (TRY) to Bank Asya, in order to support that entity.

In his statements, A.B. also provided detailed descriptions of the duties and activities of the persons who belonged to the organisation's secret structure. One of the main activities of the structure's leaders, which was responsible for all matters concerning pupils and students, involved identifying and training brilliant individuals, so that they could subsequently be placed in important public institutions such as the army, the national police force and the gendarmerie. A.B. also said that he had downloaded ByLock and used other applications, such as Kakao Talk, for communicating within the organisation.

11. The identification protocol drawn up by police on 11 February 2017 indicates that A.B. stated that he could identify the applicant on the basis of photographs.

2. *The applicant's arrest*

12. On 26 January 2017, on an order from the Çorum magistrate's court, the police conducted a search of the applicant's home and seized five mobile telephones, two hard drives, three laptops, a camera and other items.

13. On 30 January 2017 the applicant went to the Nevşehir police station and handed himself in. He was taken into police custody on suspicion of membership of an illegal organisation.

14. On the same day the applicant was examined by a doctor at the Nevşehir public hospital. The medical report indicated no trace of violence.

15. Also on 30 January 2017, after the medical examination, the applicant was taken to Çorum and placed in police custody in the premises of the drugs unit of the Çorum provincial police.

16. On 1 February 2017 the applicant met his lawyer in the premises of the anti-terrorist directorate for Çorum Province.

17. On the same date the police recorded a statement made by the applicant in the presence of his lawyer. He said that he did not recognise the witnesses who had accused him of membership of the organisation, and

denied having carried out any activity for it. He had taken part in a few dinners and discussion meetings organised by entities linked to the organisation, but he denied having held a position within its secret structure or having conducted any activity whatsoever on its behalf.

18. On 6 February 2017 the applicant appeared before the Çorum magistrate's court, which ordered that he be placed in detention pending trial for the offence of membership of an illegal organisation. In his statement to the court, the applicant retracted the statements he had made to the police.

19. On 11 February 2017, still in the context of the criminal investigation opened by the Çorum prosecutor's office into the organisation's covert structure, statements by H.E. were recorded by the police in the presence of his lawyer. H.E. stated, in particular, that he had been involved with the organisation since 2000 and had worked as a teacher in its private tutoring centres. He specified that he had known the applicant as one of the regional pupil supervisors. He added that the Çorum private tutoring company belonged to the organisation. According to the identification protocol drawn up by police on 11 February 2017, H.E. said that he could identify the applicant on the basis of photographs.

20. On 30 January and 1, 3 and 6 February 2017 the applicant underwent several medical examinations. The corresponding medical reports indicate no trace of physical violence against him.

21. On 13 February 2017 the details of the Bank Asya account held by the applicant were added to the investigation file.

22. On 19 February 2017, in the context of the same criminal investigation opened by the Çorum prosecutor's office into the organisation, the police took statements from R.C. in the presence of his lawyer. R.C. stated, in particular, that he had known the applicant as a supervisor of the organisation's student residences, and that the applicant had arranged visits to other towns and cities as part of the organisation's activities.

23. According to a report by the Çorum General Directorate of Security. dated 19 June 2017 and entitled "Research results on ByLock use", which was added to the case file, the applicant did not use this messaging application. However, another report, drawn up on the same date by the same directorate, contained information about the use of the ByLock messaging application by M.Y., the applicant's brother.

3. *The bill of indictment*

24. On 4 August 2017 the Çorum prosecutor's office filed a bill of indictment against the applicant with the Çorum Assize Court. He was accused of membership of the FETÖ/PDY, and of having conducted activities on its behalf in Çorum Province both in 2016 and previously, offences that fell within the scope of Article 314 § 2 of the Criminal Code. In the bill of indictment, the prosecutor's office first provided general information about the FETÖ/PDY; it then analysed that organisation's acts in the context of the

offence proscribed under Article 314 § 2 of the Criminal Code; lastly, it set out in detail the specific evidence against the applicant. The information on these three points, as presented in the bill of indictment, may be summarised as follows.

25. The prosecutor's office noted first that the FETÖ/PDY was an atypical or *sui generis* armed terrorist organisation which used religion as a front and a means to attain its non-religious earthly purposes. It acted in line with the instructions of the organisation leader, having the intent of establishing a new political, economic and social order. To that end, it primarily aimed at having power and acted with great secrecy with a view to being strong and establishing a new order. It used codenames, special communication channels, and money from unknown sources. It harboured the aim of taking over all constitutional institutions of the Republic of Türkiye by using its human and financial resources. The aim of this organisation was not to come to power through legitimate methods, but to dissolve parliament, the government and the other constitutional institutions by using force and violence; according to the prosecutor's office, this had been demonstrated by the attacks carried out against several symbolic State buildings, including the Parliament building and the presidential compound, with heavy weaponry.

26. The prosecutor's office then provided the following clarifications concerning the FETÖ/PDY's structure. The organisation's secret hierarchy was made up of seven layers (for a detailed description of the hierarchy, see *Yüksel Yalçınkaya*, cited above, § 162). The most eminent layer, the seventh, consisted of seventeen people chosen directly by the leader of the organisation. It was possible to move from one layer to another, but transfers above the fourth layer were determined by the leader. Moreover, the organisation had been careful to observe cell-type horizontal structuring in order not to be discovered and to prevent the State from deciphering the organisational structure. The prosecutor's office also noted that the organisation, which had organised itself in the operative units of the Security Directorate and the TAF, instrumentalised the oppression and intimidation emanating from those authorities to use the force and violence inherent in the [aforementioned bodies]. For the prosecutor's office, the organisation members' capacity to have recourse to arms as needed was essential, and sufficient, for the constitution of the offence of "armed terrorist organisation". During the coup attempt of 15 July 2016, weapons had been used by the members of the organisation, who appeared to belong to the army but who acted in line with the orders and instructions of the organisation leader, as a result of which many civilians and public officials had been martyred. Noting in particular that certain members of the organisation were employed in State bodies possessing the power to use arms, and would not hesitate to use those arms if instructed to do so by the hierarchy of the organisation, the prosecutor's office found it self-evident that the FETÖ/PDY was an armed terrorist organisation within the meaning of Article 314 of the Criminal Code.

27. According to the prosecutor's office, in order to achieve its objectives the organisation initially focused, first, on increasing its support base – particularly among students, through the "houses of light" (*ışık evleri*) allocated to them, and which were referred to in the bill of indictment as the organisation's "cells", and through private tutoring centres (*dershane*) – and, second, on infiltrating public institutions. After completing this mission of infiltrating public institutions, the organisation prioritised its educational goals, while conducting other clandestine activities. From an economic perspective, the organisation also started operating in this phase like a holding company that connected companies. Thus, it founded a bank and began operating in the health, finance, transport and media sectors, in addition to its presence in the education field.

28. As to the constituent elements of the alleged offence, the prosecutor's office presented them as follows. In the offence of membership of an armed terrorist organisation as defined by Article 314 § 2 of the Criminal Code, the designation "armed" was not a condition that was required in respect of all presumed members of the organisation, but instead to the organisation as such. Thus, in order to ascertain whether an illegal organisation was armed, the question was not whether all of its members were armed, but rather whether the organisation was sufficiently armed to commit the offences imputed to it. The prosecutor's office also stated that the FETÖ/PDY had been set up to conduct activities aimed at dismantling the unity and integrity of the State, undermining the State's authority and overthrowing the constitutional order. According to the prosecutor's office, any person who, knowingly and willingly, became a member of such an organisation, with awareness of its aims and methods, was to be considered as a member of a terrorist organisation. For a person to be convicted of the offence of membership of an armed terrorist organisation, he or she must have intentionally participated in the hierarchy of an organisation, embracing its end goals and activities; conviction also required a continuous, diversified and uninterrupted link to the organisation, as well as concrete acts by the individual in question.

29. After specifying the domestic legislative provisions governing the notions of "organisation" and "terrorism", the public prosecutor's office noted that three elements had to be present for a structure to be characterised as a "terrorist organisation", namely (i) an ideology or aim as set out in section 1 of the Prevention of Terrorism Act (Law no. 3713); (ii) an organised structure as per Article 220 of the Criminal Code, and (iii) the fact of resorting to force and violence in order to reach its aims. Submitting, first, that the organisation was very hierarchical in structure and noting the nature of the aim pursued by it and the continuity of its actions to achieve its objectives, and, secondly, that the organisation had had to resort to force and violence for the purpose of achieving the objectives listed above, and lastly that one of the most important acts in this respect had been the attempted coup launched

by the FETÖ/PDY on 15 July 2016, the prosecutor's office concluded that the FETÖ/PDY was an organisation that possessed the characteristics of a terrorist organisation.

30. With regard to the evidence against the applicant, the public prosecutor's office noted: (a) the statements made by B.A., Y.B., A.B. and H.E. during the criminal investigation, which established that the applicant was conducting activities, under a code name, to recruit and disseminate the organisation's ideology, as a student leader with responsibility for Çorum Province within the organisation's secret structure; (b) an analysis of the HTS ("Historical Traffic Search") records, which showed that the applicant had held telephone conversations with E.B., who was under criminal investigation on the same charge; (c) bank statements from the account opened by the applicant with Bank Asya, which showed the deposit of a given sum in January 2014; (d) and, lastly, the payment of the applicant's social-security contributions by a private company affiliated to the organisation. The prosecutor's office concluded that, in the applicant's case, having regard to the continuity, diversity and intensity of its activities as set out above, the offence of membership of an armed organisation as defined in Article 314 § 2 of the Criminal Code had been made out.

4. *Proceedings before the Çorum Assize Court*

31. On 23 August and 27 November 2017 the assize court held hearings and supplemented the file. At the second hearing, the applicant filed defence pleadings in which he denied all the accusations against him. In particular, he challenged the statements made by the prosecution witnesses and affirmed that he had held no hierarchical position of responsibility in the organisation's secret structure.

32. On 3 January 2018 police officers took statements from A.S., in the presence of his lawyer. A.S. indicated that the applicant had carried out activities within the organisation, under the authority of E.B., who had been the main regional leader of the organisation's secret structure.

33. On 12 February 2018 statements were taken from Y.B. by the Istanbul Assize Court, on commission, and included in the case file. Y.B. repeated the statements he had made at the criminal investigation stage (see paragraph 8 above) and said that the applicant had used the code name "Recep", held various leadership roles in the hierarchy of the secret structure responsible for the organisation's pupils, and had carried out activities on its behalf. Y.B. added that he had communicated with the applicant using the ByLock and Kakao Talk messaging services. With the applicant, he had downloaded the ByLock messaging application in December 2013 or January 2014. He also claimed that in 2013 he had participated, with the applicant, in trips to Kosovo and North Macedonia, in the context of visits that were organised by the organisation.

5. The applicant's conviction by the Assize Court

34. On 14 February 2018 the assize court held its third hearing. In the course of that hearing, the public prosecutor submitted that the information in the file was sufficient and that it was unnecessary to wait for statements to be taken from other witnesses; for their part, the applicant and his lawyer left the necessity of gathering additional evidence to the assize court's discretion. The assize court decided that the case could be decided on the basis of the file as it stood. The public prosecutor then presented his submissions on the merits of the case. Returning to the arguments developed in the bill of indictment, he sought the applicant's conviction for the offence with which he was charged. The applicant and his lawyer replied to the prosecutor's submissions. The applicant argued that the statements by the prosecution witnesses had been vague and abstract, and pleaded not guilty.

35. At the end of the hearing, the assize court convicted the applicant as charged on the basis of the evidence set out in the bill of indictment and sentenced him to six years and six months' imprisonment, pursuant to Article 314 § 2 of the Criminal Code.

36. In its judgment, the assize court made general remarks regarding the definition, types and components of a terrorist organisation. It then proceeded to examine, *inter alia*, the establishment, objectives, management and hierarchical structure of the FETÖ/PDY, as well as its financial structure and communication methods, largely along the same lines as the bill of indictment (see paragraphs 25-29 above). The fact that the State security institutions infiltrated by the FETÖ/PDY were armed and were authorised to use those arms was, in the assize court's view, a very important factor in demonstrating that the organisation was indeed armed and had a military tendency.

37. With regard to the structure and functioning of the organisation, the assize court, again largely in line with the bill of indictment, provided an overview in its judgment of the unlawful methods commonly employed by the organisation in order to achieve its ulterior motives, such as stealing university or civil-service entry examination questions for their supporters, or fabricating evidence that could result in prison sentences. Stressing that maintaining secrecy was the key to the organisation's functioning, the assize court quoted some statements by F. Gülen allegedly instructing his followers to act discreetly and keep a low profile until they reached "all the centres of power", which showed that the organisation had infiltrated all public institutions as a strategic means of seizing control over the constitutional order. The assize court further noted that the veil of secrecy had been lifted with the "bureaucratic coup attempt" of 17-25 December 2013, which had been intended to "redesign the government and politics". The assize court held that in view of its consequences, the 17-25 December events should be considered as a turning point for the recognition, at both State and public level, that the FETÖ/PDY was not an aid organisation or a movement at the service (*hizmet*) of the population, but a terrorist organisation.

38. In arguing why the FETÖ/PDY should be classified as an "organisation", the prosecutor's office noted factors such as its use of code names and private telecommunication channels; these were not, in its opinion, open and transparent methods of handling its affairs. It added that the organisation perceived the State as an adversary, and interpreted religious values in pursuance of its objectives, adapting this interpretation to the prevailing circumstances of the day. It noted that the hierarchical structure of the FETÖ/PDY was based on the system of imams, each of whom was responsible for assigned "units" in their respective geographical, sectoral and institutional fields. Led by F. Gülen as "the universal imam", the FETÖ/PDY had organised and spread at the grassroots level through continental, country, regional, provincial, district, trades, neighbourhood, and house imams. The organisation also designated imams in public institutions, such as ministries, local authorities and universities, and in the private sector.

39. The assize court also explained that the FETÖ/PDY had created, in Türkiye and abroad, structures such as foundations, associations, private schools, businesses, private tutoring centres, student residences, etc., and had conducted activities aimed at enabling it to achieve its ulterior goat through those structures. The assize court noted that the individuals who belonged to the organisation had been selected at a young age, trained in a forward-looking, systematic and programmed manner, and placed in public institutions.

40. In its judgment, the assize court also examined the legal framework governing armed terrorist organisations in Türkiye and laid out the main elements of the offence of membership of an armed terrorist organisation, referring to the relevant provisions of the Criminal Code and the Prevention of Terrorism Act (see paragraphs 75-78 below). It noted, in particular, that membership of an armed terrorist organisation required voluntary submission and subordination to the organisation's hierarchical structure, as well as an "organic link" to the organisation and participation in its activities. The organic link rendered the person available for commands and determined his or her hierarchical position and hence was the most important element in the offence of membership of an armed terrorist organisation. Mere sympathy for the organisation would not constitute an offence. It pointed out that the member should have established an organic link with the organisation and taken part in its activities. It explained that the activities of members of an armed terrorist organisation were clandestine activities aimed at achieving its goals, and that with a view to ensuring the clandestine nature of such activities, which consisted, *inter alia*, in recruiting and training new members and securing finance for these operations, the organisation's members had used code names and confidential channels of communication.

41. The Assize Court also reviewed the three factors that had to be present in the offence of "membership of an armed organisation" under Article 314 § 2 of the Criminal Code (see paragraph 29 above).

42. As to the evidence on which the applicant's conviction was based, the assize court considered that the statements obtained from witnesses at the various stages of the proceedings showed that the defendant was covertly carrying out activities within the organisation, and that, in particular, the statements by witnesses Y.B. and A.B. confirmed that he was one of the principal regional student leaders and had used the code name "Recep". It also considered it established that the applicant's social-security contributions had been paid by the *Çorum Egitim Hizmetleri Anonim Şirketi,* a company that was affiliated to the organisation, and that the HTS analysis carried out in the context of another criminal investigation showed that the defendant was in contact with members of the organisation.

43. Lastly, the assize court noted that although in December 2013 there had been no money in the applicant's bank account in Bank Asya, he had made a deposit of TRY 2,000 into his account in January 2014, an operation that, in the assize court's view, was carried out on the organisation's instructions, and had been intended to assist the bank in dealing with the economic difficulties faced by it after the events of 17-25 December 2013. This explained why the applicant's deposit into Bank Asya had been considered as an activity related to the organisation. The assize court noted that the organisation's members, and its leader, had themselves acknowledged that Bank Asya was affiliated to the FETÖ/PDY. The bank, which had been opened with a view to generating financial resources for the organisation, had been placed under surveillance by the Banking Regulation and Supervisory Authority (BDDK) after December 2013. When it was established that the bank was in difficulty and that money had been illegally transferred to companies which had close ties with the organisation, the organisation's members, on an instruction from the organisation's leader, had opened accounts or deposited significant amounts of money with it, especially at the beginning of 2014. Investigations had shown that during the period under examination the banking activities of those individuals had not been consistent with everyday life. It was for those reasons that the assize court held that these banking activities could be interpreted as an act carried out on the instruction of the organisation's leader, with a view to supporting a bank affiliated to the organisation. To justify its reasoning, the assize court referred to a judgment of the 16th Criminal Division of the Court of Cassation, delivered on 14 March 2016 (E. 2015/5452, K. 2016/1983), in which such conduct had been held to be a sign of financial support for the organisation.

44. In assessing the applicant's activities, the assize court noted that these actions had to be examined in their entirety, and the defendant's guilt determined in consequence. It argued that, in reasoning in this way, the requisite conditions of continuity, diversity and intensity had been met, and that it could be regarded as established that the defendant was a member of the organisation.

6. Witness statements obtained after the conviction judgment

45. On 26 February 2018 the Bulancak Criminal Court obtained statements, on commission, from B.A. He repeated the statements he had made during the criminal investigation (see paragraph 6 above), to the effect that the applicant, as one of the regional student leaders in the organisation's secret structure, had carried out activities on its behalf.

46. On 13 March 2018 the police recorded a statement made by A.M. in the presence of his lawyer. In it, A.M. said that he had seen a certain "Şaban" who spent time with M.; according to A.M., M. was one of those responsible for the organisation's activities in the province ("*İlci*"). A.M. also provided information about numerous members of the organisation and their activities.

47. On 21 April, 30 April, 10 May, 1 June and 4 July 2018 respectively, the police recorded statements given by junior officers I.K. and A.T., officer I.A., Ș.Y. (a student in the military academy), and O.K. (a student in Çorum), in the presence of their lawyers. I.K., A.T., I.A. and Ș.Y. gave detailed information about the activities carried out by the organisation in order to infiltrate the armed forces and claimed to have known the applicant as a member of the organisation's secret structure. I.K. stated, in particular, that he had submitted a candidature for the entrance examination to military academies and had been provided by members of the organisation with a copy of the examination paper, containing the questions that would be asked. Ș.Y. stated, among other things, that in 2013 the applicant had come to his residence and spoken to him about the organisation's intention to place its pupils in military academies. O.K. stated that during the second semester of the 2013-2014 academic year he had seen the applicant on several occasions in the student residence, and that the applicant held an important position in the organisation's hierarchy and had encouraged the students to enter military academies. All those witnesses identified the applicant from photographs.

48. On 8 August 2018 statements were taken from A.B., on commission, by the Istanbul Assize Court. A.B. repeated his statements at the criminal investigation stage (see paragraph 10 above), to the effect that the applicant had used the code name "Recep", had assumed various responsibilities as a house imam, regional student leader, principal regional student leader and a person responsible for university residences, and had carried out activities on behalf of the organisation.

49. According to the information available to the Court, the statements obtained on commission were added to the case file. In his memorials to the competent courts, the applicant challenged their contents and pleaded not guilty.

7. The applicant's appeal

50. In the meantime, on 9 March 2018, the applicant had lodged an appeal against the judgment of 14 February 2018. He argued that he was not a

ByLock user, and that the account held by him with Bank Asya had been opened for the purpose of receiving his salary payments. Although his social-security contributions had been paid by the *Çorum Eğitim Hizmetleri Anonim Şirketi*, this was simply because he had worked in a private tutoring centre that was managed by that company. The statements made by witnesses A.B and Y.B. were vague and untrue, and he could only be considered as a sympathiser of the organisation, not as one of its members. Since he had left Çorum in June 2014, the continuity of the charges against him had not been established.

51. In a judgment of 3 July 2018, the Samsun Regional Court had dismissed the appeal, holding that the first-instance court had not erred, either in its assessment or its conclusions.

8. The applicant's appeal on points of law

52. On 23 July 2018 the applicant appealed on points of law against the Samsun Regional Court's judgment. He essentially repeated, and developed, the arguments that he had already set out in the appeal against the assize court's judgment (see paragraph 50 above): in this connection, he denied having taken part in any activities, legal or illegal, of the FETÖ/PDY, and argued that his membership of that organisation had not been established on the basis of clear, definite and unambiguous evidence.

53. On 21 January 2019 the Court of Cassation upheld the applicant's conviction. In so doing, it held, in particular, that the relevant acts had been accurately classified and had corresponded to the offence set out in the law, and that both the verdict and sentence had been determined in an individualised manner.

9. Proceedings before the Constitutional Court

54. On 22 May 2019 the applicant lodged an individual application with the Constitutional Court, complaining, *inter alia*, that his conviction had been unlawful. To that end, he argued that the fact of punishing actions that were protected by the Constitution had been unforeseeable. In his submission, however, the attempted coup of 15 July 2016 had been the first act of violence attributed to the organisation, and there was no evidence that he had known of the organisation's existence prior to that event, so that he had been unaware of the FETÖ/PDY's "terrorist" nature; that circumstance ruled out the possibility of establishing the requisite criminal intent for the offence of membership of an armed terrorist organisation. As to the facts that he had worked in a tutoring centre, had had telephone conversations with a person working in the same centre and that his salary had been paid by the centre into his bank account at Bank Asya, these could not constitute punishable acts under the Criminal Code. The applicant further complained that the Turkish courts had lacked independence and impartiality, arising, in his view, from a

systemic disregard for the principle of the irremovability of judges. He also alleged, in a general manner, that there had been a violation of his right to a fair trial. Lastly, he complained of a violation of his rights to liberty, to private life and to education and stated that he had been the victim of discrimination.

In an annex submitted with the application form, he complained in general terms about the prison overcrowding to which he had been subjected while “in police custody and detention” and also about the conditions of his detention (he explained that he had been obliged to sleep on the floor, that access to the toilets and bathroom had been restricted, and that he had been unable for eight days to carry out ablutions prior to morning prayers); however, in the complaints part of the application form he did not make any specific complaint on those points.

55. In a summary judgment delivered on 25 February 2020, which was notified to the applicant on 28 February 2020, the Constitutional Court examined all the applicant’s complaints relating to the right to liberty and the right to a fair trial, namely the complaints alleging overall unfairness in the proceedings and the alleged restrictions on the rights of the defence. It dismissed the complaint alleging an overall lack of fairness in the proceedings as manifestly ill-founded; it likewise dismissed the complaint concerning the alleged restrictions on the rights of the defence, holding that the ordinary remedies had not been exhausted; lastly, it dismissed the complaint of a violation of the right to liberty on the grounds that this complaint had already been submitted in the context of another individual application.

10. Other evidence obtained after the applicant’s conviction

56. The Government also submitted a copy of a report prepared on 13 May 2019 following an examination of the mobile telephones, laptops and other digital evidence seized during the search of the applicant’s home on 26 January 2017 (see paragraph 12 above). This report indicated that the installer file for the ByLock messaging application had been discovered on one of those laptops, but it was not shown that the application had been installed.

B. The applicant’s conditions of detention and the related court proceedings

1. The applicant’s conditions of detention

a) Detention in police custody

57. Between 30 January and 6 February 2017 the applicant was placed in police custody in the premises of the Çorum provincial police drugs unit. According to the applicant, he was detained with 8 to 10 persons in an area of 7 sq. m., intended for a maximum of 2 to 3 persons. He described the conditions of his detention in police custody as follows: the quantity of food

had not been sufficient to meet the detainees' nutritional needs; the heating and ventilation in the relevant premises had been seriously defective and insufficient, amounting, in the applicant's view, to a breach of the requirement to protect suspects' mental and physical health; there had not been enough beds or suitable places for him and the other suspects detained in the same premises to sleep, with the result that he had been forced to sleep on a blanket on the floor; lastly, he had been subjected while in police custody to psychological violence by law-enforcement officers, consisting of insults, a ban on certain daily prayers and a refusal to allow him access to the toilet at certain times.

It appears from the case file that the applicant did not apply to any appeal body, either while in police custody or subsequently, to complain about these conditions of detention.

b) Pre-trial detention in Çorum Prison

58. After being placed in pre-trial detention on 6 February 2017, the applicant was taken to Çorum L-type prison ("Çorum Prison"), where he was assigned to Unit F-5 until 8 March 2018, and then to Unit F-10, where he continued to be detained until at least the date on which the present application was lodged. In L-type prisons, each unit has several dormitories, a common area, shared sanitary facilities and an outdoor courtyard.

59. With regard to the space available in Unit F-5 (Unit F-10 had the same configuration), the Government submitted that the communal living area in that unit measured 90 sq. m., the outdoor courtyard measured 64.36 sq. m., the bathroom was 6.42 sq. m., and the total area of the dormitories was 86.94 sq. m. Each unit had electrical facilities and heating. Each dormitory contained two double bunk beds, and there were a total of sixteen bunk beds per unit, which meant that in addition to the twenty-eight beds distributed across the seven individual dormitories, two bunk beds (four individual beds) had been installed in the common area. Each unit was equipped with two toilets, two showers and six washbasins, installed in the toilets and bathrooms. The total surface of the unit, all areas included, was 241.36 sq. m., and there were ten windows (90 x 110 cm), which could be opened. According to the Government, during the period of the applicant's detention in Unit F-5 its population was never lower than 37 persons, and at the most 47 persons, corresponding to personal space of 6.52 sq. m. and 5.13 sq. m respectively. The Government further pointed out that even when the occupancy rate was at its highest, each prisoner had on average 61 minutes per day to use the sanitary facilities.

60. As to the personal space available in Unit F-10, the Government explained that during the period in which the applicant had been detained there the unit's population had been a minimum of 27 persons and a maximum of 42 persons, with an average, over the relevant period, of 30 persons, corresponding to a personal space of 8.04 sq. m. The Government

noted that even when the occupancy rate was at its highest, each prisoner had 68 minutes per day to use the sanitary facilities. They also indicated that each unit had an independent outdoor courtyard, to which the doors were opened between 7 a.m. and 7.30 a.m., prior to the morning roll call, and were closed one hour before sunset or at the time of the evening roll call (7 p.m.), so that prisoners had access to an outdoor courtyard for 10 to 12 hours between May and October and for no less than 8 hours between November and April.

61. With regard to the hygiene conditions in Çorum Prison, the Government explained that prisoners were required to keep their units clean and that a certain quantity of basic cleaning products, such as bleach and dishwashing liquid, was provided free of charge for that purpose; prisoners had the possibility of buying additional cleaning products in the canteen. The Government also explained that rubbish was collected daily. With regard to the water supply, they submitted that each unit had 100 litres of hot water per person per week and 150 litres of cold water per person per day. Lastly, with regard to the activities available to the applicant, the Government stated that he had taken part in sports activities outside the unit (the frequency and duration of which the Government did not specify), but that no educational or cultural activities had been authorised.

62. The Government also provided photographs of the dormitories, sanitary facilities and communal areas in Unit F-10 and explained that, if the number of detainees exceeded the standard capacity, detainees were provided with mattresses, sheets and blankets. When the number of detainees decreased on account of releases or transfers, those prisoners sleeping on mattresses on the floor were reallocated to bunk beds.

63. The Government also explained that on 19 November 2020, 9 March 2021 and 7 June 2021 the applicant had been authorised to sit examinations for the university in which he was pursuing his higher education. Lastly, they pointed out that the applicant had received medical treatment on numerous occasions, either in the prison infirmary or in a public hospital after being transferred there.

64. The applicant did not dispute the information provided by the Government. He confirmed that each unit in Çorum Prison contained a 90 sq. m communal living space, seven separate dormitories with a total surface area of 86.94 sq. m, an outdoor courtyard of 64.36 sq. m, a bathroom of 6.42 sq. m and two toilets and two showers. He stated that he had been held in Unit F-5 for almost one year and in Unit F-10 for almost three years. Referring to a decision of the Management and Supervisory Board (see paragraph 65 below), he submitted that it was not possible to adapt the prison, which had initially been designed to accommodate a maximum of 477 prisoners, in such a way as to house between 1,950 and 2,000 prisoners. He explained, in particular, that after the attempted coup, in addition to the twenty-eight beds in the seven separate dormitories, two bunk beds had been installed in the common area to accommodate four additional detainees. He

claimed that he had been obliged to sleep on a mattress on the floor for a long period, on account of overcrowding and the fact that were not enough bunk beds.

65. The applicant also explained that, although the 64.36 sq. m courtyard had been an outdoor space where prisoners could move freely, it had nonetheless not been possible for him to walk around it normally, given the large number of prisoners who had to use the same space. As to the communal living area, he stated that this was a room, separated by doors from the outdoor courtyard and the dormitories, in which prisoners socialised, had breakfast, lunch and dinner and watched television, with the result that they spent the entire day there until bedtime; in his situation, however, the communal living area had been 90 sq. m for more than 35 prisoners, which corresponded to a personal space of well under 3 sq. m.

2. *The steps taken by the applicant to complain about his conditions of detention in Çorum Prison*

66. It appears from the case file that, following a complaint by the applicant, the Çorum Prison Management and Supervisory Board ("the Management and Supervisory Board") adopted a decision on 15 October 2018 in which it explained, *inter alia*, that the prison's capacity, initially set at 477 prisoners, had been increased by the addition of bunk beds and thus increased to 1,592 prisoners. The Board noted that between 1,950 and 2,000 persons were detained in the prison at that time.

67. On 18 February 2019 the applicant lodged an appeal against the above-mentioned decision of the Management and Supervisory Board. He complained mainly about the overcrowding in his unit, explaining in that connection that for twenty-five months he had been sharing with 36 persons a unit which, he submitted, had been designed in principle to accommodate seven prisoners, and that because of this alleged overcrowding some prisoners did not even have a bed to sleep in. He explained that these circumstances had caused him considerable mental suffering and had undermined his psychological state.

68. On 21 February 2019 the Çorum Sentence Enforcement judge dismissed the applicant's appeal. In reaching this conclusion, he mainly referred to the conclusions in the Management and Supervisory Board's decision (see paragraph 66 above). On 21 March 2019 the Çorum Assize Court upheld the decision of 21 February 2019.

69. In December 2020 the prison administration conducted an investigation to identify the inmates in Çorum Prison who had complained about their conditions of detention, with a view to transferring them to other prisons in which the occupancy rates were lower. In that context, the applicant was offered a transfer, which he refused in a letter to the prison administration of 17 December 2020, in which he stated that he was satisfied with the material conditions of his detention.

3. *The applicant's individual application concerning the conditions of his detention in Çorum Prison*

70. In the meantime, the applicant had lodged an individual application with the Constitutional Court on 24 April 2019, in which he complained about his conditions of detention in Çorum Prison. He stated, in particular, that the capacity of the centre, initially set at 477 prisoners, had been increased to 2,000 without any additional measures being taken in that regard; that for twenty-seven months the unit in which he was detained had accommodated between 38 and 46 people and that, in the absence of an available bunk bed, he had been obliged for two years to sleep on a mattress on the floor in the unit's communal living area, in which the light was always on. In his argument, the overcrowding had given rise to significant problems: the high noise levels had prevented prisoners from sleeping; the number of lockers for storing personal belongings had been insufficient, as had the number of sanitary facilities; the units had experienced ventilation problems; access to medical care had been constantly disrupted; there was not enough space for prisoners to rest, read, etc.; lastly, the hot and cold water supplies had been repeatedly cut off.

71. In a summary decision of 3 September 2020, served on the applicant on 16 September 2020, the Constitutional Court dismissed the individual appeal as manifestly ill-founded, referring to its leading judgment in *Mehmet Hanifi Baki* (B. 2017/36197, 27 June 2018; for a summary of that judgment, see *İlerde and Others v. Türkiye*, nos. 35614/19 and 10 others, §§ 128-129, 5 December 2023).

II. RELEVANT DOMESTIC AND INTERNATIONAL LEGAL FRAMEWORK AND PRACTICE

72. The domestic and international law and practice relating to conditions of detention are set out in *İlerde and Others*, cited above (§§ 107-117, 128-135 and 136-137).

73. The domestic law and practice relating to organised crime and terrorism are set out in the above-cited *Yüksel Yalçınkaya* judgment (§§ 146-149). Moreover, the Constitutional Court has delivered a number of key judgments in the context of the criminal proceedings brought in the aftermath of the military coup attempt. The Court has quoted in detail several of the Constitutional Court's rulings, particularly the judgments in *Aydın Yavuz and Others* (application no. 2016/22169, 20 June 2017) and *M.T.* (application no. 2018/10424, 4 June 2020), in a number of its judgments, including *Baş v. Turkey* (no. 66448/17, §§ 91-97, 3 March 2020) and *Akgün v. Turkey* (no. 19699/18, §§ 83-101, 20 July 2021).

With regard to the case-law concerning the FETÖ/PDY, the leading judgments adopted by the Court of Cassation were summarised in paragraphs 161-163 of *Yüksel Yalçınkaya*, cited above.

74. For the purposes of the present case, the Court cites below certain provisions of domestic law and the relevant case-law of the higher courts concerning the FETÖ/PDY.

A. The Criminal Code

75. The Criminal Code (Law no. 5237), enacted on 26 September 2004 and published in the Official Gazette on 12 October 2004, entered into force on 1 June 2005. The relevant parts of Article 220 of the Criminal Code, which concerns the offence of forming an organisation with the aim of committing a criminal offence, provide as follows:

> "(1) Anyone who forms or leads an organisation 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 the intended offences.
>
> (2) 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.
>
> (3) If the organisation is armed, the sentence to be imposed in accordance with the above paragraphs shall be increased by between one quarter and one half."

76. Article 314 §§ 1 and 2 of the Criminal Code provides for the offence of membership of an armed organisation:

> "(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.
>
> (2) Any member of an organisation referred to in the first paragraph shall be sentenced to a term of imprisonment of five to ten years."

Parts four and five of the chapter referred to in Article 314 § 1 list offences against State security and against the constitutional order and its functioning.

77. Article 30 of the Criminal Code is worded as follows:

Article 30

> "(1) Any person who, while performing an act, is unaware of matters which constitute the actus reus of an offence as defined in the law, is not considered to have acted intentionally."

B. Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)

78. The relevant provisions of the Prevention of Terrorism Act provide as follows:

Definition of Terrorism
Article 1

"(1) Terrorism is any kind of criminal act committed by one or more persons belonging to an organisation with the aim of changing the characteristics of the Republic as specified 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 or destroying or usurping the authority of the State, eliminating fundamental rights and freedoms, undermining the internal and external security of the State, public order or general health by using force and violence and through one of the methods of pressure, terror, intimidation, oppression or threat."

Terrorist Offenders
Article 2

"(1) 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 crime, shall be deemed to be a terrorist offender."

Terrorist Offences
Article 3

"The offences indicated in Articles 302, 307, 309, 311, 312, 313, 314, 315 and 320, as well as paragraph 1 of Article 310, of the Turkish Criminal Code [Law no. 5237] are terrorist offences."

Terrorist organisations
Article 7

"(1) Those who form, lead or become members of a terrorist organisation in order to commit crime [that is] directed at the purposes set out under section 1, by use of force and violence, and by means of pressure, terror, intimidation, oppression or threat, shall be punished in accordance with the provisions of Article 314 of the Turkish Criminal Code..."

C. The relevant domestic case-law

1. *Case-law of the Constitutional Court*

a) The *Metin Birdal* judgment of 22 May 2019

79. On 22 May 2019 the Constitutional Court, sitting in plenary, delivered a judgment (*Metin Birdal*, application no. 2014/15440) concerning an individual convicted of membership of the PKK (Workers' Party of Kurdistan). It concerned, in particular, freedom of peaceful assembly. The Constitutional Court examined the applicant's claim that his conviction, pronounced in the alleged absence of any definite evidence for acts which, he purported, related to freedom of peaceful assembly, had breached the principle that crimes and sentences have to have a legal basis. In its judgment, the Constitutional Court concluded, unanimously, that there had been no

violation of the right to peaceful assembly. In so doing, and having explained in detail the constituent elements of the offence of membership of a terrorist organisation, it noted that the first-instance court had not found that the applicant was a member of a terrorist organisation merely on the basis of his participation in demonstrations (which had, moreover, degenerated into violence), since that court had also examined telephone records, police reports, denunciations, the applicant's conduct and role at certain demonstrations, and the evidence as a whole, before finding that the actions carried out by the applicant in the context of the organisation's activities had displayed continuity, diversity and intensity. The relevant parts of that judgment read as follows:

> "(c) Offence of membership of an armed terrorist organisation
>
> 60. Under Article 220 of Law no. 5237, which concerns the offence of forming an organisation with the aim of committing a criminal offence, and Article 314 of the same Law, which sets out the potential penalties faced by a person committing the offence of membership of an armed organisation with a view to committing the offences of disrupting the unity and territorial integrity of the State and violating the Constitution, and in line with the [relevant judicial] practice, an individual who acts with a view to joining a criminal organisation and who is prepared to carry out the tasks entrusted to him or her within the organisation's hierarchical structure by adopting the organisation's objectives is considered [to be] a member of the organisation. In this connection, a member of an organisation is a person who adheres to the hierarchy [of the given structure] and, in consequence, submits to the organisation's will by being ready to discharge the duties entrusted to him or her.
>
> 61. It is not necessary for a person to have committed an offence in order to be punished for membership of an illegal organisation. Membership of an organisation is a punishable offence in itself: the activity of the member of the organisation need not necessarily take the form of participation in the offences committed by the organisation. The offence of membership of an organisation is a type of offence which punishes the danger posed to society by the organisation, even if the member or the organisation itself has not yet committed an offence; in this respect, it is also intended to prevent the commission of an offence as part of the organisation's activities. The fact that several people gather with a view to committing an offence represents an imminent threat to society. Given, moreover, the level of terrorism that currently exists at national and international level, such a threat becomes quite concrete.
>
> 62. ... [The fact of] punishing an individual solely on the ground that he or she belongs to an organisation and in the absence of any other offence could be seen as substituting collective criminal liability for personal criminal liability. However, in order to be convicted of this offence, it must be established that the person was aware of the nature and objectives of the organisation, wished to be a member of it and contributed to maintaining the organisation's activity and achieving its objectives by demonstrating a continuing willingness in this regard. Membership of the organisation is an effective participation. Thus, the underlying reason for the criminalisation and punishment of membership of a terrorist organisation is that the person who is a member of a terrorist organisation knowingly and willingly contributes to the danger posed by the terrorist organisation to society. This is what the Constitutional Court confirmed in stating that members of a terrorist organisation are not punished on account of the acts of others, but because they voluntarily joined such an organisation, and that in this

situation, the principle of personal criminal responsibility was not violated (Constitutional Court, E. 1991/18, K. 1992/20, 31 March 1992).

63. The offence of membership of a terrorist organisation provides for criminal liability at an early stage in relation to other typical offences. Thus, in order for a person to be punished solely on the grounds of his or her membership of a terrorist organisation and in the absence of any other offence, the judicial authorities must establish that the person maintains ties with the terrorist organisation. The examination of whether such ties exist involves an assessment of the ideas that those individuals harbour, the social groups to which they belong, their ideologies, the meaning of their conduct and the reasons underlying it.

64. Understood in this way, the assessment of whether persons who have not yet even committed an offence set out in the Criminal Code have sufficiently strong ties with a terrorist organisation to be considered members of it is liable to lead to serious pressure being exerted on the exercise of fundamental rights, such as freedom of expression, ... freedom of religion and conscience, and freedom of assembly and association.

65. In modern democracies, however, States have a positive obligation, within their sphere of responsibility, to protect individuals against the activities of terrorist organisations. This obligation requires that a fair balance be struck between the right of individuals to live in an environment that is not threatened by terrorism and the fundamental rights of persons who might be affected by the envisaged measures. It is for this reason that membership of a terrorist organisation has been identified as a crime in many developed democracies, as in our country...

...

67. For a person to be convicted beyond reasonable doubt of the offence of membership of a terrorist organisation, this must be proven in a sufficiently reasoned manner, [having regard to the criteria of] continuity, diversity and intensity, so as to show that the person concerned was knowingly and willingly involved in the hierarchical structure of the given organisation. In traditional criminal law, evidence consists in establishing the reality of a fact which occurred in the past and in forming a conviction in that regard. In the case of membership of a [criminal] organisation, the court, in order to conclude that a person was a member of the [criminal] organisation, must not only establish that the material acts referred to by the prosecution were actually committed, but must also show that the elements of the offence in question, the causal link [between those elements and the offence in question], and the perpetrator's capacity and criminal intent were all present.

68. In line with the principle that "no one shall be convicted without proof", the verdict delivered at the close of criminal proceedings must be based on evidence. Section 217 of Law no. 5271 recognised the principle that any kind of evidence is admissible by stating that "the offence charged may be substantiated by any evidence obtained in accordance with the law". In accordance with this principle, anything which is concrete, realistic, connected with the act in question and capable of establishing its truth may be regarded as evidence, provided that it was obtained by lawful means.

69. In addition, since the purpose of criminal proceedings is to establish the truth, there can be no hierarchy of evidence in terms of probative value; the evidence capable of establishing the truth of an act and forming the basis of a judgment cannot be limited by an *a priori* enumeration or by fixing a minimum number of items of evidence that may be required...

70. In consequence, given the diversity of terrorist organisations' structures and activities, it is not possible to establish *a priori* a general exhaustive list of admissible

evidence to determine whether a person is a member of a terrorist organisation. The purpose of evidence is to enable the judicial authorities to reach a conclusion and to give judgment. The Court of Cassation clarified this issue in one of its judgments as follows:

'The purpose of criminal proceedings is to reveal the material truth in such a way that there can be no doubt about it. The truth must be ascertained on the basis of reasonable and realistic evidence capable of establishing the truth of all or part of the facts of the case, or on the basis of an assessment of the evidence taken as a whole: it is absolutely contrary to the purpose of the criminal proceedings for the court to reach a conclusion on the basis of a number of hypotheses alone' (Court of Cassation, plenary assembly; E. 1993/6-79, K. 1993/108, 19 April 1993).'

71. In view of the principle that any kind of evidence is admissible, it is not possible to impose limits on the evidence which the court may take into consideration. As section 217 of Law no. 5271 clearly states, the court "freely assesses the value of the evidence on the basis of the principle of personal conviction", but it cannot act arbitrarily. The criminal court assesses all the evidence and examines whether it is sufficient to establish that the offence in question was actually committed. For the offence of membership of a terrorist organisation, the assessment of evidence differs to a certain extent from the assessment of evidence as carried out in respect of traditional offences. Since it is not necessary for a person to have committed an offence in order to be punished for membership of a terrorist organisation, there is no requirement that the material facts constitute an offence in themselves or that they constitute an offence when considered individually.

72. ... In these circumstances, in order for an individual to be convicted of membership of a terrorist organisation, the actions conducted by that person as part of the organisation's activity must be of a continuous, diverse and intense nature... In this connection, the court, after examining the evidence capable of demonstrating that the person concerned belongs to the hierarchical structure of the terrorist organisation in question, must assess the strength of the evidence in question, having regard to the aim and nature of each terrorist organisation and the extent to which it is well known, the type and intensity of the violence it uses, and any other relevant circumstances in the specific case under examination..."

b) The *Adnan Şen* judgment of 15 April 2021

80. The *Adnan Şen* judgment of 15 April 2021 (application no. 2018/8903), delivered by the Constitutional Court, sitting in plenary, concerned an individual convicted of membership of the FETÖ/PDY on the basis of his use of ByLock. In that judgment, the Constitutional Court mainly examined an alleged violation of the principle of *nullum crimen, nulla poena sine lege*). The applicant in that case claimed that the judicial interpretations of the offence of membership of an armed terrorist organisation had not been foreseeable and that his conviction had been based on acts that did not constitute an offence. In particular, he argued that the structure previously known as the "Gülen movement" had been designated as a terrorist organisation by a decision of the National Security Council of 26 May 2016, that that body's previous decisions had made no mention of it being a terrorist organisation, and that there had been no evidence of any acts of violence

before the above date to suggest that the relevant structure was a terrorist organisation.

81. In its judgment, the Constitutional Court first embarked on an examination of the characteristics and activities of the FETÖ/PDY. Reiterating that the clandestine activities of that organisation had already been the subject of investigations and prosecutions as of 2013, the Constitutional Court listed the incidents that had revealed the ulterior aims of this organisation. It also referred to some other criminal proceedings initiated against suspected FETÖ/PDY members prior to the coup attempt, such as the proceedings brought in 2015 against the police officers who had refrained from taking any measures to prevent the murder of Hrant Dink despite their knowledge of the murder plans, allegedly in pursuance of the objectives of the organisation; the espionage proceedings brought in 2014 and 2015 against a number of public officials for bugging the residence and offices of the Prime Minister, as well as some high-level confidential meetings, and for wiretapping the encrypted telephones of senior State officials; and the many investigations launched regarding allegations that questions for civil service entry and promotion examinations had been leaked to members of the organisation.

82. The Constitutional Court then reviewed the relevant domestic law and practice in respect of the offence of membership of an armed terrorist organisation. It noted that, according to the settled case-law of the Court of Cassation, conviction for membership of an armed terrorist organisation would only follow where the courts were able to (i) establish the suspect's organic link with the organisation, based on the continuity, diversity and intensity of his or her activities; and (ii) demonstrate that he or she had acted knowingly and willingly within the organisation's hierarchical structure. Amongst many Court of Cassation judgments, the Constitutional Court cited the following passage from the Sixteenth Criminal Division (E.2019/521, K.2019/4679, 5 July 2019), as relevant:

> "A member of an organisation is a person who embraces the objectives of an organisation, who adheres to [its] hierarchy, and who submits to the will of the organisation by [his or her] readiness to discharge the duties entrusted to [him or her] ... A member of the organisation must have an organic link with it and must participate in its activities. An organic link, which is the most important element of membership, is a link which is live, transitive, and active: it makes a perpetrator available for commands and instructions and determines [his or her] hierarchical position... The distinctive factor in the determination of membership of an organisation is the readiness of the member to comply, in full submission, with all orders and instructions issued within the organisational hierarchy, without calling them into question.
>
> ...
>
> Although the commission of an actual crime in connection with the organisation's activities and for the achievement of its aims is not required for punishment for membership of a terrorist organisation, the [individual] must nevertheless have made a

concrete material or mental contribution to the organisation’s actual existence or reinforcement...

...

According to the established judicial practice, ... in order for the offence of membership of an armed organisation to be constituted, there must exist an organic link with the organisation and, as a rule, there must exist acts and activities of a continuous, diverse and intense character.

...

Mental element: The mental element of the crime is direct intent and the ‘aim/objective of committing a crime’. A person partaking in an organisation must know that the organisation is one that commits crimes [or] aims to commit crimes.

...”

The Constitutional Court also referred to a number of Court of Cassation judgments where acts such as attendance at conversation meetings (primarily before 2013), communicating (via telephone) with the district imam and other suspected members of the organisation, subscription to newspapers published by the organisation and enrolment of children in schools affiliated with it were considered as acts that did not go beyond mere sympathy and affiliation with the FETÖ/PDY, since they did not suggest an organic link to it or participation in its hierarchy.

83. The Constitutional Court noted that the concepts of “terror” and “terrorism” did not have universally accepted definitions; nevertheless, the courts were under an obligation to interpret the domestic law in a foreseeable manner that did not undermine the essence of the principle of *nullum crimen, nulla poena sine lege* when ruling on terror offences. It noted that the main question which arose from the perspective of that principle was whether acts performed in connection with the FETÖ/PDY in the period prior to the coup attempt could be taken as evidence of membership of that organisation, given that the FETÖ/PDY’s criminal activities were not widely known in the relevant period.

84. In this connection, the Constitutional Court acknowledged that under Turkish law, the classification of a structure as a terrorist organisation was only possible by way of a judicial decision. It also reiterated, however, that prior to the characterisation of the FETÖ/PDY as a terrorist organisation by a judicial decision, the threat posed by the FETÖ/PDY had already been recognised in the decisions of the National Security Council, as well as in the 2014 National Security Policy Document, and many investigations on suspicion of membership of the FETÖ/PDY had been launched before the coup attempt.

85. The Constitutional Court further emphasised that the absence of a judicial ruling declaring an organisation “terrorist” would not exclude the criminal liability of the members of such an organisation, since the contrary approach would lead to impunity for all members in the period preceding any

such judicial ruling. That said, when assessing an individual's membership of the FETÖ/PDY it had also to be borne in mind that a significant proportion of the population had known and supported this organisation for many years as a religious group carrying out activities beneficial to society, especially in the field of education, without being aware of its illegal nature. It was therefore appropriate to examine a claim that an individual had been unaware of the FETÖ/PDY's true nature in the light of the mistake provision under Article 30 of the Criminal Code (see paragraph 77 above), having regard to factors such as the accused's position in the organisation and the nature of the acts attributed to him or her. Moreover, acts carried out prior to the period when the FETÖ/PDY's activities had begun to be denounced at different levels of the State and among the public would not be considered by judicial authorities as falling within the scope of criminal "organisational" activities, unless there were concrete facts and evidence suggesting that, given their nature and substance, those acts had served the terrorist organisation. In other words, the courts would seek to establish, on the basis of concrete evidence, whether the acts at issue had been carried out with "organisational" aims and within the framework of an "organisational" relationship.

2. *Case-law of the Court of Cassation*

a) Leading judgment of 26 September 2017, delivered by the plenary criminal divisions of the Court of Cassation (E. 2017/16-956, K. 2017/370)

86. On 24 April 2017 the Sixteenth Criminal Division of the Court of Cassation ("the Sixteenth Criminal Division"), sitting as a first-instance court, delivered a judgment (E.2015/3, K.2017/3), whereby it convicted two judges, namely M.Ö. and M.B., of membership of the FETÖ/PDY and abuse of office. This was the first judgment by the Court of Cassation holding the said organisation to be a "terrorist organisation" (see *Yüksel Yalçınkaya*, cited above, §§ 155-165). On 26 September 2017 the plenary criminal divisions of the Court of Cassation upheld this judgment (E. 2017/16-956, K. 2017/370).

87. In its judgment of 26 September 2017, the Court of Cassation, sitting in a plenary composed of the criminal divisions, provided an overview of the concepts of terror, criminal organisation and terrorist organisation, on the basis of the relevant provisions of the Criminal Code and the Prevention of Terrorism Act, and also engaged in an examination of the offence of founding, leading and membership of an armed terrorist organisation set out in Article 314 of the Criminal Code, which it considered to be a distinct form of organised criminality. It noted that for a structure to be classified as an "armed terrorist organisation", it would not only have to fulfil the criteria set out under Article 220 of the Criminal Code in relation to the offence of "forming an organisation with the aim of committing a criminal offence", but also had to embrace the aims and methods indicated in sections 1 and 7 of the Prevention of Terrorism Act. It stressed that the requirement of use of "force

and violence" in section 7 of the relevant Act did not necessarily mean the actual use of force and violence, and that an existing threat that such force and violence might be used would suffice. It added that the armed terrorist organisation had to be in possession of a sufficient amount of arms to carry out its aims, or to have the means of access to such arms, and it did not matter for the purposes of the offence under Article 314 of the Criminal Code whether those arms had been obtained unlawfully or were State property.

88. The Court of Cassation then proceeded to examine the history, nature and characteristics of the FETÖ/PDY, which it described as a "*sui generis* terrorist organisation". The relevant findings were noted in the judgment of the plenary criminal divisions of the Court of Cassation as follows:

> "The FETÖ/PDY is an atypical/*sui generis* armed terrorist organisation which uses religion as a front and a means to attain its non-religious earthly purposes; it acts in line with the instructions of the organisation leader, with the intent of establishing a new political, economic and social order; to that end, it primarily aims at acquiring power and acts with great secrecy (instead of transparency and openness) with a view to consolidating its strength and establishing a new order; it uses ... codenames, special communication channels, and money from unknown sources; it seeks to convince everyone that this structure does not exist and has grown and gained strength to the extent that it has succeeded in giving such an impression; it considers those who are not affiliated to it as an enemy ...; instead of clashing with the system, it penetrates the State from bottom to top in order to take control of the system through its members, who make up the 'Golden Generation'; after gaining a certain power [following the penetration of various State institutes], it eliminates its adversaries by means of illegal methods that appear legal; it thereby aims to bring about social transformation by taking whole sub-sections of the State under its control and seizing the system, as well as by using the public power it has gained; it also performs espionage activities.
>
> The FETÖ/PDY armed terrorist organisation, which harbours the aim of taking over all constitutional institutions of the Republic of Türkiye by using its human and financial resources ... is founded on the principles of 'living covertly, always fearing, not telling the truth, denying the truth'.
>
> ...
>
> The organisation has a layered hierarchical structure. Transfers between the layers is possible; that said, transfers above the fourth layer are determined by the leader. The layers are constituted as follows:
>
> (a) First Layer (Common tier): Consists of those who are connected to the organisation by faith and ties of affection and who provide actual and material support. This layer mostly consists of persons who are not part of the organisation's hierarchical structure, but who nevertheless serve [it], knowingly or unknowingly.
>
> (b) Second Layer (Faithful tier): The group of faithful people composed of those working at schools, private tutoring centres, student dormitories, banks, newspapers, foundations and institutions. These are people who attend organisational conversation meetings (*sohbet*), who regularly pay dues, and who are more or less familiar with the organisation's ideology.
>
> (c) Third Layer (Ideological organisation tier): Persons who undertake duties in unofficial activities, who adopt the organisational ideology and who accordingly disseminate the propaganda of the organisation.

(d) Fourth Layer (Inspection and control tier): Persons who are in this layer supervise all [organisational] service (legal and illegal). Those who attain the required rank in terms of commitment and obedience may be promoted to this layer. [Members of] this layer are those who joined the organisation at a young age; those who join the organisation later on can usually not undertake duties in this layer or the layers above.

(e) Fifth Layer (Organising and executing tier): Requires a high level of confidentiality. Those in this layer barely know each other. They are appointed by the organisation's leader and organise and oversee [the activities] at the State level.

(f) Sixth Layer (Special/Private tier): Consists of those who are personally appointed by Fetullah Gülen and who ensure communication between the leader and subordinate layers and who have the power, within the organisational structure, to reassign and dismiss.

(g) Seventh Layer (Senior tier): This is the most eminent layer of the organisation consisting of seventeen people chosen directly by the leader of the organisation.

The organisation has been careful to observe cell-type horizontal structuring in order not to be disclosed and to prevent the State from deciphering the organisational structure...

...

The FETÖ/PDY, which has organised itself within the operative units of the Security Directorate and the TAF, exercises the force and violence that is inherent in these entities by instrumentalising the oppression and intimidation which bestows authority on them. The organisation members' capacity to have recourse to arms as needed is a necessary and sufficient condition for designation as an 'armed terrorist organisation'; during the coup attempt of 15 July 2016, weapons were used by the members of the organisation, who ... appeared to be TAF officers but who acted in line with the orders and instructions of the organisation leader, as a result of which many civilians and public officials were martyred.

..."

In the light of the foregoing considerations, and noting in particular that certain members of the organisation were employed in State bodies possessing the power to use arms, and would not hesitate to use those arms if instructed to do so by the hierarchy of the organisation, the plenary criminal divisions of the Court of Cassation found it self-evident that the FETÖ/PDY was an armed terrorist organisation within the meaning of Article 314 of the Criminal Code.

89. The plenary then examined the circumstances under which a purported member of this armed terrorist organisation could escape liability by invoking the defence of mistake under Article 30 of the Criminal Code. It held, in particular: "the members of the organisation who know its goals and methods will be punished on the basis of their positions within the organisation" and added that "according to the organisational pyramid, it must be accepted that the members in the fifth layer [officials in the organisation with responsibility at organisational and executive level], sixth layer [senior officials of the organisation, appointed directly by its leader] and seventh layer [seventeen people chosen directly by the leader of the

organisation] and, as a rule, those in the third layer [members carrying out clandestine activities] and fourth layer [members carrying out important// clandestine activities and who joined the organisation at a young age], fall into this category. It held the following, as relevant:

> "A criminal organisation may be an illegal structure which is established at the outset to commit an offence. [Similarly], a non-governmental organisation which functions on a legal basis may subsequently turn into a criminal organisation and even into a terrorist organisation. In this connection, while the legal existence of an organisation – which has already been in existence unbeknownst to the public on account of the absence of a judicial decision [acknowledging its existence] – is contingent upon a decision to be issued by the courts, the founder, the executives or the members of the organisation would be held responsible in criminal law as from its foundation or from the date on which it became a criminal organisation despite having being founded for legitimate aims.
>
> Regard being had to the fact that the offence of membership of an armed terrorist organisation [is an offence that] may [only] be committed with direct intent [*doğrudan kast*], an assessment would need to be undertaken under the mistake provision set out in Article 30 § 1 of the Turkish Criminal Code in circumstances where some of the members of an organisation, who are part of structures which carry out their activities on a legal basis [but which harbour an] ultimate purpose that is not clearly known due to its concealment, claim that they were unaware of the fact that the relevant structure was a terrorist organisation.
>
> ...
>
> Intent presupposes that an individual has wilfully and knowingly aimed to bring about the elements in the legal description of the offence; a lack of knowledge, or incomplete or incorrect information, about those elements amounts to a mistake with regard to the material elements. If the mistake is so significant that it would prevent the existence of an intent, it is not appropriate to impose a penalty on the accused...
>
> ...
>
> There is no doubt that the FETÖ/PDY terrorist organisation possesses the necessary and sufficient organisational power, considering that it has been organised [clandestinely] in order to achieve its ultimate goal of altering the constitutional order of the State by force and violence, and [given its] presence in the armed forces of the State. It is also clear that the members of the organisation who know its goals and methods will be punished on the basis of their positions within the organisation. According to the organisational pyramid, it must be accepted that the members in the fifth, sixth and seventh layers and, as a rule, those in the third and fourth layers, fall into this category. However, a factual assessment must be carried out under Article 30 of the Turkish Criminal Code as to whether the members of the organisation pertaining to the other layers – who were utilised as the so-called legitimacy front of the organisation – were aware of the relevant [goals and methods], in view of the fact that the FETÖ/PDY first turned into a religious cult and subsequently into a terrorist organisation despite having initially emerged, and been widely perceived, as a moral and educational movement, that the organisation concealed its illegal objectives and tried to avoid being criminalised in the public eye, and that a decision of acquittal had been delivered by the Ankara Eleventh Assize Court in respect of Fetullah Gülen.
>
> ..."

b) Criminal proceedings brought against F. Gülen in 1999

90. Following the initiation of an investigation in 1999, on 31 August 2000 the Ankara Chief Public Prosecutor's Office issued a bill of indictment against F. Gülen, charging him with founding and leading a terrorist organisation. Referring mainly to its organisation, strategy and activities, the public prosecutor claimed that the accused had established a structure that aimed at insidiously demolishing the democratic, secular and social State based on the rule of law, and replacing it with a regime based on Sharia in line with his world view, despite appearing externally to support rationalism, science and technology. By a judgment dated 10 March 2003, the Ankara Second State Security Court decided to suspend the delivery of a definitive finding on the merits of the case. Following the amendment of section 1 of the Prevention of Terrorism Act on 15 July 2003, the accused requested the re-examination of the case file and the review of the suspension decision. Upon the acceptance of the request for re-examination, on 5 May 2006 the Ankara Eleventh Assize Court decided to acquit the applicant. It held that following the above-mentioned amendment, the concept of terrorism was henceforth confined to acts that were "criminal" and were committed "by using force and violence" by at least two or more people and with the purpose of changing the constitutional order. The Assize Court found, on the basis of the evidence in the case file, that the allegations that the accused had aimed to change the constitutional order had not been made out, and that the allegations of the existence of such an aim were based on estimations and inferences. Even supposing that such an aim had existed, there was no evidence to suggest that the accused, or the organisations affiliated with him, had embraced the use of force and violence, or had actually used force and violence, or had committed any acts that constituted a distinct crime. Moreover, an "organisation" had to consist of at least two people under the Prevention of Terrorism Act, whereas there was only one defendant in the case before it. Accordingly, in the absence of a "terrorist act" or a "terrorist organisation" as defined under section 1 of the Prevention of Terrorism Act, it was not possible that the accused could have founded or led an organisation within the meaning of section 7 (1) of that Act. The judgment of the Assize Court was upheld by the Court of Cassation on 5 March 2008. Subsequently, on 24 June 2008 the plenary criminal divisions of the Court of Cassation dismissed the objection of the chief public prosecutor's office at the Court of Cassation, and the judgment became final (for further details, see *Yüksel Yalçınkaya*, cited above, §§ 189-193).

III. RELEVANT COUNCIL OF EUROPE MATERIALS

A. The Council of Europe Commissioner for Human Rights

91. The applicant also referred to a memorandum (CommDH(2016)35), published on 7 October 2016 by the then Commissioner for Human Rights, Mr Nils Muižnieks, following a visit to Türkiye between 27 and 29 September 2016. This memorandum concerned the human rights implications of the measures taken under the state of emergency in that country. The relevant parts of the document read as follows (footnotes omitted; see *Yüksel Yalçınkaya*, cited above, § 198):

> "19. The authorities pointed out to the Commissioner that the danger posed by this organisation became clear to the government and the public already previously, for example during the period of 17-25 December 2013. The Commissioner also took note of the information that the National Security Council had already designated FETÖ/PDY as a terrorist organisation in 2015, while noting that the conclusions of this body are not addressed to the public, but to the Council of Ministers.
>
> 20. Nevertheless, the Commissioner must also take note of the fact that this organisation's readiness to use violence, a sine qua non component of the definition of terrorism, had not become apparent to Turkish society at large until the coup attempt. Furthermore, it has not yet been recognised as a terrorist organisation in a final judgment of the Turkish Court of Cassation which, according to the Turkish authorities, is a crucial legal act in the Turkish legal system when it comes to the designation of an organisation as terrorist. Despite deep suspicions about its motivations and modus operandi from various segments of the Turkish society, the Fethullah [*sic*] Gülen movement appears to have developed over decades and enjoyed, until fairly recently, considerable freedom to establish a pervasive and respectable presence in all sectors of Turkish society, including religious institutions, education, civil society and trade unions, media, finance and business. It is also beyond doubt that many organisations affiliated to this movement, which were closed after 15 July, were open and legally operating until that date. There seems to be general agreement that it would be rare for a Turkish citizen never to have had any contact or dealings with this movement in one way or another.
>
> 21. The Commissioner stresses that these considerations do not address the nature or motivations of FETÖ/PDY itself, but point to the need, when criminalising membership and support of this organisation, to distinguish between persons who engaged in illegal activities and those who were sympathisers or supporters of, or members of legally established entities affiliated with the movement, without being aware of its readiness to engage in violence...
>
> 22. The Commissioner therefore urges the authorities to dispel these fears by communicating very clearly that mere membership or contacts with a legally established and operating organisation, even if it was affiliated with the Fethullah [*sic*] Gülen movement, is not sufficient to establish criminal liability and to ensure that charges for terrorism are not applied retroactively to actions which would have been legal before 15 July."

B. The European Commission for Democracy through Law (Venice Commission)

92. The applicant also referred to an opinion on Articles 216, 299, 301 and 314 of the Turkish Criminal Code (CDL-AD(2016)002), adopted by the Venice Commission at its 106th Plenary Session, held on 11 and 12 March 2016. The relevant parts of the opinion read as follows (footnotes omitted):

> "**1. Membership of an armed organisation (Article 314)**
>
> ...
>
> 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...
>
> 101. If this 'organic relationship' with the organisation cannot be proven on the basis of acts attributed to the defendant, which do not present any 'continuity, diversity or intensity', the paragraphs on 'aiding and abetting an armed organisation' or 'committing crime on behalf of an armed organisation' under Article 220 may be applied...
>
> 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...
>
> ...
>
> 105. ... [T]he Commission reiterates that conviction on the basis of weak evidence in the application of Article 314 may create problems in the field of Article 7 ECHR since this provision embodies, *inter alia*, the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy... Any allegation of membership to an armed organisation must be established with convincing evidence and beyond any reasonable doubt.
>
> ..."

LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

93. The applicant complained about the conditions in which he had been held while in police custody and then following his placement in Çorum Prison. He relies on Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

94. The Government raised an objection of failure to comply with the six-month time-limit[1] and of failure to exhaust the domestic remedies, on several grounds. First, with regard to the conditions in which the applicant had been held while in police custody from 30 January to 6 February 2017, they submitted that this complaint had been presented belatedly, and for the first time, before the Court. They explained that at no stage in the proceedings, not even in his "individual application form" to the Constitutional Court, had the applicant raised this complaint. Moreover, in the Government's submission, the applicant had had an opportunity to bring an action for damages before the administrative courts, asking for a review of the facts, in order to claim compensation for the conditions in which he had been held while in police custody. The Government therefore considered that the applicant had not, in respect of this complaint, exhausted the domestic remedies or complied with the six-month time-limit. According to the Government, the same applied to the applicant's allegations that the police officers had subjected him to psychological violence while he was in police custody.

95. In so far as the applicant complained about the conditions of his detention in Çorum Prison, the Government submitted that this complaint should also be rejected for failure to exhaust domestic remedies, and relied on the following two grounds. The first was that the applicant should, in their view, have raised these complaints initially with the prison authorities, which were in the best position to remedy them; however, he had lodged an objection directly with the sentence-enforcement judge. The Government based the second ground on the fact that the applicant had not applied to the civil courts for compensation for the overcrowding which, he claimed, had existed in Çorum Prison. In support of that argument, the Government referred to a judgment of the Jurisdiction Disputes Court concerning the jurisdiction of the ordinary courts in such matters, arguing that it was clear from that case-law that the applicant could have brought an action for damages before the civil courts in order to claim compensation for the alleged overcrowding.

96. The applicant contested these arguments. First, with regard to the conditions in which he was held in police custody, he submitted that, contrary to the Government's assertions, he had indeed raised with the domestic courts his complaint about the ill-treatment he had suffered during the period under consideration (as a result of overcrowding in the police custody area and the physical and psychological pressure exerted on him) and had brought those

[1] In line with Protocol No. 15 to the Convention, the relevant part of which entered into force on 1 February 2022, the time-limit set out in Article 35 § 1 of the Convention for lodging applications has been reduced to four months. However, the six-month time-limit remains applicable in the present case (Article 8 § 3 of Protocol No. 15).

complaints to the Constitutional Court through his individual application to it, but the Constitutional Court had not examined them. As to the complaint concerning the conditions of his detention in Çorum Prison, he submitted that the remedies available in the ordinary administrative or civil courts had not offered reasonable prospects of success in that regard.

97. The Court refers to the general principles concerning the exhaustion of domestic remedies and the effectiveness of domestic remedies for the purposes of Article 13 of the Convention with regard to conditions of detention, as set out and restated in the case of *Ulemek v. Croatia* (no. 21613/16, §§ 71-80, 31 October 2019). It reiterates, in particular, that for a system of protection of prisoners' rights to be effective, preventive and compensatory remedies had to co-exist in a complementary manner. The preventive remedy must be capable of preventing the continuation of the alleged situation or to bring about an improvement in the material conditions of detention; and once the situation complained of had ceased, it had to be open to the individual to bring a compensatory claim. In the absence of a mechanism allowing for both these remedies, the prospect of future redress cannot legitimise severe suffering in breach of Article 3 and unacceptably weaken the legal obligation on the State to bring its standards of detention into line with the Convention requirements (see *Ulemek*, cited above, §§ 71 and 72, and *J.M.B. and Others v. France*, nos. 9671/15 and 31 others, § 167, 30 January 2020).

98. With regard to the conditions in which the applicant was held in police custody, the Court notes that it appears from the evidence before it that the applicant did not complain about them to any relevant authority, either during the period under consideration or after the police custody had ended on 6 February 2017. Admittedly, he lodged – more than two years after the latter date – two individual applications with the Constitutional Court, and it is not in dispute between the parties that, with regard to the conditions of police custody, the individual application is one of the remedies to be exhausted. However, the first of these individual applications, lodged by the applicant on 24 April 2019, specifically concerned his conditions of detention in Çorum Prison (see paragraph 70 above); the applicant did not present any complaint therein regarding alleged ill-treatment while in police custody or his conditions of detention during that same period. The second individual application, lodged on 22 May 2019 while the first was still pending before the Constitutional Court, mainly concerned the applicant's conviction (see paragraph 54 above), and although the applicant seems to have complained generally, in the annex to the application form, about the alleged overpopulation during "his police custody and his detention" (see paragraph 54 above), he did not submit any specific complaint in this connection in the application form itself. The Constitutional Court therefore acted properly in limiting the scope of its decision to the main complaints submitted by the applicant in the application form and examined all of the

applicant's complaints from the perspective of the right to freedom and the right to a fair trial, without ruling on the conditions in which he was held (see paragraph 55 above).

99. The Court reiterates that the obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. In particular, Article 35 § 1 requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Vučković and Others v. Serbia (preliminary objection)* [GC], nos. 17153/11 and 29 others, §§ 71-72, 25 March 2014).

It follows that, with regard to his complaints concerning his detention in police custody, the applicant did not exhaust the domestic remedies available to him in the manner provided for in domestic law, and thus failed to comply with the requirements of Article 35 § 1 of the Convention. Accordingly, the Government's objection of failure to exhaust domestic remedies must be upheld and the applicant's complaint concerning the conditions of police custody rejected, pursuant to Article 35 §§ 1 and 4 of the Convention.

100. With regard to the complaint concerning the conditions of the applicant's detention in Çorum Prison, the Cour points out that, in its recent judgment in *İlerde and Others v. Türkiye* (nos. 35614/19 and 10 others, 5 December 2023), it already examined the various remedies mentioned by the Government here in support of their objection under Article 35 § 1 of the Convention. In the light of its case-law in this area (ibid., §§ 145-165), it held that, with the exception of an individual application to the Constitutional Court, it could not be concluded with a sufficient degree of certainty that Turkish law provided a person detained in a situation such as that of the applicant with a preventive and/or compensatory remedy whereby he or she could complain of the conditions of detention (ibid., § 162). The Court sees no reason to find otherwise here, given that, when the present application was lodged, the applicant was still being held in Çorum Prison, even if, as indicated in his letter of 17 December 2020 (see paragraph 69 above), it can be assumed that his conditions of detention improved considerably after his application was lodged. In any event, the Court points out that the applicant's complaint about the conditions of his detention in Çorum Prison was initially raised with a view to obtaining preventive relief before the first-instance courts, and subsequently before the Constitutional Court. None of those courts explicitly or implicitly acknowledged that the conditions of detention had been inadequate with respect to Article 3 of the Convention. In those circumstances, the Court considers that a compensation claim before the civil courts was bound to fail and was not therefore relevant in the present case (see, *mutatis mutandis, İlerde and Others*, cited above, § 165). In

consequence, it considers that the Government's objection as regards a failure to exhaust domestic remedies must be dismissed.

101. The Court notes that the complaints under Article 3 of the Convention concerning the material conditions in which the applicant was detained in Çorum Prison are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

102. The applicant repeated his allegations that the number of people accommodated in the units in which he had been detained for more than two years had varied between 38 and 46 persons; that those units had been designed to house a maximum of seven people, but that following the attempted coup of 15 July 2016, the capacity had been increased fivefold, as was clear from the decision of the Management and Supervisory Board that had been sent to him. He had been detained in Unit F-5 for almost one year and in Unit F-10 in Çorum Prison for almost three years. He also disputed the Government's argument that he had had an average of 5 sq. m. of personal space. In this connection, he disputed the Government's method of calculation and submitted that he had had less than 3 sq. m. of personal space. He further explained that there had been a constant rotation in the unit between prisoners sleeping on bunk beds and those sleeping on a mattress on the floor. When the unit's population was larger, he had therefore been obliged to sleep on a mattress on the floor in the communal living area. In his submission, it was clear from the information provided by the Government that there were only thirty-two single beds per unit, four of which were in the communal area. He added that neither the prison authorities nor the judicial authorities had conducted a thorough investigation into his complaints about the conditions of his detention.

103. For their part, the Government, referring to the conditions of detention in Çorum Prison as described in paragraphs 59-63 above, submitted that when the applicant was detained therein he had had more than 6 sq. m of personal space. They argued that, under the Court's case-law, the fact that the applicant had on average more than 5 sq. m of personal space gave rise to a strong presumption that there had been no violation of Article 3 of the Convention. They further explained that not only had the applicant had, on average, sufficient personal space, but he had also had sufficient ventilation and access to fresh air, a bed, natural lighting, cleaning and hygiene facilities, and sanitary facilities. In consequence, they considered that the conditions of the applicant's detention had not attained the minimum level of severity required to fall within the scope of Article 3 of the Convention and had not exceeded the unavoidable level of suffering inherent in deprivation of liberty.

2. *The Court's assessment*

104. The Court refers to the principles established in its case-law regarding inadequate conditions of detention (see *Muršić v. Croatia* [GC], no. 7334/13, §§ 96-101, 20 October 2016, and *İlerde and Others,* cited above, §§ 169-172).

105. First of all, the Court notes that at the relevant time Türkiye was experiencing a surge in the prison population in various prisons across the country as a result of circumstances related to the attempted coup of 15 July 2016 (see *İlerde and Others,* cited above, § 6). The material in the case file indicated that Çorum Prison was one of the establishments concerned by this overpopulation. It is clear from the decision adopted by the Çorum Prison Management and Supervisory Board on 15 October 2018 (see paragraph 66 above) that, following the event in question, the prison's capacity, initially set at 477 prisoners, had been increased to 1,592 prisoners by installing bunk beds. Thus, the number of prisoners housed in the prison during the period in which the applicant was detained there varied between 1,950 and 2,000 persons.

106. The Court notes that between 6 February 2017, when the applicant was placed in pre-trial detention, and 2 April 2020, when the present application was lodged, that is, for more than three years, the applicant was held in Çorum Prison. He was initially assigned to Unit F-5, where he stayed for about fourteen months, and then to Unit F-10, where he stayed for more than two years. In L-type prisons (the category of prison in question), each unit has several dormitories, a communal living area, shared sanitary facilities and an outdoor courtyard. The total surface area of each unit of the prison, including all spaces, was 241.36 sq. m, organised as follows: a communal living space of 90 sq. m.; seven dormitories with a total surface area of 86.94 sq. m; an outdoor courtyard of 64.36 sq. m; and sanitary facilities with a total surface area of 6.42 sq. m., comprising two toilets with six washbasins and two showers. Thus, in its initial configuration, each unit was designed to accommodate seven prisoners, each of whom would have a personal space of more than 24 sq. m., in line with the criteria adopted by the Court (see paragraph 108 below). However, it appears from the information submitted by the parties that the units' capacity was increased by more than four-fold during the period under consideration. In the Court's view, this in itself had the effect of subjecting prisoners to the adverse consequences of a situation of prison overcrowding, since the overall infrastructure of the units was clearly not designed to accommodate such a large number of prisoners for such a lengthy period. Furthermore, according to the information provided by the parties, although each dormitory had initially been equipped with a single bed for a single prisoner, two additional bunk beds, designed for a total of four prisoners, had been installed in each dormitory, and two further bunk beds, intended for an additional four prisoners, had been installed in the communal living area, so that the unit had a total of sixteen bunk beds for

thirty-two prisoners. Each unit had electricity and heating facilities. Finally, there were 10 windows, measuring 90 cm by 110 cm, which could be opened and closed.

107. According to the Government, during the applicant's detention in Unit F-5 it accommodated a minimum of 37 and a maximum of 47 prisoners. The Government explained that 37 or 47 persons had been detained in the same unit; each person had 6.52 or 5.13 sq. m. of personal space respectively, and even when the occupancy rate was the highest, each prisoner had an average of 61 minutes per day to use the sanitary facilities.

With regard to in Unit F-10, the Government stated that during the applicant's detention there had been a minimum of 27 persons and a maximum of 42 persons. According to the Government, the applicant shared the unit with an average of 30 fellow inmates. He had therefore had 8.04 sq. m. of personal space in his cell and had been able to use the sanitary facilities for at least 68 minutes per day. Even when the occupancy rate was highest, each prisoner had an average of 61 minutes per day to use the sanitary facilities. The applicant disputed the method proposed by the Government for calculating the prisoners' personal space, without, however, calling into question the information concerning the number of prisoners.

108. The Court reiterates its settled case-law to the effect that once a credible and reasonably detailed description of the allegedly degrading conditions of detention, constituting a prima facie case of ill-treatment, has been made, the burden of proof is shifted to the respondent Government, which alone have access to information capable of corroborating or refuting the applicant's allegations. They are required, in particular, to collect and produce relevant documents and provide a detailed account of an applicant's conditions of detention. Relevant information from other international bodies, such as the CPT, on the conditions of detention, as well as the competent national authorities and institutions, should also inform the Court's decision on the matter (see *Muršić*, cited above, § 128). Having regard to the information submitted by the parties, it concludes that it has sufficient material before it to decide the present case, although there are no specific CPT reports in respect of Çorum Prison (see *İlerde and Others*, cited above, § 173). In this connection, it has already held that the minimum standard of living space per detainee is 3 sq. m., excluding the area used for sanitary facilities (ibid., §§ 110 and 114) and the outside courtyards (see *İlerde and Others*, cited above, § 175). Thus, in calculating the personal space available to the applicant, it is necessary to deduct the area of these facilities and the external courtyards, which the Government have not done.

109. Moreover, in cases where the overcrowding was not significant enough to raise, in itself, an issue under Article 3, the Court has considered that other aspects of detention conditions had to be taken into account in examining compliance with that provision. Those aspects include the possibility of using toilets with respect for privacy, ventilation, access to

natural air and light, quality of heating and compliance with basic hygiene requirements. Where a prison cell – measuring in the range of 3 to 4 sq. m of personal space per inmate – is at issue, the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention On the other hand, where a prisoner has more than 4 sq. m of personal space, this factor, in itself, does not raise an issue under Article 3 of the Convention (see *Muršić*, cited above, § 139, and *J.M.B. and Others*, cited above, § 256).

110. Calculated on the basis of the criteria adopted by the Court, the applicant's personal space during the fourteen months he spent in Unit F-5 appears to have varied between 3.6 and 4.6 sq. m., and between 4 and 6 sq. m. for the period of more than two years that he spent in Unit F-10. While the information provided by the parties does not make it possible to ascertain the duration of the applicant's detention in Unit F-5 in such conditions that his personal space was between 3 and 4 sq. m., it must however be noted that when he was detained in Unit F-10, he had personal space of more than 4 sq. m. The Court must also have regard to other relevant factors, namely the possibility of sufficient freedom of movement and out-of-cell activities and the general conditions of the applicant's detention. The burden of proving that there were such factors is on the Government.

111. As the Court has already observed (see paragraph 109 above), where a prison cell – measuring in the range of 3 to 4 sq. m of personal space per inmate – is at issue the space factor is a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related, in particular, to access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements (see *Muršić*, cited above, § 139).

112. With regard to the sanitary and hygiene conditions of the applicant's detention, the Court considers, on the basis of the parties' submissions, that it is established that the toilet facilities in the units were fully separated by a door (compare *Szafrański v. Poland*, no. 17249/12, § 39, 15 December 2015) and that the inmates had daily access to hot and cold water. Although the Court can accept that the sanitary conditions thus established may have been affected by the fact that the facilities were operating beyond their capacity, it cannot conclude, on the basis of the evidence before it, that the degree of cleanliness of the facilities, the number of toilets and washbasins available and the time available to each prisoner to use them were inadequate in terms of the Convention standards. Moreover, it is not disputed between the parties that, in addition to a door leading to an outdoor courtyard that measured 64.36 sq. m., each unit had several windows, which allowed ventilation and access to light, and that prisoners could use that outdoor courtyard for 10 to 12 hours between May and October and for no fewer than 8 hours between

November and April (see paragraph 60 above; compare *İlerde and Others*, cited above, §§ 191 and 193, and the case-law cited therein). In the light of the parties' submissions, the Court therefore concludes that the general conditions provided to prisoners in the units in question, including cleanliness, ventilation and lighting, were adequate in terms of the standards foreseen by the Convention.

113. Admittedly, for a long period of his detention the applicant was affected by prison overcrowding, particularly in that he was required to sleep on a mattress on the floor. In this connection, the Court notes that the Government merely submitted that detainees always had their own mattresses and bedding (see paragraph 62 above). In view of the number of bunk beds, which corresponded to a maximum capacity of 32 inmates, it can be regarded as established that during the periods of overcrowding when the number of prisoners exceeded that capacity the applicant had to sleep for a certain time on a mattress on the floor, a situation which did not comply with the basic rule established by the CPT: "one prisoner, one bed" (see *Vasilescu v. Belgium*, no. 64682/12, § 101, 25 November 2014; see also *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 146-147, 10 January 2012). The Court points out, however, that in those cases where it has found a violation of Article 3 on account, *inter alia*, of inadequate bedding conditions, it had regard to all the circumstances: in *Vasilescu*, for example, the applicant, who had been required to sleep on a mattress on the floor for several weeks, had been confined to an individual space of less than 3 sq. m. for fifteen days and had been deprived of access to running water and to the toilets, at least at night, for sixty days (ibid., §§ 99-105); the applicant in the case of *Aliyev v. Azerbaijan* (nos. 68762/14 and 71200/14, § 125, 20 September 2018), who had had to share his bed with other prisoners, also had personal space of 1.1 sq. m. (compare also *Gusev v. Russia*, no. 67542/01, §§ 56-57, 15 May 2008). To date, the Court has never found a violation of Article 3 solely because a prisoner was required to sleep on a mattress on the floor, except in cases where, in addition to inadequate sleeping conditions, he had less than 3 sq. m. of personal space. Admittedly, it is essential that each detainee have an individual sleeping place in the cell (see *Ananyev and Others*, cited above, § 148); however, while the Court is uneasy about the fact that the applicant slept on mattresses on the floor for long periods, it is not convinced that this aspect, taken alone or in conjunction with other material aspects of his detention, subjected him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (see, similarly, *İlerde and Others*, cited above, § 194).

114. In short, having examined the facts as submitted by the parties, the Court does not rule out the possibility that the applicant may have suffered difficulties and a certain amount of distress on account of his detention in the conditions described above; it considers, however, having regard to the cumulative effect of those conditions, that they did not attain the threshold of

severity required for the applicant's treatment to be assessed as inhuman or degrading within the meaning of Article 3 of the Convention.

It follows that there has been no violation of Article 3.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

115. The applicant complained that the acts that formed the basis of his conviction were lawful at the relevant time and that in holding him criminally liable for those acts the authorities had engaged in an expansive and arbitrary interpretation of the relevant laws, in violation of the principle of no punishment without law enshrined in Article 7 of the Convention, the relevant part of which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> ..."

A. Admissibility

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

B. Merits

1. The parties' submissions

a) Submissions of the applicant

117. The applicant challenged his conviction for membership of an armed terrorist organisation. He argued that several essential conditions for the offence to be made out had not been met. In particular, he submitted it had not been shown that an armed terrorist organisation existed, that he had been aware of the nature of that organisation, and it had not been established, on the basis of qualitative criteria, that he had actually belonged to that organisation, or that there had existed specific intent on his part to achieve the organisation's aims.

118. He argued, first, that the initial investigation in respect of F. Gülen in 2000, the subsequent proceedings against him and, in particular, the latter's acquittal in 2006, and the fact that the movement in question had not been categorised as a terrorist organisation until the end of 2013, showed the lack of foreseeability and legal basis, for the purposes of Article 7 of the Convention, of his conviction. He explained that after F. Gülen's indictment on 31 August 2000 on charges of founding and leading a terrorist

organisation, all of the Gülen movement's activities had been extensively investigated, and at the close of those investigations, F. Gülen had been acquitted of all charges on 5 May 2006. When upholding the acquittal on 24 June 2008, the plenary criminal divisions of the Court of Cassation had confirmed that it had not been established that the accused, and the organisations allegedly linked to him, had harboured the goal of overthrowing the constitutional order, or had resorted to violence (see paragraph 90 above). From then on, the Gülen movement had maintained its activities without facing any other investigations until the end of 2013, when it was held responsible for several high-profile political scandals. He also emphasised that the domestic courts had held that the available evidence was not sufficient to establish the use of coercion or violence by the organisation.

119. Referring to statements and actions by the country's political leaders and high-ranking figures who had promoted or supported the movement's activities prior to 2013, the applicant stressed that the Gülen movement had not been formally designated as a terrorist organisation at the time of the actions which had resulted in his conviction. He explained that all of the acts held against him had been carried out before 2014. He emphasised that under Turkish law only a court could decide whether a structure was a terrorist organisation; however, although investigations had been opened into the Gülenist movement's activities between 2009 and 2014, the movement had not been categorised as an armed terrorist organisation and there had been no final judicial decisions to that effect. The applicant stated that, until the attempted coup, there had been no judgment by the domestic courts classifying the FETÖ/PDY as an armed terrorist organisation. The recommendations issued by the National Security Council in 2014, 2015 and 2016 had, in his view, been administrative in nature, and had had no judicial effect.

120. The applicant also argued that he had been charged with the same offences as F. Gülen. Referring to the Memorandum of the Council of Europe Commissioner for Human Rights (see paragraph 91 above) and to the Opinion of the European Commission for Democracy through Law (see paragraph 92 above), he drew the Court's attention to the fact that although the acts attributed to him were, in his view, lawful when they were carried out, the domestic courts had considered that they were illegal and had found him guilty of membership of an armed terrorist organisation.

121. The applicant challenged, in particular, the interpretation that had been given to his activities. He argued that he had taken part only in lawful activities, and that his actions had not been such as to indicate that he belonged to an armed terrorist organisation. Before the domestic courts, he had admittedly acknowledged having been accommodated in a residence belonging to the organisation while he was a university student, but he had denied involvement in activities that would imply inclusion in the organisation's hierarchy. He had also acknowledged his employment for

about six months by a private tutoring company belonging to the organisation, explaining that this had simply been a way for him to earn his living. He had used his bank account at Bank Asya to receive the salary payments which he received as an employee of the above-mentioned company. In summary, he criticised the judicial authorities' interpretation, to his disadvantage, of the evidence before them, and suggested that those interpretations had been unforeseeable and expanded in an unacceptable manner the scope of the criminal law, thus breaching the principle of legality.

122. He also argued that facts such as providing accommodation for students in the organisation's houses, the presence of leaders for those houses (*imams*), the offer of financial support to students through these houses, and even the dissemination of these services and the organisation's activities across the country through the intermediary of regional, municipal and district *imams*, had not been classified by the relevant court as material elements of the offence of forming a terrorist organisation. Emphasising that the charges against him were the same as those that had been raised and addressed in the proceedings brought against F. Gülen, he submitted that those latter proceedings had concluded with a final judgment finding that the acts attributed to F. Gülen did not constitute an offence, and he relied, in consequence, on the principle of *res judicata* in this regard.

123. The applicant considered that the above elements prompted the conclusion that the domestic legal provisions had not been foreseeable as to their application. Arguing that he could not reasonably have foreseen at the time of the acts on which his conviction was based that the FETÖ/PDY would be classified as a terrorist organisation by the domestic courts, he explained that, in those circumstances, he could not have been required to foresee that his actions could amount to an offence that was punishable under Article 314 § 2 of the Criminal Code.

124. He then explained that under domestic law and practice, the offence of membership of an armed terrorist organisation necessitated not only the existence of an organisation which aimed to commit the offences listed in the Criminal Code, but also required that the organisation operate in a hierarchical structure and that the alleged members have performed acts of a certain continuity, diversity and intensity; he alleged that none of this had been established in his case. He added that at no point in their respective judgments had the domestic courts laid out the hierarchical structure of the alleged armed terrorist organisation, other than in abstract and general terms, or his position therein. In his submission, many questions, such as whom he had taken orders from or to whom he had reported, with whom he had attended the meetings of the terrorist organisation, the offences he had committed on its behalf, and the degree of intensity and diversity of his presumed involvement in the acts of the terrorist organisation had been left unanswered when the domestic courts concluded that the elements of the offence attributed to him had been present.

125. The applicant noted in this connection that even if it were to be accepted that the Gülen movement was a terrorist organisation, it was of the utmost importance to determine whether he had personally been aware of that fact at the time of the acts attributed to him, this state of awareness being one of the intrinsic elements of the offence of membership of an armed terrorist organisation. He contended that establishing the ultimate goal of an organisation was altogether different from establishing an individual's knowledge and acceptance of that goal. In arguing that he could not have been aware of the terrorist nature and intentions of the Gülen movement the applicant referred once again to the Court of Cassation's judgment of 2008, confirming F. Gülen's acquittal of all crimes, and to the many statements made by high-level Government officials publicly declaring their support for and appreciation of that movement over the years.

126. He further maintained that none of the acts attributed to him were such as to indicate membership of an armed terrorist organisation. In his view, the material elements of the offence of membership of an armed terrorist organisation were construed extremely broadly due to the very wide interpretation of the offence set out in in Article 314 § 2 of the Criminal Code, which had been wholly unforeseeable and had expanded the scope of criminal liability for the offence in question.

127. In the applicant's opinion, even if it were to be accepted that the evidence against him demonstrated his association with the Gülen movement, it still needed to be proven beyond reasonable doubt that he had acted with the requisite specific intent. The specific intent in this context required the accused to have acted with the knowledge that the organisation had been established to commit certain offences and with the purpose of committing those offences. Establishing these points was particularly important in the present context, bearing in mind that the Gülen movement was a social structure which had been supported by all segments of society for decades. Holding ordinary members of that structure criminally liable for illegal activities carried out by the executives of the organisation, without establishing their individual intent, was contrary to the principle of individual criminal responsibility and amounted to collective punishment. The applicant claimed that he had been convicted essentially for allegedly associating with a community, some members of which had allegedly committed certain crimes.

b) Submissions of the Government

128. The Government explained, first, that Article 314 § 2 of the Criminal Code did not itself provide a definition of terrorism or terrorist organisation; those definitions were set out in the Prevention of Terrorism Act. Under section 1 of this Act, in its current wording, terrorism was defined as any kind of criminal act committed by use of force and violence, through one of the methods of pressure, terror, intimidation, oppression or threat, in pursuit of

any of the aims listed in that same provision. Section 3 of the same Act provided that the offences indicated in, *inter alia*, Article 314 of the Criminal Code were terrorist offences. Section 7 of the Act stipulated that those who become members of a terrorist organisation in order to commit crime in pursuance of the purposes set out under Section 1, by use of force and violence, through the methods of pressure, terror, intimidation, oppression or threats, were to be punished in accordance with Article 314 of the Criminal Code.

129. The Government also stated that although under Turkish law the designation of a structure as a "terrorist organisation" was contingent upon a judicial finding to this effect, this was not a prerequisite for a conviction for membership of an armed terrorist organisation. According to domestic case-law, the founders, directors or members of a terrorist organisation could be held criminally liable from the date of the foundation of the organisation, or from the date on which it had transformed into a criminal organisation, even in the absence of a prior judicial decision proscribing it. They explained that to hold otherwise would mean that a person would go unpunished for the offences he had committed prior to a court decision designating a structure as a terrorist organisation, which would seriously imperil the fight against terrorism.

130. They also indicated that the legal framework governing the offence of membership of an armed terrorist organisation was complemented by the Court of Cassation's case-law, which provided further clarity both on the elements of an armed terrorist organisation, and on the offence of membership of such an organisation. Thus, the Court of Cassation had specified that for the purposes of the offence set out in Article 314 § 2 of the Criminal Code, the "organisation" was not an abstract gathering but one that was based on a hierarchical structure. In ascertaining the existence of the organisation, it had to be assessed whether it had, or had previously had, sufficient members, tools and equipment to enable it to commit the intended offence, as required under Article 220 of the Criminal Code. In particular, it had to be verified whether the organisation possessed, or had possessed, a sufficient amount of arms to carry out its aims, or the means to access such arms.

131. In the Government's submission, the Court of Cassation had further clarified that conviction for membership of an armed terrorist organisation followed only where the accused's organic link with the armed organisation was established, based on the continuity, diversity and intensity of his or her activities, and where it was demonstrated that he or she had acted knowingly and willingly within the organisation's hierarchical structure and embraced its objectives. It had moreover specified the mental element of the offence as being "direct intent and the aim or objective of committing a crime". It therefore followed that a person taking part in an organisation had to know that it was one that committed, or aimed to commit, crimes, and had to possess

a specific intent to achieve that purpose. Although the commission of an actual crime in connection with the organisation's activities and for the achievement of its aims was not required to establish the offence of membership of an armed terrorist organisation, the individual must nevertheless have made a concrete material or mental contribution to the organisation's actual existence or reinforcement.

132. The Government next reviewed the constituent elements of the crime of membership of an armed terrorist organisation, which they claimed were formulated with sufficient precision in the relevant legislative framework and the case-law of the Court of Cassation, as referred to in detail in the judgments against the applicant. Based on those elements, the domestic courts had examined the FETÖ/PDY, including its purpose, functioning, socio-cultural and hierarchical structure, model of organisation and attempts to establish a parallel State structure, and had concluded that it was an armed terrorist organisation, albeit a *sui generis* one. In arriving at this conclusion, the domestic courts had taken into account the fact that the FETÖ/PDY had not aimed to come to power through legitimate methods, but had intended to abolish Parliament, the Government and other constitutional institutions by coercion, violence and other undemocratic methods, through the members whom it had strategically placed within the State bureaucracy. The members who had been placed in institutions authorised to use force, such as the army, the police and the MİT, had – during the coup attempt – used weapons belonging to the State against public institutions, the security forces and civilians with a view to bringing about their intended aims.

133. In consequence, according to the Government, a member of an organisation was a person who became a part of the criminal organisation and relinquished his or her will in favour of that of the organisation by submitting himself or herself to the superior will of the organisation. A person did not necessarily have to have committed an offence to be sentenced for membership of a terrorist organisation. Membership of a terrorist organisation was a punishable criminal offence in itself (see, for the offence of membership of a terrorist organisation, the Constitutional Court's judgment in *Metin Birdal*, points 61-65, paragraph 79 above).

134. The Government further emphasised that not all members of the organisation could be considered as possessing the knowledge and direct intent required for a finding of guilt under Article 314 § 2 of the Criminal Code. In this connection, they referred to the Court of Cassation's judgment in which it specified that the organisation was made up of seven layers, and that the members in the first and second layers – who were utilised as the so-called legitimacy front of the organisation – were not necessarily aware of the goals and methods rendering it an "armed terrorist organisation" and could, in principle, benefit from the mistake provision stipulated under Article 30 of the Criminal Code (see paragraph 88 above).

135. With regard to the characteristics of the FETÖ/PDY, the Government submitted that the domestic courts, both in the judgment convicting the applicant (see paragraphs 36-44 above) and in the numerous other judgments about that organisation delivered by the highest courts (see paragraphs 80-89 above), had analysed in a detailed manner the creation of the FETÖ/PDY, as well as its purpose, illegal activities, attempts to establish a parallel state, governing model, hidden hierarchical structure and functioning. In sum, it was clear from those decisions that the FETÖ/PDY was an atypical/*sui generis* armed terrorist organisation which used religion as a front and a means to attain its non-religious earthly purposes. According to the Government, the organisation did everything to ensure that all of its acts and activities were carried out in secrecy, in order to overthrow the constitutional and democratic order and bring in its own ideological order. Like an intelligence agency, it used codenames, special communication channels, and money from unknown sources and tried to convince everyone that such a structure did not exist. It acted in line with the instructions of the organisation leader, with the intent of establishing a new political, economic and social order. To that end, it was primarily aimed at obtaining power and acted with great secrecy – instead of transparency and openness – with a view to [becoming] strong and establishing a new order. It harboured the aim of overthrowing the Government of the Republic of Türkiye by force, violence and other illegal methods, or of preventing it wholly or partly from discharging its duties; of suppressing, weakening and redirecting State authority; of presenting itself as an alternative authority; and eventually of seizing State authority. It had a continuous, covert and hierarchical structure involving persons who served for the same purpose but who would never otherwise act together in the normal course of life, including public officials and civil servants who were authorised by law to use arms [and] force and to enforce [the law], and who operated in an occupational hierarchy. It was organised in a cell-type structure [with cells which were] independent from one another, and secret organisational meetings were regularly held in pre-designated houses in order to ensure the continuity of organisational activities and commitment to the leader. Members of the organisation reported to their hierarchy on their organisational activities, and prepared documents and reports analysing its areas of activity. In order to achieve its objective of taking control of constitutional institutions, the members of the organisation who had been placed in institutions that were authorised to use force, such as the police and the gendarmerie, the National Intelligence Agency (MİT) and the Office of the Chief of General Staff, had succeeded in obtaining weapons, which were given to them by the State and had used by them not only against the security forces and public institutions but also against civilians, thus committing a number of serious acts to enable them to achieve their aims, including killing and inflicting bodily harm.

136. As to the relevance for the applicant's complaints under Article 7 of the fact that the Court of Cassation had upheld F. Gülen's acquittal on 24 June 2008, and whether, having regard to hat acquittal, his conviction for membership of the FETÖ/PDY had been unforeseeable, the Government stressed that the scope of those proceedings had been limited to acts carried out and/or detected by the authorities prior to 31 August 2000, that is, the date on which the bill of indictment had been filed against F. Gülen. It therefore followed that the finding in 2008 that, up to 2000, the impugned structure was not an armed terrorist organisation did not necessarily render unforeseeable a later finding to the contrary, based on acts that took place or evidence that surfaced after 2000.

137. The Government emphasised in this connection that after 2013 many investigations had been initiated into the illegal acts undertaken by the members of the FETÖ/PDY, such as the "17-25 December investigations" or the "MİT trucks investigations". The National Security Council had declared the structure a "terrorist organisation" in its various meetings held between 26 February 2014 and 26 May 2016. The FETÖ/PDY had thus begun showing its true colours publicly by the time the applicant had committed the acts forming the basis of his conviction. In consequence, the Government argued that, irrespective of F. Gülen's acquittal in 2008, the applicant could reasonably have foreseen, when committing these acts, the domestic courts' interpretation of the FETÖ/PDY as a terrorist organisation.

138. With regard to the charges against the applicant, the Government submitted that, during the period when the organisation's activities were giving rise to intense debates in public opinion, the applicant was carrying out clandestine activities at a high level of responsibility within the secret structure responsible for the organisation's pupils. The Government further argued that although the applicant denied having carried out such activities himself, he had acknowledged that members of the organisation engaged in illegal activities. The Government also submitted that, having examined the numerous items of evidence produced before them (witness statements, HTS records, etc.), the domestic courts had established that from 2010 to 2014 the applicant had gradually risen through the ranks of the hierarchy within the organisation's Çorum structure, before becoming a regional leader, and that during this period he had carried out multiple organisational tasks in connection with these functions. It had been established that the applicant, who had been responsible for several houses belonging to the organisation, had recruited new members, organised many group activities and guided the students towards public institutions such as military academies and the organisation's secret units. In the Government's submission, the facts of recruiting new members for such an organisation, planning clandestine activities to this end, training those members, supervising and guiding them with a view to achieving the organisation's aims and, lastly, infiltrating [individuals] into public institutions and the armed forces, had to be

considered as reprehensible conduct under the criminal law. According to the Government, it was also clear from the statements gathered by the authorities that in 2014 the applicant had left Çorum Province on the instructions of the organisation's pupil adviser and had moved to Ankara to conduct activities for the organisation (see paragraph 10 above). The Government viewed this as evidence that the applicant, who was regularly promoted to a higher rank within the secret structure responsible for the organisation's pupils, was a loyal member of the organisation and had shown unwavering commitment in his loyalty towards it.

139. The Government also argued that during the investigation or prosecution stage, some individuals who gave statements in respect of the applicant had indicated that the applicant looked after those pupils who were to be placed in military academies and that he had guided certain students within the pupils structure towards such institutions. In the Government's view, it had thus been established beyond reasonable doubt that the applicant belonged to the organisation's secret structure and had personally conducted numerous clandestine activities for it. Given the rank he held within the organisation, the Government considered that the applicant had been able to foresee that the organisation's secret cells also included a military structure, and that the organisation's members who belonged to that structure would have been in a position to use weapons if need be. In this regard, the Government submitted that the concept of foreseeability was not an absolute one and had to be examined in the specific circumstances of each case.

140. The Government considered it established that at a time of intense public debates about the organisation's illegal activities, the applicant had deposited money in Bank Asya at the request of the organisation's leader, and that he had worked in a private tutoring centre affiliated to it, which had paid his social-security contributions. The judicial authorities had determined that the applicant, by entering into an organic link with the organisation, had faithfully adopted the ideology and purposes of the organisation and had maintained his commitment towards it. In consequence, the Government submitted that when the applicant carried out the acts summarised above on the organisation's behalf, he was in a position to foresee that the organisation's aims could be considered unlawful, that the organisation could be designated as an armed terrorist organisation and that his actions could be held to constitute the offence of membership of a terrorist organisation.

141. With more specific regard to whether the applicant could reasonably have foreseen, at the time of committing them, that the actions for which he was ultimately charged could be construed as evidence of the offence of membership of an armed organisation, the Government stated that in view of the public awareness that had emerged, particularly after 2013, about the FETÖ/PDY's illegal activities, the domestic courts had found that the applicant had been in a position to understand the ultimate purpose of the organisation, its structuring within the State institutions and the armed forces,

and the fact that the organisation's members, who had access to the different armed branches of the State, would use this force when this became necessary to achieve the organisation's aims. The Government noted that, against this background, the courts had concluded, given in particular the applicant's level of education, knowledge and professional experience, and the nature of the evidence against him, that he had committed the acts attributed to him wilfully and with full knowledge of the illegal purposes of the FETÖ/PDY.

142. The Government also submitted that, under Turkish law, no lawful act could constitute the offence of membership of an armed terrorist organisation. Thus, in the present case, as in other investigations and prosecutions conducted in connection with the offence of membership of a terrorist organisation, an individual's acts became the subject matter of criminal proceedings only because, under cover of a lawful activity, they were committed for an illegal purpose, namely, to pursue the aims of a terrorist organisation. The Government pointed out that in order for an apparently lawful action – that was in reality illegal – to constitute the offence of membership of an armed terrorist organisation, it had to contain the elements of continuity, intensity and diversity, and to demonstrate the existence of a hierarchical link. Thus, the Government explained, referring to the Constitutional Court's judgment in *Metin Birdal*, that even if an individual's actions, taken alone, did not amount to an offence, they could constitute an offence when assessed in their entirety. In other words, the acts in question determined the status or profile of the applicant (see the *Metin Birdal* judgment, point 62, paragraph 79 above). For example, the fact of belonging to an association affiliated with a terrorist organisation did not in itself constitute an offence; however, examined in conjunction with other acts, such as the use of a code name within the hierarchical structure of the organisation and in the context of activities carried out on its behalf, holding organisational meetings and taking responsibility for houses run by the organisation, it could be accepted that the above fact fell within the material elements of the offence of membership of a terrorist organisation. The Government explained that this had been the long-standing and consistent case-law of the domestic courts; the Court of Cassation had long acknowledged, in the context of other terrorist organisations, that the performance of certain acts, by their nature, could in themselves constitute the offence of membership of an armed terrorist organisation. The Government referred in this connection to a judgment of the plenary criminal divisions of the Court of Cassation dated 26 June 2001, in which that court had held that the defendants act of submitting a curriculum vitae to Hezbollah, an illegal armed organisation, proved the existence of an organic link between him and that organisation, in that it demonstrated his readiness to discharge the duties that would be entrusted to him. The Government stated that no changes had been made to the offence of membership of a terrorist organisation for almost twenty years.

143. In sum, the Government considered, in the light of the Court of Cassation's relevant case-law, that the judicial authorities had acted correctly in concluding that the acts imputed to the applicant, "taken as a whole", constituted the offences of membership of the armed terrorist organisation FETÖ/PDY.

2. The Court's assessment

a) The general principles

144. For a recapitulation of the general principles governing the application of Article 7 § 1 of the Convention, the Cour refers to its relevant case-law in this area (see, in particular, *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, §§ 237-242, 26 September 2023; *Vasiliauskas v. Lithuania* [GC], no. 35343/05, §§ 153 et seq., ECHR 2015; *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 50, ECHR 2015; and *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 77-93, ECHR 2013; see also *Total S.A. and Vitol S.A. v. France*, nos. 34634/18 and 43546/18, §§ 52-57, 12 October 2023).

145. As regards, more specifically, the accessibility and foreseeability of criminal law, the Court has consistently reiterated that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law together with case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see *Del Río Prada*, cited above, § 91, and *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions*, 1996-V). Those qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.

146. Equally, it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. 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 *Cantoni*, cited above, § 31, and *Soros v. France*, no. 50425/06, § 51, 6 October 2011). However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. 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 *Kafkaris v. Cyprus* [GC], no. 21906/04, § 141, ECHR 2008, and *Soros*, cited above, § 52). Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see *Kafkaris*, cited above, § 141, and *Del Río Prada*, cited above, § 92).

147. The progressive development of the criminal law through judicial law-making is thus a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *Yüksel Yalçınkaya*, cited above, § 239; *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, § 50, ECHR 2001-II; and *Norman v. the United Kingdom*, no. 41387/17, §§ 60 and 66, 6 July 2021).

148. The Court further reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, § 68, Series A no. 173). A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, *inter alia*, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 37, Series A no. 316-B, and *Achour v. France* [GC], no. 67335/01, § 54, ECHR 2006-IV).

149. Lastly, the Court reiterates that, in principle, it is not its task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification, provided that these are based on a reasonable assessment of the evidence (see *Rohlena*, cited above, § 51). Its duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. Given the subsidiary nature of the Convention system, it is not the Court's function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *Vasiliauskas*, cited above, § 160; *Streletz, Kessler and Krenz*, cited above, § 49; and *Jorgic v. Germany*, no. 74613/01, § 102, ECHR 2007-III), and unless that domestic assessment is manifestly arbitrary (see *Kononov*, cited above, § 189). This principle also applies where domestic law refers to rules of general international law or international agreements (see *Korbely v. Hungary* [GC], no. 9174/02, § 72, ECHR 2008), and where domestic courts apply principles of international law (see *Kononov*, cited above, § 196).

b) Application of those principles to the present case

150. The Court considers it necessary to clarify from the outset that the present case is very different from the above-cited *Yüksel Yalçınkaya* case, which concerned Mr Yalçınkaya's conviction for membership of an armed terrorist organisation, which was based decisively on use of the encrypted messaging application ByLock, without the domestic courts having duly

established, in an individualised manner, the constituent material and mental elements of the offence set out in Article 314 § 2 of the Criminal Code. In the present case, however, the applicant was convicted of the offence of membership of an armed terrorist organisation, on account of acts committed, in particular, between 2011 and 2014 and on the basis of a wide range of evidence, and sentenced on the basis of the above-cited provision, the foreseeability of which he has challenged under Article 7 of the Convention.

151. With regard, first, to the accessibility of the law on which the conviction was based, the Court notes that the provisions of Article 314 § 2 of the Criminal Code entered into force on 1 June 2005 (see paragraph 75 above), that is, prior to the period in which the acts imputed to the applicant were allegedly committed. The Court must therefore ascertain whether, at the time of those acts were committed this offence was clearly defined in domestic law.

152. The applicant alleged in particular that, in convicting him, the authorities had violated Article 7 of the Convention in two respects: first, the FETÖ/PDY had not been designated as an "armed terrorist organisation" when he allegedly committed the acts attributed to him; secondly, he claimed that he had been convicted for lawful acts, through an expansive interpretation of the relevant laws. The Court will address these claims in turn.

i. Whether the FETÖ/PDY had been designated as a terrorist organisation at the time of the acts attributed to the applicant

153. The Court notes that it examined this question in its Grand Chamber judgment *Yüksel Yalçınkaya* (cited above), which concerned a conviction for membership of an armed terrorist organisation based decisively on use of the encrypted messaging application ByLock prior to the attempted coup of 15 July 2016. It found that the FETÖ/PDY had not yet been designated, in the manner provided for in domestic law, as an armed terrorist organisation when the applicant in that case carried out the various acts for which he was convicted. Although the applicant in the present case was not accused of having used that encrypted messaging service over the same period, the Court's approach can be applied to the present case, given that the acts held against the present applicant are alleged to have been committed before the end of 2014. In the above-mentioned judgment, the Court noted that, while the Erzincan Assize Court (ruling at first instance) declared the organisation to be terrorist in nature on 16 June 2016 – that is, one month prior to the coup attempt –, the first final judgment to that effect was delivered by the Samsun Regional Court of Appeal on 7 March 2017. The first rulings of the Court of Cassation in that regard followed on 24 April and 26 September 2017 (ibid., §§ 252-253).

154. However, as the Court noted in its *Yüksel Yalçınkaya* judgment, the fact that the FETÖ/PDY had not yet been designated, in the manner provided

for in domestic law, as an armed terrorist organisation when the applicant carried out the various acts held against him was not sufficient to render his conviction incompatible with Article 7 of the Convention. As the Court had already accepted in *Parmak and Bakır v. Turkey* (nos. 22429/07 and 25195/07, § 71, 3 December 2019), the rule in Turkish law regarding the legal designation of a terrorist organisation does not have the effect of precluding the criminal liability of the founders or members of the organisation for acts undertaken before such designation, to the extent that they acted "knowingly and willingly" (compare *Kasymakhunov and Saybatalov v. Russia*, nos. 26261/05 and 26377/06, §§ 82-87, 14 March 2013). In this connection, under Turkish law, the case-law of the Court of Cassation holds that, where domestic courts are confronted with the task of assessing for the first time whether an organisation can be classified as terrorist, they must carry out a thorough investigation and examine the nature of the organisation by scrutinising its purpose, whether it has adopted an action plan or similar operational measures, and whether it has resorted to violence or a credible threat to use violence in pursuing that action plan (see *Parmak and Bakır*, cited above, § 71).

155. The Court considers accordingly that the relevant question for the purposes of the present case, as in the above-cited *Yüksel Yalçınkaya* case (§ 254), is not whether the FETÖ/PDY had already been proscribed as a terrorist organisation at the time of the acts attributed to the applicant. It is whether his conviction for membership of an armed terrorist organisation was sufficiently foreseeable given the requirements of the domestic law, in particular as regards the cumulative constituent material and mental elements of the offence such as they appear in Article 314 § 2 of the Criminal Code, the Prevention of Terrorism Act and in the relevant case-law of the Court of Cassation. It is therefore necessary to examine whether the applicant's membership of an armed terrorist organisation was established in keeping with the requirements of the domestic law.

ii. Whether the applicant was convicted on the basis of lawful acts following an expansive interpretation of the relevant laws

156. The applicant also complained that he had been convicted for lawful acts, through an expansive interpretation of the relevant laws. In addressing this complaint, the Court must first examine the constituent elements of the offence of membership of a terrorist organisation, then examine more closely the *actus reus* and *mens rea* of this offence in the context of the present case.

α) The elements of the offence of membership of an armed terrorist organisation

157. The Court notes that the applicant's conviction was based on Article 314 § 2 of the Criminal Code, which punishes membership of an armed organisation. Although Article 220 of the Criminal Code defines the

offence of forming an organisation with the aim of committing any criminal offence (criminal organisation), Article 314 of the same Code specifically concerns an armed organisation formed with the purpose of committing one of the offences referred to in the first paragraph of that provision, that is, offences against State security and the constitutional order. With regard to the characteristics of a criminal organisation for the purposes of Article 220 of the Criminal Code, it is clear from the Court of Cassation's case-law that the domestic court must assess whether the organisation has, or had, sufficient members, tools and equipment to enable it to commit the intended offence. In assessing the means available to the organisation to achieve this objective, the court must verify whether the organisation possesses, or possessed, a sufficient amount of arms to carry out its aims, or the means to access such arms, and whether it uses, or used, pressure, force and violence, terror, intimidation, oppression or threat (see section 1 of the Prevention of Terrorism Act, quoted in paragraph 78 above).

158. The Court also notes that the case-law of the highest national courts illustrates the complexity of examining cases of presumed membership of organisations that are found *a posteriori* to be terrorist in nature, and the importance of these courts applying the law in a foreseeable and rigorous manner, so as to administer justice in accordance with the fundamental principles of criminal law. According to the national courts' relevant case-law, conviction for membership of an armed terrorist organisation follows only where the accused's organic link with the armed organisation is established, based on the continuity, diversity and intensity of his or her activities, and where it is demonstrated that he or she acted knowingly and willingly within the organisation's hierarchical structure and embraced its objectives (see *Yüksel Yalçınkaya*, cited above, § 248). A member of a criminal or armed organisation is a person who adheres to the hierarchy of the structure in question, and accordingly submits to the will of the organisation by being ready to discharge the duties entrusted to him or her. In consequence, membership of such an organisation amounts to a continuing offence, that is, the acts in question must have been committed over a period of time (for the definition of a continuing criminal offence, see *Rohlena*, cited above, § 57).

159. The mental element of the crime is "direct intent and the aim/objective of committing a crime". It follows that for a person to be considered as participating in an organisation's activities, it must be established that he or she knows that the organisation commits, or aims to commit, crimes, and that he or she has a specific intent to contribute to achieving that purpose. Although the commission of an actual crime in connection with the organisation's activities and for the achievement of its aims is not required to establish the offence of membership of an armed terrorist organisation, the individual must nevertheless have made a concrete material or mental contribution to the organisation's actual existence or

reinforcement (see *Yüksel Yalçınkaya*, cited above, § 248). Moreover, according to the Court of Cassation, the members of the organisation who know its goals and methods will be punished on the basis of their positions within the organisation (see paragraph 89 above).

160. Thus, the wording of the relevant provisions (Articles 220 and 314 of the Criminal Code and sections 1 and 7 of the Prevention of Terrorism Act, cited in paragraphs 75, 76 and 78 above) and the case-law of the highest courts indicates that where it is established by evidence whose soundness has been tested by the national court (see the Constitutional Court's judgment in *Mithat Birdal*, point 72, paragraph 79 above) and at the close of proceedings in which the right to a fair trial has been respected, that an accused belonged to the hierarchy of a criminal organisation, that his activities demonstrated continuity, diversity and intensity, and that the individual in question occupied a given position within the organisation's secret hierarchy, then it is considered that he was aware of that organisation's aims and methods.

161. In *Yüksel Yalçınkaya*, the Court examined the wording of these legal provisions. Having regard to their interpretation by the domestic courts, it considered that this offence was codified and defined under Turkish law, in keeping with the principle of legality under Article 7 of the Convention (ibid., § 249). The Court sees no reason to hold otherwise in the present case. Nonetheless, the applicant complained that he was convicted for acts that were lawful, through an expansive interpretation of the relevant laws. The Court will examine this argument below.

β) The mental element of the offence

162. With regard to the characterisation of the offence, the Court notes, first, that for the establishment of the facts (see, for example, *Grande Stevens and Others v. Italy* (dec.), nos. 18640/10 and 4 others, § 78, 15 January 2013, and *Sampech v. Italy* (dec.), no. 55546/09, § 38, 19 May 2015), the Assize Court held, in a judgment that was lengthily reasoned in both facts and law, that the applicant had intentionally joined the organisation and had carried out clandestine activities in the context of his functions within the organisation's secret structure, and concluded that this conduct was punishable under Article 314 § 2 of the Criminal Code.

163. The Court further notes that the domestic courts examined whether the various constituent elements of the offence of membership of a terrorist organisation had been made out. It notes in this connection that the applicant was found guilty of the acts of which he was accused, namely carrying out unlawful activities within the organisation's secret structure, at least during the period between 2011 and 2014. The Çorum Assize Court, in particular, gave reasons for its judgment on that point by conducting a detailed analysis of each of those elements in the light of the provision on which the offence was based, as interpreted by it. Thus, having examined the evidence submitted to it (witness statements, HTS records, etc.), it established that the

applicant had secretly carried out activities within the organisation by using a code name and that he was one of the main regional student leaders in the organisation's secret structure. In evaluating the applicant's activities, the Assize Court noted that all those acts had to be assessed in their entirety and that the accused's guilt had to be determined accordingly. It noted that, in reasoning in this way, the requisite conditions of continuity, diversity and intensity had been met and that it could be regarded as established that the accused was a member of the organisation (see paragraph 42 above).

164. The Court observes in this regard that it is clear that the above-mentioned acts did not benefit from the presumption of legality when they were committed and did not pertain to the applicant's exercise of his Convention rights (see, *a contrario*, *Taner Kılıç v. Turkey (no. 2)*, no. 208/18, § 105, 31 May 2022; *Yüksel Yalçınkaya*, cited above, § 343; and *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, §§ 278-280, 22 December 2020). Nor can it be concluded that the acts for which the applicant was convicted were attached, in an unverifiable manner, to a criminal aim (compare *Kavala v. Turkey*, no. 28749/18, § 145, 10 December 2019). The applicant was not accused of having conducted those activities as part of a lawful entity acting in accordance with the law: it was established that the applicant's activities were specifically aimed at enlarging the support base from which the organisation intended to recruit, especially among students, and to infiltrate public institutions. Furthermore, it should not be overlooked that the national courts also established that the activities of the organisation's members, such as those in issue in this case, were carried out in secret, in order to achieve that organisation's aims, and that the organisation had also resorted to illegal actions, such as stealing university or civil-service entry exam questions for its supporters (see paragraphs 37-40 above). Consequently, the Court is not persuaded by the applicant's argument that he was convicted for lawful acts.

165. It follows that the material element (*actus reus*) of the offence for which the applicant was convicted lay, in the present case, in the fact that the applicant, by making himself available for commands and instructions, became part of the organisation's hierarchical structure and had secretly, intensely and continuously conducted activities for the achievement of the organisation's aims.

166. Admittedly, the domestic courts also justified the applicant's conviction by the fact that his social-security contributions had been paid by a private company that was allegedly affiliated with the organisation and that – according to the domestic courts, on orders from the organisation's leader – the applicant had deposited money in his bank account in January 2014. However, the Court has already expressed doubts as to the merits of reasoning which derives assistance from actions of this nature (that is, from acts that were apparently lawful at the moment they were undertaken and which accordingly benefit from a presumption of legality), in order to conclude that

there existed plausible reasons to suspect that an individual had committed an offence (see *Taner Kılıç (no. 2)*, cited above, § 105) or on which to base a conviction (see *Yüksel Yalçınkaya*, § 343). In the present case, the Court finds it clear that this was merely circumstantial evidence, and insufficient to convict the applicant of membership of a terrorist organisation.

167. The Court observes, however, that it is clear from the decisions of the domestic courts and the Government's observations that the acts thus attributed to the applicant had very limited bearing on the outcome of the proceedings. The reference to this evidence was used only to corroborate the conclusion that the applicant, who had carried out activities as part of the hierarchy of the organisation's secret structure, was a member of an armed terrorist organisation (see, to similar effect, *Yüksel Yalçınkaya*, cited above, § 268; compare *Kasymakhunov and Saybatalov,* cited above, § 85).

168. The applicant also argued that the mental element of the offence in question had not been duly established in his case. The Court will examine this argument below.

γ) The intentional element of the offence

169. The Court reiterates its case-law to the effect that the Contracting States remain free, in principle, to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected by the Convention and therefore to define the constituent elements of such offences (see *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 243, 28 June 2018). Nonetheless, the requirement of accessibility and foreseeability entails that, in principle, a measure can only be regarded as a penalty within the meaning of Article 7 where an element of personal liability on the part of the offender has been established. Accordingly, Article 7 requires, for the purposes of punishment, the existence of a mental link through which an element of liability may be detected in the conduct of the person who physically committed the offence (see *Yüksel Yalçınkaya*, cited above, § 242, and *G.I.E.M. S.r.l. and Others,* cited above, §§ 242 and 243).

170. The Court refers to its finding above that the offence provided for by Article 314 § 2 of the Criminal Code was codified and defined under Turkish law, in keeping with the principle of legality under Article 7 of the Convention (see paragraph 161 above) and that the applicant was found guilty of this offence on account, in particular, of unlawful activities carried out by him within the organisation's secret structure (see paragraphs 163-165 above). It also notes that under Turkish law the offence of membership of an armed terrorist organisation can only be committed with direct intent, and that the Court of Cassation itself has accepted that not all members of the organisation could be considered as possessing the knowledge and direct intent required for a finding of guilt under Article 314 § 2 of the Criminal Code (see paragraph 89 above).

171. In this connection, the Government explained that, given that the applicant carried out high-level activities within the organisation's secret structure in Çorum from 2010 to 2014, he had been in a position to foresee, in the circumstances of the relevant time, that the acts that were ultimately attributed to him fell within the scope of participation in an illegal organisation and were, accordingly, illegal. As established by the domestic courts, the facts, in the Government's view, showed that the applicant was a reliable member of the organisation, and that he demonstrated unwavering commitment towards it. In the Government's view, the applicant, given his status within the organisation, was in a position to understand that the organisation's secret cells also contained a military structure and that the organisation's members who belonged to that structure were likely to use weapons when given orders to that effect.

172. For his part, the applicant, referring to the judgment acquitting F. Gülen in 2000, submitted that, contrary to the public prosecutor's argument that acts such as the management of private houses for students, appointment as a leader (*imam*) for those houses or the organisation of events to prepare students for various examinations were regarded as illegal acts that were committed by the organisation allegedly led by F. Gülen, this latter individual had been acquitted in 2000 of the same charges as those brought against him. The applicant therefore relied on the *res judicata* principle.

173. The Court does not consider it necessary to dwell on the argument that the applicant draws from the *res judicata* principle, which is relative in that it is limited *inter partes*, and appears to have been raised for the first time before the Court. In any event, the Court dismissed an identical argument in the above-cited *Yüksel Yalçınkaya* judgment (§ 253), when it stated that that F. Gülen's earlier acquittal of the charge of founding an armed terrorist organisation did not *per se* exclude the possibility of a different verdict regarding the nature of the FETÖ/PDY at a later time on the basis of subsequent developments.

174. More specifically, the Court does not doubt that the need to establish the existence of the constituent elements of the relevant offence on a case-by-case basis was all the more compelling in the present context, given the organisation's pervasive presence in all sectors of Turkish society for a considerable period of time, as noted by the domestic judicial authorities (see *Yüksel Yalçınkaya*, cited above, § 266). It also notes the Government's arguments regarding the *sui generis* nature of the FETÖ/PDY as an organisation operating in secrecy.

175. The Court observes, however, that the domestic courts established the intentional element of the alleged offence with reference to a wide range of prosecution evidence showing that the applicant, as a leader within the organisation's secret structure, had conducted his clandestine activities on the organisation's behalf. In this respect, the present case thus differs from that of *Yüksel Yalçınkaya*, in that, in the latter case, it was the mere use of ByLock

which was equated with knowingly and willingly being a member of an armed terrorist organisation (see *Yüksel Yalçınkaya*, cited above, § 267), while the applicant in the present case, in contrast to Mr Yalçınkaya (ibid., § 257), was convicted of the offence of membership of an armed terrorist organisation, not on account of an established use of ByLock, but on the grounds that he belonged to the organisation's secret structure.

176. Furthermore, according to the case-law of the Constitutional Court, when they are called upon to determine whether an individual belongs to the FETÖ/PDY the courts must also bear in mind that a significant proportion of the population knew, and supported, the organisation for many years as a religious group which carried out activities that were beneficial to society, such as in the field of education, without being aware of its illegal nature. The Constitutional Court held that in those circumstances, where an accused alleged that he had been unaware of the nature of the FETÖ/PDY, this claim had to be examined in the light of the mistake provision in Article 30 of the Criminal Code, having regard to factors such as the accused's position in the organisation and the nature of the acts attributed to him or her (see paragraph 85 above). In addition, according to the Court of Cassation, the members of the organisation who knew its goals and methods were to be punished on the basis of their positions within the organisation (see paragraph 89 above; see also *Yüksel Yalçınkaya*, cited above, § 163).

177. That being so, it is clear from the case-law of the domestic courts that, where a member of a structure which carries out activities in a lawful manner but harbours an ultimate unknown purpose (due to its concealment) claims that he or she was unaware of the fact that the given structure was a terrorist organisation, then these courts must undertake an assessment under the "mistake provision" set out in Article 30 § 1 of the Turkish Criminal Code. If the mistake is so great as to rule out the existence of intent, no penalty is be imposed on the accused (see paragraph 89 above). However, where it is established at the close of proceedings which complied with the right to a fair trial that an accused belonged to the organisation's hierarchy, carried out activities aimed at achieve the organisation's ulterior goals and displaying continuity, diversity and intensity, and occupied a specific position within this structure, it is considered, as in the present case, that the accused was aware of the organisation's goals and methods.

In the Court's view, this assessment by the domestic courts of the intentional element in the applicant's case represented a foreseeable rather than expansive interpretation and application of the criminal-law provision in question.

178. Furthermore, the Court notes that, before the domestic courts, the applicant merely denied that he was a member of the organisation's secret structure and stated that he had simply taken part in a few dinners and discussion meetings organised by establishments linked to it, so that he could be considered only as a sympathiser of the organisation (see paragraphs 17,

34, 50 and 52 above). It should not, however, be overlooked that the applicant's membership of the organisation's secret structure and the continuity, diversity and intensity of his clandestine activities in this context were established in the course of proceedings which have not been held to be contrary to the principles of a fair trial guaranteed by the Convention, and in which no infringement of the rights of the defence has been found.

179. In this connection, the Court notes that in any system of law it is for the domestic courts to interpret the provisions of substantive criminal law in order to determine, by reference to the structure of each offence, the date on which, all the requirements of the offence being present, a punishable act was committed. The Convention may not act as a bar to this kind of judicial interpretation, provided that the conclusions reached by the domestic courts are reasonably foreseeable within the meaning of the Court's case-law (see *Rohlena*, cited above, § 58). Moreover, the Court is not called upon to rule on the applicant's individual criminal responsibility (see *Kononov*, cited above, § 187).

iii. General conclusion

180. In view of all the above considerations, the Court is satisfied that the offence of which the applicant was convicted not only had a basis in the relevant "national ... law at the time when it was committed" but also that this law defined the offence sufficiently clearly to meet the quality requirement of foreseeability, so as to enable the applicant to regulate his conduct for the purposes of Article 7 of the Convention (see, *mutatis mutandis*, *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V). It also considers that the interpretation of the provisions of Article 314 § 2 of the Criminal Code adopted by the domestic courts is not expansive and that it resulted in the present case in an outcome that is consistent with the essence of the offence and must therefore be regarded as reasonably foreseeable.

181. There has accordingly been no violation of Article 7 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 3 of the Convention in respect of the conditions of detention in Çorum Prison and under Article 7 of the Convention admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 3 of the Convention;

3. *Holds* that there has been no violation of Article 7 of the Convention;

Done in French, and notified in writing on 27 August 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Arnfinn Bårdsen
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Krenc is annexed to this judgment.

A.R.B.
H.B.

CONCURRING OPINION OF JUDGE KRENC

(Translation)

1. I voted in favour of finding no violation of Article 3 of the Convention in the present case, and I should like briefly to explain that decision.

2. My reason for voting against a finding of a violation of Article 3 lies essentially in the fact that, as noted in the present judgment (see paragraph 113), the Court has, to date, never found a breach of that provision solely because a detainee has been required to sleep on a mattress on the floor, with the exception of cases where, in addition to inadequate bedding conditions, the personal space afforded to the applicant was less than 3 sq. m.

This is how the case-law stands and I have resolved to follow it. Nonetheless, I cannot hide certain concerns.

3. In my view, the conditions of detention experienced by the applicant in the present case raise serious issues.

4. It should be noted at the outset that the capacity of Çorum Prison was initially set at 477 inmates. However, the number of inmates rose to 1,592 following a decision of 15 October 2018, and it appears that in reality the number of prisoners housed in the prison during the period of the applicant's incarceration varied between 1,950 and 2,000 persons (see paragraph 105).

In other words, the number of prisoners was four times higher than the prison's capacity. Thus, the rise was not in the realm of doubled or tripled capacity, but represented a fourfold increase compared to the initial capacity, a particularly striking situation.

5. This extreme overcrowding inevitably leads to inadequacy in terms of prison infrastructure.

It is enough to consider that, in terms of sanitary facilities, each unit was equipped with only two toilets and two showers (see paragraph 59), for 37 to 47 prisoners in Unit F-5 and for 27 to 42 prisoners in Unit F-10 (see paragraphs 59 and 60).

It is also clear from the material submitted to the Court that beds were installed in the communal living area as a result of overcrowding in the dormitories (see paragraph 106).

One might also question whether a courtyard measuring 64.36 sq. m. was sufficiently spacious for such a large increase in the number of inmates, and whether the inmates could adequately engage in external activities in that space (see paragraph 65).

6. In this context, the applicant's conditions of detention were problematic, given the limited personal space available to him.

We are aware that the case-law approach in this area was determined by a Grand Chamber in the *Muršić v. Croatia* judgment ([GC], no. 7334/13, 20 October 2016).

On a personal level, I must admit to misgivings on this point, since it is hardly easy to calculate or verify surface-area measurements with any accuracy from Strasbourg.

Notwithstanding this methodological reservation (which also raises the question of how evidence is to be established in the area of prison conditions), the present judgment notes that the personal space afforded to the applicant during the fourteen months that he spent in Unit F-5 varied between 3.6 and 4.6 sq. m. (see paragraph 110). Although the Court held in the *Muršić* case that 3 sq. m. of personal space was the minimum standard applicable under Article 3 of the Convention, it nevertheless considered that between 3 and 4 sq. m. of personal space could lead to a finding of a violation of this provision if the lack of space went together with other poor material conditions of detention (see *Muršić*, cited above, § 139).

7. In this regard, it is clear that the lack of personal space afforded to the applicant was not a one-off situation, but instead persisted for many months. Given that reference is made to the "cumulative effect" of the conditions of detention (see paragraph 114), it is impossible to ignore this duration and the consequences of those conditions for an inmate's psychological or physical health, given also the lack of privacy or constant noise (see paragraphs 4-5 above).

8. The lack of personal space available to the applicant was further exacerbated by the fact that he was required to sleep on a mattress on the floor. This is an aspect of the case-file to which I attach particular importance. Such a situation is not compatible with either the CPT standards (see *Vasilescu v. Belgium*, no. 64682/12, § 101, 25 November 2014) or even with the Court's own standards, in which the principle of "one prisoner, one bed" has been established (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 148, 10 January 2012).

It must be observed that the applicant was obliged to accept this situation "for a long period of his detention" (see paragraph 113). Thus, this was far from an exceptional or provisional situation, or a more limited duration, as examined by the Court in other cases (compare, in particular, *İlerde and Others v. Türkiye*, nos. 35614/19 and 10 others, § 194, 5 December 2023, and *Vasilescu,* cited above, § 101).

9. It is for these reasons that I wished to express my concerns, separately and respectfully, since there is a risk that such conditions of detention will be trivialised and the requirements of Article 3 of the Convention thereby watered down.