

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

GRAND CHAMBER

CASE OF YASAK v. TÜRKİYE

(Application no. 17389/20)

JUDGMENT

Art 43 • Government's request to reconsider the referral decision of the Grand Chamber panel rejected • Appropriateness of the decision not to be assessed by the Grand Chamber • Case, in so far as declared admissible, automatically referred to the Grand Chamber to be decided afresh
Art 35 § 3 (a) • Application not amounting to an abuse of the right of application
Art 7 • *Nullum crimen sine lege* • *Nulla poena sine lege* • Conviction for being member of armed terrorist organisation without any assessment of the applicant's *mens rea* of the offence • Enumeration of the principles of the requirement of individualised liability – *nulla poena sine culpa* • Domestic courts' failure to establish the *mens rea* required under domestic law, through an individualised and contextual assessment of criminal liability strictly limited to the temporal framework of the offence • Reliance of the applicant's role in the educational field without establishing the existence of a personal, functional or hierarchical link with the organisation's strategic branches and the extent of his responsibilities • Reliance on general considerations about the organisation's development from a religious movement to an entity designated as a terrorist organisation without establishing the applicant's awareness of this transformation and that he joined the organisation and maintained links in full knowledge of those facts • Violation of the individual right not to be punished without the existence of a mental link through which an element of personal liability must be established
Art 3 • Degrading treatment • Cumulative conditions of the applicant's conditions of detention in prison attained the minimum level of severity

Prepared by the Registry. Does not bind the Court.

STRASBOURG

5 May 2026

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



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In the case of Yasak v. Türkiye,

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

Mattias Guyomar*, President*,
Ivana Jelić,
Lado Chanturia,
Ioannis Ktistakis,
Kateřina Šimáčková,
Faris Vehabović,
Jolien Schukking,
Gilberto Felici,
Saadet Yüksel,
Anja Seibert-Fohr,
Peeter Roosma,
Ana Maria Guerra Martins,
Anne Louise Bormann,
Úna Ní Raifeartaigh,
Artūrs Kučs,
Mateja Đurović,
Juha Lavapuro*, judges*,

and Abel Campos, *Deputy Registrar,*

Having deliberated in private on 7 May 2025, 5 November 2025 and 11 February 2026,

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

INTRODUCTION

1. The case concerns the applicant's conviction, under Article 314 § 2 of the Turkish Criminal Code, for membership of an armed terrorist organisation, and also the conditions of his detention while serving his sentence in Çorum Prison. It raises issues under Articles 7 and 3 of the Convention.

PROCEDURE

2. The case originated in an 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.

3. The applicant was represented by Mr J. Vande Lanotte and Mr J. Heymans, lawyers practising in Mariakerke (Belgium). The Turkish Government ("the Government") were represented by their Agent.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 19 February 2021 the Government were given notice of the applicant's complaints under Articles 3 and 7 of the Convention. The remainder of the application (in particular, the applicant's complaint under Article 6) was declared inadmissible, pursuant to Rule 54 § 3.

5. In a judgment of 27 August 2024, a Chamber of the Second Section composed of Arnfinn Bårdsen, President, Jovan Ilievski, Saadet Yüksel, Lorraine Schembri Orland, Frédéric Krenc, Diana Sârcu and Gediminas Sagatys, and Hasan Bakırcı, Section Registrar, unanimously declared admissible the complaint under Article 3 of the Convention concerning the conditions of detention in Çorum Prison, and also the complaint under Article 7. Unanimously, it declared the remainder of the application inadmissible. It also concluded, unanimously, that there had been no violation of Article 3 or Article 7 of the Convention. The concurring opinion of Judge Krenc was appended to the judgment.

6. On 26 November 2024 the applicant requested that the case be referred to the Grand Chamber under Article 43 of the Convention. On 16 December 2024 a panel of the Grand Chamber granted that request.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

8. The applicant and the Government each filed further written observations on the merits of the case (Rule 59 § 1). In addition, third-party comments were received from the United Nations Special Rapporteur on Counter-Terrorism and Human Rights, Mr Ben Saul, who had been invited by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rules 44 § 3 and 71 § 1). Written comments were also received from the European Criminal Bar Association and the Italian Federation for Human Rights, the President of the Grand Chamber having granted them leave to intervene in the written procedure (ibid.).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 May 2025.

There appeared before the Court:

(a) for the Government

Mr A. AYDIN, *Co-Agent*,
Mr S. TALMON,
Mr O. DEĞİRMENCİ, *Counsel,*
Ms B. BAYRAK ŞENOCAK,
Mr N. UZUN,
Mr H. AKCEVİZ,
Mr Ş. TAŞ, *Advisers;*

(b) for the applicant
Mr J. HEYMANS,
Mr J. VANDE LANOTTE, *Counsel*,

The Court heard addresses by Mr Aydın and Mr Talmon, for the Government, and from Mr Heymans and Mr Vande Lanotte, for the applicant, as well as their replies to questions put by judges.

10. Each of the parties also submitted written observations on certain of the questions put to them by the judges at the hearing.

11. Following the hearing, the President of the Grand Chamber, Marko Bošnjak, withdrew from the case when his term of office at the Court came to an end. As President of the Grand Chamber he was succeeded by Mattias Guyomar, and as a member of the composition he was replaced by the first substitute judge, Ana Maria Guerra Martins. Stéphanie Mourou-Vikström also withdrew from the case following the end of her term of office. She was replaced by the second substitute judge, Peeter Roosma (Rule 24 § 3).

THE FACTS

I. THE BACKGROUND TO THE CASE

12. The case concerns one of many sets of criminal proceedings brought against the alleged members of an armed terrorist organisation, namely the group referred to by the Turkish authorities as the "Fetullahist Terrorist Organisation/Parallel State Structure" (hereinafter "the FETÖ/PDY" or "the organisation"), which they consider to be responsible for the attempted *coup d'état* that took place in Türkiye on 15 July 2016 (for more details on that event and the measures taken by the national authorities at that time, see *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, §§ 10-17, 26 September 2023). For the purposes of the present case, the relevant elements relating to the attempted coup of 15 July 2016 and the organisation are summarised below.

A. Attempted *coup d'état* of 15 July 2016 and declaration of a state of emergency

13. During the night of 15 to 16 July 2016 a group of members of the Turkish armed forces calling themselves the "Peace at Home Council" attempted to carry out a military coup aimed at overthrowing the democratically elected Parliament, Government and President of Türkiye. During the attempted coup, more than 8,000 military personnel under the instigators' control bombarded several strategic State buildings, including the Parliament building and the presidential compound, attacked the hotel where the President was staying and the convoy in which the Prime Minister was

travelling, held the Chief of General Staff hostage, attacked and occupied a number of public institutions, occupied television studios, blocked the bridges over the Bosphorus and the airports in Istanbul with tanks and armoured vehicles, and fired on demonstrators who had taken to the streets to oppose the coup attempt. According to the figures provided by the Government, more than 250 people, including civilians, were killed on the night in question and more than 2,000 people were injured.

14. The day after the attempted military coup, the national authorities blamed the network linked to Fetullah Gülen (hereinafter referred to as "F. Gülen"), a Turkish citizen who at that time and until his death on 24 October 2024 was resident in Pennsylvania (United States of America), and was considered to be the leader of the FETÖ/PDY. The authorities attributed responsibility for the coup attempt to members of the FETÖ/PDY who had infiltrated the Turkish armed forces.

15. On 16 July 2016 the Bureau for Crimes against the Constitutional Order at the Ankara Chief Public Prosecutor's Office initiated a criminal investigation into the attempted coup. Acting within the framework of that investigation, the regional prosecutors' offices launched criminal investigations against those suspected of being involved in the coup attempt, as well as against other persons suspected of having links to the FETÖ/PDY.

16. On 20 July 2016 the Government declared a state of emergency for a period of ninety days as from 21 July 2016. The state of emergency was subsequently prolonged on seven occasions, each time for ninety days.

17. On 21 July 2016 the Turkish authorities gave notice to the Secretary General of the Council of Europe of a derogation from the Convention under Article 15. On 18 July 2018 the state of emergency was lifted.

B. The classification of the FETÖ/PDY as a terrorist organisation

18. Under Turkish law, the classification of a structure as a terrorist organisation is possible only by way of a judicial decision (see paragraph 102 below). According to the case-law of the Court of Cassation, domestic courts called upon to assess for the first time whether an organisation can be classified as terrorist must carry out a thorough investigation and determine 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 paragraph 114 below).

19. It appears from the domestic court judgments submitted by the parties that although the FETÖ/PDY, which was formerly known as the "Gülen movement" or the "Gülen community" (*Gülen cemaati*), had initially been perceived as a religious group after its inception in the 1960s, its motivations and *modus operandi* had nevertheless raised suspicions and contributed to a longstanding public debate as to whether its motivations were solely religious

(see paragraph 112 below). In this connection, the leader of the movement, F. Gülen, was charged in 1999 with founding and leading a terrorist organisation, on account of the activities of the "Gülen movement". The Court of Cassation, sitting in plenary criminal divisions, ultimately acquitted him of this charge in a final decision delivered on 24 June 2008 (see *Yüksel Yalçınkaya,* cited above, § 18).

20. It also appears from the relevant domestic court judgments that the debates and controversy surrounding the FETÖ/PDY intensified after 2013, particularly following the so-called "17-25 December investigations" and the "MİT trucks" incident, which reinforced misgivings about the motivations of the FETÖ/PDY and triggered numerous investigations in relation to suspected members of that movement on terrorism-related charges (ibid., § 19).

21. The assessment by the State security services of the FETÖ/PDY also changed over time. The National Security Council, a consultative body, issued increasingly strong warnings about the FETÖ/PDY from the start of 2014, by means of press statements issued at the end of its regular bi-monthly meetings. This growing concern is reflected in a gradual change in the description of the organisation in those press releases: in February 2014, it was considered a "structure threatening public peace and security". In the press release issued at the close of the meeting of 30 October 2014, the National Security Council listed the FETÖ/PDY as one of the threats facing Türkiye's national security and referred to the organisation in the following terms: "parallel structures and illegal formations, conducting illegal acts under the guise of legality at home and abroad, that threaten our national security and disturb public order." Following its meeting on 26 May 2016, the last to be held prior to the coup attempt, the National Security Council issued a press statement, the relevant part of which reads as follows:

> "The efforts undertaken to ensure the peace and security of our citizens and the public order, the achievements in the fight against terror and terrorist[s] and the measures taken against the parallel State structure – which threatens our national security and which is a terrorist organisation – have been discussed."

This was the first time that the National Security Council expressly referred to the organisation as a terrorist organisation (ibid., § 251).

22. As regards the status of the organisation in domestic case-law, it was only on 16 June 2016 that the Erzincan Assize Court, sitting as a court of first instance, designated the organisation as terrorist in nature for the first time. Similarly, the first final judgment by a court of appeal attributing this status to the organisation was that of 7 March 2017, delivered by the Samsun Regional Court of Appeal. In addition, in two judgments delivered on 24 April and 26 September 2017, the Court of Cassation designated the FETÖ/PDY as a "terrorist organisation" (ibid., §§ 155-156 and 251; see also paragraphs 113-115 below). Thus, it was over the period 2016-2017 that the organisation was formally classified as a terrorist organisation by the courts.

II. THE CIRCUMSTANCES OF THE CASE

23. The applicant was born in 1987 and currently lives in Stockhausen-Illfurth, Germany. When his application was lodged, he was serving a prison sentence in the L-type prison in Çorum.

24. After the coup attempt, the Çorum Public Prosecutor's Office initiated a criminal investigation into the activities of the FETÖ/PDY in Çorum Province. In an indictment filed on 4 August 2017 (see paragraph 30 below), the applicant was accused of belonging to the organisation, which marked the beginning of the criminal proceedings against him. The accusation was based on evidence gathered in the course of the criminal investigation referred to above and was subsequently supplemented by evidence obtained during the proceedings before the Çorum Assize Court. This evidential material is set out in detail below. Certain witness statements that were taken by the police or by the public prosecutor before the bill of indictment was lodged played a key role in the applicant's conviction and were given by witnesses who had indicated a wish to benefit from the "active repentance" regime, including Y.B. and A. B. (see paragraphs 43 and 46 below).

A. The applicant's arrest and his statements

25. On 26 January 2017, on orders from the Çorum magistrates' court, the police carried out a search of the applicant's home during which they seized, among other devices, five mobile phones, two hard drives, three laptops and a camera.

26. On 30 January 2017 the applicant handed himself in at the Nevşehir police station. He was placed in police custody on suspicion of membership of the FETÖ/PDY.

27. On 1 February 2017 the applicant met with his lawyer at the premises of the Çorum Province Anti-Terrorism Directorate.

28. On the same day the police recorded the applicant's statement in the presence of his lawyer. He stated that he had participated in a few dinners and three conversation meetings organised by institutions linked to the organisation when he was staying in the university residence, but denied that he had held any position within this structure or that he had carried out any activity on behalf of that organisation. Questioned about the incriminated organisation's aim and strategy, he indicated that he knew nothing about these. He added that he had approached the Gülenist movement to obtain a reference that could facilitate his job search.

During the police interview, the relevant portions of the statements taken from witnesses B.A. and Y.B. were read out to the applicant and questions were asked about them (see paragraphs 39 and 43 below). In response, the applicant stated that he did not know B.A. and Y.B., who had accused him of belonging to the FETÖ/PDY, and that he had not carried out any activities on

behalf of the organisation in question. He added that he had not assumed any responsibility as a regional student leader ("*Bölge Talebe Mesulleri*", hereinafter "BTM") or principal regional student leader ("*Büyük Bölge Talebe Mesulü*", hereinafter "BBTM") and had not guided or directed anyone. He further stated that he had not carried out any investigation of individuals on behalf of the *cemaat*. He had heard in the media that the organisation (*örgüt*) was carrying out such investigations into its members. Moreover, in response to the questions put to him, he repeated that he had not carried out any activities on behalf of the *cemaat*, with the exception of the Turkish Language Olympiad, and that he did not know E.B. (see paragraph 52 below). He also claimed to be unfamiliar with the organisation's structure, although he had heard that in each province there was a leader ("*il abisi"* – older brother of the province) and it was this person who organised the people under his supervision ("*her ilin bir abisi varmış, altındaki kişileri o organize ediyormuş"*).

29. On 6 February 2017 the applicant appeared before the Çorum magistrates' court, which ordered his detention on charges of membership of the FETÖ/PDY. He repeated the statements he had made to the police, stating that he did not wish to benefit from the active repentance regime, since he had no connection with the organisation in question.

B. The bill of indictment

30. On 4 August 2017 the Çorum Public Prosecutor's Office lodged a 71-page indictment against the applicant with the Çorum Assize Court. He was accused of being a member of the FETÖ/PDY, and of having carried out activities on behalf of that organisation in Çorum Province, in 2016, acts which fell within the scope of Article 314 § 2 of the Criminal Code. In the indictment, the public prosecutor's office first provided general information about the organisation, then examined the acts of which the organisation was accused from the perspective of Article 314 § 2 of the Criminal Code, and, lastly, detailed the evidence against the applicant. The evidence relating to these points, as set out in the indictment, may be summarised as follows.

31. The bill of indictment began by describing the FETÖ/PDY as 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 alleged that the organisation acted in line with the instructions given by its leader, with the intent of establishing a new political, economic and social order. To that end, the organisation was alleged to be aimed primarily at obtaining power, while acting with the greatest secrecy in order to achieve control and establish a new order. It purportedly used code names, special communication channels, and money from unknown sources, and harboured the aim of taking over all the constitutional institutions of the Republic of Türkiye by means of its human and financial resources. The prosecutor's office alleged that the

organisation's aim was not to come to power through legitimate methods, but to overthrow parliament, the government and the other constitutional institutions through force and violence, as demonstrated by the attacks carried out against several symbolic State buildings, including the Parliament building and the presidential compound.

32. The bill of indictment also described the specific terminology used by the FETÖ/PDY and its structure. In particular, it explained that the FETÖ/PDY had adopted a "cell-type organisation" within public institutions, that those cells consisted of a maximum of five persons who were subordinated to their hierarchical superior, named the "Brother" (*örgüt abisi*), and were the smallest organisational units within the FETÖ/PDY. The cells were not aware of each other's existence, so that if one cell was exposed, the others could continue their activities. The bill of indictment added that the organisation considered the infiltration of State institutions as one of its objectives. In particular, prior to civil-service entrance examinations, information had been provided to candidates so as to enable them to succeed in those examinations.

33. The indictment also provided the following details concerning the structure of the FETÖ/PDY. The organisation's secret hierarchy purportedly consisted of seven layers (for a detailed account of this hierarchy, see *Yüksel Yalçınkaya*, cited above, § 162). The seventh and highest layer was made up of seventeen individuals, chosen directly by the leader of the organisation. Transfers between the layers was possible; that said, transfers above the fourth layer were determined by the leader. In addition, the organisation had taken care to adopt a horizontal cellular structure in order to avoid detection and prevent the State from deciphering its functioning. The indictment further stated that the FETÖ/PDY, which had set itself up in the operative units of the Security Directorate and the armed forces, made use of the force and violence inherent in those entities, taking advantage of the domination and intimidation afforded by their authority. It stated that during the coup attempt of 15 July 2016, weapons were used by the members of the organisation, who appeared to be army officers but who were acting in line with the orders and instructions of the organisation's leader, as a result of which many civilians and public officials had died. Given in particular that certain members of the organisation were employed in State bodies that were authorised to carry weapons, and that those persons would not have hesitated to use the weapons in question if instructed to do so by the organisation's hierarchy, the indictment stated that it was self-evident that the FETÖ/PDY was an armed terrorist organisation within the meaning of Article 314 of the Criminal Code.

34. According to the indictment, during its first phase of existence, until the *coup d'état* of 12 September 1980, the organisation had initially endeavoured, on the one hand, to broaden its support basis – which it had recruited in particular among students, through the "houses of light" (*ışık evleri*) intended to accommodate them, houses described in the indictment as

the organisation's "cells", as well as through private tutoring centres (*dershane*) – and, on the other, to infiltrate public institutions with a view to achieving its objectives. It explained that, after completing this undercover project, the organisation had prioritised its objectives in the field of education, while secretly pursuing other activities. In addition, the organisation had, in a second phase following the 1980 *coup d'état*, made considerable progress in its plan to infiltrate public institutions. A key element of the organisation's long-term plan was to identify and train bright students, with a view to placing them in important public institutions. Economically, it had begun to operate as a holding company, bringing together several interlinked companies. Thus, in addition to its presence in the education field, it had founded a bank and launched activities in the health, finance, transport and media sectors.

35. The indictment also presented the elements of the offence of membership of an armed terrorist organisation within the meaning of Article 314 § 2 of the Criminal Code. After noting the domestic legislative provisions governing the concepts of "organisation" and "terrorism" and referring to the judgment of the 9th Criminal Chamber of the Court of Cassation, handed down on 27 November 2011 (E.2012/2721, K.2012/13802), the indictment explained that three elements had to be present for a structure to be qualified as a "terrorist organisation": (i) an ideology or purpose, as set out in section 1 of the Prevention of Terrorism Act (Law no. 3713), (ii) an organised structure, as defined in Article 220 of the Criminal Code, and (iii) the use of force and violence by the structure to achieve its goals. In that regard, it stated that those three elements were present in the present case. The indictment concluded that the FETÖ/PDY was an organisation that exhibited the characteristics of a terrorist organisation and that one of its most significant acts had been the attempted coup carried out by it on 15 July 2016.

36. With regard to the evidence contained in the indictment concerning the applicant, this consisted of: (a) the statements by witnesses B.A., Y.B., A.B. and H.E., taken during the criminal investigation, which allegedly established that the applicant had been covertly recruiting and disseminating the organisation's ideology under a code name, as one of the student leaders for Çorum Province within the organisation's secret structure; (b) analysis of the Historical Traffic Search (HTS) records of the telephone line belonging to E.B., showing that the applicant's name was listed among the persons with whom E.B. had been in contact; (c) bank statements for the applicant's account with Bank Asya, which showed that a certain sum had been deposited in January 2014; and, lastly (d) the payment of the applicant's social-security contributions by a private company affiliated to the organisation. The indictment concluded that, in the applicant's case, having regard to the continuity, diversity and intensity of his activities as mentioned above, the offence of membership of an armed organisation as defined in Article 314 § 2 of the Criminal Code had been made out.

C. The evidence obtained during the investigation and subsequent criminal proceedings

37. The evidence obtained in the course of the investigation and in the criminal proceedings against the applicant falls into several categories: (1) witness statements; (2) an analysis and findings report on the HTS records of a mobile telephone line; (3) two reports on the payment of social-security contributions; and (4) the applicant's banking activities with Bank Asya. This evidence has been grouped and presented below by category, rather than by the date on which it was obtained.

38. The witness statements mentioned below (see paragraphs 39-51), were obtained at various stages in the proceedings (by the police or the public prosecutor's office). The Çorum Assize Court, which was responsible for trying the case, decided to have these witnesses heard by way of letters rogatory (see paragraph 56 below); two of them, namely Y.B. and A.B., were thus heard by courts acting under letters rogatory. It also appears from the case file that the applicant stated, on a single occasion, that he was willing to confront these witnesses before the Çorum Assize Court (see paragraph 59 below). However, neither in his notice of appeal (see paragraph 73 below), nor in his appeal on points of law (see paragraph 75 below), nor in his application to the Constitutional Court (see paragraph 77 below), did he raise any complaint concerning the lack of confrontation with any of these witnesses. The file contains no information regarding the outcome of the criminal proceedings opened against two of the witnesses who are specifically mentioned in the Assize Court's judgment (see paragraph 64 below).

1. Witness statements taken in the criminal investigation initiated by the Çorum Public Prosecutor's Office

(a) B.A.'s statements

39. On 7 December 2016 the police took a statement from B.A., who was suspected of membership of the FETÖ/PDY. When making his statement in the presence of his lawyer, B.A. expressed a wish to benefit from the "active repentance" regime set out in Article 221 of the Criminal Code, which provides for the possibility of a reduction in sentence in exchange for information. He then stated as follows. Between 2010 and July 2015 he had taken part in the organisation's activities, but claimed to have left it in 2015. In the context of these activities, he had known numerous individuals within the secret structure responsible for overseeing the organisation's student network in Çorum Province. In response to a question about the purpose and strategy of the organisation, he stated as follows:

> "I do not know the organisation's goal and strategy. When I was in the organisation, I was told that its aim was to train a pious generation and I didn't know that it had another aim. During the attempted *coup d'état* of 15 July, I understood that it was

working to achieve the aim of overthrowing the State and building a structure in line with its ideology."

According to B.A., the hierarchical organisation of this structure was as follows: at the top was the regional student supervisor ("*Büyük Bölge Sorumlusu*"), who was responsible for the principal regional student leaders ("BBTM"), who in turn supervised the regional student leaders ("BTM"); lastly, the BTMs were responsible for directing a network of "older house brothers" in residences where candidates for competitive examinations for the civil service or students from various universities were housed. B.A. also explained that certain measures had been taken to ensure the secrecy of their activities (*gizlilik tedbirleri*), such as the use of ByLock messaging, the storage of their mobile phones in a room other than that where the "discussion meetings" took place, the use of code names by certain senior leaders of the organisation, and monitoring of their activities by the house imams, who used code names.

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

"Recep or Şaban – I know for sure that one of these names was his code name. He was 26 or 27 years old, 1.75 or 1.80 m tall, had fair skin, brown hair, and a slight limp. He was continuing his studies at the Faculty of Economics and Administrative Sciences, where he had graduated. I know that he comes from Kayseri. I found out there that he was one of the BBTMs within the organisation. During a camp for residents of the student accommodation, he was responsible, with the assistance of the regional leaders (*Bölgeci*) and the BTMs, for 90 to 100 students: he planned the organisation's activities and scheduled conversation meetings ("*sohbet*") aimed at familiarising the students with the organisation's ideology. I heard that in 2010 and 2011, he asked the *imam* (person responsible for the house) and my friends about me. I understood that he was thinking of appointing me as an "older house brother" ("*ev abisi*") ..."

B.A. also explained why he had not assumed any responsibilities within the organisation. He stated, in particular:

"I [had] already said that the principal regional student supervisor Recep or Şaban [the applicant] had inquired about me, asking the older house brother in my residence and my friends about me, and that I understood that he was thinking of making me an older house brother. However, I think he crossed me out because I was a smoker and had a girlfriend at that time, and I was not very involved in the organisation's activities."

40. It appears from the identification report drawn up by the police on 8 December 2016 that B.A. identified "Recep or Şaban" from photographs, and that this individual was none other than the applicant.

41. It appears from the preliminary report of the Çorum Assize Court of 23 August 2017 (see paragraph 56 below) and the minutes of the hearing of 14 February 2018, that the Assize Court had originally planned to hear B.A. on a letter rogatory. However, it ultimately opted to decide the case on the basis of the evidence available at the date of that hearing and having regard to the parties' position on the state of the evidence as expressed at the hearing(see paragraph 61 below).

42. However, on 26 February 2018, that is, after the delivery of the first-instance court's judgment of 14 February 2018, the Bulancak Criminal Court took B.A.'s statement on a letter rogatory. He repeated the statements he had made at the criminal investigation stage (see paragraph 39 above), to the effect that the applicant, as one of the BBTMs in the organisation's structure, had carried out activities on its behalf.

(b) Y.B.'s statements

43. On 10 January 2017 Y.B. gave a statement to the public prosecutor in the presence of his lawyer. Y.B. had also expressed his wish to benefit from the "active repentance" regime. He said that he had been linked to the organisation since 2007, and provided very detailed information about the organisation's hierarchical structure and its activities in Çorum Province for the purpose of recruiting and training students in line with the organisation's ideology. He stated, in particular, that he had first been appointed as a house *imam*. He added that between 2010 and 2014 he had lived in Çorum, and that in 2010 and 2011 he had been a regional leader, responsible for six student houses belonging to the organisation, and had then been appointed BBTM; he stated in that regard that there were four other BBTMs, including the applicant. He also stated that he had been responsible for some of the students who attended police and military academies. He added that from October 2014 he had begun working in a private tutoring centre in Çorum (*Çorum Eğitim Hizmetleri Anonim Şirketi*), but that, during his employment, his real task had been to look after the secret structure responsible for the students belonging to the organisation. He also stated that he had used applications such as ByLock and Kakao Talk to communicate with other members of the organisation. He added that he had been appointed in 2015 and 2016 as the person responsible for judges in Konya Province, and had charge of eleven judges and prosecutors, grouped under the names T4 and T5. He had been in contact with the other leaders of judges' groups, without however knowing those judges himself. He claimed to have severed 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 a *coup d'état* on 15 July 2016, but that, during the week in question, he had regularly received prayers via ByLock messaging and been invited to recite them.

44. It appears from the identification report drawn up by the police on 13 January 2017 that Y.B. had identified the applicant from photographs.

45. On 12 February 2018, at the request of the Çorum Assize Court, a statement was taken from Y.B. by the Istanbul Assize Court on a letter rogatory and placed in the case file. Y.B. confirmed and reiterated the statements he had made at the stage of the criminal investigation (see paragraph 43 above) and stated that the applicant had used the code name "Recep", held various positions of responsibility in the hierarchy of the secret structure responsible for the organisation's pupils, and carried out activities

on its behalf. Y.B. added that he had communicated with the applicant using the ByLock or Kakao Talk messaging services. He and the applicant had downloaded the ByLock messaging service in December 2013 or January 2014. He also stated that in 2013 he had participated with the applicant in trips to Kosovo[1] and North Macedonia, in the context of visits arranged by the organisation.

(c) A.B.'s statements

46. On 2-3 February 2017 the police took a statement from A.B. in the presence of his lawyer. A.B., who was suspected of membership of the organisation, also indicated that he wished to benefit from the "active repentance" regime. In his statement (which came to 34 pages), he claimed that he had been unaware when he was a member of the organisation that it was illegal, and that in 2013 he had begun to question the organisation's real purpose. His family had also warned him. He claimed to have left the organisation at the end of 2015.

A.B. provided very detailed information about the hierarchical structure to which he had belonged, and on the activities that were carried out in Çorum Province to recruit and train students.

As regards the applicant in particular, A.B. stated that he had assumed the following responsibilities: initially an *imam* in a student house in Çorum Province prior to 2011, the applicant had then been appointed as a BTM in 2011-2012 under the responsibility of F., one of the BBTMs; he had then become a BBTM in 2012-2013; lastly, having been appointed regional supervisor of students in 2013-2014, he had been in charge of between 20 and 25 houses belonging to the organisation. A.B. stated that he had assumed the latter responsibility jointly with the applicant in 2013 and 2014 and had carried out activities with him on behalf of the organisation under the authority of a certain Çetin ("student adviser" within the organisation); at the end of 2014 Çetin had asked the applicant to go to Ankara to prepare for the civil-service entry competition. He added that his social-security contributions had been paid between 2013 and 2015 by the Çorum tutoring centre, for his activities on behalf of the organisation rather than for work carried out for the tutoring centre. He also stated that, on the instructions of his hierarchical superior within the organisation, he had paid the sum of 10,000 Turkish liras (TRY) into Bank Asya in order to support that institution.

The relevant portions of A.B.'s statement read as follows:

> "Recep (K) Şaban Yasak: [this person] was a third-year student in the Faculty of Economics during the period 2010-2011. During that time, he was a house imam ... I

[1] All references to Kosovo in the present judgment, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

know that during the 2011-2012 academic year, he carried out BBTM duties. I do not remember exactly the areas of responsibility. To the best of my recollection, this individual held the position of *İlci* [provincial leader] with responsibility for KYK [university residences] in the academic year 2013-2014. I know that [he] was sent to Ankara at the end of 2014 by Çetin, an educational adviser ... to prepare for the civil-service entrance exam. I do not know what happened next.

I don't know how many KYK leaders served under this person's command in 2013-2014. However, I know only one, the following person:

Perviz: I don't remember this person's family name. I am not entirely sure of his position within the organisation under the command of Recep (K) Şaban Yasak, but he served as a KYK leader during the 2012-2013 academic year. I do not recall this person's subsequent organisational activities. ..."

After giving information about the other people belonging to the educational structure of the organisation, A.B. continued as follows:

"I have already given information about the person named Recep (K) Şaban Yasak ... During the academic year 2011-2012, he worked as a BTM under the direction of BBTM Fuat. When I mentioned this person earlier, I [already] told you about the positions he subsequently held. There were 6 to 7 student houses attached to it ... I did know some of the house imams, but I would not be able to remember them.

I know that during the 2011-2012 academic year, we went to Kayseri for a day with the people who lived in the houses for which we were responsible. The students were led by me, [the applicant] and Musa ...

...

During this period [2012-2013], we went to Jordan with Çetin's organisation, both for tourism and to visit the *cemaat* institutions and schools. I, Recep (K) Şaban Yasak and 6-7 other people whose names I don't remember were the student leaders ....

Çetin: ... He was also an educational advisor during this period. I remember downloading the Kakao Talk programme used by the organisation from the Google Play Store on his instructions and using it to communicate. In other words, we started making our daily phone calls from this point.

Recep (K) Şaban Yasak: ... [During the period 2013-2014], he was a BBTM like me, under Çetin's authority. I know that he had 20 to 25 student houses under his responsibility, but I do not know the area of responsibility.

...

... Although I had not really worked, Çetin arranged for me to be accepted to work in the public-relations department of *Çorum Eğitim Hizmetleri Anonim Şirketi*. Thus, my social-security contributions were paid by that company between 2013 and 2015."

With regard to the civil-service entry examinations, he specified that a person named A. with the code name Selim had tasked him with looking after groups of secondary-school students, continuing their religious training in accordance with the organisation's ideology, grading them on the basis of their participation in the organisation's activities, guiding them in their careers and supporting, for example, those who wanted to become police officers and soldiers. When asked about a practice whereby candidates in the civil-service entry examinations had been given examination-related

materials in advance so as to place them at an advantage, he replied that he had never seen such a practice. He said that Selim personally took care of students who wished to become police officers or servicemen and had been in a position to know what was really going on.

In addition, A.B. described in detail the duties and activities of the persons belonging to the organisation's structure. One of the main activities of the leaders of this structure, which was responsible for everything related to pupils and students, was to identify and train talented individuals with a view to placing them in important public institutions, such as the army, the national police and the gendarmerie. A.B. also stated that he had downloaded ByLock and used, among other things, applications such as Kakao Talk for exchanges within the organisation.

Regarding his duties under the responsibility of a certain Çetin, he explained that the latter had given him the task of maintaining contact with the students in the final years of university who wished to join institutions or military academies. In this role, he had personally looked after some of the students, checked whether they assumed tasks within the organisation, and verified whether they were studying the Koran, the *Risale-i Nur* [a study of the Koran written by Saidi Nursi, an early 20th-century theologian] and the books of F. Gülen sufficiently, and also their loyalty to the organisation.

He further stated that when students passed the entrance exam to the army, individuals named "*Doktor*" [*doctor*] by the organisation began to take charge of them, and the latter were also in contact with another student whom the organisation named an "*Öğretmen*" [*teacher*]. He added that after completing their studies, students in military academies were supervised by the organisation's local leaders. He also specified that the BBTMs could be appointed as "*Öğretmen*" for students in the military academies. In this regard, he claimed to have been appointed "*Öğretmen*" for two students in the Kuleli Military High School and to have carried out routine organisational activities using the code name Hamit. These activities were as follows: he telephoned the student in question using a landline; he set up an appointment at a house designated by the organisation; he would engage in a conversation with the aim of training him in the ideology of the organisation (*örgüt ideolojisi doğrultusunda yetişebilmesi için sohbet veriyordum*); he would advise him to pray secretly, not to go to the mosque for Friday prayers, to perform dry ablution (*tayammum*) and not to reveal his membership in the movement.

In response to a question about the organisation's purpose and strategy, he stated that he had been unaware of them, and that he had realised after the attempted coup of 15 July 2016 that the organisation had been using him and his fellow members as a tool for achieving its aim. He also explained that the use of code names ("*kod ismi kullanılması*") and the ByLock and Kakao Talk messaging services, the storage of their mobile phones in a room other than the one where the conversation meetings took place, and the steps taken

during the meetings with students in the military academies were measures to guarantee the secret nature of their activities.

It is also clear from A.B.'s statements that he was a student at the same faculty as the applicant.

47. It appears from the identification report drawn up by the police on 11 February 2017 that A.B. had identified the applicant from photographs.

48. In addition, on 8 November 2017 the Istanbul Assize Court, at the request of the Çorum Assize Court, took a statement from A.B. on a letter rogatory, and placed it in the case file. A.B.'s statement read as follows:

> "I continued my university studies at the Faculty of Management of the University of Hitit in Çorum between 2008 and 2015. During this period, I stayed in the *cemaat* houses, as they were called at the time, and I moved four or five times. I did not stay in the same house as the accused, but the latter, who was a student at the Faculty of Economics at the time, also stayed in the *cemaat* houses. The code name (*kod adı*) of the accused was Recep and, during his stay in the *cemaat* house, he assumed the following responsibilities: house imam, BTM, BBTM, and subsequently one of the persons responsible for university residences in 2013-2014. The house imam is responsible for material and spiritual matters within the house. On many occasions, I participated in conversation meetings, and I do not recall that the accused led these conversations, which took place two or three times a month. Like me, the accused participated in them as a listener. During the conversations, we talked about religious topics, drank tea and ate. We also talked about the people who could join the *cemaat* and the problems in the houses. However, no fundraising (*himmet*) occurred at these meetings, as we were students. The house imam collected money according to each person's financial situation and if the amount collected was not enough, the regional imam (*bölge imamı*) was informed, so that financial assistance could be obtained. We did not collect financial donations from students. I don't know exactly, but it may be that the accused had a subscription to the daily newspaper *Zaman* and the magazine *Sızıntı*. I don't know if he had an account with Bank Asya. A BTM took charge of 7 or 8 houses and provided financial assistance to these students, which came from the regional *imam*. A BBTM would take care of 20 to 25 houses; he knew the students staying in these houses as well as the house imams and obtained financial assistance from the regional imam. When he was a BTM and BBTM, the accused carried out similar activities. During the meetings, we watched (sic.) F. Gülen's CDs and read his books ..."

(d) H.E.'s statements

49. On 11 February 2017 the police took a statement from witness H.E., in the presence of his lawyer. H.E. stated, *inter alia*, that he had been linked to the organisation since 2000 and had worked as a teacher in the private tutoring centres run by that organisation. He stated that he had known "Recep" as one of the BBTMs. He added that the private tutoring centre in Çorum belonged to the organisation. Asked about the ban on entering rooms in which discussion meetings were being held with one's mobile phone and the use of code names by members of the organisation, he replied that these were measures to ensure the confidentiality of the activities. It appears from the identification report drawn up by the police on 11 February 2017 that H.E. had identified "Recep" as the applicant from photographs.

50. It transpires from the Assize Court's preliminary report of 23 August 2017 (see paragraph 56 below) that that court had originally decided to hear H.E. on a letter rogatory, but ultimately chose to examine the case on the basis of the evidence available to it on that date, without H.E. being heard again (see paragraph 61 below).

(e) A.S.'s statements

51. On 3 January 2018 the police took a statement from witness A.S., in the presence of his lawyer. The statement was placed in the file. A.S., suspected of belonging to the organisation, stated that he too wished to benefit from the "active repentance" regime. He indicated that he had known E.B. in 2012, and also Çetin. He stated that the latter was the organisation's "educational adviser" from December 2012 to 2015 and that he had been responsible for the entire structure in so far as it concerned universities and secondary schools. He specified that it was Çetin who directed students towards military academies or careers as police officers. With regard to the applicant, A.S. stated that he had carried out activities within the organisation under the authority of E.B., who was the main regional officer for the structure.

2. The analysis report on HTS records from a mobile telephone line

52. On 11 July 2016 police officers from the Anti-Terrorism Directorate drew up an analysis report ("*İnceleme ve Tespit Tutanağı*"), containing an analysis of the HTS records of the mobile telephone line used by E.B., who was suspected of being the main individual within the organisation's structure responsible for recruiting and guiding pupils and students. This report indicated that during the period that E.B. and his wife G.B. were the main leaders for the student houses, they had left Çorum Province in November 2015. After listing the other persons suspected of membership of the structure with responsibility for the organisation's students, the report also indicated that an analysis of the HTS records during the period 2013-2015 had been requested from the Telecommunications and Information Technology Directorate. According to that report, it appeared from the telephone line records that the applicant was one of the persons with whom E.B. had been in contact. However, the report did not specify the frequency, dates, length, or content of these telephone conversations, or even whether there had been more than one. Similarly, the material submitted by the parties contains no information on the outcome of the criminal investigation against E.B.

3. The report on payment of the applicant's social-security contributions

53. On 30 January 2017 a second analysis report was drawn up by police officers from the Anti-Terrorism Directorate. That report stated that it

appeared from the information provided by the Social Security Fund that the applicant's social-security contributions had been paid by the *Çorum Eğitim Hizmetleri Anonim Şirketi* without, however, specifying the dates of payment of these contributions.

4. Document on the applicant's banking activities with Bank Asya

54. By letter of 13 February 2017, Bank Asya – which at the time was under the authority of the Savings Deposit Insurance Fund – sent to the Çorum Security Directorate information about the applicant's banking activities with it. The letter indicated that the applicant had held a bank account with Bank Asya and that, although this account had been empty in December 2013, the account holder had deposited the sum of TRY 2,000 [667 Euros (EUR) under the exchange rate at the time] in his account in January 2014. Other deposits had subsequently been made: TRY 1,609.79 [EUR 536], TRY 759.79 [EUR 252], and TRY 150.19 [EUR 50] over the following months. It added the applicant had withdrawn money several times over the same period, before the account had been closed on 19 November 2014. According to this document, those deposits did not correspond to salary payments, which had been made to another account.

D. Other documents produced by the Government

55. The Government produced other documents and statements related to the applicant's case, obtained in the course of the criminal proceedings. However, this material was not mentioned in any of the decisions delivered by the domestic courts. It is not therefore necessary to consider it further.

E. The proceedings before the domestic courts

1. The proceedings before the Çorum Assize Court

56. On 23 August 2017 the Çorum Assize Court ("the Assize Court") issued a preliminary report (*tensip zaptı*) by which it accepted the indictment against the applicant and set the date for the first hearing, to be held on 27 November 2017. It also requested that the statements of the witnesses B.A., Y.B., A.B. and H.E. be taken on letters rogatory.

57. On 24 October 2017 the Çorum Bar Association appointed a lawyer to represent the applicant.

58. On 8 November 2017 a statement was taken by the Istanbul Assize Court from A.B. on a letter rogatory and placed in the file (see paragraph 48 above).

59. On 27 November 2017 the Assize Court held a hearing in the presence of the applicant and his lawyer. During that hearing, the applicant filed defence pleadings, in which he denied all of the charges against him. He

retracted the content of his statements to the police and the magistrates' court. In particular, he disputed the statements made by the prosecution witnesses and claimed that he had not held any position of responsibility in the hierarchy of the organisation's secret structure. He stated that he was ready to confront these witnesses in court. He added that he knew only witness A.B., who had been studying at the same faculty, and that he had no personal relations with him. He also said that he did not understand why that witness had made incriminating statements. With regard to the HTS records for E.B.'s telephone line, he stated that he had worked with that person in the same company and that "it was possible that he had called him a few times for professional reasons" (*iş dolayısıyla kendisini birkaç kez aramış olabilirim).* He applied for bail, in view of the length of his pre-trial detention and the fact that all the evidence had been gathered. The relevant parts of the applicant's statements read as follows:

> "... I have read the 71-page indictment. I have been in pre-trial detention for more than ten months for membership of a terrorist organisation called '*Fetullahçı Terör Örgütü/Paralel Devlet Yapılanması'*. When I look at the acts described in the indictment, the offence with which I am charged and the evidence adduced, I consider that no relationship between those acts and [my actions] could be established. I have never carried out any illegal activity against my country ... I do not agree that I am a member of a terrorist organisation. Nor do I accept the evidence, documents, reports and statements of the prosecution witnesses in the file. Moreover, I do not accept my statements as recorded by the police and the magistrate's court. My written defence pleadings as submitted to the court are valid. Although the indictment contains long descriptions, I have seen nothing indicating that I received instructions from anyone, passed information to anyone, or gave instructions to anyone. I have not seen any evidence ... In addition, it is unfair to claim, as the indictment does, that I was a member of an armed terrorist organisation without explaining how I was a member of that organisation, how I joined it, how I carried out its activities and for what purpose.
>
> As for my defence regarding the witness statements: I do not know of a person named B.A. Had I known him, there should at least have been telephone conversations, and this would have been mentioned in the file. This witness doesn't even know my name. The fact that he stated that my name was Recep or Şaban is in itself contradictory ...
>
> As for Y.B.'s statements, I don't know this person .... I assumed no responsibilities as a BBTM within the organisation or anywhere else. It is obvious that this witness was lying, because it is not normal that he would remember every detail, such as my alleged position, my job, the license plate number, and my city of birth. Either this person has a computer-like memory, or he has signed documents containing information that had already been gathered. It is for this reason that I am ready to confront this witness and the others.
>
> As for A.B. ..., I do not accept any of his allegations. I have never used a code name, contrary to what the witnesses allege, and I am not a member of an illegal terrorist organisation. Between 2008 and 2012 I was studying at the Faculty of Economics and Social Sciences at the University of Hitit in Çorum. I know A.B. because he was studying at the same faculty .... After finishing my bachelor's degree, I started my master's degree. Similarly, I had started working in the private tutoring company in Çorum to pay university fees and rent. A.B. started working in the same company.

> However, I do not understand why he made such statements about me ... I consider that he made them to save himself.
>
> ..."

60. On 12 February 2018, a statement was taken from Y.B. by the Istanbul Assize Court on a letter rogatory and placed in the case file (see paragraph 45 above).

2. The applicant's conviction

61. On 14 February 2018 the Assize Court held a hearing in the presence of the applicant's lawyer. The applicant took part via the videoconferencing system SEGBİS (*Ses ve Görüntü Bilişim Sistemi*). During the hearing, the prosecutor maintained that the evidence in the case file was sufficient and that there was no reason to wait for the statements of other witnesses to be taken. For their part, the applicant and his lawyer left it to the discretion of the Assize Court as to whether the verdict should be delivered without seeking additional evidence. The relevant part of the hearing minutes reads as follows:

> "The prosecution was asked [to speak]: ... Although the examination of the digital materials and a report on the subscription to the digital platforms have been requested and it has been decided to hear B.A., in view of the state of the case and the evidence collected, the prosecution asks the court to waive the inclusion in the file of the answers to these questions and the addition of the witness's statements, which are unlikely to provide [further] clarification.
>
> The defendant's lawyer was asked [to speak]: I leave it to the discretion of the court ('*takdir mahkemenindir'*).
>
> The accused: I agree with my lawyer's statements."

The Assize Court held that the case could be decided on the basis of the evidence as it stood. The prosecutor then set out his observations on the merits of the case. Repeating the arguments in the indictment, he requested that the applicant be convicted as charged. The applicant and his lawyer responded to the prosecutor's submissions. The applicant argued that the prosecution witnesses' statements were vague and abstract and that the evidence did not prove his guilt. The relevant part of the hearing minutes reads as follows:

> "The accused's defence counsel was asked to present his observations in response to the prosecution's observations on the merits of the case, and the accused's defence: 'We request the accused's acquittal, since it appears from the evidence that the accused was not actively using his bank account with Bank Asya and that there was no concrete evidence against him other than the witnesses' vague statements.
>
> The accused was asked to present his observations in response and his defence on the merits: ... 'I retract my statements as obtained by the police and by the magistrates' court'. ... I have not used ByLock. My account with Bank Asya is the account into which my salary was paid. The witnesses' statements are vague. Therefore, I request my acquittal and – should the court decide otherwise –, I ask that favourable provisions be applied.

[Since the hearing was drawing to a close, the judge asked the accused for his final word. He replied as follows:] 'I request my acquittal'."

62. On the same day, the applicant also submitted a written defence statement. In particular, he disputed the statements by witness A.S. (see paragraph 51 above). He claimed that all the statements by the witnesses for the prosecution were based on subjective considerations and contained no proven facts. He alleged that all of these witnesses had admitted to being members of the organisation and had benefited from the active repentance regime in exchange for their testimony against him. In his view, this created a conflict of interest between those persons and himself, and he concluded that such statements could only constitute prima facie evidence, which had to be supplemented by other evidence. He explained that there was no trace of his having used ByLock, that he did not have a subscription to any newspaper, magazine or digital platform, that he was not a member of any non-governmental organisation or trade union, and that the only remaining evidence was the statements by the witnesses, which he contested. In consequence, he requested his acquittal.

63. At the close of the hearing, the Assize Court unanimously found the applicant guilty of the charges against him and sentenced him to seven years and six months' imprisonment, pursuant to Article 314 § 2 of the Criminal Code. One of the judges objected to the sentence that had been imposed and to the applicant's continued detention. He considered, among other points, that there was nothing to justify the decision not to impose the minimum sentence – in this case, five years' imprisonment.

3. The judgment of the Çorum Assize Court

64. In its judgment of 14 February 2018, the Assize Court first summarised the prosecution's arguments, and then the applicant's defence. It also summarised the statements made by witnesses A.B. and Y.B. As regards the assessment of the evidence, it held as follows:

"... Having regard to all of the prosecution evidence and the case file, the accused's defence pleadings as set out at various stages, his financial transactions with Bank Asya (which funded the terrorist organisation FETÖ/PDY), after December 2013 once the investigation into that organisation had begun, and the reports showing that [the accused] was in contact with another accused, E.B., against whom the Çorum Public Prosecutor's Office was conducting a criminal investigation on suspicion of being a member and leader of a terrorist organisation, the witness statements and [other] evidence obtained during the criminal investigation, and in view of the fact that the offence [with which the accused is charged was] membership of an 'armed terrorist organisation', it is appropriate at the outset to define the concepts of [criminal] organisation, terrorist organisation ..., the objective pursued by such an organisation and what is entailed by membership of such an organisation.

... For a criminal organisation to exist there must be at least three members who have come together with the intention of committing an offence, a hierarchical structure, and

continuity in committing an indeterminate number of offences. [Equally], the organisation must have sufficient resources to commit these offences.

[Further,] the organisation in question must have a permanent hierarchical structure bringing together persons who work towards a definite objective and having attained a size enabling it to achieve that objective ....

The person who created the criminal organisation is its head; a person who leads the organisation by instructing and convincing other members to act within their respective roles is a leader in the organisation; a person who joins this organisation by adhering to its aims and for the purpose of achieving these aims is a member.

Organisational activities are acts carried out in complete confidentiality, with a certain intensity and continuity, with a view to achieving the organisation's objectives. In order to ensure the confidentiality of their actions, members of the criminal organisation favour the use of secure means of communication and code names. Their actions consist in expanding the organisation's influence, recruiting new members, training them and ensuring the organisation's funding.

Section 1 of the Prevention of Terrorism Act (Law no. 3713) defines the concept of terror. Under that provision, terrorism is 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 order to overthrow the constitutional order ... A terrorist organisation is an organisation that people join in order to achieve its objectives through the use of force and violence, by means of pressure, terror, intimidation, oppression or threat ...

...

In order for a structure to be classified as an armed terrorist organisation, within the meaning of Article 314 of the Criminal Code, it must be:

(a) an organisation with a hierarchical structure, operating under strict discipline and with active support, consisting of at least three members, having sufficient members and means to commit the offences;

(b) an organisation whose purpose is to commit certain types of offences (including offences against the State); and

(c) an organisation possessing weapons.

The offence of belonging to an armed terrorist organisation may be committed by voluntarily adhering to the hierarchy of the organisation, adopting its objectives, activities and acts. This means that membership must be voluntary. Even if the offence is committed at the point of joining the organisation, it continues for the entire duration of the membership. The perpetrator's acts and activities of a certain continuous, diverse and intense character constitute the offence of membership of that organisation. ...

Secondly, it is necessary to determine the characteristics of the FETÖ/PDY:

According to the report by the General Directorate of Security and the Constitutional Court's judgment no. 2016/6, it is known that a structure founded by Fetullah Gülen in the 1960s and known until recently as a religious group named the 'Gülen Community', 'Hizmet Movement' and 'Community', has expanded its activities in many fields, especially in education and religion, and has spread them to more than a hundred countries.

With regard to this organisation, the premise that its members had infiltrated the Turkish armed forces, the general administration, the judiciary, the law-enforcement

agencies, educational institutions, and that those persons were operating in accordance with the organisation's aims rather than with the objectives of the State, has been publicly discussed for a long time.

Over time, this premise has gone beyond the stage of public debate and have been the subject of numerous investigations and criminal proceedings. In the relevant investigations and prosecutions, this structure has been referred to as the "Fetullah Terrorist Organisation" (FETÖ) and/or the "Parallel State Structure" (PDY).

The founder of the terrorist organisation FETÖ/PYD, its creation and activities

It is Fetullah Gülen, who has been a preacher and imam in various cities since 1958 ... who founded this organisation.

The organisation's cells (*hücre evi*) are 'houses of light' (*ışık evleri*). These houses, which were first opened in 1966 in Tepecik, İzmir, under the name of *Nur Evi*, began to spread throughout the country over the following years and took the name of houses of light ...

The organisation adopted a 'cell structure' within public institutions. These cells are each composed of five to six people. The members of these cells do not know each other, so that if one of them is discovered, the others can continue their activities. The leader of the cells is called 'brother' (*abi*) and the members of the cell must obey him ... The organisation's meetings are conducted with the utmost secrecy (*büyük gizlilik*).

Imams, who are the leaders of the organisation, receive reports and give instructions. At the top of the hierarchy is the universal imam, namely Fetullah Gülen, the head of the FETÖ/PDY. Below him, there is an advisory council, the world imam, continental imams, country imams, regional imams, city imams, neighbourhood imams and the imams of the houses of light. In addition, each institution has its own imam.

Under the authority of the Imam of Türkiye, there are five regional imams, who are the hierarchical superiors of the city imams in their respective regions ... In addition to the regional imam, there is also an "educational advisor". The imam is responsible for the organisation's financing through a network of traders, while the "educational advisor" directs the organisation's educational structure, which forms the basis of the parallel structure.

....

... Unlike other religious organisations and movements working in the education field, the FETÖ/PDY does not target students in vulnerable situations, but instead intelligent and successful students. This [strategy] paved the way for undercover activities that contributed to the organisation's goal: to seize control of the State.

..."

65. The Assize Court also listed the activities of the terrorist organisation FETÖ/PYD, namely the infiltration of the police, the army and other strategic State institutions. It set out the *modus operandi* of these activities, which in the court's view were intended to create an atmosphere of fear and intimidation by means of the press. It also stated that the organisation had unlawfully obtained information and data on judges, academics, members of the armed forces, members of the security forces, senior public officials, administrative officials, journalists, etc., and that it had used this information to exert pressure on these individuals in order to achieve its objectives.

Similarly, the Assize Court found that the level of infiltration of the justice system had increased in the 1990s, and that after 2007 the organisation had begun to plot against members of the armed forces who did not share its ideology, by initiating criminal proceedings on the basis of falsified evidence. According to the Assize Court, during that period the organisation had used psychological violence and coercion (*manevi cebir ve şiddet*) to achieve its objectives. It held that "after implanting itself within the army, the police and the judiciary, the organisation, now sure of its power, began to reveal its secret organisation and to carry out open actions" (*Askeriye, polis ve adliyedeki örgütlenmesinden sonra artık gücünden emin olan örgüt gizli örgütlenmesini açığa çıkarmaya başlamış, açıktan açığa eylemlerde bulunmuştur*). It listed these activities: from 2007 onwards, bringing criminal proceedings against, among others, members of the armed forces, including an illegal investigation against the Director of the State Intelligence Service [in February 2012], criminal investigations launched against the Government on 17 and 25 December 2013, etc. The Assize Court considered that the organisation had been required to use force and violence in order to achieve the above objectives, and one of the most important elements in this regard was the coup attempt perpetrated by the FETÖ/PDY on 15 July 2016. It stated, in particular:

> "The organisation has shown that in using its armed wing, its aim was to destroy the Republic of Türkiye or to usurp its authority, within the meaning of section 1 of the Prevention of Terrorism Act.
>
> Through this act [the coup attempt], the terrorist organisation has also demonstrated that it is capable of committing targeted crimes, given the number of its members ... who have access to heavy weapons in the armed units of the police and the armed forces, and its resources and equipment.
>
> The activities carried out by the organisation with a view to seizing control of the State, from its inception to the present day, and the intensive recruitment of officials within the units it deemed effective within the State, show clearly that its aims and actions are continuous.
>
> [The organisation has] a hierarchical and strictly centralised structure; it organises meetings at which the participants have been selected in advance and during which even mobile phones are left outside the room. It conducts its activities in secrecy and in a covert manner. [Accordingly, it must be concluded that this] organisation has all the characteristics of an armed terrorist organisation and possesses the heaviest forms of weaponry, as seen during the coup attempt."

66. In the same judgment, the eleven press releases issued following the decisions of the National Security Council were mentioned. It appears that in the meetings held between October 2014 and March 2016, the organisation was specifically described as a "structure threatening public peace and national security" or as a "parallel State structure" and an "illegal formation". Lastly, in the press release of 26 May 2016 the National Security Council expressly classified the FETÖ/PDY as a terrorist organisation for the first time (see *Yüksel Yalçınkaya*, cited above, §§ 108-113).

67. The Assize Court also referred to the organisation's secret activities (*gizlilik faaliyetleri*), noting that it attached great importance to secrecy (*gizliliğe*) and asked its members to take the following measures: not to call the other units on mobile phones, not to send text messages, to use secret communication tools such as ByLock messaging, to be aware that ordinary email and other messaging services were being monitored, to use a code name and to minimise contacts with members of the organisation.

68. The Assize Court also looked into the organisation's activities with regard to financial deposits with Bank Asya. It explained that it appeared from a press article that, during a telephone conversation which had taken place on 25 December 2013, F. Gülen had asked that steps be taken to improve this bank's situation. Then, citing certain information relating to the statements by the organisation's head, it considered that he had given instructions that money was to be deposited with Bank Asya in order to support it financially. It added that the bank in question, which, as admitted by the organisation's head and its members, had been opened in order to generate financial resources for the organisation, had been placed under supervision by the Banking Regulation and Supervision Agency (BDDK) after December 2013. It noted that once it had been established that the institution was in difficulty and that money had been illegally transferred to companies that were closely related to the FETÖ/PDY, the members of the organisation had, on the instructions of its head, opened accounts or deposited considerable sums of money with the bank, especially from the beginning of 2014. According to the Assize Court, criminal investigations had established that the banking activities of those individuals during the period in question were not compatible with ordinary life. It was on those grounds that the Assize Court held that those banking activities could be interpreted as an act carried out on the instructions of the organisation's main leader, with a view to supporting a bank affiliated to the organisation. To justify its reasoning, the Assize Court referred to the judgment of the 16th Criminal Chamber of the Court of Cassation, handed down on 14 March 2016 (E.2015/5452, K.2016/1983), in which that court had already held that such conduct amounted to an indication of financial support for the organisation.

69. The Assize Court also observed that criminal proceedings brought against 73 persons, including F. Gülen, as leader and members of a terrorist organisation, were pending before the Ankara 4th Assize Court. It added that the aim of the organisation was to overthrow the constitutional order, within the meaning of sections 1 and 7 of the Prevention of Terrorism Act and, in consequence, that it had to be classified as an "armed terrorist organisation". It stated that, although the organisation had existed for some time, it had taken many years for its terrorist nature and true objectives to be truly understood, and that, in parallel, it had insidiously infiltrated State institutions, exploiting religious feeling while establishing a parallel State structure.

70. The relevant part of the Assize Court's judgment concerning the acts committed by the applicant reads as follows:

> "An examination of all the evidence gathered at the investigation stage and in the criminal proceedings before our court leads to the conclusion that ...
>
> The defendant's social-security contributions were paid by *Çorum Eğitim Hizmetleri Anonim Şirketi*, a company which is in contact with and affiliated to the armed terrorist organisation [in question];
>
> It appears from the statements by witnesses Y.B. and A.B. that the accused was active at a level entailing responsibilities within the armed terrorist organisation FETÖ/PDY, that he was a principal regional student leader in the organisation and that he used the code name Recep.
>
> It appears from the HTS analysis conducted as part of the criminal investigation by the Çorum Public Prosecutor's Office under no. 2015/7454 that the accused was in contact with members of the terrorist organisation;
>
> The accused was a client of Bank Asya ... At the instigation of the head of the organisation, Fetullah Gülen, the accused deposited the sum of TRY 2,000 in this bank, although he had no money in his account in December 2013 ... Thus, and in the light of the case-law of the Court of Cassation [on this matter], it must be considered that the accused deposited this sum as instructed and that this action must be viewed as an activity in favour of the FETÖ/PDY ...
>
> The applicant's actions must be assessed individually and as a whole. A single act may sometimes be sufficient to make out the offence of membership of an organisation. Where apparently lawful activities are involved, they must be assessed as a whole and the legal situation of the accused must be determined accordingly.
>
> In the light of all the evidence referred to above, it is appropriate to conclude that the applicant's acts and activities, which demonstrated a degree of continuity, diversity and intensity, amounted to the offence of membership of a terrorist organisation. ..."

4. The appeal lodged by the applicant

71. On 16 February 2018 the applicant's lawyer lodged an appeal against the judgment of 14 February 2018.

72. On 19 February 2018 the applicant appointed a new lawyer.

73. In addition, on 16 March 2018 the applicant lodged a new appeal against the judgment of 14 February 2018. He argued that he was not a ByLock user; that the account he held with Bank Asya was intended to receive his salary payments; that 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 run by that company; that the statements by witnesses A.B and Y.B. were vague and misleading and that he could only be considered as a sympathiser of the organisation and not as a member of it; and that, since he had left Çorum in June 2014, the continuity of the acts of which he was accused had not been established.

74. In a judgment of 3 July 2018, the Samsun Regional Court of Appeal dismissed the appeal, holding that the first-instance court had not erred in

either its assessment or its conclusions. The relevant parts of that judgment read as follows:

> "The procedural acts during the trial were carried out in accordance with the law. It is established that the accused's social-security contributions were paid by *Çorum Eğitim Hizmetleri Anonim Şirketi,* which is in contact with and affiliated to the armed terrorist organisation FETÖ/PDY. It is clear from the statements by witnesses Y.B. and A.B. that the accused was active at a level entailing responsibilities within the armed terrorist organisation FETÖ/PDY, that he was a BBTM within the organisation and that he used the code name "Recep". It appears from the HTS analysis conducted as part of the criminal investigation by the Çorum Public Prosecutor's Office under no. 2015/7454 that the accused was in contact with members of the terrorist organisation. It is established that the accused obeyed the organisation's instruction to transfer money to Bank Asya. It is understood that the evidence on which the verdict is based has been lawfully obtained, that the charges and defence arguments put forward at the various stages of the proceedings were presented in such a way as to enable the [appeal court's] review, that their essence has been faithfully discussed, that the [judges'] ultimate conviction is based on specific, consistent and non-contradictory elements, that the acts were properly characterised and corresponded to the type of offences laid down in the law. It is understood that the sanctions have been applied individually. [In consequence], the arguments submitted by the accused and his counsel were not found to be appropriate. The appeal by the accused and his lawyers against the verdict is rejected on the merits ..."

5. The applicant's appeal on points of law

75. On 23 July 2018, the applicant appealed on points of law to the Court of Cassation against the judgment of the Samsun Regional Court of Appeal. In his appeal, he essentially repeated and developed the arguments which he had already set out in his appeal against the Assize Court's judgment (see paragraph 73 above): thus, he denied having taken part in any activity, legal or illegal, by the FETÖ/PDY, and argued that it had not been shown by clear, precise and unambiguous evidence that he was a member of that organisation.

76. On 21 January 2019 the Court of Cassation upheld the applicant's conviction. In so deciding, it held, *inter alia*, that the acts in question had been correctly classified and were such as to enable the offence defined in the law to be made out, and that both the verdict and the sentence had been delivered on an individual basis.

6. The proceedings before the Constitutional Court

77. On 22 May 2019 the applicant lodged an individual appeal with the Constitutional Court complaining, *inter alia*, of a violation of his right to a fair trial. In so doing, he argued, first, that there had been no "act classified as an offence by law". To this end, he argued that the punishment of constitutionally protected acts had been unforeseeable. He argued that "[i]n order for an act to be punished, the law must define it as an offence. In order for the offence charged to occur, there must exist an organisation that was established to commit the offences listed in Articles 4 and 5 of the Criminal

Code; this organisation must have armed itself in order to achieve its objective; and above all, [the individual] himself must knowingly and voluntarily have become a member of that organisation." However, he explained, "given that it is accepted that the first armed action by the organisation in question was the coup attempt of 15 July 2016, given that no documents and no information indicate that [he was] aware of the existence of an organisation before that date, and given that there is no causal link between the actions imputed and the offence in question, it is clearly contrary to the law to uphold the conviction verdict when it should be overturned". As to the fact that he had worked in a tutoring centre, that he had telephone conversations with a person working in the same institution and that his salary had been paid by that institution into his account with Bank Asya, he argued that these could not constitute punishable acts under the Criminal Code.

Secondly, he complained of a violation of his defence rights. In this regard, he argued that he had not been taken to court during the intermediate hearings and that he had not been notified of the prosecutor's opinions. He explained that he had appeared in court for the first time nine months after his arrest. He also claimed that he had been able to participate in the last hearing only through the "SEGBİS" video-link system (see paragraph 61 above) and that he had not been able to present his defence in full.

He also criticised the Turkish courts for a lack of independence and impartiality, which, in his view, was linked to a systemic failure to comply with the principle of irrevocability of judges.

He also complained of a violation of his rights to liberty, privacy and education, and claimed to have been a victim of discrimination.

78. In a summary judgment delivered on 25 February 2020 and served on the applicant on 28 February 2020, the Constitutional Court examined all the complaints made by the applicant on the basis of the right to liberty and the right to a fair trial. It rejected the complaint of a general lack of procedural fairness, finding it manifestly ill-founded; it also rejected the complaint relating to the alleged restrictions on the rights of the defence, considering that the ordinary remedies had not been exhausted; lastly, it rejected the complaint alleging a violation of the right to liberty on the ground that this complaint had already been submitted in the context of another individual application.

F. The applicant's conditions of detention and the related proceedings

1. The applicant's conditions of detention

(a) Detention in police custody

79. Between 30 January and 6 February 2017, the applicant was placed in police custody in the premises of the Çorum provincial police drugs unit.

(b) Pre-trial detention in Çorum Prison

80. 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. The Government explained that in L-type prisons, each unit has several dormitories, a common area, shared sanitary facilities and an outdoor courtyard. They stated that prisoner capacity in Çorum Prison, initially designed to hold 477 persons, had been increased to 1,000 prisoners during its construction, and that it had opened on 15 November 2006 with that number of places. This capacity had been successively raised to 1,250 inmates in December 2008, then to 1,670 in June 2012, as part of a modernisation plan that complied with the minimum standards published by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), with all the necessary facilities. Thus, at the time of the applicant's imprisonment, the prison's normal capacity would have been 1,670 detainees.

81. 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 fittings and heating. They stated that there were 30 individual beds, arranged as bunk beds. Thus, when there were 30 prisoners, each person had his own bed. When this capacity was exceeded, additional mattresses, of equivalent quality to those on the beds, were used on a temporary basis, on the basis of a collective decision by the inmates. Their use was neither imposed by the authorities nor prompted by external constraints. Each unit was equipped with two toilets, two showers and six washbasins, installed in the toilets and bathrooms. The total surface area of the unit, all sections included, was 241.36 sq. m, and there were ten windows (measuring 90 x 110 cm), which could be opened. According to the Government, during the thirteen months in which the applicant was detained in Unit F-5, between February 2017 and March 2018, the number of inmates varied between 37 and 47 persons. According to the estimations provided, this corresponded to personal space of between 6.52 sq. m (for 37 prisoners) and 5.13 sq. m (for 47 prisoners). The Government added that even when the occupancy rate was at its highest, each prisoner had on average 61 minutes per day to use the sanitary facilities.

82. With regard to Unit F-10, the Government indicated that during the period in which the applicant had been detained there the number of inmates had varied between 27 and 42 persons, with an average number of 30 persons over the relevant period. This corresponded to personal space of 8.04 sq. m. The Government specified 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 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. Moreover, referring to a document provided by the management of Çorum Prison, they stated that on 24 March 2021 the applicant had been detained with 30 other persons in Unit F-10.

83. 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 were able to buy additional cleaning products in the prison shop. They added that rubbish was collected daily. Cold water was available around the clock, and hot water was provided on two days per week for 24 hours, on the basis of 65 litres per person per day, or the equivalent of 130 litres per week. 150 litres of cold water were provided per person per day. The system automatically adjusted the quantities depending on the number of inmates, ensuring that individual consumption was not affected by prison overcrowding. There was no indication in the prison records that the water had been cut off, nor any complaints. Inside lighting in the units was controlled by the prisoners, and the lights were turned off at night. The corridors were permanently lit, without affecting the dormitories. The heating system operated for 24 hours a day in winter, providing a temperature of 22-24°C. Ventilators were available in the canteen. Lastly, with regard to the activities proposed, the Government stated that the applicant had taken part in sports activities outside the unit, without however providing information about their frequency and duration. On the other hand, he had not been authorised to participate in educational or cultural activities.

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

85. 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 studies. Lastly, they pointed out that the applicant had received medical treatment on numerous occasions, either in the prison infirmary or, after being transferred, in a public hospital.

86. Like the Government, the applicant stated that each unit in Çorum Prison had 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 Çorum Prison Management and Supervisory Board ("the Management and Supervisory Board") (see paragraph 90 below), he submitted that it had been impossible to adapt the prison, initially designed to accommodate a maximum of 477 prisoners, in such a way as to house between 1,950 and 2,000 prisoners. In particular, he explained that after the attempted coup, over and above the twenty-eight beds set up in the seven separate dormitories, two bunk beds had been installed in the common area. He submitted 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 there were not enough bunk beds.

More specifically, with regard to his detention in Unit F-5, he submitted that he had been obliged to sleep on a mattress on the floor, in the common areas, during the first four months on his imprisonment. He alleged that it was only once a bunk bed had been freed up that he obtained an individual sleeping place. He indicated that he had then been transferred to Unit F-10, where overcrowding was at such a level that the prisoners had to sleep on a rota basis in order to be able to use a bed. He stated that each prisoner was able to sleep in a bunk bed for two months, before being required to spend a month sleeping on a mattress on the floor in the common areas. The applicant claimed to have spent about three years in Unit F-10, which meant, in his calculations, that he had been required to sleep on a mattress on the floor for about ten months. In total, he estimated that he had been required to sleep on a mattress on the floor for almost fourteen months, all periods of detention included, in Units F-5 and F-10.

87. The applicant also explained that, although the 64.36 sq. m courtyard was 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, ate all their meals 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 personal space of well below 3 sq. m.

88. With regard to the communal areas, the applicant claimed that the light had never been turned off, for security reasons – if not, the prison wardens could not monitor the surveillance cameras or take action in the prison during the night. This situation was allegedly widespread, and not limited to the Çorum L-type prison. Reports by the Human Rights Association (*İnsan Hakları Derneği* – hereafter "the İHD") had noted that similar conditions existed in other prisons. For example, in its 2023 annual report on prisons, the İHD had indicated that permanent lighting in the communal areas was a recurrent complaint by prisoners, and a source of disturbed sleep and psychological stress.

89. The applicant submitted that, during his imprisonment in Çorum L-type Prison, access to both hot and cold water had been severely restricted, in clear breach of the minimum standards of hygiene, essentially on account of overcrowding. He indicated that hot water had been available only twice a week – on Wednesdays and Saturdays – between 2017 and the end of 2020. Contrary to the Government's assertions that it had been available for 24 hours per day, in reality it was provided for a maximum of only two hours per day. In addition, each prisoner had access to only 50 litres of hot water per week, and that amount was supposed to cover both personal hygiene and laundry. Although the amount of time that hot water was available had in theory been extended over the years, the individual quota had remined unchanged, and access had in practice remained limited on account of overcrowding and the insufficient capacity of the facilities. With regard to cold water, although the Government claimed that it had been available round-the-clock, the applicant submitted that between the beginning of 2017 and July 2018 – a period corresponding to the state of emergency – it had been available only twice per day, for about forty minutes after mealtimes. More than forty prisoners had shared a reduced number of toilets and sinks, resulting in a serious deterioration in hygiene and sanitation conditions. During the summer, the poor ventilation, combined with the lack of water, had made the conditions of detention particularly unpleasant, characterised by stifling heat and nauseating smells. The prisoners had initially attempted to make up for these shortages by stocking water in plastic bottles, but this practice had been quickly forbidden by the prison administration, allegedly on security grounds. It was only after the state of emergency had been lifted that a daily quota of 100 litres of cold water per person had been introduced, leading to a partial improvement in the situation – although in practice access continued to be sporadic. The applicant submitted that these persistent restrictions, combined which chronic overcrowding and insufficient sanitary facilities, had resulted in long queues and limited access to clean facilities, and had led to considerable physical and mental suffering.

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

90. It appears from the case file that, following a complaint by the applicant, the Management and Supervisory Board rejected his complaint in a decision of 15 October 2018. It explained, *inter alia*, that the prison's capacity, initially set at 477 prisoners, had been increased through 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.

91. On 18 February 2019 the applicant lodged an appeal against the above-mentioned decision by the Management and Supervisory Board. He complained mainly about the overcrowding in the unit in which he was being

held, explaining in that connection that for twenty-five months he had been sharing, with 36 persons, a unit which, in his submission, had ordinarily been designed to accommodate seven prisoners, and that because of this overcrowding some prisoners did not even have a bed to sleep in. He explained that these circumstances had caused him considerable mental suffering and undermined his psychological state.

92. By a decision of 21 February 2019, the Çorum Sentence Enforcement judge dismissed the applicant's appeal, referring essentially to the conclusions in the Management and Supervisory Board's decision (see paragraph 90 above). On 21 March 2019 the Çorum Assize Court upheld the decision of 21 February 2019.

93. 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 the context of this approach, the applicant was offered a transfer, which he refused in a letter to the prison administration of 17 December 2020, stating 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

94. On 24 April 2019 the applicant lodged an individual application with the Constitutional Court, complaining about his conditions of detention in Çorum Prison. He stated, in particular, that the prison's capacity, initially set at 477 prisoners, had been increased to 2,000 without any compensatory measures being introduced. For twenty-seven months the unit in which he was detained had accommodated between 38 and 46 people. This unit had been made up of two distinct areas: a dormitory with bunk beds and a communal area. On account of an insufficient number of sleeping places, he alleged that he had been obliged for two years to sleep on a simple mattress on the floor, alternating with 5 to 6 fellow prisoners in a shift system. He had also been required to sleep in the unit's communal living area, where the permanent lighting and ambient noise had made it difficult to sleep. He argued that the overcrowding had given rise to significant problems: high noise levels; an insufficient number of lockers for storing personal belongings and of sanitary facilities; ventilation problems; sporadic access to medical care; inadequate space to rest or read, and frequent interruptions to the hot and cold water supplies.

95. In a summary decision of 3 September 2020, served on the applicant on 16 September 2020, the Constitutional Court dismissed this 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).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Domestic law

1. The Criminal Code (Law no. 5237 of 26 September 2004, entered into force on 1 January 2005)

96. The first paragraph of Article 21 of the Criminal Code reads as follows:

Intent

"The commission of an offence depends on the existence of intent. Intent is the voluntary and conscious realisation of the elements of the legal definition of the offence."

97. Article 30 of the Criminal Code reads as follows:

Mistake

"(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. Culpability for recklessness arising from such mistake shall be preserved."

98. The relevant parts of Article 220 of the Criminal Code, which deals with the offence of forming an organisation for the purpose of committing a criminal offence, read 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. However, for an organisation to exist there must be at least three members.

(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."

99. Article 314 §§ 1 and 2 of the Criminal Code provide that the offence of membership of an armed organisation is punishable by the following penalties:

"(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."

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

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

101. The relevant provisions of the Prevention of Terrorism Act read as follows:

Definition of the concept of terrorism
Section 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."

Perpetrators of terrorist offences
Section 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
Section 3

"The offences referred to in Articles 302, 307, 309, 311, 312, 313, 314, 315 and 320, as well as in paragraph 1 of Article 310, of the Turkish Criminal Code are terrorist offences."

Terrorist organisations
Section 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."

102. Under Turkish law, the classification of a terrorist organisation can only result from a court decision. According to the case-law of the Court of Cassation, when domestic courts are faced with the task of assessing for the first time whether an organisation can be classified as terrorist, they must conduct a thorough investigation and determine the nature of the organisation by examining its purpose as well as whether it has adopted an action plan or

similar operational measures and whether it has resorted to violence or has credibly threatened to use violence in the implementation of this action plan (judgment of the İzmir State Security Court of 25 July 2002, E.2001/421, K.2002/207, upheld by the Court of Cassation; and judgment of the Plenary Court of Cassation (Criminal Divisions) of 11 March 2003, E.2003/9-39, K.2003/32, both cited in *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, §§ 42-45 and 71, 3 December 2019).

B. Relevant domestic case-law

1. The case-law of the Constitutional Court

(a) The judgment of 4 August 2016 on the dismissal of two members of the Constitutional Court

103. In its judgment of 4 August 2016 (appeal no. 2016/6, 2016/12), the Constitutional Court, sitting in plenary session, decided to dismiss two of its members from their positions for being linked to the FETÖ/PDY. In that judgment, after tracing the history of the structure founded by F. Gülen, it concluded that its real objective was the takeover of the State. It noted, *inter alia*, that this organisation had been referred to in the relevant investigations and prosecutions as the 'Fetullah terrorist organisation' (FETÖ) and the 'parallel State structure' (PDY). It considered that the organisation had gradually infiltrated all public institutions, in particular the armed forces and the police, and that its members, once integrated into the State apparatus, acted in line with its objectives rather than with those of the State. In noted that the FETÖ/PDY hierarchy was based on a structured network of 'imams' responsible for different units at various geographical, sectoral and institutional levels, under the authority of F. Gülen, designated as the 'universal imam'. It added that the organisation had also established a structure that was parallel to the official administration, by placing "imams" within ministries, local authorities, universities and private companies, and that a separate hierarchy, made up of individuals who had been chosen by F. Gülen and reported to him directly, supervised the internal functioning. Lastly, it noted that the organisation conducted its activities with utmost confidentiality, using secure communication methods to preserve the secrecy of its operations. According to the Constitutional Court, some of the illegal activities allegedly carried out by the members of the FETÖ/PDY were as follows:

> "(a) Criminal proceedings were brought against F. Gülen before a military court for having spread propaganda against secularism, in order to align, in part, the fundamental social, economic, political or legal rules of the State with religious principles and beliefs. He was subsequently convicted, and that decision was upheld by the Military Court of Cassation (Military Court of Cassation decision No. 1973/146-272).
>
> (b) Criminal proceedings were brought against F. Gülen before the Ankara 2nd State Security Court for having created an organisation aimed at changing the structure of the

secular State and establishing a State based on religious rules. However, it was decided to stay the judgment of this case... (Ankara State Security Court no. 2, E.2000/124, K.2003/20). In the context of the above-mentioned case, the General Staff, the gendarmerie ..., had maintained that F. Gülen aimed to establish an alternative system to the State ... with a system similar to military discipline.

(c) With regard to the murder of Hrant Dink, editor-in-chief of the newspaper Agos, following an armed attack in Istanbul on 19 January 2007, criminal proceedings were brought against certain senior members of the national police, who were accused of being members of the FETÖ/PDY, on the grounds that, in line with the organisation's objectives, they had failed to prevent the murder, although they knew that it would be committed (Istanbul 14th Assize Court, case no. E.2015/337).

(d) Criminal proceedings were brought against certain officials, allegedly members of FETÖ/PDY, on the grounds that they had engaged in political and military espionage activities by bugging the Prime Minister's home and workplaces (Ankara 7th Assize Court, Case No. E.2014/412).

...

l. The allegations that the alleged members of the FETÖ/PDY structure had given exam questions to members of the organisation in advance for civil-service entrance or promotion examinations have been the subject of numerous investigations ..."

104. In the same judgment, the fourteen press releases issued following the decisions of the National Security Council were mentioned (see paragraphs 21 and 66 above). It appears that in the meetings of 26 February and 30 April 2014, the organisation had been explicitly described as "a structure threatening public peace and national security". Then, in the subsequent eight press releases issued between June and October 2015, it had been referred to as a "parallel State structure" and an "illegal formation". Lastly, in the press release of 26 May 2016, for the first time, the National Security Council expressly classified the FETÖ/PDY as a terrorist organisation (see *Yüksek Yalçınkaya,* cited above, §§ 108-113).

(b) The *Metin Birdal* judgment of 22 May 2019

105. In its judgment *Metin Birdal* (appeal no. 2014/15440), delivered on 22 May 2019, the Constitutional Court, sitting in plenary session, ruled on an individual's conviction for membership of the Workers' Party of Kurdistan (PKK). The case raised questions, *inter alia*, relating to freedom of peaceful assembly and the principle of legality of offences and penalties. Mr Birdal challenged his conviction, arguing that there was no definite evidence proving his membership of a terrorist organisation and that the charges related to the exercise of his right to peaceful assembly. However, after examining various items of evidence – including telephone records, police reports, denunciations, and the applicant's behaviour during violent demonstrations – the Constitutional Court unanimously concluded that there had been no violation of the right to peaceful assembly, on the grounds that the conviction had been based on evidence demonstrating the applicant's active and continuous involvement in the terrorist organisation.

106. This judgment enabled the Constitutional Court to rule, among other points, on the definition and constituent elements of the offence of membership of a terrorist organisation. In this regard, it reiterated that, in accordance with Articles 220 and 314 of the Criminal Code, membership of a terrorist organisation constitutes an autonomous offence, not requiring that the individual concerned has personally participated in the commission of an offence. Thus, it held that a member of a criminal organisation is considered to be any person who adheres to its hierarchy, espouses its objectives and is ready to carry out the missions entrusted to him. This criminalisation is intended to prevent future offences, given the inherent threat that such an organisation poses to society. However, the Constitutional Court specified that membership alone cannot be sufficient to establish guilt: it must be shown that the individual was aware of the organisation's nature and objectives, wished to be part of it and actively and continuously contributed to it. Thus, criminal responsibility is not based on collective guilt but on effective and voluntary participation in the hierarchical structure of the terrorist organisation.

107. With regard to the criteria for assessing and taking evidence, the Constitutional Court established that the assessment of membership of a terrorist organisation is based on the notions of continuity, diversity and intensity in the acts committed by the accused in the context of the organisation's activities. In its view, these elements had to be proven beyond any reasonable doubt and assessed in the context of each terrorist organisation, including its *modus operandi* and level of violence. In accordance with the principle of freedom of evidence, the Constitutional Court emphasised that judicial authorities could base their conviction regarding guilt on a wide range of lawfully obtained evidence, without imposing a pre-established hierarchy of probative value. It noted that the Court of Cassation had confirmed this approach by affirming that the material truth must be revealed through a comprehensive analysis of the evidence and not on the basis of isolated hypotheses. Lastly, the Constitutional Court reaffirmed that the assessment of evidence in relation to membership of a terrorist organisation differs from that applicable to traditional criminal offences, since it is not necessary for each constituent act to be a separate offence in itself. In conclusion, it considered that the judgment being appealed against had been based on a rigorous analysis of the facts and that the applicant's conviction had complied with the principle of legality.

(c) The *Adnan Şen* judgment of 15 April 2021

108. The judgment *Adnan Şen*, delivered on 15 April 2021 by the Constitutional Court (appeal no. 2018/8903 – for a partial translation of this judgment see *Yüksel Yalçınkaya*, cited above, §§ 182-189), concerned the conviction of an individual for membership of the FETÖ/PDY, mainly because he had used ByLock, an encrypted messaging application associated

with that organisation. The case raised the issue of respect for the principle of the legality of offences and penalties. The applicant challenged the domestic courts' interpretation of the offence of membership of a terrorist organisation, taking the view that it was not foreseeable and that his conviction was based on acts which, in his view, did not constitute an offence. He submitted, *inter alia*, that the designation of the FETÖ/PDY as a terrorist organisation had not been officially recognised by the National Security Council until 26 May 2016 and that, until that date, no act of violence had made it possible to characterise the entity as a terrorist organisation.

109. As regards the elements of the offence and the criteria for its characterisation, the Constitutional Court first examined the activities of the FETÖ/PDY, recalling that it had been the subject of investigations and prosecutions since 2013, which had revealed its true objectives. It cited several sets of criminal proceedings initiated prior to the attempted *coup d'état* of 15 July 2016, including those concerning police officers accused of inaction in the face of the assassination of Hrant Dink [editor-in-chief of the newspaper Agos, following an armed attack in Istanbul on 19 January 2007], civil servants prosecuted for spying and cases of fraud in civil-service entrance examinations. It then analysed the definition of the offence of membership of an armed terrorist organisation, based on the case-law of the Court of Cassation. According to the latter court, a person could be found guilty of this offence if two cumulative conditions were met: the existence of an organic link between the individual and the organisation, established on the basis of the continuity, diversity and intensity of his or her activities; and clear evidence that the individual acted knowingly and voluntarily within the hierarchical structure of the organisation. It confirmed that membership of a terrorist organisation did not require participation in a specific offence, but presupposed a concrete, material or intellectual contribution to its development. It also specified that the organic link with the organisation must be active and dynamic, implying total submission to the orders and objectives of the organisation's hierarchy.

110. With regard to the principles of legality and the taking of evidence, the Constitutional Court stressed that there was no universal definition of the concepts of terrorism and terrorist organisation but pointed out that the courts were required to interpret the law in a predictable manner, without rendering meaningless the principle of the legality of offences and penalties. One of the main issues in the case was to determine whether acts committed before the coup attempt could be used as evidence of membership in the FETÖ/PDY, although the organisation had not yet been unanimously recognised as a terrorist organisation. In this regard, it acknowledged that, although an organisation could only be classified as terrorist by a court decision, the threat posed by the FETÖ/PDY had already been identified in official documents (such as national security policy documents) since 2014.

111. Lastly, the Constitutional Court affirmed that the lack of formal recognition of the FETÖ/PDY as a terrorist organisation prior to 2016 could not be used to justify the impunity of its members for previous acts. However, it stressed that for many years part of the population had perceived this organisation as a religious movement with a spiritual and educational vocation. In consequence, it considered that the criminal courts were obliged to assess carefully the knowledge that each accused might have had of the organisation's true nature. Thus, when an individual maintained that he had been unaware that the FETÖ/PDY was an illegal organisation, his argument had to be examined in the light of Article 30 of the Criminal Code, which provided for taking into account an error of fact. It concluded that the courts had to establish in a concrete manner whether the acts complained of were committed for terrorist purposes and whether they demonstrated a conscious commitment to the organisation's aims, based on clear, precise and convincing evidence.

(d) The *Bilal Celalettin Şaşmaz* judgment of 18 October 2022

112. In its judgment in the case of *Bilal Celalettin Şaşmaz* of 18 October 2022 (appeal no. 2019/20791), the Constitutional Court examined Mr Şaşmaz's argument that his conviction for membership of a terrorist organisation violated the principle of the legality of offences and penalties. It unanimously concluded that there had been a violation of that principle. Mr Şaşmaz had been convicted of membership of the FETÖ/PDY on the basis of his membership of a trade union, his participation in "religious conversations" (*dini sohbet*) prior to 2013, and of witness statements and communication records establishing contacts with the organisation's officials ("*imams*"). The relevant parts of this judgment read as follows:

> "40. ... The main issue to be decided in this application is whether the applicant could reasonably have foreseen, at the time he allegedly committed the acts with which he was charged, that these would be construed as evidence of the offence of membership in an armed organisation. There is no doubt that if it were shown that the accused was aware of the terrorist nature and objectives of the organisation with which he was affiliated at the time when he committed the acts [in question], that he wished to be affiliated with it and that he contributed to the maintenance of the organisation's activity and the achievement of its objectives by demonstrating a continued will in this regard, such acts could engage his criminal liability (*Metin Birdal*, §§ 62, 67)."
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> ...
>
> (a) The case-law of the Court of Cassation and the Constitutional Court on the offence of membership of a terrorist organisation in the context of the FETÖ/PDY
>
> 44. The FETÖ/PDY is a structure founded by Fetullah Gülen, which has been active since the 1960s and has been described as a religious group for many years. This structure has been known as the "community" (*cemaat*), the "Gülen community", the "service movement" (*hizmet hareketi*), the "volunteer movement" (*gönüllüler hareketi*) and the "group" (*camia*). ... The structure in question is especially well organised in public institutions and bodies; it is also involved in legal activities in different social,

cultural and economic fields, especially in education and religion. It has gained a certain importance in civil society ...

45. The FETÖ/PDY was not designated as a terrorist organisation until after 2013, and investigations and prosecutions in respect of its organisation and activities were conducted intensively after that date ...

46. The Court of Cassation did not depart from its previous case-law on the offence of membership of a terrorist organisation when it assessed the characteristics of the FETÖ/PDY, whose terrorist and anti-State security activities have become visible in recent times ...

...

48. Indeed, the Court of Cassation took into account the fact that the FETÖ/PDY is not an organisation like the PKK, which had been recognised as a terrorist organisation by the courts and the State authorities for quite some time and was known as such by society. In several judgments, the Court of Cassation has noted that the FETÖ/PDY initially emerged as a moral and educational movement ... Indeed, a significant part of society supported this movement and its activities, without being aware of its illegal structure ...

49. It is therefore necessary to make a careful distinction between persons who were members of that organisation, with knowledge of its true face and illegal structure (*illegal yönünü*), and ordinary persons who had no knowledge of it. However, it is difficult to make this distinction in proceedings concerning the FETÖ/PDY. The first reason for this difficulty lies in the [complex] nature of judicial proceedings relating to terrorist offences and in the severity of the penalties imposed ... The second reason for this difficulty arises from the legal process relating to the classification of the FETÖ/PDY as a terrorist organisation. In many cases, the acts underlying a prosecution had been carried out before the FETÖ/PDY was classified as a terrorist organisation in accordance with legal procedure and before it was known as such by third parties.

50. It should be emphasised, however, that the existence of a final judicial decision classifying a structure as a terrorist organisation is not one of the constituent elements of the offence [in question]. A judgment by which a court rules on the characteristics of an organisation is by nature declaratory. The opposite reasoning would result in impunity for the actions of terrorist organisations because of the absence of the constituent elements of the offence... [T]he most important function of such a final judicial decision is to classify, legally, this type of organisation as a terrorist organisation and, in this respect, to make it known that this is what that organisation is. For that reason, it is essential to determine the intentions of persons who had contacts and affiliation with such an organisation where there are not yet any judicial decisions ... and where this characteristic is therefore not yet known to the public ...

51. It follows that in order for an individual to be found guilty of the offence of membership of the FETÖ/PDY, it must be shown that he or she was aware of the nature and objectives of the organisation, wished to be part of it and has contributed to the organisation's survival and the achievement of its objectives, showing continuing willingness in this regard. As a consequence of this requirement, the Court of Cassation, having regard to the fact that the offences of membership of or aiding a terrorist organisation can be committed only with direct intent and specific motive ... The Court of Cassation emphasised that it is necessary to evaluate individuals' legal situations in the context of culpability and mistake. In other words, for a person to be convicted of the offence of membership of the organisation in question, the Court of Cassation requires [the lower courts] to rely on sufficient evidence establishing that the individual,

going beyond mere sympathy or affiliation, knowingly became a member with full awareness of the organisation's terrorist nature and aims.

52. For this reason, the Court of Cassation considers that acts such as mere sympathy for the organisation or approval of the organisation's objectives, values and ideology, reading and possessing publications relating to it, and respect shown towards the organisation's leader, are not sufficient to convict a person of the offence of belonging to a terrorist organisation. According to the Court of Cassation, a member of the FETÖ/PDY must (1) knowingly and voluntarily join this organisation; (2) be aware of this organisation's nature and objectives; (3) wish to be part of this organisation; (4) have a continued willingness to be a member of the organisation; (5) have a motive for committing an offence ...

53. On the basis of the above considerations and having regard to the hierarchical structure of the FETÖ/PDY, as extensively brought to light by the security forces, the Court of Cassation has concluded that members of the organisation at the highest levels (*üst düzeyde bulunan*) must have been aware of the characteristics, objectives and methods of the organisation to which they belonged, that they must have been acting with a view to committing offences and that their willingness to be members of the organisation must be continuous. At the same time, the Court of Cassation has [also] accepted that, since the FETÖ/PDY had been operating for a long time on a legal basis and concealed its ultimate goal, it had to be shown that those persons who were in contact with its layers, which were being used as a showcase of legality, were aware of the organisation's ultimate goal ...

54. [It appears from the assessment of the domestic courts that], unless it is shown that they were aware of the organisation's ultimate purpose, persons who were merely in contact with the lower levels of the FETÖ/PDY and had sympathy for the organisation, and [therefore] who acted on the basis that it was a 'moral and educational movement', a "volunteer movement" or a "religious community", were considered as persons having had contact with the organisation or having been affiliated with it. [Similarly], in view of the severity of the criminal penalties incurred for membership of a terrorist organisation, a sensitive distinction has been made between persons who erroneously believed that they were affiliated with a non-governmental organisation operating on a legal basis, before the ultimate purpose of the organisation became known to all, and those persons who were familiar with the FETÖ/PDY's objectives and methods and who had joined the highest ranks of the organisation's pyramid structure ..."

...

(b) The assessment of the applicant's activities ...

"56. ... [I]n order for the guilt of a person who participated in the conversation meetings [in question] to be confirmed, the Court of Cassation requires that the organisational nature of these discussion meetings be demonstrated .... However, no assessment of the organisational nature of these conversation meetings was made by the first-instance court.

57. Another item of evidence taken into account by the first-instance court in convicting the applicant of membership of a terrorist organisation is [his] continued membership of Aktif Eğitim-Sen [a legal trade union at the material time] after 2013. The Court of Cassation has assessed the evidence of membership of legally constituted trade unions or legally constituted associations in many of its judgments concerning convictions for membership of the FETÖ/PDY. Under this assessment, the fact that a person is a member of trade unions, associations and other legal bodies affiliated to the

FETÖ/PDY, or participates in the boards of directors, cannot be considered as an organisational activity sufficient to demonstrate that the individual knew the ultimate objective of the organisation [or] had established a hierarchical organic link with it ...

...

59. There remains only material concerning 'the social environment, inferred on the basis of the HTS records' ... and the witness statements claiming to know the applicant as a 'member of *cemaat'*. However, without knowing the content and context of these exchanges, the mere fact of being in contact with other accused persons was not sufficient to conclude that this individual knew the organisation's ultimate objective, [or] was conducting organisational activities within the hierarchy of the terrorist organisation..."

(c) Assessment of the case in the light of the principle of legality of offences and penalties

...

63. In the present case, the courts considered that the applicant's participation in certain discussion meetings, the witness statements claiming that he had social interactions [with the members of this movement], his membership of a trade union which was legal at the time but which was later dissolved because of its affiliation with a terrorist organisation, and the HTS records showing that he was in contact with persons who were members of the FETÖ/PDY, constituted evidence of the offence of membership in a terrorist organisation. In the opinion of the Constitutional Court, there is no doubt that the applicant belonged to, or at least sympathised with, a structure disguised as a religious community when he committed the acts for which he was convicted. Nonetheless, as indicated above, the judicial authorities have not alleged that the applicant was one of the members of the FETÖ/PDY who held the higher-level posts in the organisation's pyramid structure and knew its ultimate aim and methods (*nihai amacını ve yöntemlerini bilen ve örgütlenme piramidinin üst katlarında yer alan örgüt mensuplarından*). Nor did they claim, in any way, that he had been aware of the terrorist nature of this structure, with which he maintained ties at a time when it was still perceived as a straightforward religious community, before it was officially designated by the State as a terrorist organisation and generally recognised as such. Convicting an individual for his or her membership of a structure without showing that the individual in question was aware that it was a terrorist organisation is not only contrary to the general principles of criminal law, but may also lead to convictions for serious offences, such as membership of a terrorist organisation, on the basis of acts which, when they were committed, were not defined as offences ...

64. In the present case, after having examined as a whole the discussion meetings, the applicant's membership of a trade union affiliated to the organisation and his contacts with persons who were the subject of criminal proceedings for having been an '*imam*' in the organisation, the first-instance court was unable to establish that the applicant had acted with awareness that he was a member of a terrorist organisation. [In consequence,] it has not been shown that the applicant, who allegedly sympathised with and had contact with the organisation on the basis that the FETÖ/PDY was a non-governmental organisation or a religious community operating on a legal basis, could reasonably have foreseen that his acts, which were used as prosecution evidence in his conviction, would entail criminal liability. In conclusion, the applicant's conviction for the offence of membership of a terrorist organisation was based on an extensive and unforeseeable application of the criminal law, to the accused's detriment ..."

2. The case-law of the Court of Cassation

(a) The judgments of 24 April 2017 and 26 September 2017

113. With regard to the characteristics of the FETÖ/PDY, the Government referred in particular to two judgments adopted in 2017. First, on 24 April 2017, the Sixteenth Criminal Chamber of the Court of Cassation, ruling at first instance, delivered a judgment (E.2015/3, K.2017/3) in which it found two judges, M.Ö. and M.B., guilty of membership of the FETÖ/PDY and abuse of office. This was the first judgment by the Court of Cassation to qualify the FETÖ/PDY as a "terrorist organisation" (for lengthy excerpts from this judgment, see *Yüksel Yalçınkaya*, cited above, §§ 155-165). On 26 September 2017 the Court of Cassation, meeting in plenary session of the Criminal Chambers, upheld this judgment (E.2017/16-956, K.2017/370).

114. In its judgment of 26 September 2017, the Court of Cassation, sitting in plenary session of the Criminal Chambers, clarified the concepts of terrorism, criminal organisation and armed terrorist organisation, on the basis of the Criminal Code and the Prevention of Terrorism Act. In particular, it examined the offences of founding, leadership and membership of an armed terrorist organisation, as set out in Article 314 of the Criminal Code, emphasising that they amounted to a specific form of organised crime. In order for a structure to be classified as an armed terrorist organisation, it must meet the criteria of Article 220 of the Criminal Code, which defines the constitution of a criminal organisation, as well as the criteria of sections 1 and 7 of the Prevention of Terrorism Act, which specify the objectives and methods of such an organisation. The Court of Cassation specified that the effective use of force and violence is not a condition *sine qua non* to characterise a terrorist organisation, and that a proven risk of recourse to violence is sufficient. It also reiterated that the organisation must have a sufficient store of weapons or the means to access them, regardless of whether these weapons were acquired legally or illegally.

115. With regard to the characterisation of the FETÖ/PDY as an armed terrorist organisation, the Court of Cassation in its analysis held that the FETÖ/PDY was a terrorist organisation *sui generis*, that is, atypical, differing from other terrorist structures through its clandestine operation and its instrumentalisation of religion. The judgment emphasised that the FETÖ/PDY was seeking to establish a new political, economic and social order, by gradually infiltrating State institutions and consolidating its influence through covert methods. It noted that the structure used a secret *modus operandi*, based on code names, specialised communication channels and secret financing. Its objective was not to enter into direct conflict with the system, but to subvert it from within by placing its members, known as the "golden generation", in key positions in the administration. Once installed in the State machinery, the organisation eliminated its opponents through

illegal methods, under the guise of legality, with the aim of reshaping the State in its image.

116. Moreover, the Court of Cassation presented the FETÖ/PDY hierarchy as structured in seven distinct layers, with rigid control exercised by the organisation's leader. It stated that the first layers included sympathizers and active members, while the upper layers included executive and strategic executives, chosen directly by the organisation's leader, F. Gülen. The organisation operated according to a horizontal cellular structure, making it difficult for the authorities to identify it. The Court of Cassation also pointed out that the FETÖ/PDY had infiltrated the armed forces and the police, and that the events of 15 July 2016 demonstrated that its members were ready to resort to arms on the orders of the hierarchy, which had resulted in the death of many civilians and State employees. It concluded that the FETÖ/PDY was clearly an armed terrorist organisation within the meaning of Article 314 of the Criminal Code.

117. As for the members' criminal liability and the application of the principle of error, the Court of Cassation examined the conditions under which an alleged member of the organisation could invoke the mistake provision, within the meaning of Article 30 of the Criminal Code, in order to avoid criminal liability. It stated that those members who were aware of the organisation's objectives and methods ought to be sanctioned on the basis of their hierarchical position. Thus, the members of the fifth, sixth and seventh layers (executive and strategic executives, who were close to the organisation's leader) fell unequivocally into this category and that, in principle, members of the third and fourth layers, although they had joined the organisation at a young age, were also presumed to have been aware of its criminal nature. By contrast, with regard to the members of the lower layers, who might initially have perceived the FETÖ/PDY as an educational and moral movement, the Court of Cassation stressed the need to examine on a case-by-case basis whether they were aware of the organisation's true objectives. It noted that the FETÖ/PDY had for many years masked its criminal nature and concealed its political agenda, which could explain why some individuals did not perceive its terrorist nature until an advanced stage. It concluded that the courts had to scrutinise carefully whether the actions of members of the lower layers revealed a conscious and active adherence to the organisation's objectives.

118. Lastly, the Court of Cassation specified that criminal intent was a key factor in characterising membership of a terrorist organisation. It held: "Intent presupposes that an individual has wilfully and knowingly aimed to bring about the elements in the legal definition of the offence". It underlined the importance of the criterion of criminal intent in assessing the liability of the organisation's members, distinguishing between those who had been fully aware of the FETÖ/PDY's criminal objectives and those who, at a lower level, could have been unaware of its unlawful nature. It stated as follows: "...

having regard to the fact that the offence of membership of an armed terrorist organisation [can 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". It added that an error as to the nature of the organisation could be invoked, but only if it was serious enough to preclude any intention of knowingly contributing to the organisation's criminal activities. It gave the example of an individual who was objectively unaware that the FETÖ/PDY was a terrorist organisation and whose lack of criminal intent could justify an acquittal. However, it stipulated that this argument could by no means apply to the organisation's senior executives, whose active and conscious participation was proven. Lastly, it stated that the absence of formal recognition of an organisation's terrorist nature at a given moment did not prevent its members from being prosecuted, where concrete facts demonstrated their effective and conscious participation in the organisation's criminal activities.

(b) The judgment of 24 October 2017

119. In a judgment (E.2017/1809, K.2017/5155) delivered on 24 October 2017, the Sixteenth Criminal Chamber of the Court of Cassation overturned an accused's conviction for membership of the FETÖ/PDY. The relevant parts of that judgment read as follows:

> "A member of an organisation is a person who adopts the goals of the organisation, who has committed himself to its hierarchical structure and thus surrenders his will to that of the organisation, in order to be ready to perform the tasks assigned to him. To be a member of an organisation means to join it and to be under the command of the hierarchical power that dominates the organisation. A member of an organisation must establish an organic link with it and participate in its activities. The organic link is the most important element of adherence, because it is a living ... and effective link which enables the perpetrator to receive orders and instructions and determines his or her hierarchical position ...
>
> ... Actions such as mere sympathy with the organisation or embracing the organisation's goals, values, and ideology, reading and owning publications related to the organisation, [and] respect for the organisation's leader, are not enough to be a member of the organisation.
>
> A member of an organisation must join it knowingly and voluntarily, being aware of the nature and objectives of the organisation in question, wishing to be a member of it, and demonstrating a willingness to join it on an ongoing basis. A [person] who joins an organisation must act with the intention and wish to become a member, knowing that it is an organisation created for the purpose of committing acts that the law considers to be criminal. In the case of the offence of membership of a criminal organisation, the motive must also be "to commit an offence".
>
> ...

> ... The terrorist organisation FETÖ/PDY, whose ultimate goal is to change the constitutional order of the State through force and violence, initially emerged as a moral and educational movement. It was perceived as such by many people from all strata of society ... The accused is said to have been in contact with the [cells] used to showcase the organisation's legitimacy. However, there is no evidence that he was aware of the organisation's ultimate objective or that he was involved in its hierarchy, having established an organic link with it. [In particular, the following acts are not sufficient to] prove that he is a member of the organisation: HTS reports demonstrating that he was in telephone contact with persons who were considered to be are said to be the organisation's regional imams, and against whom an investigation was conducted on account of their alleged involvement in the organisation's regional structure; his participation in religious discussion meetings held by the organisation before 2013 and in some such meetings after 2013; the fact that his child is enrolled in a school affiliated with the organisation; the fact that he subscribes to the organisation's newspapers ...."

(c) Other relevant judgments of the Court of Cassation

120. The Government relied on a line of case-law from the Court of Cassation in order to clarify the criteria to be derived from Turkish case-law concerning the offence of membership of an armed terrorist organisation. It is clear that the Court of Cassation has identified several recurrent constituent elements of the offence: ideological commitment to the organisation; participation in continuous, diverse and intensive actions; the existence of a hierarchy and of discipline, even if flexible; the use of code names; and regular contact with other members (see, *inter alia*, E.1994/9-229, K.1994/275; E.2006/10-253, K.2007/80; E.2007/10553, K.2008/5903; E.2012/7394, K.2013/8794; E.2015/4767, K.2015/1862; and E.2007/11916, K.2009/1340). The Court of Cassation also held that whether an organisation was "armed" did not depend on its possession of individual weapons, but on its structural capacity to commit violent offences (E.2012/7394, K.2013/8794). In addition, in its judgment of 26 May 2006 (E.2007/11916, K. 2009/1340), the Court of Cassation also considered that the fact of using a code name, having links with members of a terrorist organisation, keeping a bomb in one's home and bringing food supplies to members of a terrorist organisation demonstrated the continuity and diversity in the actions of an accused individual, and convicted him under Article 314 § 2 of the Criminal Code.

121. With regard to the mental element of an offence, the above-cited case-law requires that the person knowingly joined a criminal organisation, with the intention of being part of a group pursuing criminal aims. The willingness to commit offences does not necessarily have to concern specific acts but implies a conscious adherence to the organisation's criminal purpose (E.2016/7162, K. 2017/4786). The relevant parts of that judgment read as follows:

> "Mental element: The mental element of the offence is direct intent and 'intent to commit an offence'. Anyone who joins an organisation of this type must be aware that it commits offences and seeks to commit them. A member of such an organisation must

> join it knowingly and willingly, be aware of the nature and objectives of the organisation, wish to be part of it and show his or her willingness to do so on a continuous basis ... Once established that the intent of all the perpetrators is to join an organisation created for the purpose of committing offences, it is not necessary that they all intend to commit the same offences. It is necessary that the person involved in an organisation is aware that the purpose of the organisation is to commit offences."

With regard to evidence, the Government relied on the value of the witness statements as an admissible form of evidence, while emphasising that the court remained free to assess the credibility of witnesses (E.2013/1-251, K.2013/454).

122. Equally, judgment E.2019/9643, K.2020/4780, delivered on 6 October 2020 by the Sixteenth Criminal Chamber of the Court of Cassation, concerns the conviction of three high-ranking military officers for attempting to overthrow the constitutional order by force and violence (Article 309 of the Criminal Code) on account of their direct involvement in the attempted *coup d'état* of 15 July 2016. The judgment shows that these servicemen were in contact with the FETÖ/PDY's "*imams mahrem"* [secret or intimate imams], with responsibility for the air force.

123. For his part, the applicant referred to several judgments in which the Court of Cassation had either upheld or set aside convictions for membership of the FETÖ/PDY, particularly for lack of evidence (*inter alia*, E.2022/894, K.2024/7516; E.2023/12473, K.2024/3259; E.2023/32471, K.2024/3383; and E.2021/20451, K.2024/2718). He also relied on a judgment of 2022 in which the Court of Cassation had quashed convictions in relation to the Kurdistan Islamic Revolution Movement (KIDH), in the absence of evidence that the given organisation still existed as a terrorist threat, and emphasised the need to distinguish between the exercise of fundamental freedoms (expression, association) and genuine involvement in a terrorist organisation (E.2018/16-368, K.2022/751). He also relied on the relevant parts (set out below) of the judgment delivered by the Court of Cassation, in plenary session of the Criminal Divisions, on 19 June 2001 (E.2001/9-125, K.2001/128):

> "The members [of a terrorist organisation] are those who do not hold any special leadership responsibilities; who merely join the organisation; who adhere to the objective; who are aware of the nature of the organisation when they join it, and who consider that the organisation's objectives correspond to their own purposes."

3. The criminal proceedings against F. Gülen in 1999

124. The proceedings in question are described in paragraphs 189 to 193 of the above-cited *Yüksel Yalçınkaya* judgment.

II. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The United Nations

125. Pursuant to Article 15 of the International Covenant on Civil and Political Rights (ICCPR), "[n]o 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". In *Nicholas v. Australia* (HRC, UN Doc. CCPR/C/80/D/1080/2002), the United Nations Human Rights Committee stated that Article 15(1) requires that every necessary element of a criminal offence be proven to the requisite standard of proof at trial. The conviction of a person despite the absence of sufficient proof of an essential element of the offence would violate both the principle of legality and the principle of legal certainty provided by Article 15(1) (see *Yüksel Yalçınkaya*, cited above, §§ 194-195).

B. The Council of Europe

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

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

"...

E. Article 314 (armed organisation)

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

...

1. Membership of an armed organisation (art. 314)

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

...

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

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 of an armed organisation must be established with convincing evidence and beyond any reasonable doubt.

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

...

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

2. Council of Europe Commissioner for Human Rights

127. On 7 October 2016 Nils Muižnieks, the Commissioner for Human Rights, published a memorandum (CommDH(2016)35) on the human rights implications of the measures taken under the state of emergency in Türkiye. In his memorandum, he stressed that Türkiye's response to the 2016 coup attempt must uphold human rights and fundamental legal principles such as legality, non-retroactivity, and legal certainty. He took note of the information that the National Security Council had designated FETÖ/PDY as a terrorist organisation in 2015, while also noting that the conclusions of this body were not addressed to the public, but to the Council of Ministers. He warned against criminalising mere association with this organisation, which had operated lawfully across society before the coup, and urged the authorities to ensure that terrorism charges were not applied retroactively. He also underlined that emergency measures must remain necessary and proportionate. His successor, Dunja Mijatović, carried out a visit to Türkiye in July 2019, and published her report on that visit on 19 February 2020 (CommDH(2020)1). She highlighted the persistence of overly broad interpretations of terrorism and the offence of membership of an armed terrorist organisation, noting that individuals were often convicted based on lawful past activities or tenuous links. She cautioned that this practice undermined legal certainty, reversed the presumption of innocence, and led to convictions based on presumed intent rather than evidence, thereby threatening the rule of law and fundamental freedoms in Türkiye (see *Yüksel Yalçınkaya,* cited above, §§ 198-199).

THE LAW

I. PRELIMINARY ISSUES

128. The Government began by asking the Grand Chamber to reconsider the decision by the five-judge panel to accept the referral request. In this connection, they submitted that the applicant, who had sought to withdraw his application at the Chamber stage, requesting that it be struck out, was not entitled to make this referral request. Moreover, according to the Government, the referral request did not satisfy the requirements of Article 43 of the Convention, in that in his referral request the applicant was in fact

seeking to challenge the assessment of the evidence by the domestic courts. In this regard, they submitted that the case did not raise any serious question relating to the interpretation or application of the Convention, nor any serious issue of general importance that would justify a referral to the Grand Chamber.

129. The Government then submitted that the application, and in particular the request for referral to the Grand Chamber, should be declared inadmissible under Article 35 § 3 (a) of the Convention for abuse of the right of individual application. They argued that the application did not concern the applicant's individual rights but was essentially seeking to challenge the Turkish courts' classification of the FETÖ/PDY as an armed terrorist organisation. In their view, that particular goal was reflected in the referral request, which invited the Court to examine whether the given classification was compatible with the Convention. They emphasised that the applicant continued to deny the terrorist nature of the FETÖ/PDY and had submitted, in support of his position, an expert report (drawn up at the request of his lawyer) which described the movement as a mere educational network. They considered that this approach amounted to exploiting the applicant in order to contest the Turkish authorities' classification of the FETÖ/PDY. They added that the application was opportunistic in nature, as also illustrated by the applicant's contradictory attitude during the proceedings. They noted that in his letter of 23 August 2023, he had asked that his application be struck out, referring to a deterioration in his health, to professional and family difficulties arising from the publicity surrounding the case, and to pressure from those around him. Yet he had never requested that his identity not be disclosed, as permitted by Rule 47 § 4 of the Rules of Court. The Government noted that it was only four days before the delivery of the Chamber judgment, unfavourable to his interests, that he had suddenly invoked a need for anonymity. Lastly, they pointed out the applicant's inconsistency; three months after asking that his case be removed from the Court's list, he had suddenly reactivated his application, requesting that the case be referred to the Grand Chamber. This approach, focused on challenging the classification of the FETÖ/PDY, confirmed in the Government's view the abuse of the right of individual application.

130. The Court will address these issues in turn.

A. The Government's request to reconsider the decision of the Grand Chamber panel

131. The Court notes that on 9 July 2024 the Chamber deliberated and adopted its judgment. Very shortly before the delivery of its judgment on 27 August 2024 and only a few days after the publication, on 20 August 2024, of the press release announcing the forthcoming delivery, the applicant's lawyer informed the Chamber (in an email of 6.35 p.m. on 23 August 2024)

of his client's intention to withdraw the application. In justifying that request, the applicant indicated, *inter alia*, the possible repercussions of the delivery of the Chamber judgment on his private life, and criticised the use allegedly made of statements by witnesses who had benefited from the "active repentance" regime.

132. On 26 August 2024 the Chamber rejected the applicant's request under Article 37 § 1 *in fine* of the Convention, having regard to the state of the proceedings and in the interests of the proper administration of justice. The Chamber judgment was accordingly delivered on 27 August 2024, with all the ensuing consequences. Thus, the application was not struck out and the applicant did not cease to be a party to the case.

133. Subsequently, on 26 November 2024, the applicant requested that the application be referred to the Grand Chamber under Article 43 of the Convention. On 16 December 2024 a panel of the Grand Chamber granted that request, in accordance with the second paragraph of the above-mentioned provision.

134. The Court observes that where a case has been duly referred at the request of one of the parties, as in the present situation, it is not for the Grand Chamber to assess the appropriateness of the decision made by the panel. Accordingly, once the panel has taken the view that the case raises, or could raise, a serious question or issue within the meaning of Article 43 § 2, it is the entire "case", in so far as it has been declared admissible, that is automatically referred to the Grand Chamber, to be decided afresh by means of a new judgment (see *Pisano v. Italy* (Striking out) [GC], no. 36732/97, §§ 26-27, 24 October 2002). It follows that the Government's request to have the Grand Chamber panel's decision set aside must be rejected.

B. Abuse of the right of individual application

135. The Court reiterates that the implementation of Article 35 § 3 (a) of the Convention, according to which it declares inadmissible any individual application which it considers to be "abusive", is an "exceptional procedural measure", and that the concept of "abuse" refers to its ordinary meaning, namely, the harmful exercise of a right by its holder in a manner that is inconsistent with the purpose for which such right is granted (see *Miroļubovs and Others v. Latvia*, no. 798/05, § 62, 15 September 2009). On the latter point, the Court has stated that for such "abuse" to be established on the part of the applicant it requires not only manifest inconsistency with the purpose of the right of application but also some hindrance to the proper functioning of the Court or to the smooth conduct of the proceedings before it (see *S.A.S. v. France* [GC], no. 43835/11, § 66, ECHR 2014 (extracts); see also *Kovačević v. Bosnia and Herzegovina* [GC], no. 43651/22, § 131, 25 June 2025).

136. The Court has applied this provision in four types of situation (see, in particular, *Miroļubovs and Others*, cited above, §§ 62-66). First, in the case of applications which were knowingly based on untrue facts with a view to deceiving the Court, whether there was falsification of the documents in the file or failure to inform the Court of an essential item of evidence for its examination of the case or of new major developments in the course of the proceedings. Secondly, in cases where an applicant had used particularly vexatious, contemptuous, threatening or provocative expressions in his or her correspondence with the Court. Thirdly, in cases where an applicant had deliberately breached the confidentiality of negotiations for a friendly settlement. Fourthly, in cases where applicants had repeatedly sent quibbling and manifestly ill-founded applications resembling an application previously lodged by them that had been declared inadmissible. The Court has also stipulated that, even though an application motivated by publicity or propaganda is not, by that very fact alone, an abuse of the right of application, the situation is different where the applicant, driven by political interests, gives an interview to the press or television showing an irresponsible and frivolous attitude towards proceedings that are pending before the Court (ibid, § 66; for references to the cases in question, see *S.A.S.,* cited above, § 66).

137. The Court notes at the outset that the present application does not correspond to any of these cases. Admittedly, the applicant's change of mind, first asking to have his application struck out, then requesting a referral to the Grand Chamber, may seem surprising. However, it cannot be regarded as amounting to an "abuse" of the right of individual application. In addition, even assuming that the protection of the applicant's individual rights was not the main purpose of his action and that his request was primarily aimed at challenging the legal designation of an organisation by the Turkish courts – which could be regarded as "manifestly contrary to the purpose of the right of application" – it emphasises that his status as a victim, in the light of his complaints under Articles 3 and 7 of the Convention, cannot be called into question. Nor does it find sufficient evidence to support the conclusion that the applicant's conduct impeded the proper conduct of the proceedings before the Grand Chamber. It points out that the Court has already held that the parties can submit arguments and counter-arguments relating to their case before it, which the Court can accept or reject, but that such allegations cannot in themselves be regarded as an abuse of the right of individual application (see *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, § 185, ECHR 2014 (extracts)). Taking into account also the fact that the inadmissibility of an application on the ground that it constitutes an abuse of the right of application must remain an exception (see *S.A.S.*, cited above, § 68), the Court dismisses the Government's preliminary objection.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

138. The applicant submitted that the acts for which he was convicted were lawful at the time when he had purportedly committed them and that, by imposing criminal liability for those acts, the authorities had interpreted the relevant rules of law expansively and had thus arbitrarily disregarded the principle of "no punishment without law" enshrined in Article 7 of the Convention, the relevant part of which is worded 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. The Chamber judgment

139. The Chamber concluded, unanimously, that there had been no violation of Article 7 of the Convention. In reaching that conclusion, it first emphasised that the present case differed from the situation at issue in *Yüksel Yalçınkaya v. Türkiye* ([GC], no. 15669/20, 26 September 2023), where the conviction had been based mainly on the use of the communication application ByLock, without an individualised demonstration of the constituent elements of the offence under Article 314 § 2 of the Criminal Code. It noted, however, that in the present case the applicant had been found guilty of the offence of membership of an armed terrorist organisation and convicted under the above-mentioned provision for acts that were committed essentially between 2011 and 2014, and on the basis of a wide range of evidence. With regard to the accessibility of the law, it noted that Article 314 § 2 of the Criminal Code had been in force since 1 June 2005, well before the period in question.

140. The Chamber noted that, according to the applicant, the authorities had infringed Article 7 of the Convention in two respects when convicting him: first, the FETÖ/PDY had not been designated as an "armed terrorist organisation" at the time when he allegedly committed the acts with which he was charged; secondly, he had been convicted for lawful acts and as a result of an expansive interpretation of the relevant laws.

141. With regard to the designation of the FETÖ/PDY as a terrorist organisation, the Chamber noted that the applicant was alleging a violation of Article 7 on the grounds that there was no legal recognition of the FETÖ/PDY as a terrorist organisation at the material time. It pointed out, however, that under Turkish law, the fact that a group was not yet legally classified as a terrorist organisation did not exclude the criminal liability of its members for previous acts, provided that they had acted knowingly and willingly. Thus, according to the Chamber, the central issue was not whether

the FETÖ/PDY had been officially classified as a terrorist organisation during the period in question, but whether the applicant's conviction had been foreseeable in the light of the domestic law and the constituent elements of the offence as defined by Article 314 § 2 of the Criminal Code, the Prevention of Terrorism Act and the case-law of the Court of Cassation.

142. As to the applicant's argument that he had been convicted for lawful acts and as a result of an expansive interpretation of the relevant laws, the Chamber began by analysing the relevant provisions and their interpretation by the domestic courts. Referring to the *Yüksel Yalçınkaya* judgment, it held that the offence had been defined in Turkish law in compliance with the principle of legality under Article 7 of the Convention.

143. With regard to the material and intentional elements of the offence, the Chamber noted that the applicant had not acted in the context of a law-abiding legal entity, but had taken part in activities designed to recruit students and infiltrate public institutions, and that the domestic courts had established that these activities were carried out secretly, with the aim of achieving the objectives of the organisation, which had also resorted to illegal actions such as fraud in university entrance exams and civil-service competitions. Thus, in the Chamber's view, the material element of the offence lay in the fact that the applicant had placed himself at the disposal of the organisation, had integrated its hierarchical structure and had carried out covert, intensive and continuous activities on its behalf.

144. With regard to the intentional element, the Chamber distinguished this case from that of *Yüksel Yalçınkaya*, where the mere use of ByLock had been equated with intentional membership of a terrorist organisation. In the present case, the Chamber held that the domestic courts had established the applicant's criminal intent on the basis of a wide range of evidence demonstrating his active role in the organisation's clandestine structure. In addition, referring to the case-law of the domestic courts, the Chamber emphasised that where an accused claimed to be unaware of the true nature of the FETÖ/PDY, this allegation fell to be assessed in the light of Article 30 of the Criminal Code, on mistake. This assessment had to address the accused's position within the organisation and the nature of the acts imputed to him. The Chamber held that the domestic courts' interpretation of the intentional element had been foreseeable and in accordance with the principles of criminal law and had not gone beyond the legal framework in force.

145. The Chamber found that there had existed at the relevant time a legal basis for the offence with which the applicant was charged and that its definition was sufficiently clear to satisfy the requirements of foreseeability under Article 7 of the Convention. It found that the interpretation adopted by the domestic courts had not been expansive but had fallen within the scope of the offence set out in the Criminal Code and had been reasonably foreseeable. It thus concluded that there had been no violation of Article 7.

B. Merits

1. Arguments of the parties

(a) The applicant

146. The applicant challenged his conviction for membership of an armed terrorist organisation. He submitted that several essential conditions for the establishment of this offence had not been met. In particular, he asserted that the very existence of an armed terrorist organisation had not been proved, that he had been unaware of the nature of that organisation, that no evidence had been established as to his actual membership, and that no specific intent to achieve the organisation's objectives could be imputed to him.

147. He put forward several arguments concerning the existence of the terrorist organisation.

148. First of all, he repeated that the initial investigation against F. Gülen in 2000, and the latter's final acquittal in 2008, demonstrated the lack of foreseeability and legal basis for his own conviction, assessed under Article 7 of the Convention. He also referred to statements and actions by senior political figures who, prior to 2013, had publicly supported the Gülenist movement, and asserted that the FETÖ/PDY had not been considered a terrorist organisation at the time of the events leading to his conviction. Before the Grand Chamber, he argued that in 2013 the Gülenist movement had been widely perceived in Türkiye as a respected and well-structured organisation, enjoying the support of the Government and the judiciary. Its activities were extensive, and millions of Turkish citizens had links with it. He acknowledged that F. Gülen's acquittal and the favourable attitude of the authorities at that time did not exclude the possibility that a terrorist organisation could subsequently have emerged but considered that during the period in question no Turkish citizen could have foreseen such a designation. Thus, he considered that no one could be presumed to have known that the movement would later be designated as a terrorist entity. He submitted that such knowledge had to be demonstrated by tangible evidence and underlined the need to prove that he had been aware of the organisation's terrorist nature at the time of his involvement. He added that, under Turkish law, only a judicial decision could designate an entity as a terrorist organisation, and until the attempted *coup d'état* in 2016, no final decision had classified the FETÖ/PDY as such. He also pointed out that it was only after the 2016 coup attempt that this classification had been adopted by the Turkish authorities. He referred to the case of *Atilla Taş v. Turkey* (no. 72/17, § 137, 19 January 2021) to show that, until the attempted coup of 15 July 2016, no legal action had been taken against persons who were subsequently convicted of membership of an armed terrorist organisation. He also submitted that he could not reasonably have foreseen that student involvement in this movement could subsequently be held to constitute a criminal offence.

149. Before the Grand Chamber, he further stated that he did not accept the characterisation of the Gülenist movement as an armed terrorist organisation. He pointed out that this classification of the Gülenist movement was not accepted internationally. In his submission, the United Nations Security Council had never recognised it as such, and several UN bodies had, on the contrary, condemned the Turkish Government's actions against the movement. The UN Special Rapporteurs had stressed that this designation did not meet the requirements of due process or the definition of terrorism. Similarly, the Council of Europe and the European Union, as well as many European States, the United States of America and Canada, had not classified the FETÖ/PDY as a terrorist movement. The applicant therefore considered it essential, when assessing the criminal intent of an individual accused of belonging to the movement, to have regard to the fact that major institutions contested this classification. He wondered, given that influential organisations still refused to consider the Gülenist movement as a terrorist movement, how a mere student could have been expected to be aware of its purported nature? Such a presumption could not be accepted without direct evidence of terrorist intent, since any indirect evidence was, in his view, insufficient in that regard.

150. With regard to the acts imputed to him, the applicant put forward the following arguments. First, he stressed that the charges against him were identical to those brought against F. Gülen, who had ultimately been acquitted. In this connection, he also argued that his activities had been lawful when they were carried out. He further submitted that his trial had been based on indirect evidence, with no tangible proof of involvement in terrorist activities. Convicted by the Çorum Assize Court on 14 February 2018 for membership of an armed terrorist organisation, his guilt had purportedly been based on five elements: the payment of his social-security contributions by a company affiliated with the Gülenist movement, his presumed role as a regional student leader, the alleged use of a code name, telephone contacts with suspected members of the movement and a deposit of TRY 2,000 in Bank Asya. The Samsun Court of Appeal had upheld that conviction without reassessing the question of his individual liability, as had the Court of Cassation and the Constitutional Court, which had rejected his appeals without a thorough analysis of the material and intentional elements of the offence.

151. In this connection, the applicant noted before the Grand Chamber that the domestic courts had held that he had exercised a number of roles that were related to the Gülenist movement. The material in the file indicated that he had lived in Çorum in a student house that was affiliated to that movement, and that from September 2009 he had occupied the post of *abi* (house leader), a post that he was said to have held until June 2010. This type of structure generally brought together five or six students, including the *abi*. From September 2010 he had allegedly become a regional student leader (BTM), a

post he had held until June 2012. In that capacity, he had allegedly given private classes to the students living in five to seven houses (including his own) in the city of Çorum. Between September 2012 and June 2013 he was said to have carried out the same duties under the title of principal regional student leader (BBTM), when he purportedly gave private classes in about twenty student houses, again in Çorum. During the following academic year (September 2013 – June 2014), he was said to have been a tutor in State-owned university residences within Çorum Province. All of these duties were allegedly carried out on a voluntary basis, in parallel with his undergraduate studies. In addition, between December 2013 and June 2014, he had been employed by the company *Çorum Eğitim Hizmetleri Anonim Şirketi,* an educational structure which was affiliated to the Gülenist movement and operated six academic establishments in the region. He was said to have worked as a public relations officer for one of those schools.

152. He added that student houses in Türkiye, including those affiliated with the Gülenist movement, were well-known and legal, contrary to the Government's claims. His role as a BBTM had been arbitrarily equated with a hierarchical position implying knowledge of the movement's terrorist objectives, although these structures operated horizontally. In support of his argument, the applicant submitted figures on the number of students and BBTMs associated with the Gülenist movement at the relevant time, stating that between 188,000 and 224,000 students had then been residing in student houses linked to the movement; according to his estimates, there had been between 1,600 and 1,900 BBTMs. He submitted that it would be absurd to assume that all of these individuals necessarily met the conditions required to be considered as having been aware of the organisation's true objectives.

153. The applicant submitted that this approach had led to the mass criminalisation of individuals on the basis of assumptions, in violation of the principle of legal foreseeability and of Article 7. He also complained of a retroactive reclassification of the facts: before the emergency decree of July 2016, schools linked to the Gülenist movement had been legal and subject to State supervision. After that date, however, the fact of working in these establishments had been considered as evidence of terrorist affiliation. The courts had also equated the use of code names (a widespread practice in religious communities to avoid persecution) with evidence of clandestine and criminal intent, without any legal basis. Lastly, ordinary acts, such as a TRY 2,000 deposit with Bank Asya, had been instrumentalised to establish a link to terrorism, although the bank had been legal and supported by various citizens, including opponents of the Government.

154. The applicant emphasised, more specifically, that his conviction had largely been based on statements obtained from witnesses who benefitted from the active repentance regime, without any face-to-face confrontation having been organised. Equally, he disputed the relevance of the other evidence relied on against him. With regard to the HTS analysis, he submitted

that mere contact with alleged members of the movement was not sufficient to establish effective membership of a terrorist organisation. As for the deposit of money into a Bank Asya account, he pointed out that there was no evidence that this transaction had been associated with criminal activity. Lastly, concerning the installation file of the ByLock application on his laptop, that evidence proved neither its actual installation nor his use of that application.

155. The applicant further argued before the Grand Chamber that the indictment did not specify the period during which he was alleged to have been a member of a terrorist organisation. The reference to the year 2016 seemed to stem from a judicial practice which frequently equated the date of arrest (30 January 2017) with that of the presumed offence. The Samsun Regional Court of Appeal had thus retained that date as a reference point. He submitted that the only tangible evidence in the official documents was the social-security contributions paid by *Çorum Eğitim Hizmetleri A.Ş.* (19 December 2013-11 June 2014) and a bank deposit of TRY 2,000 in January 2014. Witness statements indicated that he had been a BBTM (2012-2013) and coordinator of university residences (September 2013-June 2014). However, that information did not enable the chronology of the presumed offence to be determined with precision, raising an issue under Article 7. In his submission, the Government had added to the file allegations that were made after June 2014, and which had not been examined by the domestic courts.

156. In summary, with regard to the assessment of the evidence against him, the applicant submitted that a global examination revealed that his conviction had been based on a presumption of guilt by association or on collective liability, rather than on individualised evidence of his criminal intent. Such an approach contravened the fundamental principle of individual criminal responsibility, in violation of European case-law.

157. With regard to the constituent elements of the offence referred to in Article 314 of the Criminal Code, the applicant submitted that Article 7 required that any offence be based on the demonstration of two constituent elements: a material element, namely the existence of specific acts reflecting effective participation in a terrorist organisation, and an intentional element, namely the conscious intention to support that organisation's criminal objectives. With regard to the material element of the offence, he noted that conviction for membership of an armed terrorist organisation required evidence of a hierarchical structure and a commitment characterised by continuity, diversity and intensity in the acts committed. However, the existence of those elements had not been demonstrated in his case. The domestic courts had not established his rank within a precise hierarchical structure, nor had they demonstrated his effective involvement in alleged criminal acts.

158. As to the mental element of the offence, the applicant maintained that he had never known about the terrorist nature of the Gülenist movement, insisting that a distinction had to be drawn between an organisation's presumed objective and an individual's potential awareness of it. He repeated that the Turkish governmental authorities had publicly supported the movement. In particular, he submitted that the failure to take the temporal factor into account had made it impossible to assess correctly the mental element of the offence with which he was charged. Indeed, in order to convict an individual as a member of a terrorist organisation, it was in his view essential to establish that he or she was aware of that organisation's objectives and knowingly supported them over a given period. He developed the following arguments in support of his submission.

159. First, he submitted that prior to the end of 2013 the Gülenist movement had been viewed favourably by both the Government and public opinion, and that it could not in any way be described as a terrorist organisation. He further argued that the criminal nature of the Gülenist movement remained inconclusive in the Court's case-law. In that connection, he referred to several judgments, especially *Yasin Özdemir v. Turkey* (no. 14606/18, 7 December 2021, concerning a conviction for glorifying crime and criminals), *Atilla Taş v. Turkey* (cited above, concerning the detention of a singer on account of his articles and writings), and *Ilıcak v. Turkey (no. 2)* (no. 1210/17, 14 December 2021, on the detention of a journalist for her articles). Equally, he emphasised that, during the domestic proceedings, the question of specific intent had not been examined and the element of knowledge had not been assessed with even a minimum degree of reasonableness. In his view, this failing was contrary to the fundamental principles of the Convention and to the Grand Chamber's conclusions in the *Yüksel Yalçınkaya* judgment. Thus, he considered that the courts had applied a logic of automatic guilt, which was not in keeping with the principles established in the Court's case-law. In particular, he emphasised that there was no significant difference between his case and that of *Yüksel Yalçınkaya*. In the latter, the main evidence had been based on the use of the ByLock app, while in his own case, the presumption of guilt had been based on his alleged role as a student coordinator. However, this presumption had been based solely on his position, without any tangible criminal conduct being established.

160. In this connection, the applicant criticised the case-law of the Turkish Court of Cassation, which classified individuals into different "layers" within the Gülenist movement, without carrying out an individualised assessment of their real involvement. He submitted that, since the 2017 judgment (see paragraphs 113-118 above), the Court of Cassation had described the Gülenist movement as a hierarchical structure, a concept systematically taken up in subsequent convictions.

161. In the light of the foregoing, the applicant argued that his conviction was based on an approach that had no temporal basis, thus ruling out any consideration of the factual reality and the gradual evolution of the political context. The judicial proceedings against alleged members of the Gülenist movement had introduced new evidential mechanisms and broadened the definition of membership of a terrorist organisation, in violation of the principles of foreseeability and individual criminal liability. This method had resulted in a conviction without the courts having rigorously established the mental element of the offence, which was incompatible with the requirements of the Convention and the Court's case-law. In short, the applicant challenged the characterisation of the facts used against him and highlighted the lack of tangible evidence establishing his effective and conscious membership of an armed terrorist organisation.

162. The applicant considered that the evidence thus set out supported the conclusion that the domestic legal provisions had not been foreseeable in 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 might amount to an offence that was punishable under Article 314 § 2 of the Criminal Code. In his view, the scope of the material and moral elements of the offence of membership of an armed terrorist organisation had been considerably widened by a particularly extensive interpretation of the offence set out in the above provision. That interpretation had been totally unforeseeable and had extended the scope of criminal liability for the offence in question.

(b) The Government

163. The Government began by stating that the offence of membership of an armed terrorist organisation, provided for in Article 314 § 2 of the Criminal Code, was based on a combined interpretation of several legal provisions and domestic case-law. They pointed out that the question of the foreseeability of that offence had already been decided by the Grand Chamber in the case of *Yüksel Yalçınkaya* (cited above). In that judgment, the Court had held that the offence of which the applicant was convicted was codified and defined under Turkish law, in keeping with the principle of legality under Article 7 of the Convention. It had considered that the relevant provision was formulated with sufficient precision to enable an individual to know, if need be with appropriate legal advice, what acts and omissions would make him criminally liable (ibid., § 249). The Government further emphasised that the Court had also held that the absence, at the material time, of an official designation of the FETÖ/PDY as an armed terrorist organisation did not preclude Mr Yalçınkaya's conviction under Article 7 of the Convention, provided that

it was established that he had acted knowingly and willingly (ibid., § 253). In their view, those considerations were fully applicable to the present case.

164. With regard to the determination of the temporal element of the offence, the Government explained that the Çorum Assize Court had examined various items of evidence establishing the applicant's membership of the FETÖ/PDY. Although neither the indictment nor the Assize Court's judgment mentioned a specific period, this could clearly be inferred from the applicant's conduct, which had been accepted as evidence for that purpose. It was clear from the evidence obtained at the investigation stage and during the criminal proceedings, in particular from the statements of several witnesses, that the applicant had held positions of responsibility within the FETÖ/PDY between 2010 and 2014. In addition, frequent telephone communications between the applicant and key members of the organisation (E.B., G.B.) between 2013 and 2015 had been established. The applicant's social-security contributions had been paid between December 2013 and June 2014 by a company affiliated to the FETÖ/PDY. Lastly, it had been shown that in January 2014 he had deposited the sum of TRY 2,000 with Bank Asya, on the instructions of the organisation's leader. In this connection, the Government pointed out that the offence of membership of an armed terrorist organisation was a continuing offence (*mütemadi suç*).

165. The Government further emphasised that the first-instance court, relying on the Constitutional Court's judgment of 4 August 2016, had carefully analysed the origins, objectives, illegal activities and hidden hierarchical structure of the FETÖ/PDY, as well as its attempts to establish a parallel State structure. The organisation had been described as a hierarchical structure that had infiltrated public institutions in order to gain control of the State, including through student houses, which were used to recruit and prepare new members. The Constitutional Court had also noted that, among the organisation's illegal acts, it had unlawfully obtained the questions for public examinations in order to place its members at an advantage (see paragraphs 103-104 above). This analysis had been conducted both in the judgment convicting the applicant and in numerous other subsequent judgments handed down by the highest courts.

166. The Government also submitted that the Çorum Assize Court had applied the legal framework in force and had based its verdict on several items of evidence: witness statements, communication records, suspicious financial transactions and payments of social-security contributions by a company affiliated to the FETÖ/PDY. It had then assessed the question of the applicant's membership of the organisation in the light of the diversity, continuity and intensity of his actions, as well as his role in the recruitment and orientation of new members. It had also examined the mental element of the offence, finding that the actions in question demonstrated voluntary adherence to the organisation's objectives.

167. In particular, on the basis of witness statements and material evidence, the Çorum Assize Court had established that the applicant was not a mere sympathiser, but that he held a high-level position within the FETÖ/PDY's clandestine structure in Çorum. It had found that he supervised student houses, organised ideological conversation meetings and facilitated recruitment within the organisation. It held that his activities demonstrated his active role in disseminating the organisation's ideas and objectives, in particular by mentoring future members. It had concluded that the material evidence, such as telephone contacts with other members, suspicious financial transactions and the payment of his social-security contributions by an affiliated entity, confirmed that he was a member of the organisation. In addition, the Assize Court had taken into account the national context from 2013 onwards, a period during which several investigations and events (the purges in the civil service, the MİT trucks affair, the operations of 17-25 December 2013) had revealed to the general public the FETÖ/PDY's true nature. The applicant's conviction had thus been based on an overall assessment of his actions and the fact that they were consistent with the organisation's objectives.

168. As to the applicant's hierarchical position and his criminal liability, the Government reiterated that the applicant had held a number of high-level positions within the organisation: house imam, BTM, BBTM and provincial official (*İlci*). He had also used a code name, which, in line with the Court of Cassation's established case-law, was a key indicator of membership of an illegal organisation (see paragraph 120 above). The Assize Court had considered that the applicant's hierarchical position within the organisation was decisive in establishing his membership of an armed terrorist organisation, taking into account the continuity, diversity and intensity of his activities, as well as his adherence to the organisation's methods and objectives.

169. The Government described the structure and purpose of the student organisation as follows: this entity supervised, trained and guided students with a view to their gradual integration into the organisation. It was highly hierarchical and strictly supervised, underpinned by a rigorous selection system based on three criteria: loyalty to the organisation, organisational skills and experience within the organisation. The student coordinators, appointed by their superiors, could perform several roles as needed. Their mission was to organise meetings and training in affiliated houses, to monitor and evaluate the ideological progress of students, to collect and analyse information on students and schools, to identify and recruit new members, and to manage student houses, including by supervising discipline and finances. This structure was based on a clearly defined hierarchy, ranging from the regional educational advisor to the "Brother" responsible for the students, each of whom carried out supervisory and monitoring tasks. Its ultimate goal was to integrate its members gradually into State institutions,

including the armed forces, the police, the public administration and the judiciary, in order to exert lasting influence and achieve the organisation's strategic objectives.

170. The Government also submitted that the Çorum Assize Court's analysis of the applicant's activities had been in complete harmony with the relevant and settled case-law of the Court of Cassation. According to that case-law, an armed terrorist organisation had to meet several criteria, including having a hierarchical structure, carrying out continuous actions, and using violence or threat against the constitutional order. The designation of the FETÖ/PDY as an armed terrorist organisation had been established by the Court of Cassation judgments in 2017 (see paragraphs 113-118 above) and confirmed by the Constitutional Court (see paragraphs 103 and 109 above). Similarly, according to the Court of Cassation's settled case-law, membership implied a hierarchical link with the organisation, adherence to its objectives and availability to carry out its orders. The offence was based on an organic connection with the organisation, characterised by continuous, varied and intense acts, without it being necessary for the member to have personally committed an offence (see paragraphs 113-120 above).

171. The Government explained that the Çorum Assize Court had applied these principles when concluding that the applicant had made a material and moral contribution to the FETÖ/PDY's existence and consolidation by carrying out recruitment, training and financial activities, while using a code name to preserve secrecy. This approach had been neither new nor unforeseeable, since it was in line with the case-law of the Court of Cassation, which had held that similar activities characterised the offence of membership of an armed terrorist organisation (see paragraph 120 above). The applicant had actively recruited and mentored students, organised ideological meetings and participated in activities aimed at strengthening the organisation's base. His role in the management of student houses and his involvement in the FETÖ/PDY hierarchy showed that he was not a passive member but an active participant, contributing to the organisation's objectives.

172. With regard to the probative value of the evidence obtained by the national authorities, the Government pointed out that, according to the Court of Cassation's settled case-law, it was for the domestic courts to assess witness statements freely, in order to determine whether and how the charges had been committed. They stressed that, in cases involving organised crime, the judicial authorities faced significant difficulties on account of the secret nature of the activities of criminal organisations, rendering identification of members and their actions problematic. In consequence, the national case-law considered that statements by repentant members benefiting from measures to mitigate their sentences were an essential means of investigation, making it possible to obtain information about the structures and *modus operandi* of terrorist organisations. In the present case, after having analysed the evidence collected, the Çorum Assize Court had concluded that the statements were

sincere and consistent, and therefore accepted them as decisive evidence for the applicant's conviction. This approach, in the Government's view, was in line with the established case-law of the Court of Cassation and the courts of appeal, which recognised the probative value of converging testimony in organised crime cases.

173. With regard to the assessment of criminal intent (*mens rea*), the Government explained that this was based on knowledge of the organisation's objectives and willingness to adhere to them. The Turkish Court of Cassation required that membership be proven by an organic connection and continuous, varied and intense activities. Under its case-law, a member had to be aware of the organisation's aims and demonstrate a continuing willingness to contribute to them (see paragraphs 113-121 above). It had stated: "Intent presupposes that an individual has wilfully and knowingly aimed to bring about the elements in the legal definition of the offence" (see paragraph 118 above). According to the Government, it was necessary in the present case to distinguish acts pertaining to the *actus reus* of the offence – in this case, the establishment of an organic link with the organisation (that is, integration into its hierarchical structure and availability in response to orders and instructions) and the contribution made to the organisation – from the acts imputed to the applicant, such as exercising a function within the organisation, the use of a code name or participation in the organisation's activities. The Turkish courts deduced from those imputed acts both the *actus reus* and the *mens rea*, on the basis of their continuity, diversity and intensity. In other words, the material element was not used in isolation to establish intent, but the accused's specific acts enabled all of the constituent elements of the offence to be inferred. In the applicant's case, the acts attributed to him differed from the *actus reus* in the narrow sense, and, taken both individually and collectively, went beyond what was necessary to establish only the *actus reus* of the offence.

174. The Government added that the Çorum Assize Court had established that, since the applicant had held a senior hierarchical position in the FETÖ/PDY and monitored new members, he could not have been unaware of the organisation's true nature and had acted in full knowledge of the facts in order to further its aims. In consequence, the applicant's high position within the student structure had been essential not only in establishing his membership of an armed terrorist organisation, but also to demonstrate that he could not have been unaware of the organisation's true nature and that he had acted knowingly to promote its objectives. According to the Government, the applicant's involvement in the organisation's activities was confirmed by his regular promotions within it and the use of a code name to preserve secrecy. On the basis of the Court of Cassation's case-law, the Assize Court had concluded that only members at the lowest levels could be considered unaware of the FETÖ/PDY's true intentions. The Government submitted that it was inconceivable that the applicant, having exercised an active leadership

role and been promoted within the structure, had been unaware of the organisation's methods and objectives. Contrary to the *Yüksel Yalçınkaya* case, in which the use of ByLock alone had been held to be insufficient to prove membership, the applicant's conviction had been based on an accumulation of varied and corroborated evidence.

175. With regard to the recent judgments of the Constitutional Court, the Government explained that in the *Adnan Şen* case (see paragraphs 108 to 111 above), the Constitutional Court had confirmed that criminal liability for membership of the FETÖ/PDY was to be based on an organic and hierarchical link with the organisation, involving continuous, diversified and intense acts. The Court of Cassation had held that isolated acts, such as participation in conversation meetings, subscribing to an affiliated newspaper or suspicious banking transactions were not sufficient to prove criminal membership. However, it had acknowledged that the absence of a judicial decision designating an organisation as terrorist did not exonerate its members from liability. In the case of *Bilal Celalettin Şaşmaz* (see paragraph 112 above), the Constitutional Court had found a violation of the principle of legality of offences and penalties, noting that the first-instance court had not shown that the accused could reasonably have foreseen that his actions would expose him to criminal liability. Similarly, in its recent judgments, the Constitutional Court had concluded that elements such as membership of an association affiliated to the FETÖ/PDY, depositing money at Bank Asya or subscribing to the newspaper *Zaman* were not in themselves sufficient to establish an organic link with the organisation. However, the Constitutional Court had upheld convictions in several cases, finding that holding positions of responsibility within the FETÖ/PDY, the use of code names, and participation in ideological recruitment and training activities demonstrated voluntary and conscious involvement in the terrorist organisation.

176. Nonetheless, the Government maintained that the applicant's situation differed from that in other cases, such as *Bilal Celalettin Şaşmaz*, where the convictions had been overturned. In contrast to those cases, where the evidence had been based on isolated elements, the applicant's guilt had been established on the basis of a concordant body of evidence: he had been responsible for the recruitment and ideological training of FETÖ/PDY members, held leadership positions within the organisation's hierarchical structure and executed direct orders from its leadership. In addition, he had used a code name, a criterion that the Court of Cassation had held to be a decisive indicator of membership of a terrorist organisation. In conclusion, the Government argued that the applicant's conviction had been based on principles established and consistently applied by the domestic courts; they submitted that the material and moral elements of the offence had been made out and that the conviction had been foreseeable and compatible with the legal rules in force.

177. The Government emphasised that, in relation to membership of an armed terrorist organisation, the Turkish courts assessed the accused's direct intent (*dolus directus*) on the basis of Article 21 of the Criminal Code. Intent was based on knowledge of the elements of the offence and the will to carry them out, implying a conscious and voluntary adherence to the organisation. Thus, in order to establish membership of the FETÖ/PDY, the courts required that the accused had been aware of the organisation's objectives and been willing to adhere to them, made tangible contributions to its functioning, demonstrated active commitment through continuous and varied activities, and assumed a clear organisational role within its hierarchy. Lastly, the Court of Cassation had ruled that criminal lability did not depend on the official date of the FETÖ/PDY's designation as a terrorist organisation, but on an accused's actual involvement before and after that designation. The Court of Cassation also took into account the concept of mistake, that is, of legitimate ignorance. However, in the case of secret organisations such as the FETÖ/PDY, the courts examined whether the accused enjoyed a position of trust and could have known of the organisation's hidden purposes. In that scenario, the defence of mistake was not accepted. In addition, the Court of Cassation's case-law specified that only those who had severed all ties with the organisation before the public revelation of its criminal intentions could rely on mistake in their defence. By contrast, those persons who had pursued their activities after key events, such as the investigations of December 2013 or the attempted *coup d'état* of 2016, could not rely on this defence argument.

178. In this connection, the Government stated that Article 30 § 1 of the Criminal Code provided that an individual could not be considered as having acted intentionally if, at the time of the act in question, he or she was unaware of the material elements of the offence. This provision, applicable to all offences in which a mental element was necessary, including membership of an armed terrorist organisation, made it possible to take into consideration possible ignorance of the organisation's nature and unlawful objectives. It could be relied on as a defence argument, either explicitly, or implicitly through the circumstances of the case, and would then oblige the courts to verify if the conditions for the existence of the offence were present, having regard to the possibility of mistake. Application of this provision did not require that the accused prove his or her innocence, but that the courts assess the facts and available evidence in establishing, or not, *mens rea*. Article 30 § 1 had been applied in certain cases concerning the FETÖ/PDY in which the defendants had not played an active role, had not used encrypted communication tools, and had dissociated themselves from the organisation after the public disclosure of its true nature.

179. By contrast, according to the Government, in the present case the applicant had never relied on Article 30 § 1 of the Criminal Code, nor submitted that he had acted in error or without awareness of the organisation's objectives. On the contrary, the applicant had denied any links with it, despite

clear and incriminating evidence, and he had continued to deny its terrorist nature. Before the domestic courts, he had merely dismissed the evidence produced, without submitting a defence plea based on ignorance or error. In those circumstances, it had not been necessary for the domestic courts to examine of their own motion the application of Article 30 § 1 of the Criminal Code. Moreover, that provision did not apply to the applicant, since he had maintained his involvement with the FETÖ/PDY after 2013, when the organisation had been officially designated as a threat to the State. In particular, the Government considered that, in view of the applicant's rank within the organisation, he had been in a position to foresee that the organisation's secret cells also included a military structure and that the organisation's members who were part of that structure would be able to use weapons when the time came. In that regard, they argued that the concept of foreseeability was not an absolute concept and that it had to be examined in the light of the specific circumstances of each case.

180. In conclusion, the Government submitted that the domestic courts' assessment of the applicant's criminal intent had been carried out in a rigorous manner and in accordance with the principles of law; his conviction had been based on solid evidence demonstrating his active involvement in the FETÖ/PDY. It followed that the interpretation and application of the Criminal Code had been foreseeable, thus respecting the principle of *nullum crimen, nulla poena sine lege*.

181. The Government claimed that the applicant's case differed from the case of *Yüksel Yalçınkaya*, in which the use of the ByLock application had been sufficient to prove membership of the terrorist organisation. In contrast to that case, the applicant had held positions of responsibility within the FETÖ/PDY, specifically in its educational structure. Lastly, the Government emphasised that the applicant was asking the Grand Chamber to reassess the designation of the FETÖ/PDY as an armed terrorist organisation and to determine whether he fulfilled the material and moral elements of the offence. However, referring to the judgments in *Kononov v. Latvia* ([GC], no. 36376/04) and *Del Rio Prada v. Spain* ([GC], no. 42750/09, ECHR 2013), they pointed out that it was not the role of the Court to take the place of the domestic courts in the application of domestic criminal law.

182. In short, the Government considered, in the light of the relevant case-law of the Court of Cassation, that the judicial authorities had been entitled to conclude that the acts for which the applicant was charged, "taken as a whole", constituted the offence of membership of the armed terrorist organisation FETÖ/PDY.

183. Lastly, the Government pointed out that, in accordance with the principle of subsidiarity which underlay the Convention system, it was primarily for the domestic courts to assess the evidence in criminal proceedings, and that the Court could not substitute its assessment for theirs.

2. Third-party observations

(a) The UN Special Rapporteur on Counter-Terrorism and Human Rights

184. The Special Rapporteur presented to the Court a summary of the main conclusions and recommendations made within the United Nations concerning the principle of legality as enshrined in international criminal law, with particular emphasis on the specific requirements it imposed in the context of the punishment of terrorism-related offences. He noted that this principle was enshrined in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, which prohibited any conviction based on an act or omission that did not constitute a criminal offence at the time it was committed, whether under national or international law. In substantive terms, this principle had several complementary components: the prohibition of retroactive criminalisation of conduct (*nullum crimen sine lege*), the prohibition of imposing a penalty which was not legally provided for (*nulla poena sine lege*), the rejection of the extension of offences by analogy (*nullum crimen sine lege stricta*), and the requirement of clarity, precision and predictability in the formulation of criminal law (*nulla poena sine lege certa*).

185. The Special Rapporteur highlighted the implications for the protection of human rights of an insufficiently rigorous structure of terrorism-related offences. He warned against accountability mechanisms based on a chain of imprecise legal classifications, in which an indeterminate definition of terrorism would allow for the expanded designation of entities as "terrorist organisations". This designation could then be used as a basis for the automatic application of ancillary offences such as membership, support, recruitment or financing, irrespective of probative evidence. He stated that such mechanisms raised concerns in terms of legal certainty and respect for fundamental rights. He considered it necessary, in order to prevent such abuses, that the link between an individual and an organisation designated as terrorist be based on strictly defined legal criteria. With regard to the material element, it had to be demonstrated that the individual had contributed in a direct, significant and objectively identifiable manner to the commission of a terrorist act, defined as an act of serious violence, but that ancillary behaviour, humanitarian or educational actions, or indirect contributions could not in themselves justify criminalisation. With regard to intent, it had to be established that the individual had known (that is, been aware of or had a clear idea) of the terrorist objective pursued by the organisation, as well as had the intent to commit the terrorist offence related to the organisation. He stated that presumptions or inferences relating to the knowledge of the individual should generally be refrained from, particularly where they had the effect of reversing the burden of proof or compelling the accused to justify himself by submitting a defence.

186. The Special Rapporteur added that the "secret" or non-public nature of an organisation could not, in itself, constitute sufficient evidence of guilt, particularly in contexts where the exercise of the freedoms of expression, association or assembly was severely restricted. Similarly, he submitted that the exercise of managerial functions in a complex or decentralised organisation did not, in the absence of specific evidence, make it possible to impute to the person concerned knowledge of the possible terrorist activities of that entity. He considered that the classification of an organisation as a terrorist entity had to be derived from a judicial or administrative decision based on substantial evidence and delivered in compliance with the requirements of a fair trial. In this regard, he pointed out that certain anti-terrorism laws, particularly in Türkiye, had been criticised for their imprecise wording and their application to persons who had legitimately exercised their rights under international law.

187. In conclusion, the Special Rapporteur reaffirmed that the principle of legality constituted a fundamental guarantee against any form of arbitrariness. By imposing requirements of clarity, precision and predictability, it contributed to the consolidation of the rule of law. He noted that the use of vague or overly broad offences in counter-terrorism legislation had, in several contexts, led to the criminalisation of legitimate civil society activities. In his view, those practices could have violated fundamental rights such as the rights to freedom of expression, freedom of assembly, freedom of association, political participation and the right to equality.

(b) European Criminal Bar Association

188. This third-party intervener analysed the Court's case-law on Article 7 and the application of criminal law to terrorist organisations. It noted that the Court required an element of personal liability, requiring proof of the *mens rea* and *actus reus*, especially in cases of terrorism, where membership of an organisation could not be inferred from mere legal activities. It also emphasised that the principle of non-retroactivity prohibited any conviction for acts that were not criminal offences at the time of their commission. In the area of terrorism, it considered that the subsequent designation of an organisation as terrorist could not, in itself, justify a retrospective conviction. The domestic courts had to show that the accused had been aware of the criminal nature of the organisation at the time of the offence. Lastly, while recognising the requirements of the fight against terrorism, it pointed out that the Court had always insisted on the need to ensure the legality, predictability and proportionality of prosecutions, in order to avoid any broad interpretation of criminal law which could lead to arbitrary convictions.

(c) Italian Federation for Human Rights

189. The Italian Federation for Human Rights criticised, in particular, the broad and unforeseeable interpretation of the concept of "member of a terrorist organisation", which, in its view, was not based on evidence of active participation in criminal acts, but on indirect evidence, such as previous professional or social affiliations with the Gülenist movement. It criticised the criminalisation of non-violent behaviour, the lack of clear legal criteria in the application of Article 314 of the Criminal Code and the Prevention of Terrorism Act (Law no. 3713), as well as the ambiguous role played by the National Security Council in designating organisations as terrorist. It submitted that the Turkish justice system applied a presumption of guilt by reversing the burden of proof, thus violating the fundamental principles of criminal law and the presumption of innocence.

3. The Court's assessment

(a) Relevant general principles

190. The guarantee enshrined in Article 7 of the Convention, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention even in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 92, 17 September 2009; *Del Río Prada*, cited above; and *Yüksel Yalçınkaya*, cited above, § 237, each with further references).

191. Article 7 of the Convention is not confined to prohibiting the retroactive application of criminal law to the disadvantage of an accused. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy. From these principles it follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. 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 written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see, among other authorities, *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, § 50, ECHR 2001-II; *Del Río Prada*, cited above, § 91; and *Yüksel Yalçınkaya*, cited above, § 238).

192. It is not sufficient for the purposes of Article 7 that an offence is set out clearly in domestic law. A failure on the part of the domestic courts to comply with the relevant law, or an unreasonable interpretation and application thereof in a particular case, could in itself entail a violation of Article 7 of the Convention (see, among many other authorities, *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 781, 25 July 2013; *Žaja v. Croatia*, no. 37462/09, §§ 91 and 92, 4 October 2016; and *Pantalon v. Croatia*, no. 2953/14, § 48, 19 November 2020). The requirement that criminal offences be strictly defined by law would be thwarted if the domestic courts were to circumvent the law when interpreting and applying it to the specific facts of a case (see *Yüksel Yalçınkaya*, cited above, § 256, with other references).

193. Furthermore, Article 7 enshrines the principle of *nulla poena sine culpa*, as it protects the right of any individual not to be punished without his personal liability having been duly established (see *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, §§ 242-244, 28 June 2018; see also *Varvara v. Italy*, no. 17475/09, § 71, 29 October 2013). This requirement of individualised liability involves a number of interrelated principles. First, Article 7 precludes criminal liability based on collective guilt or guilt by association; liability must be personal to the individual accused. Secondly, personal liability for punishment requires not only proof of the material acts, but also the existence of a mental link (*mens rea*) through which an element of liability may be detected in the conduct of the individual who physically committed the offence (see, *mutatis mutandis*, *G.I.E.M. S.r.l. and Others*, cited above, § 242; see also *Sud Fondi S.r.l. and Others v. Italy*, no. 75909/01, § 116, 20 January 2009). This is not to say that presumptions of liability giving rise to certain forms of objective or strict liability are precluded, provided they comply with Article 6 § 2 of the Convention. Presumptions of law or fact operate in every legal system and are not prohibited by the Convention, but they must remain within certain limits as regards criminal law. According to the Court's case-law, these limits will be overstepped where a presumption has the effect of making it impossible for an individual to exonerate himself from the accusations against him, thus depriving him of the benefit of Article 6 § 2 of the Convention (see, *mutatis mutandis*, *G.I.E.M. S.r.l. and Others*, §§ 243-244). Thirdly, the Court has affirmed that there is a clear correlation between the degree of foreseeability of a criminal-law provision and the personal liability of the offender (see *Yüksel Yalçınkaya*, cited above, § 242). Bearing in mind the object and purpose of Article 7 (see paragraph 190 above), and irrespective of the factual basis for the offence, the substantive guarantees of legal certainty should be satisfied (ibid, § 268).

194. The Court reiterates that, in principle, it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court's role is confined to ascertaining whether the effects of

such an interpretation are compatible with the Convention (see *Yüksel Yalçınkaya*, cited above, § 240, with further references).

195. The Court has stressed, however, that its powers of review must be greater when the Convention right itself, Article 7 in the present case, requires there to have been a legal basis for a conviction and sentence. It is therefore incumbent on the Court to ascertain whether, at the material time, there existed a legal basis for the applicant's conviction and whether the outcome reached by the competent domestic courts was compatible with the object and purpose of Article 7. Were the Court to exercise a lesser power of review, that provision would become devoid of purpose (see, ibid., § 241). In this connection, an extensive and unforeseeable interpretation of the law by the domestic courts, setting aside the constituent – notably the mental – elements of the offence and treating it as akin to an offence of strict liability, thereby departing from the requirements clearly laid down in domestic law, would amount to an extension of the scope of the offence, to the detriment of the accused, and would undermine the safeguards enshrined in Article 7 of the Convention (see, *mutatis mutandis,* ibid., § 271).

(b) Application to the present case

(i) Preliminary observations

196. The Court will conduct its review on the basis of the facts as found by the domestic courts. Under its well-established case-law, it is not its task under Article 7 of the Convention to rule on the applicant's criminal responsibility (see *Streletz, Kessler and Krenz*, cited above, § 51; *Navalnyye v. Russia*, no. 101/15, § 58, 17 October 2017; and *Khodorkovskiy and Lebedev v. Russia (no. 2)*, nos. 42757/07 and 51111/07, § 572, 14 January 2020). It is primarily for the domestic authorities to establish the facts, assess the constituent elements of an offence, including the applicant's intent, on the basis of the evidence in the case file, and to decide, pursuant to the domestic law as interpreted in judicial practice, on the classification of the applicant's conduct (see, *mutatis mutandis, Rohlena v. the Czech Republic* [GC], no. 59552/08, § 55, ECHR 2015). From the standpoint of Article 7 § 1, the Court's role is to consider whether the acts for the commission of which the applicant was sanctioned fell within the definition of a criminal offence that was sufficiently foreseeable. In other words, the examination of the complaint under Article 7 rests on the premise that the applicant committed all of the acts established in the domestic courts' findings of fact (see, *mutatis mutandis, Saakashvili v. Georgia*, nos. 6232/20 and 22394/20, § 144, 23 May 2024).

197. The Court also observes that the applicant has made several complaints relating to the admissibility of evidence and the alleged restrictions on defence rights. It points out, however, that the complaints under Article 6 of the Convention were rejected at the stage of

communicating the case, for failure to exhaust domestic remedies. In any event, it stresses that under its established case-law, rules of a procedural nature do not, in principle, fall within the scope of Article 7 of the Convention. That provision does not set any requirements as to the procedure by which offences must be investigated and brought to trial (see *Khodorkovskiy and Lebedev*, cited above, § 789). Nor does it extend to the rules of criminal procedure governing, for example, the hearing of witnesses or the criteria for the admissibility of evidence, provided that these rules do not affect either the definition of the offences or the determination of the applicable penalty (see *Bosti v. Italy* (dec.), no. 43952/09, § 55, 13 November 2014; see also, by contrast, *Scoppola (no. 2)*, cited above, §§ 111-113).

198. Moreover, the Court points out that in the recent *Yüksel Yalçınkaya* judgment (cited above), it already ruled on certain matters that are also relevant to the examination of this case. First, it held that the formal designation of the FETÖ/PDY as a terrorist organisation by the courts at a date subsequent to the commission of alleged offences was not, in itself, sufficient to render a conviction contrary to Article 7 of the Convention (ibid., § 253). Secondly, it held that F. Gülen's acquittal in 2008 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 (ibid.). Lastly, it held that the offence provided for in Article 314 § 2 of the Criminal Code, as defined by the legislation and case-law, had a legal basis that was sufficiently clear and foreseeable to comply with the requirements of Article 7 (ibid., §§ 246-249). The Court sees no reason to depart from its conclusions on these points.

199. The Court emphasises that the Convention forms an indivisible whole within which the protected rights are interdependent and intertwined. Thus, when it is a matter of combatting terrorism, the Convention requires member States not only to take preventive measures to protect the lives of the population in the event of a real and imminent threat of attack but also to ensure that protected rights are effectively guaranteed. It is therefore in the light of the Convention as a whole, having regard to the interplay between the various requirements which serve to ensure that it is implemented effectively, that the Court must exercise its scrutiny (see *Pagerie v. France*, no. 24203/16, § 149, 19 January 2023, with further references). In this regard, the Court has already acknowledged the unique challenges faced by the Turkish authorities and courts in the context of their efforts against the FETÖ/PDY, having regard to the atypical nature of that organisation, which, according to the domestic authorities and courts, pursued its aims covertly rather than through traditional terrorist methods. It has made the finding in several cases that the coup attempt which took place in Türkiye revealed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention. However, none of these considerations mean that the fundamental safeguards enshrined in Article 7 of the Convention, which is a

non-derogable right that is at the core of the rule-of-law principle, may be applied less stringently when it comes to the prosecution and punishment of terrorist offences, even when allegedly committed in circumstances threatening the life of the nation. The Convention requires the observance of the Article 7 guarantees, including in the most difficult of circumstances (see, *mutatis mutandis, Yüksel Yalçınkaya*, cited above, §§ 269-270).

(ii) The issue to be decided in the present case

200. In the *Yüksel Yalçınkaya* judgment, the Court found a violation of Article 7 on the grounds that the applicant's conviction for membership of an armed terrorist organisation was secured without duly establishing the presence of all of the constituent elements of that offence in an individualised manner, in contravention of the requirements of domestic law and the principles of legality and foreseeability that are at the core of the protection under Article 7 (see *Yüksel Yalçınkaya*, cited above, § 267). In that judgment, the Court found that the domestic courts had automatically inferred the applicant's guilt from his mere use of the ByLock application, without examining in concrete terms whether the *actus reus* and *mens rea* elements of the offence in question were present in his case. Such an approach, which failed to comply both with the requirements of domestic law and with the principles of legality and foreseeability that lie at the heart of the protection afforded by Article 7, led the Court to find a violation of Article 7 of the Convention (ibid., §§ 262, 264 and 267).

201. Although, in contrast to the above-cited case, the applicant in the present case was found guilty of the same offence on the basis of a wider range of evidence, the Court considers that it raises an identical question to that examined in *Yüksel Yalçınkaya*. The Court is again required to determine whether the applicant's conviction for membership of an armed terrorist organisation was secured without duly establishing, in an individualised manner, the presence of all of the constituent elements of that offence (ibid., § 267). It will therefore first examine the *mens rea* requirement for the offence of membership of a terrorist organisation, and then assess how the domestic courts evaluated the applicant's *mens rea* in relation to that offence.

(iii) The mens rea *requirement for the offence of membership of a terrorist organisation*

202. The Court notes that the offence in question, that of membership of a terrorist organisation, was undeniably a serious one, incurring severe penalties. In the context of this offence, every individual has a right not to be punished without personal liability having been duly established – which includes establishing the mental element of the offence (*mens rea)* (see paragraph 193 above). The central element that must be established before a person can be convicted of membership of a terrorist organisation is the

nature of the relationship between the individual and the given organisation, which is intrinsically linked to establishing the existence of the requisite *mens rea*. Accordingly, criminal liability cannot be based on collective guilt, nor on guilt by association; it must be individualised to the accused person, and it must clearly involve the establishment of *mens rea*.

203. It is not disputed that, under domestic law, the offence under Article 314 of the Criminal Code required the establishment of *mens rea* (see paragraphs 96 and 105-121 above; see also point 100 of the Venice Commission's Opinion, in paragraph 126 above). The Court points out that Article 314 § 2 of the Criminal Code specifically concerns membership of an armed terrorist organisation which resorts to "violence", rather than membership of a structure which engages solely in criminal activities within the meaning of Article 220 of the Criminal Code (see paragraph 98 above). It is therefore necessary to show that the defendant was aware, at the relevant time, of the organisation's objectives and violent methods, this awareness being an essential prerequisite for establishing *mens rea* (see the Constitutional Court's judgment in *Bilal Celalettin Şaşmaz*, paragraph 112 above). It is precisely within this framework that the case-law interpretation of direct intent (*dolus directus*) was given by the Court of Cassation (see paragraphs 118, 119 and 121 above), according to which it must be established that the person acted "knowingly" and "willingly" – in other words, that he or she wished to be part of such an organisation and demonstrated a continuous willingness to belong to it. This criterion makes it possible to distinguish genuine adhesion to the organisation and its violent objectives from mere contact, or from association without a clearly established criminal intent. It also constitutes an essential guarantee in the areas of legal certainty and the protection of fundamental rights (see the observations of the United Nations Special Rapporteur, paragraphs 185 and 187 above).

(iv) The domestic courts' establishment of the mens rea *of the offence in the present case*

204. The issue in the present case is whether the approach taken by the domestic courts in establishing the applicant's *mens rea*, prior to convicting him of membership of an armed terrorist organisation, was compatible with Article 7 of the Convention. The Court considers, as it did in *Yüksel Yalçınkaya* (cited above, § 266), that the need to establish the presence of the elements of the relevant offence on an individual basis was all the more compelling in the present context, given the organisation's presence in Turkish society for a considerable period of time, as noted by the domestic judicial authorities (see paragraph 64 above). In such circumstances, it was essential that the criminal law be applied in a manner that remained foreseeable and strictly confined to its clearly defined limits, so as to avoid imputing liability on the basis of mere association. The establishment of the

constituent elements of the offence – in particular the drawing of inferences as to *mens rea* from the acts attributed to the applicant and the context in which those acts occurred – had to be undertaken with particular rigour. The particularly relevant aspects in this regard were the temporal element of the offence and the fact that the applicant had worked in the organisation's educational wing.

205. With regard to the temporal element of the offence, the Court considers that the first-instance court's judgment lacked the necessary rigour, a shortcoming that was not remedied in the later stages of the proceedings. The bill of indictment did not clearly indicate the time-period during which the applicant was alleged to have been a member of the organisation and aware of its violent objectives. Various items of evidence relied on by the prosecution (see paragraphs 36 and 70 above) enable the Court to infer that the time-period of his alleged membership ended sometime in 2014, possibly towards the end of that year, although perhaps earlier, in June 2014. This period not only precedes by one and a half to two years the attempted coup of 15 July 2016 but is also well before the Turkish authorities' official recognition of the FETÖ/PDY as a terrorist organisation. It was only after the events described in detail in the Assize Court's judgment that the organisation – initially perceived as a movement with religious, moral and educational objectives – was officially designated as a terrorist organisation, first by the administrative authorities, then by the domestic courts following the attempted coup of July 2016 (see paragraph 65 above). In this context, the domestic courts had a duty to assess whether the applicant's participation in an educational structure within that organisation could be regarded as amounting to deliberate and conscious adhesion to a terrorist project, or whether it might be consistent with more innocent participation. However, the reasoning of the first-instance court contains no explanation as to why the applicant's specific activities up to and including 2014 were held to establish the requisite *mens rea* beyond reasonable doubt (see paragraph 70 above).

206. In this connection, the Court does not question the domestic courts' position that the fact of maintaining ties with the organisation after December 2013 could be a relevant factor in assessing whether or not an individual was criminally liable. However, this general consideration does not dispense the domestic courts from their overall obligation to establish the *mens rea*, through an individualised and contextual assessment that is strictly limited to the temporal framework of the alleged offence.

207. Particular care must be taken for instance when the alleged facts bear no direct link to acts of violence (see the observations of the United Nations Special Rapporteur, paragraph 185 above). In this regard, the Court notes that the parties presented several arguments concerning the legal characterisation and the lawfulness of the acts imputed to the applicant. At the hearing, the Government's position was that while none of the acts imputed to the applicant were, in themselves, prohibited by law, it was not the acts *per se*

that were punishable, but rather what they were held to be evidence of, namely, the offence of membership of an armed terrorist organisation. The Court acknowledges that, in practice, cases involving membership of criminal or terrorist organisations typically involve the inferring of conclusions about *mens rea* from an accused person's conduct and activities as a whole, over a given period of time. These acts may reveal an organic link with the organisation, attesting to conscious adherence to and active participation in its objectives. Direct evidence of membership, such as a confession by the accused person, is relatively rare. It is therefore common for courts to rely on circumstantial evidence, from which they may infer that an individual is, or is not, a member of a given organisation. Such an approach is not in itself contrary to the Convention, provided that the exercise is carried out in accordance with Article 7. In the present case, however, the domestic courts failed to take proper account of the relevant temporal element of the imputed acts and did not conduct the contextual analysis required in such circumstances.

208. In addition, the Court notes that all of the acts in respect of which the applicant was charged related to posts that he held within the organisation's educational branch. As is clear from the findings of the domestic courts, the organisation had for many years been deeply embedded in several sectors of Turkish society, especially in the field of education, where it operated in a legal manner (see paragraph 64 above), presenting itself as a "moral and educational movement" (see paragraph 112 above, points 48 and 54 of the *Bilal Celalettin Şaşmaz* judgment; see also paragraph 119 above). This *modus operandi*, which encompassed various spheres, could have led many individuals, at a given point, to maintain ties with the organisation's visible structures, without being aware of its real objectives (see the memorandum of the Commissioner for Human Rights, paragraph 127 above). That circumstance made it all the more necessary to conduct an individualised and contextual assessment of the intentional element, which was, moreover, required in order for the offence of membership of an armed terrorist organisation to be made out.

209. The Government argued that knowledge of the organisation's true nature had to be assessed from the perspective of the individual concerned (they referred to *Del Río Prada*, cited above, §§ 112 and 117) and that, given the applicant's position – particularly when he held the post of BBTM – he could have anticipated the existence of infiltrated cells in the army and the possible use of violence. The Court reiterates that it was necessary to establish, on the basis of concrete evidence, that the applicant had the requisite *mens rea* for the offence (see paragraph 202 above). The domestic courts were therefore required to ascertain not only whether there existed an actual link between the applicant and the members or structures operating within the organisation's most central or strategic components, such as, for example, its military branch, but also whether the nature of that link was such

as to permit it to be legitimately inferred that he possessed the requisite *mens rea* under domestic law. Instead, however, they essentially relied on the applicant's role in the field of education, without establishing – or even seeking to establish – the existence of a personal, functional or hierarchical link with the organisation's strategic branches. Nor did they ascertain the extent of his responsibilities in relation to those branches, or his knowledge of the organisation's terrorist objectives, at a time when no act of violence had been attributed to the organisation.

210. The Court notes the domestic courts' finding that the applicant had been "active at a level entailing responsibilities" within the organisation (see paragraphs 70 and 74 above). However, it observes that although the Court of Cassation has taken the view that there existed a seven-layered hierarchy within the organisation with varying degrees of culpability of individuals operating at those different levels (see paragraph 116-117 above), the domestic courts did not address this point at all, and failed to clarify at what level of that hierarchy he was considered to be when holding the position of BBTM.

211. In the Court's view, where a court seeks to infer the *mens rea* from facts established in circumstances comparable to those of the present case, such an inference is compatible with the requirements of Article 7 only if it is based on an individualised analysis, closely anchored to the specific facts of the case (see paragraphs 193 and 202 above). The mere fact, in that regard, of belonging to a structure that was, at the material time, largely perceived as a religious group (see *Yüksel Yalçınkaya*, cited above, § 18) could not, by itself, lead to a conclusion that the applicant, when carrying out the acts which formed the basis of his conviction, possessed the requisite *mens rea* for the offence (see paragraph 112, point 63 of the *Bilal Celalettin Şaşmaz* judgment, and paragraph 116 above). In the present case, however, the domestic courts relied instead on general considerations about the organisation's development – from a religious movement to an entity subsequently designated as an armed terrorist organisation – without establishing that the applicant had been aware of this transformation, or that he had joined the organisation and continued to maintain his links with it in full knowledge of the facts. The relevant section of the first-instance court's judgment (see paragraph 70 above) shows that it merely listed the items of evidence and proceeded to draw the conclusion that the applicant had the requisite *mens rea,* without seeking to explain in what way this evidence established that the applicant had been aware of the organisation's terrorist objectives and had joined it, or continued to adhere to it, with that knowledge.

212. This failure by the domestic courts to conduct any assessment of the applicant's *mens rea* in the light of the specific evidence regarding his actions and role amounted to a fundamental breach of the requirement to conduct an individualised assessment of criminal liability. The Court notes in this connection the absence of any meaningful explanation in the relevant

domestic judgments as to how one of the essential elements of the offence, namely the *mens rea*, had been determined in the applicant's case. In particular, the domestic courts did not explain why the fact that the applicant had held certain responsibilities within the organisation's educational branch – well before it was designated as a terrorist organisation by the national authorities and the courts – led to the conclusion that he was aware of the organisation's nature and terrorist objectives, intended to be part of that organisation, and contributed to it in an active and continuous manner, as required under domestic law (see paragraph 203 above and, *mutatis mutandis, Yüksel Yalçınkaya*, cited above, § 263).

213. Such an approach violates the individual right, guaranteed by Article 7 of the Convention, not to be punished without the existence of a mental link through which an element of personal liability must be established (see paragraphs 193 and 202 above; see also, *mutatis mutandis, Yüksel Yalçınkaya*, cited above, § 264).

(v) Conclusion

214. In the light of the foregoing, the Court concludes that there has been a violation of Article 7 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

215. The applicant complained about the conditions in which he had been held in Çorum Prison. He relied 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. The Chamber judgment

216. The Chamber began by dismissing the Government's objection that the applicant had failed to exhaust the domestic remedies in respect of his complaint about his conditions of detention in Çorum Prison, and declared it admissible. Referring to the judgment in *İlerde and Others v. Türkiye* (nos. 35614/19 and 10 others, 5 December 2023), it stressed that, with the exception of an individual application to the Constitutional Court, it could not be concluded that there existed a preventive and/or compensatory remedy whereby an individual could complain of the conditions of detention with a sufficient degree of certainty that they would be improved or compensation provided. In addition, the applicant had already applied, unsuccessfully, to the first-instance courts requesting an improvement in his conditions of detention, before applying to the Constitutional Court. The Chamber concluded that a civil claim for compensation would not have had a reasonable prospect of success, and, accordingly, dismissed this objection.

217. On the merits, the Chamber found that, at the relevant time, Turkish prisons were experiencing a surge in population as a result of circumstances arising from the attempted coup of 15 July 2016. The applicant had been held for more than three years in Çorum Prison, in two units that had both originally been designed for seven inmates, but where it was possible to lodge up to 32 prisoners per unit by adding bunk beds, including in the communal living area. Thus, the applicant had at times been obliged to sleep on a mattress on the floor when no bed had been available. According to the figures submitted, his personal space varied between 3.6 and 4.6 sq. m in Unit F-5, and between 4 and 6 sq. m in Unit F-10, which gave grounds for examining other material factors: access to natural light and sufficient ventilation, the state of the sanitary facilities, the possibility to move about and walk in the fresh air, etc. However, it appeared that each unit was equipped with separated toilet facilities, and that there was daily access to hot and cold water, windows which allowed ventilation, and an external courtyard measuring 64.36 sq. m, which could be accessed for between 8 and 12 hours per day depending on the season.

218. With regard to the severity of the detention, the Chamber acknowledged that the applicant had experienced difficulties and a certain amount of distress as a result of the overcrowding, particularly the occasional obligation to sleep on the floor. However, in order for the Court to find a violation of Article 3, the situation had to exceed the threshold of suffering inherent in any deprivation of liberty. In view of the overall conditions of detention (a surface that remained within the minimum standards, regular access to an external courtyard, adequate sanitary facilities, natural light and ventilation), the Chamber considered those conditions had not attained 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 therefore considered that there had been no violation of Article 3 of the Convention.

B. The parties' submissions

1. The applicant

219. The applicant did not mention in his referral request the finding of no violation as regards his conditions of detention. In his observations before the Grand Chamber, he nonetheless invited the Court to find that there had been a violation of Article 3. In this connection, he submitted that, even if it were accepted that the personal space available to him had varied between 3.6 and 6 sq. m, his conditions of detention had been compounded by other factors, particularly the overcrowding and precarious living conditions.

220. In this regard, the applicant argued that he had been subjected to extremely difficult conditions of detention, which had seriously undermined his dignity. First, he stated that he had been required to sleep on a mattress on

the floor for fourteen months on account of the prison overcrowding. He alleged that, in certain units, the prisoners had been required to adopt a rota system, obliging him to alternate between sleeping for a two-month period in a bunk bed, then for one month on a mattress on the floor. Second, he claimed to have spent twenty-four months under constant surveillance, sharing an area of 90 sq. m with 37 other prisoners, which had prevented him from enjoying any rest, any privacy or any personal activity. Third, he complained of insufficient sanitary facilities – only two toilets and two showers for 37 persons –, exacerbated by frequent water shortages, which led to long queues, especially in the morning. He stated that access to hot water was restricted to a twice-weekly two-hour period, which limited the duration of showers to seven minutes per inmate. Fourth, he complained of a deliberate exclusion from the cultural and recreational programmes on offer, alleging that this had also applied to the other prisoners held for similar offences, at least until July 2018. Fifth, he indicated that he had been placed, for six months, in a badly heated cell, in which the night-time temperature fell to 8-9°C in winter, making sleeping conditions unbearable. He added that in summer the temperature reached almost 30°C, which seriously disrupted the possibility for a night's rest. Lastly, he stressed the cumulative nature of these conditions – overcrowding, lack of privacy, limited access to water, insufficient hygiene, lack of activities, constant light, having to sleep on the floor – which, in his view, had gone beyond the level of suffering inherent in any deprivation of liberty.

2. The Government

221. Before the Grand Chamber, the Government emphasised first that the applicant, in his initial application form, had not expressly complained about the fact that he had been obliged to sleep on a mattress on the floor in prison, complaining solely about the fact that he had slept in those conditions while in police custody. They added that, in his request for referral, the applicant had not objected to the fact that the Chamber judgment had found no violation of Article 3 of the Convention on the grounds of his conditions of detention, basing his arguments exclusively on Article 7. They also pointed out that, in the *İlerde and Others* judgment, the Court had held that the fact of sleeping on a mattress on the floor did not in itself amount to a violation of Article 3 where a prisoner had personal space of more than 3 sq. m. They noted that, in the present case, the Chamber had relied on this case-law and concluded that there had been no breach of this provision. In conclusion, since this complaint had not been raised in the initial application, had already been examined and dismissed in a previous judgment and the applicant had not mentioned it in his request for referral, they considered that it was not necessary to examine it again. They therefore invited the Grand Chamber to dismiss the complaints regarding the conditions of detention without conducting a fresh examination.

222. Alternatively, the Government argued that, since he had not submitted any complaint to Çorum Prison regarding overcrowding, or brought an action for compensation after his detention, the applicant had not properly exhausted domestic remedies.

223. As to the merits, the Government submitted that there was no evidence that would justify departing from the Chamber's assessment that the applicant had not been subjected to treatment that was incompatible with Article 3.

224. In this connection, they submitted that the applicant, like the other inmates, had never been assigned by the prison authorities to sleep on a mattress on the floor, or been obliged to do so. They explained that the use of such mattresses resulted from an agreement among the prisoners. They noted that the applicant had never claimed to have been forced to sleep on the floor by the other prisoners, nor made any complaint to that effect. They added that, when the number of prisoners exceeded the capacity of 30 bunk beds, the inmates slept, on a rota basis, on mattresses that were identical to those on the beds and were placed on a temporary basis in the units, but not in the communal areas, and that those arrangements were decided through an agreement reached among the prisoners. They concluded that the allegation that they slept in noisy and permanently lit areas was unfounded. Moreover, the applicant's medical records contained no reference to treatment or a consultation for health problems related to the complaints that he had submitted *ex post facto*. Lastly, they emphasised that, during the period in which the applicant was detained (6 February 2017-12 September 2021), the authorities had taken measures to counter the overcrowding, particularly by transferring 71 inmates to other prisons.

C. The Court's assessment

1. Scope of the case

225. The Court reiterates at the outset that the content and scope of the "case" referred to the Grand Chamber are delimited by the Chamber's decision on admissibility. Thus, the Grand Chamber may examine the case only in so far as it has been declared admissible; it cannot examine those parts of the application which have been declared inadmissible (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 88, 18 December 2018).

226. The Court notes that, in his application form, the applicant expressly complained about the material conditions of detention in the L-type closed prison in Çorum, where he had been detained after his arrest, a point which the Government did not dispute. When this complaint was communicated to the parties, a specific question was asked about the conditions of detention in that establishment, with particular emphasis on the applicant's allegation that, because of prison overcrowding, he had been forced to sleep on the floor. During the proceedings before the Chamber, the parties exchanged

observations on the material conditions of detention in Çorum Prison, providing detailed information on the number of beds and the inmates' sleeping arrangements. Without calling into question the subject-matter of the complaint, the Government claimed that the fact of sleeping on a mattress on the floor was only a temporary solution in the unit in which the applicant was detained. In addition, the Chamber found admissible the complaint under Article 3 of the Convention concerning the conditions of detention in Çorum Prison. In consequence, this complaint encompasses all aspects of the relevant conditions of detention, and the fact that the applicant did not include arguments in his request for referral does not preclude its consideration.

227. The Grand Chamber will therefore examine this complaint, as declared admissible by the Chamber, in the light of the requirements of Article 3 of the Convention.

2. On the Government's preliminary objection

228. Before the Grand Chamber, the Government objected, as they had before the Chamber, that domestic remedies had not been exhausted. They relied on the following two grounds. First, in the Government's view, the applicant ought to have submitted these complaints at the outset to the prison authorities; however, he had lodged an objection directly with the sentence-enforcement judge. Secondly, the Government argued that the applicant had not applied to the civil courts for compensation in respect of the overcrowding that, in his submissions, prevailed 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 and argued that it was clear from the given 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.

229. The Court reiterates that the Grand Chamber is not precluded from examining, where appropriate, questions concerning the admissibility of an application under Article 35 § 4 of the Convention, as that provision enables the Court to dismiss applications it considers inadmissible "at any stage of the proceedings". Therefore, even at the merits stage and subject to Rule 55, the Court may reconsider a decision to declare an application admissible where it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see, for example, *Muršić v. Croatia* [GC], no. 7334/13, § 69, 20 October 2016).

230. 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 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 as guaranteed under Article 3 to be effective, preventive

and compensatory remedies have to co-exist in a complementary manner. The preventive remedy must be capable of preventing the continuation of the alleged situation or of bringing about an improvement in the material conditions of detention. Once the situation complained of has ceased, it must be open to the individual to bring a compensatory claim. In the absence of such a mechanism, combining both types of remedy, the prospect of future compensation alone might legitimise 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).

231. In its recent judgment in *İlerde and Others*, cited above, the Court already examined the various remedies relied on by the Government under Article 35 § 1 of the Convention. In the light of its relevant case-law (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 detained person with a preventive and/or compensatory remedy whereby he or she could challenge effectively the conditions of detention (ibid., § 162). It sees no reason to depart from that conclusion in the present case, especially since the applicant was still being held in the impugned conditions of detention in Çorum Prison when the present application was lodged. Moreover, it appears from the case file that the complaint concerning the conditions of detention was initially raised with a view to obtaining preventive relief before the first-instance courts, then before the Constitutional Court (see paragraphs 90-95 above). However, none of these courts acknowledged, even implicitly, the inadequate nature of the given conditions under Article 3 of the Convention. In those circumstances, an action for compensation before the civil courts – which, in any event, would have had no preventive effect – had no reasonable prospect of success. Indeed, it has not been demonstrated that the domestic civil courts had jurisdiction to impose immediate measures (such as injunctions) to remedy the situation, or that it was in their practice to do so (ibid., § 165). The Court accordingly dismisses the Government's objection of failure to exhaust domestic remedies.

3. The complaint under Article 3

(a) General principles

232. The relevant case-law principles relating to prison overcrowding have been set out in the *Muršić* judgment (cited above, §§ 96-101; see also *İlerde and Others*, cited above, §§ 169-172). In particular, a strong presumption of a violation of Article 3 arises when the personal space available to a detainee falls below 3 sq. m in multi-occupancy accommodation (ibid., § 137). It is then for the respondent Government to

demonstrate convincingly that there were factors capable of adequately compensating for the scarce allocation of personal space (ibid., §§ 137-138). This strong presumption will normally be capable of being rebutted only if the following factors are cumulatively met: (1) the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor; (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; and (3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention (ibid., § 138).

233. In situations where the personal space in a multi-occupancy cell is between 3 and 4 sq. m per inmate, this remains a weighty factor in the Court's assessment of the adequacy of the conditions of detention. A violation of Article 3 will be found if this factor is combined with other elements indicating inappropriate physical conditions of detention (ibid., § 139). Where a prisoner has more than 4 sq. m of personal space, the question of personal space no longer raises an issue, but other aspects of the physical conditions of detention remain relevant for the Court's assessment (ibid., § 140). These aspects include access to outdoor exercise, natural light or air, availability of ventilation, adequacy of heating arrangements, the possibility of using the toilet in private, and compliance with basic sanitary and hygiene requirements. The length of an individual's detention under specified conditions must also be taken into account (ibid., § 170).

234. In particular, the Court has held on several occasions that a very short period of outdoor exercise constitutes an aggravating factor for the prisoner, confined as he or she is to the cell for the remainder of the day with no freedom of movement (see, for example, *Canali v. France*, no. 40119/09, § 50, 25 April 2013). In the *Ananyev and Others v. Russia* judgment (nos. 42525/07 and 60800/08, §§ 150-152, 10 January 2012), it drew attention to the relevant prison standards developed by the Committee for the Prevention of Torture, according to which all prisoners, without exception, should be allowed at least one hour of exercise in the open air every day, preferably as part of a broader programme of out-of-cell activities.

235. With regard to sanitary facilities and hygiene, the Court reiterates that ready access to decent toilets and the possibility of maintaining good personal hygiene are essential to human dignity, and that prisoners must have ready access to toilet facilities such as to protect their privacy (see *Ananyev and Others*, cited above, §§ 156-157). Furthermore, and as relevant to the present case, the Court emphasised in the *Ananyev and Others* judgment that every detainee must have an individual sleeping place in the cell and that the failure to meet this requirement in itself gives rise to a strong presumption that the conditions of detention were in breach of Article 3 (see, *mutatis mutandis*, ibid, § 148).

236. Lastly, the Court has clarified the methodology for the calculation of the minimum personal space allocated to a detainee in multi-occupancy accommodation for its assessment under Article 3. On the basis of the CPT's methodology, it considers that the area taken up by any in-cell sanitary facilities should not be counted in the total surface area. On the other hand, space occupied by furniture must be included in the calculation. What is important is whether detainees have the possibility to move around within the cell normally (see *Muršić*, cited above, § 114). With regard to external courtyards, the Court held in the *İlerde and Others* judgment that these spaces should not be included in the calculation of personal space. It considered, however, that the availability of unrestricted access to an outdoor yard during daylight hours is a weighty factor which should be assessed when considering overall material conditions of detention (see *İlerde and Others*, cited above, § 175).

(b) Application of these principles to the present case

237. As a preliminary consideration, the Court notes that following the attempted coup of 15 July 2016 Türkiye experienced a surge in the prison population in several prison facilities (see *İlerde and Others*, cited above, § 6). It notes that from 6 February 2017 the applicant was held in Çorum Prison, initially in Unit F-5 for thirteen months, then in Unit F-10 for more than three years, and that this prison also faced the problem of overcrowding. Initially designed to accommodate 477 persons, Çorum Prison saw its capacity increase to 1,000 prisoners in 2006 when it was opened, then to 1,250 in 2008, and lastly to 1,592 in 2018, through the addition of bunk beds (see paragraphs 80 and 90 above). Each unit, with a total surface area of 241.36 sq. m including all sections, had several dormitories, a communal living area, shared sanitary facilities and an outdoor courtyard, but the number of prisoners had by then reached between 1,950 and 2,000, thus exceeding the planned capacity.

238. The Court reiterates its settled case-law to the effect that once an applicant has provided a credible and reasonably detailed description of allegedly degrading conditions of detention, the burden of proof is shifted to the respondent Government, which must produce information capable of corroborating or refuting the applicant's allegations.

239. With regard to the duration of the contested conditions of detention, the Court notes that the period under consideration extends from 6 February 2017 (see paragraph 80 above) to 24 March 2021 (see paragraph 82 above). On the latter date, the number of prisoners in the unit in which the applicant was accommodated was above 30 inmates, or that unit's maximum capacity. It notes that between 6 February 2017 and 24 March 2021 the applicant was held successively in Units F-5 (February 2017 to March 2018) and F-10 (March 2018 to March 2021). During the thirteen months spent in Unit F-5, the number of prisoners varied between 37 and 47, consistently exceeding the

normal capacity of 30 persons. In line with the calculation method set out above (see paragraph 236), the applicant's personal space in that unit varied between 3.6 and 4.6 sq. m, without it being possible to determine with certainty for how long this space was less than 4 sq. m. Subsequently, in Unit F-10, the number of prisoners varied between 27 and 42, occasionally exceeding the standard capacity, and the applicant had between 4 and 6 sq. m of personal space. Accordingly, under its relevant case-law (see paragraphs 232-233 above), the Court considers that, as far as personal space is concerned, it is not necessary to apply in the present case a strong presumption of a violation of Article 3, which is associated with situations in which the personal space is less than 3 sq. m. It is therefore necessary to examine the other aspects of the physical conditions of detention.

240. 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 access to hot and cold water. Moreover, it is not disputed between the parties that, in addition to a door which led to an outdoor courtyard measuring 64.36 sq. m, each unit had several windows, which allowed ventilation and access to natural 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. In those circumstances, the Court concludes that the general conditions in the units, particularly with regard to cleanliness, ventilation, lighting and the possibility of having access to an external courtyard, could be considered in principle compatible with the requirements of the Convention (see *İlerde and Others*, cited above, §§ 191-193, and the references cited therein). However, these conditions, while appearing satisfactory in themselves, cannot be assessed in isolation from the length of detention spent in an overcrowded environment. Indeed, the passage of time exacerbates the adverse effects of overcrowding, lack of personal space and limited sanitary facilities, and tends to aggravate the difficulties inherent in conditions of detention. Thus, conditions which might be tolerable over a short period may, with the passage of time and when combined with other factors of hardship, impose a heavy physical and psychological burden on detainees.

241. With regard to sleeping conditions, the Court observes that the Government has recognised that a certain number of prisoners were required to sleep on a mattress on the floor, while also claiming that the applicant, like his fellow prisoners, had never been obliged by the authorities to do so, and that this arrangement resulted from an agreement among the prisoners. Given the limited number of beds corresponding to a maximum capacity of 30 prisoners per unit, the Court considers it established that the applicant was required, during periods of severe overcrowding, to sleep on a mattress on the floor, both in Unit F-5 and in Unit F-10. Moreover, it sees no reason to

question the truth of the applicant's allegations that the prisoners slept on a rota system, obliging him to alternate between two months in a bunk bed and one month on a mattress on the floor. For that reason, it accepts the applicant's argument that, in total, he was required to sleep for about fourteen months – that is, for four consecutive months in Unit F-5 and for ten months, in periods of about one month each, in Unit F-10 – on a mattress on the floor (see paragraph 86 above).

242. The Court notes a difference in the parties' submissions as to the placement of the mattresses on the floor. The Government alleged that, when the number of prisoners exceeded the 30 available beds, mattresses – identical to those on the beds – were temporarily installed alongside the beds, but never in the communal areas. The applicant claimed, on the contrary, that they were laid out in the communal areas, and subject to overnight lighting for security reasons (see paragraph 88 above). Since the Government disputed that the applicant ever slept on a mattress in a communal area, it follows that they did not accept the allegation that at times the applicant was subjected to overnight lighting (see paragraph 83 above). The Court notes that the applicant's complaint to the Constitutional Court included a reference to sleeping conditions that were disrupted by the constant light and ambient noise levels (see paragraph 94 above). The Constitutional Court dismissed that complaint (see paragraph 95 above). In view of the Government's failure to submit credible probative evidence capable of contradicting the applicant's assertions (see paragraph 139 above), in circumstances where they undoubtedly have greater access to potential sources of evidence concerning this matter, the Court accepts as established that the applicant was obliged to sleep on a mattress on the floor in the communal area and exposed to overnight lighting.

243. While the CPT has referred to a fundamental principle of "one prisoner, one bed" (see *Vasilescu v. Belgium*, no. 64682/12, §§ 48 and 101, 25 November 2014), the Court acknowledges that, to date, it has never found a violation of Article 3 solely because a detainee has been required to sleep on a mattress on the floor, except where the personal space afforded to the applicant in that situation was less than 3 sq. m and there were other unacceptable conditions of detention. It points out that it has found a breach of Article 3 in situations where prisoners, in the absence of individual beds, were obliged to sleep in shifts, sometimes even on the floor itself or under the beds, in cells that were manifestly overcrowded. It has regard both to the absence of individual sleeping places in cells and to the overall material conditions of detention, especially the available surface area per person (see the references in the *Ananyev and Others* judgment, cited above, § 146). In the above-cited *Vasilescu* case, the Court took into account the aggregate shortcomings, as the applicant had been obliged to sleep for sixty days on a mattress on the floor, in a personal space of under 3 sq. m, without access to running water or to toilets during the night, and had been exposed to passive

smoking (ibid. §§ 100-104). Similarly, in *Aliyev v. Azerbaijan* (nos. 68762/14 and 71200/14, § 125, 20 September 2018), the applicant was sharing his bed with other prisoners and had only 1.1 sq. m of personal space.

244. However, the Court observes that although the applicant always had use of a mattress of equivalent quality to those used on the ordinary beds, he was nonetheless obliged, for a total period of about fourteen months, to sleep on a mattress that had been placed on the floor in the communal areas, which were not adapted for rest. These areas, which lacked privacy, were permanently exposed to artificial light and a noisy atmosphere, on account of comings and goings, and the high number of fellow prisoners. This arrangement necessarily affected his quality of sleep, resulting in both physical and mental fatigue. The Court considers that this prolonged deprivation of adequate conditions for sleep must have constituted a particularly heavy physical and psychological burden for the applicant (see, *mutatis mutandis*, *Kalashnikov v. Russia*, no. 47095/99, § 97, ECHR 2002-VI, and *Yakovenko v. Ukraine*, no. 15825/06, § 85, 25 October 2007) and was manifestly contrary to the principle of "one prisoner, one bed" (see *Ananyev and Others*, cited above, § 148).

245. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant. The length of the period during which a person is detained in the particular conditions has also to be considered (see *Muršić*, cited above, § 101). Consequently, as stated above (see paragraph 240), even when the applicant's personal space varied between 3.6 sq. m and 6 sq. m during his detention, other aspects of the material conditions of detention remain relevant to the Court's assessment (ibid., § 140).

246. During the applicant's detention in Çorum Prison, the establishment was operating in a situation of manifest overcrowding: although its maximum capacity had been increased to 1,592 places through the addition of bunk beds, the actual prison population had reached a figure of between 1,950 and 2,000 persons (see paragraph 237 above). Moreover, as indicated above (paragraph 239), during the first thirteen months of his detention in Unit F5, the number of detainees ranged between 37 and 47, consistently and significantly exceeding the unit's normal capacity. Subsequently, during his approximately three-year stay in Unit F10, while there was a relative improvement this remained limited, as the number of detainees still reached up to 42. This persistent overcrowding was accompanied by inadequate sanitary facilities: each unit was equipped with only two toilets and two showers for up to 47 detainees in Unit F-5 and 42 detainees in Unit F-10. These factors were combined with the exceptional precariousness of sleeping arrangements that saw the applicant without an individual bed in the dormitory for a total of fourteen months, during which time he endured a lack of privacy, constant exposure to artificial light at night, and the disturbance of his sleep due to the continuous comings and goings of the other detainees.

These circumstances formed part of a broader context of chronic prison overcrowding, which had a direct impact both on the material conditions of detention and on the applicant's effective ability to participate in cultural and recreational activities, at least until July 2018 (see paragraph 220 above). Furthermore, given that the courtyard measured only 64.36 sq. m, such a high prison population could benefit from outdoor exercise to only a very limited extent, which constitutes an aggravating factor and exacerbated the particularly harmful effects of the overcrowding.

247. The deficiencies identified, stemming from the overcrowding to which the applicant was exposed, were far from occasional or exceptional, as they persisted for approximately four years. Exposure of such duration cannot be characterised as temporary or regarded as offset by any compensatory factors. Nor can it be compared with the shorter periods examined in previous cases (see, for example, *İlerde and Others*, cited above, § 194, and *Vasilescu*, cited above, § 101). Having regard to the cumulative effect of all these circumstances, the Court considers that the applicant was subjected to treatment exceeding the unavoidable level of suffering inherent in detention and attaining the minimum level of severity required to fall within the scope of Article 3 of the Convention.

It follows that there has been a violation of that provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

248. Article 41 of the Convention provides:

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

A. Damage

249. The applicant claimed just satisfaction in respect of the pecuniary and non-pecuniary damage that he considered he had sustained. He argued that, as a result of his imprisonment, he had been unable to pursue his studies or start a career, and that he was then unable to find a job, a situation which, in his submission, is a common one for individuals linked to the Gülenist movement. He stated that after living with no career prospects in Türkiye, he fled to Germany, where he was granted asylum in June 2024 and is currently attending integration courses. He estimated his loss of income at EUR 44,550 over four years. He also claimed to have sustained non-pecuniary damage as a result of his social exclusion, exile and stigmatisation. No documentation was submitted in support of these allegations. He also claimed EUR 80,000 in respect of the pecuniary and non-pecuniary damage that he had allegedly sustained as a result of his conditions of detention.

250. The Government did not comment on this matter before the Grand Chamber.

251. The Court reiterates that the awarding of sums of money to applicants by way of just satisfaction is not one of its main duties but is incidental to its task under Article 19 of the Convention of ensuring the observance by States of their obligations under the Convention (see *Nagmetov v. Russia* [GC], no. 35589/08, § 64, 30 March 2017). The Court enjoys a certain discretion in the exercise of that power, as the adjective "just" and the phrase "if necessary" attest (see *Molla Sali v. Greece* (just satisfaction) [GC], no. 20452/14, § 32, 18 June 2020, with further references). Depending on the circumstances, the Court may also consider that a finding of a violation constitutes sufficient just satisfaction and thus dismiss related claims (see *Nagmetov*, cited above, § 70, and the references cited therein; see also *Yüksel Yalçınkaya*, cited above, § 422).

252. The Court's guiding principle, in particular as regards just satisfaction in respect of non-pecuniary damage, is equity, which involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred (see *Yüksel Yalçınkaya*, cited above, § 423, and the references cited therein).

253. Turning to the applicant's claims in respect of pecuniary damage, the Court notes that according to its settled case-law, it is for applicants to show that such damage has resulted from the violations alleged and to produce documents in support of their claims (ibid., § 424). It notes that the applicant was unemployed at the time of his arrest. In consequence, it can see no causal link between the violations found and the alleged pecuniary damage. Moreover, any claim regarding an alleged loss of earnings during the term of imprisonment is speculative. For that reason, the Court dismisses the claim in respect of pecuniary damage (see, to the same effect, ibid., § 424).

254. As regards non-pecuniary damage, the Court observes that – as in the case of *Yüksel Yalçınkaya* (cited above, § 425), in which it found violations of Articles 6, 7 and 11 of the Convention – the applicant has the possibility of requesting the reopening the domestic proceedings under Article 311 § 1 (f) of the Code of Criminal Procedure following the delivery of the present judgment. In principle, this would constitute the most appropriate remedy in respect of the violation of Article 7, provided that, when requested, this remedy is implemented diligently and in full conformity with the Court's findings in this judgment. The Court further underlines that this approach has since been confirmed and applied (see *Delga v. France*, no. 38998/20, § 77, 9 July 2024, and also *Demirhan and Others v. Türkiye*, nos. 1595/20 and 238 others, § 53, 22 July 2025). It therefore considers that the finding of a violation of Article 7 constitutes sufficient just satisfaction in the present case, and accordingly dismisses the applicant's claims in this respect.

255. In contrast, with regard to the finding of a violation of Article 3, the Court reiterates that the suffering caused to a person detained in conditions that are so poor as to be incompatible with Article 3 of the Convention cannot be made good by a mere finding of a violation; it calls for an award of compensation (see, *mutatis mutandis*, *Muršić*, cited above, § 181). In fixing the amount, it takes account, in particular, of the length of time that the applicant was exposed to poor conditions, and to all of the circumstances set out in paragraphs 246-247 above, which are decisive elements in assessing non-pecuniary damage (see, *mutatis mutandis,* ibid.). Ruling on an equitable basis and having regard to all of the circumstances set out above, the Court awards the applicant EUR 2,800 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

256. The applicant claimed a total of EUR 29,450 in respect of the costs and expenses incurred before the Court. He specified that this amount included, first, the fees for his legal representative in the proceedings before the Chamber, Mr Makas, which were set at TRY 45,000 (approximately EUR 3,650 at the relevant time), and EUR 400, corresponding to various accessory costs (translations, postal costs, transfers and supplies). This claim was supported by a legal services contract signed between Mr Makas and the applicant on 3 May 2021. The applicant added that this sum also included EUR 25,400 in respect of the proceedings before the Grand Chamber, comprising the fees for his counsel, Mr Heymans and Mr Vande Lanotte, and the travel and accommodation costs for the hearing, estimated at EUR 1,400. In support of this claim, he submitted a fee agreement dated 20 February 2025, issued by his representatives' legal firm Van Steenbrugge Advocaten.

257. The Government did not comment on this matter before the Grand Chamber.

258. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In accordance with Rule 60 §§ 2 and 3 of the Rules of Court, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part (see *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 189, 17 May 2016). A representative's fees are actually incurred if the applicant has paid them or is liable to pay them pursuant to a legal or contractual obligation (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 371, 28 November 2017, and the references cited therein). As for the number of representatives necessitated by the case, and the rates charged, those are matters taken into consideration by the Court, as relevant, within the framework of its assessment as to whether the costs and expenses have been reasonably

incurred (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 55, ECHR 2000-XI).

259. In the present case, the Court considers that the legal services agreement submitted by the applicant for his representation by Mr Makas before the domestic courts and the Court constitutes sufficient proof that he was under a legal obligation to pay the fees charged by the latter (see *Yüksel Yalçınkaya*, cited above, § 430, with the references cited therein). Regard being had to the documents in its possession and its case-law, the Court considers it reasonable to award the applicant the full sum claimed, namely EUR 4,050, in respect of the costs incurred before the domestic courts and the Chamber.

260. In respect of the costs and expenses incurred following the referral of the case to the Grand Chamber, the Court considers that the applicant's decision to appoint additional counsel to represent him before the Grand Chamber can be regarded as justified in view of the complex nature of the case. It notes, however, that the work carried out in this case is not comparable to that carried out by the same lawyers in the case of *Yüksel Yalçınkaya* (cited above, § 431), in the context of the proceedings brought before the Grand Chamber following relinquishment of jurisdiction. That being said, it reiterates that, according to its case-law, an applicant may obtain reimbursement of costs and expenses only in so far as they have been shown to have been actually and necessarily incurred and to be reasonable as to quantum (see *G.I.E.M. S.r.l. and Others v. Italy (just satisfaction)* [GC], nos. 1828/06 and others, § 72, 12 July 2023). In these circumstances, regard being had to the documents in its possession and the above considerations, the Court considers it reasonable to award the applicant the sum of EUR 5,000 in relation to the costs and expenses incurred in the proceedings before the Grand Chamber.

261. The Court therefore awards the applicant a total of EUR 9,050 in respect of costs and expenses.

FOR THESE REASONS, THE COURT,

1. *Dismisses*, unanimously, the Government's request for re-examination of the decision by the panel of the Grand Chamber;

2. *Dismisses*, unanimously, the Government's objection of inadmissibility alleging an abuse of the right of individual application;

3. *Dismisses*, unanimously, the Government's preliminary objection alleging failure to exhaust domestic remedies with regard to the conditions of detention;

4. *Holds*, by 11 votes to 6, that there has been a violation of Article 7 of the Convention;

5. *Holds*, by 9 votes to 8, that there has been a violation of Article 3 of the Convention;

6. *Holds,* by 11 votes to 6, that the finding of a violation of Article 7 constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant under this provision;

7. *Holds*, by 11 votes to 6,

(a) that the respondent State is to pay the applicant, within three months, EUR 2,800 (two thousand eight hundred euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to him, in respect of the non-pecuniary damage which he has suffered as a result of the violation of Article 3;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Holds*, by 15 votes to 2,

(a) that the respondent State is to pay the applicant, within three months, EUR 9,050 (nine thousand and fifty euros) to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 May 2026, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Mattias Guyomar
Deputy Registrar	President

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

(a) Joint partly dissenting opinion of Judges Vehabović, Schukking, Chanturia, Yüksel, Seibert-Fohr, Roosma, Guerra Martins and Ní Raifeartaigh;

(b) Partly dissenting opinion of Judge Guerra Martins;

(c) Partly dissenting opinion of Judge Lavapuro, joined by Judges Jelić, Ktistakis, Šimáčková and Đurović;

(d) Joint dissenting opinion of Judges Vehabović, Chanturia, Felici, Yüksel, Ní Raifeartaigh and Kučs;

(e) Dissenting opinion of Judge Ní Raifeartaigh.

JOINT PARTLY DISSENTING OPINION OF JUDGES VEHABOVIĆ, SCHUKKING, CHANTURIA, YÜKSEL, SEIBERT-FOHR, ROOSMA, GUERRA MARTINS AND NÍ RAIFEARTAIGH

1. We have voted against finding a violation of Article 3 of the Convention because the conditions of detention in the Çorum Prison, although deplorable, did not, in our view, 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.

Application of the *Muršić v. Croatia* standards for overcrowding

2. The majority has not correctly applied the criteria for finding a violation of Article 3 in the context of prison overcrowding. The Grand Chamber judgment in *Muršić v. Croatia* ([GC], no. 7334/13, 20 October 2016) established a clear methodology for such cases, distinguishing between situations where personal space is below 3 sq. m and those where it is between 3 and 4 sq. m.

3. In *Muršić*, the Court held that when personal space falls below 3 sq. m, a "strong presumption" of a violation of Article 3 arises. However, where personal space is between 3 and 4 sq. m, a violation will only be found if this spatial factor is coupled with "other aspects of inappropriate physical conditions of detention". Finally, where a prisoner has more than 4 sq. m of personal space, the spatial factor ceases to be an issue, and the focus shifts entirely to the overall adequacy of the facility.

4. In the case of the applicant Yasak, the data regarding his personal space in Çorum Prison is clear (see paragraph 232 of the judgment):

> **Unit F-5 (13 months):** Personal space ranged from 3.6 to 4.6 sq. m
> **Unit F-10 (approx. 3 years):** Personal space ranged from 4 to 6 sq. m

5. Consequently, at no point during the applicant's years in Çorum Prison did his personal space trigger the "strong presumption" of an Article 3 violation. The assessment must therefore be whether the conditions were so egregious as to reach the threshold of "inhuman or degrading" treatment, despite the provision of space that generally met or exceeded minimum international standards.

Rebutting the allegations of degrading treatment

6. The majority's finding of a violation rests primarily on the cumulative effect of overcrowding and the fact that the applicant was required to sleep on a mattress on the floor at different periods of his detention. However, a detailed analysis of the facility and the administrative measures taken by the Turkish authorities reveals that the "unavoidable level of suffering inherent in detention" was not exceeded.

7. First, the majority consider that Çorum Prison was manifestly overcrowded on account of the fact that its "maximum capacity" of 1,592 places was exceeded, the actual prison population being between 1,950 and 2,000 persons (see paragraph 246 of the judgment). Moreover, the prison's maximum or "planned capacity" had already been increased on several occasions when compared to the initial design (see paragraph 237 of the judgment). We find this line of argument unconvincing. First, the overall "capacity" of a prison does not allow for conclusive findings in respect of a particular applicant who is detained in his or her own specific conditions. Secondly, and more importantly, prison design and domestic planning regulations can vary considerably, so the fact that more prisoners than originally intended have been accommodated in a particular section, unit, or cell is not decisive. It appears that in the present case each unit had originally been designed to accommodate seven prisoners, each of whom would have had rather generous personal space of more than 24 sq. m (see paragraph 217 of the judgment, and, for further details, paragraph 106 of the Chamber judgment). Reducing such "planned capacity" by increasing the number of prisoners per unit can hardly in itself raise an issue under Article 3. The reference by the majority to planned capacity should thus not be read as a new criterion for the assessment of sufficiency of the personal space per prisoner.

8. Second, we emphasize the existence of multiple compensatory factors in Çorum Prison. One of the most critical elements in the *Muršić* test is the "freedom of movement and adequacy of out-of-cell activities". The evidence establishes that the applicant had access to an independent outdoor courtyard for 8 to 12 hours every single day, depending on the season. This is far in excess of the CPT minimum standard of one hour and provided a significant relief from the crowding within the dormitories. The applicant could move freely into the fresh air for the vast majority of his waking hours, a factor which the Court has consistently used to mitigate the effects of limited cell space. The majority have found that the small size of the courtyard (64.36 sq. m) compared to the high number of prisoners meant that they could benefit from outdoor exercise to only a very limited extent, which constituted an aggravating factor and exacerbated the particularly harmful effects of the overcrowding (see paragraph 246 of the judgment). While we do not dispute the relatively small size of the courtyard for 27 to 47 detainees, one should not lose sight of the fact that the courtyard was accessible, depending on the

season, for eight to twelve hours per day (see paragraph 240 of the judgment). If one were to make a calculation on the basis of the widely accepted minimum standard of at least one hour of outdoor exercise time per day (see the CPT document quoted in *Muršić*, § 48), it would appear that for one hour per day the 64 sq. m courtyard could be used by three to five detainees at a time. Or for two hours, by five to eight prisoners at a time. Viewed from this angle, while not ideal, the possibilities of outdoor exercise can hardly be described as "an aggravating factor" that "exacerbated the particularly harmful effects of the overcrowding" (we refer again to paragraph 246 of the judgment). Quite the contrary.

9. Third, the overall material conditions of the L-type prison were modern and adequate. Each unit had separate sanitary facilities (toilets and showers) which were fully partitioned by doors, ensuring personal privacy – a factor often missing in cases where violations are found. The Government provided credible data showing the daily availability of 150 litres of cold water per person and 24-hour hot water on a twice-weekly basis. Natural light and ventilation were ensured by ten large openable windows in each unit. The heating system ensured temperatures of 22-24°C in winter. These facts do not describe an institution that is "altogether inappropriate".

10. Fourth, regarding the mattresses on the floor, we note that the applicant had an individual mattress, and his own bed linen. The mattresses provided to the applicant were of the same quality as those on the beds, and the use of a "rota" system was a collective agreement among the inmates themselves, rather than a punitive measure imposed by the guards. The Court has previously held that sleeping on a mattress on the floor does not in itself amount to a violation where personal space remains above 3 sq. m, as was the case here. The present case cannot be compared to those cases referred to in the judgment (see paragraph 243) in which the Court found a violation on account of the total absence of an individual bed in cells that were manifestly overcrowded, the sharing of a bed or the necessity for a prisoner to sleep in shifts in the same bed, combined with extreme overcrowding. The majority's conclusion that the prolonged deprivation of adequate conditions for sleep must have constituted a particularly heavy physical and psychological burden (see paragraph 244) is without precedent and effectively lowers the threshold of Article 3.

The applicant's refusal to accept a transfer and the principle of good faith

11. A significant fact that the majority appears to have overlooked is the applicant's refusal to accept a transfer to a less crowded facility. In December 2020, as part of an effort to reduce overcrowding in Çorum Prison, the administration offered the applicant a transfer to another prison with lower occupancy rates. In a letter dated 17 December 2020, the applicant

expressly refused this offer, stating that he was "satisfied with the material conditions of his detention".

12. While the consent of a detainee cannot justify treatment that is objectively inhuman, it is relevant in assessing the degree of personal suffering and the "threshold of severity". It is contradictory for an applicant to claim before an international court that his conditions were so degrading as to violate his human dignity, while simultaneously informing the prison authorities that he is satisfied and wishes to remain. This refusal suggests that the applicant's social and familial links in Çorum outweighed any distress caused by the overcrowding, indicating that the suffering was not "inhuman" in the autonomous sense of Article 3. Moreover, the fact that the applicant did not mention the Article 3 aspect of the judgment in his request for referral to the Grand Chamber speaks for itself.

13. Furthermore, the domestic judicial system demonstrated its willingness to address the applicant's complaints. His claims were reviewed by the Management and Supervisory Board, the Sentence Enforcement Judge, the Çorum Assize Court, and ultimately the Constitutional Court. The fact that those authorities did not find a violation does not mean the remedy was ineffective; rather, it indicates that they applied domestic standards (such as the Mehmet Hanifi Baki criteria) that were in reasonable harmony with the Court's Muršić case-law.

PARTLY DISSENTING OPINION OF JUDGE GUERRA MARTINS

I respectfully disagree with the majority as regards the conclusion that the finding of a violation of Article 7 constitutes sufficient just satisfaction in the present case.

Before setting out the reasons for my dissent, I would like to underline that, in my opinion and contrary to the systems of common law, a judge in this Court is not bound by previous case-law, when it is recent and where he or she was not part of the relevant judicial formation. I do not therefore feel bound by the case of *Yüksel Yalçınkaya v. Türkiye* ([GC], no. 15669/20, 26 September 2023) on this issue.

For the sake of clarification, my dissent is restricted to the refusal to award any sum in respect of the non-pecuniary damage arising from the violation of Article 7.

The majority relied on the following arguments:

- the Court did not award any non-pecuniary satisfaction in the case of *Yüksel Yalçınkaya,* in which it found violations of Articles 6, 7 and 11 of the Convention;

– the applicant has the option of requesting the reopening of the domestic proceedings under Article 311 § 1 (f) of the Code of Criminal Procedure following the delivery of the present judgment;

- such reopening would constitute the most appropriate remedy in respect of the violation of Article 7, provided that, when requested, this remedy is implemented diligently and in full conformity with the Court's findings in the present judgment;

- the *Yalçınkaya* approach to this matter has since been confirmed and applied in other cases (see *Delga v. France*, no. 38998/20, § 77, 9 July 2024, and also *Demirhan and Others v. Türkiye*, nos. 1595/20 and 238 others, § 53, 22 July 2025).

Concerning the first argument, it is worth emphasising that the deliberations in *Yüksel Yalçınkaya* were not unanimous on this issue. The partly dissenting opinion of Judge Schembri Orland, joined by Judges Pastor Vilanova and Šimáčková, contains several powerful counter-arguments, most of which I endorse.

Starting with the interpretation of Article 41 of the Convention, I note that this provision contains three preconditions for application:

- the finding of a violation of the Convention or the Protocols thereto;

- the internal law of the High Contracting Party concerned allows only partial reparation to be made;

- the necessity to afford just satisfaction to the injured party.

In addition, the Court has held that, as regards just satisfaction in respect of non-pecuniary damage, its guiding principle is equity, which involves flexibility and an objective consideration of what is just, fair and reasonable

in all the circumstances of the case (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 224, ECHR-2009). Lastly, the Court has also deemed that the exercise of its power to make such awards is discretionary.

Without diverging from this interpretation, I am of the opinion that, in this particular case, the applicant should have been awarded just satisfaction, for the following reasons:

(1) the seriousness of the violation: as the Court acknowledges in paragraph 190 of the judgment, "the guarantee enshrined in Article 7 of the Convention, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention even in time of war or other public emergency". This means that the violation of Article 7 in itself constitutes a serious breach of the Convention. In my opinion, a breach of other provisions of the Convention is not necessary here in order to award just satisfaction;

(2) the additional extreme burden placed on the applicant: specifically, that he use the possibility of requesting the reopening the domestic proceedings under Article 311 § 1 (f) of the Code of Criminal Procedure following the delivery of the present judgment. After many years of imprisonment, and having been released, the applicant fled to Germany, where he was granted asylum in June 2024 and where he is currently attending integration courses (see paragraph 249 of the judgment). From my perspective, it is unreasonable to ask an applicant, who spent many years in prison on the basis of judicial decisions that have been deemed contrary to the Convention, to trust that same system. Furthermore, he is living in exile, far from his own country, because of the same proceedings.

(3) Even if, when requested, the remedy is implemented diligently and in full conformity with the Court's findings in this judgment, the social exclusion, exile and stigmatisation remain a reality. So, as the dissenters pointed out in *Yüksel Yalçınkaya,* there can be no doubt that the applicant sustained non-pecuniary damage from the violation of Article 7.

(4) Thus, in accordance with the principle of equity, it would have been more just, fair and reasonable to award a sum in just satisfaction to the applicant, recognising that non-pecuniary damage occurred as a result of a breach of a fundamental human right.

PARTLY DISSENTING OPINION OF JUDGE LAVAPURO, JOINED BY JUDGES JELIĆ, KTISTAKIS, ŠIMÁČKOVÁ AND ĐUROVIĆ

1. This case concerns the legality of the applicant's conviction for membership of an armed terrorist organisation and the conditions in which he subsequently served his sentence. The domestic courts convicted him on the basis of lawful activities predating the organisation's designation as a terrorist organisation, without establishing his individual knowledge or intent regarding any alleged terrorist aims. He was thus found guilty essentially by association, and was sentenced to seven years and six months' imprisonment.

2. The Grand Chamber correctly found violations of Articles 7 and 3 of the Convention. We fully agree with those conclusions.

3. However, we regret that the majority considered that the finding of a violation of Article 7 constituted in itself sufficient just satisfaction. In our view, that approach fails to reflect both the legal and moral gravity of the breach and its intrinsic connection with the Article 3 violation.

4. Article 41 requires the Court to afford just satisfaction where domestic law allows only partial reparation. While reopening of proceedings may address the continuing legal consequences of a wrongful conviction, it does not erase the suffering endured as a result of that conviction and the punishment served. Non-pecuniary awards serve to acknowledge the moral injury inherent in the breach of a fundamental right.

5. The violation of Article 7 in the present case is not merely technical. It concerns the core principle of *nulla poena sine culpa*. Criminal punishment within the Convention system presupposes individual culpability. By replacing proof of *mens rea* with associative elements, the domestic courts transformed criminal responsibility into status-based liability. Such a defect strikes at the heart of the rule of law and human dignity.

6. Article 7, like Article 3, is absolute and non-derogable under Article 15 § 2. The imposition of punishment without establishing guilt constitutes a fundamental misuse of penal power. The harm thereby inflicted – stigma, anxiety, and the moral injury of being branded a terrorist without proof of intent – cannot be considered abstract or sufficiently remedied by a declaratory finding alone.

7. Moreover, the Article 3 violation did not occur in isolation. The degrading detention conditions took place while the applicant was serving a sentence imposed in breach of Article 7. This cumulative dimension is legally significant. As the Court has recognised in *Del Río Prada v. Spain [GC],* (no. 42750/09, § 145, 21 October 2013) and *M. v. Germany* (no. 19359/04, § 141, 17 December 2009), where unlawful punishment and deprivation of liberty are established, non-pecuniary damage cannot be adequately compensated by a mere finding of a violation.

8. The gravity of the damage suffered by the applicant in this case also lies in the way in which two non-derogable core rights were breached. Where the State both punishes without establishing guilt and subjects the individual to degrading conditions of detention, the infringement strikes simultaneously at the legitimacy of punishment and at the minimum standards of humane treatment. It is not merely that two rights were breached; it is that two core Convention rights were disregarded in the same factual sequence.

9. It should also be emphasised that, when compared to the *Yalçınkaya* case (*Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023), this is a more serious infringement of the applicant's rights, as the applicant in the present case had to endure a violation of two non-derogable rights. It is inconsistent to award non-pecuniary damages under Article 3 while denying them under Article 7, when both violations form part of a single continuum of harm, and both strike at the Convention's core guarantees.

10. The applicant sustained direct and foreseeable non-pecuniary damage: the stigma of a terrorism conviction and the humiliation inherent in degrading detention. Under the Court's settled case-law, awards for non-pecuniary damage serve to recognise such harm and to reflect, in equitable terms, its severity – not to confer enrichment, but to affirm the seriousness of the breach.

11. Given the concurrent violation of two absolute rights, we consider that a monetary award under both Articles was required. Only such redress adequately reflects the gravity of the non-pecuniary damage suffered by the applicant and reaffirms the centrality of individualised culpability and human dignity within the Convention system.

JOINT DISSENTING OPINION OF JUDGES VEHABOVIĆ, CHANTURIA, FELICI, YÜKSEL, NÍ RAIFEARTAIGH AND KUČS

1. With due respect to our colleagues in the majority, we are unable to concur with their conclusions regarding the finding of a violation of Article 7. We respectfully disagree that the flaw in question falls within Article 7 of the Convention and consider that it falls, if anywhere, within the scope of Article 6. There is, however, no admissible Article 6 complaint before the Grand Chamber.

2. The key section of the judgment in this regard is at paragraphs 204-213. Having defined the issue as being "whether the approach taken by the domestic courts in establishing the applicant's *mens rea...* was compatible with Article 7" (see paragraph 204), the Grand Chamber proceeds to describe fundamental flaws in the approach of the domestic courts, primarily with reference to matters that were not taken into account (see paragraphs 205-211). The ultimate *characterisation* of the flawed approach is set out at paragraphs 212-213. Here it is stated that the domestic courts failed to conduct "any assessment of the applicant's *mens rea* in the light of the specific evidence regarding his actions and role", an omission which amounted to a breach of "the requirement to conduct an individualised assessment of criminal liability". The judgment also notes "the absence of any meaningful explanation" as to how the *mens rea* had been determined in his case. It concludes that the domestic courts' approach violated the right "not to be punished without the existence of a mental link through which an element of personal liability must be established". Thus, the flaw leading to the violation is ultimately characterised as a failure to conduct any assessment of the applicant's *mens rea.* (It may be noted that, in contrast to *Yüksel Yalçınkaya v. Türkiye* ([GC], no. 15669/20, 26 September 2023), there is no explicit reference to foreseeability). With the greatest of respect, we do not consider that a trial court's failure to conduct an assessment of a particular defendant's *mens rea* is a flaw which falls within the scope of Article 7. We base this view on the difference between the law in its general application to all people, and the application of the law to a specific individual with reference to the evidence in the particular case.

3. The domestic law on the ingredients of the offence for membership of a terrorist organisation was, in its general terms, sufficiently clear as to meet the requirements of foreseeability under Article 7. This precise conclusion was reached by the Grand Chamber in *Yüksel Yalçınkay*a (cited above, §§ 246-249**)** and this is accepted by the majority in the present case (see paragraph 198 of the judgment). The majority therefore locates the problem not in the general Turkish law defining the ingredients of the membership offence, but in the *application* of that law to the applicant in the criminal proceedings against him. In our view, this is problematic, because we

consider that the concepts protected by Article 7 are primarily concerned with law at the general level; that is to say, as it applies to all persons. Where, however – as in the present case –, the law itself is both clear and Convention-compliant at the general level, and the flaw lies in the trial court's evaluation of the evidence with reference to the (clear) ingredients of the offence, the problem is not one under Article 7; instead, we believe, it is a fair-trial problem of some kind under Article 6.

4. The judgment hinges on the majority's understanding of the concept of individualised liability. There is, however, a distinction between individualised assessment of liability as a requirement of the offence-definition at the general level, on the one hand, and as a requirement of a fair trial, on the other. The principle of individualised assessment at the general level is given concrete expression by the legislation (or case-law) describing a particular *mens rea* as a necessary ingredient of the offence. We agree that this falls within the scope of Article 7. However, the principle of individualised assessment as a *fair hearing* requirement is given effect by a trial court's evaluation of whether the evidence presented in respect of a particular accused person is sufficient to prove all the ingredients (*actus reus* and *mens rea*) of the offence. We consider this to fall within Article 6. Given that Turkish law contained an adequate requirement of *mens rea* in its offence-definition, the problem in the present case therefore arises not at the level of the general law but at the level of its application to the evidence in the individual case. This supports the conclusion that the problem in the present case is one falling outside of the scope of Article 7.

5. A similar conclusion follows if one considers matters from the angle of foreseeability, an issue closely related to individualised liability. The relevant time for assessing foreseeability as an essential quality of a criminal provision for the purpose of Article 7 is the time of the conduct alleged to constitute evidence of the commission of the offence; the relevant question is whether one can, at this point, foresee that a given conduct amounts to a criminal offence. However, if a criminal court fails to apply the law at the time of trial, that is a different kind of problem – and one related to the trial process, not to Article 7.

6. It is not necessary for the purpose of the present case to identify the precise form of Article 6 violation which took place, if any. It is sufficient to record our view that it is not an Article 7 issue and, that being so, our inability to find a violation of Article 7 in the present case.

7. Before concluding, we pause to observe a possible objection to our position based on *Yüksel Yalçınkaya.* It is true that the majority of the Grand Chamber in that case considered Article 7 to apply to a situation which involved the evaluation of the evidence during the trial process. It took the view that an individualised assessment of guilt had effectively been bypassed by the domestic courts, in the sense that one piece of evidence (use of the Bylock application) had automatically and conclusively been treated as proof

of guilt (see *Yüksel Yalçınkaya*, cited above, §§ 262-67). It might therefore be argued that the Court in *Yüksel Yalçınkaya* has already created a path into Article 7, and that the majority treads the same path. We do not agree, for even if we accept the majority decision in *Yüksel Yalçınkaya* as a starting point, the result in the present case does not necessarily follow from it. The situation in the present case cannot be directly equated with *Yüksel Yalçınkaya.* Here, there were five categories of evidence (see paragraph 37 of the present judgment); even if we reduce this further to two key pieces of evidence, namely (i) the witness evidence that the applicant had reached the position of a BBTM and performed the tasks associated with that role, and (ii) that he used a codename, there is an important nuance of a difference between treating a particular piece of evidence as automatic evidence of guilt (which is what was said to have occurred in *Yüksel Yalçınkaya)* and evaluating several pieces of evidence to see if they satisfy the requirement of *actus reus* and *mens rea*. The automaticity of the role played by the Bylock evidence, as accepted by the majority in *Yüksel Yalçınkaya*, does not find a parallel in the present case. Therefore, even if one accepts the decision in *Yüksel Yalçınkaya* as a small but acceptable incursion of an Article 6 concept into Article 7 terrain, its extension to the present case involves an expedition of an altogether different order of magnitude. The present judgment risks a significant erosion of the boundary between Articles 6 and 7, potentially creating large areas of overlap and attenuating key conceptual differences between them.

DISSENTING OPINION OF JUDGE NÍ RAIFEARTAIGH

(in respect of Article 7)

1. The applicant was convicted of membership of a terrorist organisation in the domestic criminal proceedings and his conviction was upheld on appeal. What is in focus in this case with regard to his criminal trial is whether the domestic courts' approach to establishing his *mens rea* in respect of the above offence was Convention-compliant. The majority have given an answer to this question under Article 7 of the Convention whereas, in my view, the question should instead have been posed - and answered - under Article 6. The short dissenting opinion of six judges which I have joined sets out this position succinctly, but as the present judgment marks an important milestone in the Court's position regarding *mens rea* and criminal responsibility, I wish to share some further views on the reasons for my dissent. However, I would emphasise at the outset that I share in full the majority's criticisms of the domestic courts' engagement with the issue of *mens rea*, as set out in paragraphs 204-212 of the judgment. My misgivings concern the appropriate form of analysis under the Convention architecture and should not therefore be misinterpreted as an endorsement of what occurred at the domestic level in this case.

2. It may seem curious that although the Court has been engaging with issues related to the criminal-justice systems of the Contracting States for over sixty-five years, its case-law contains relatively few pronouncements about *mens rea* as an element of criminal liability. It is, after all, a familiar concept to any criminal lawyer, a concept which is invoked on a daily basis in the criminal trial courts of the (now) forty-six Contracting States. It is indeed so familiar that it is easy to forget that *mens rea* is a key – and, historically speaking, relatively modern – criminal-law concept, which funnels into a deceptively simple and workable package some deep philosophical and psychological assumptions about the interaction between the law and the construction of individual criminal responsibility. The familiar concept of *mens rea* sits at the interface between profound ideas about responsibility for one's actions and the harsh, practical reality of a "guilty" verdict. Yet its central importance to criminal liability at the national level does not find a parallel in terms of its prominence in the Court's case-law.

3. The relatively infrequent discussion of *mens rea* in the Court's case-law is less surprising, however, when one considers that the Court is only indirectly concerned with the content of the substantive criminal law and plays an extremely limited role with regard to the assessment of evidence in individual trials. The Court's commendable reluctance to become a "court of fourth instance" has undoubtedly contributed to its relative silence on the concept of *mens rea* (and the ingredients of criminal liability in general). That

has recently changed. In holding that the domestic court's evaluation of the Bylock evidence violated Article 7, the judgment in *Yüksel Yalçınkaya v. Türkiye* ([GC], no. 15669/20, 26 September 2023) placed at the heart of its decision an analysis of a domestic court's assessment of the ingredients of criminal liability. The Court in the present case goes a step further and reaches three key conclusions: (i) that the domestic courts' approach to the applicant's *mens rea* in light of the evidence was flawed; (ii) that this flawed assessment fell to be analysed under Article 7; and (iii) that the flawed assessment by the domestic courts constituted a violation of Article 7. It is worth pausing to consider the following question: why is the assessment of the domestic courts' approach not being conducted under Article 6? That Article is, after all, the key Convention provision concerning the conduct of trials, and concerns the application of the general law to individual cases, whereas Article 7 is more typically concerned with the general law itself. I offer some thoughts below as to how the Court's judgment today has come about, as well as its potential future impact.

Why does the judgment conduct the analysis under Article 7 and not Article 6?

4. The first, and essential, point is that when this case reached the Grand Chamber, there was no admissible Article 6 complaint on the table[1]. Concerning the trial process (as distinct from the applicant's complaints concerning prison conditions), the only admissible complaint was under Article 7.

5. A second important point is that by the time the applicant's case reached the Grand Chamber, many of the arguments he had made in his initial application had already been decided on in *Yüksel Yalçınkaya*, in a manner unfavourable to him. These included two crucial decisions. The first was that

[1] The following incidental point may be of interest to common-law lawyers in particular. The key prosecution evidence in respect of the applicant was provided by witnesses who were never cross-examined; and, indeed, some of them never gave evidence in court at all, their evidence having been adduced by way of police or prosecutor statements contained in the file placed before the trial court (see paragraph 38 of the judgment). They had benefited from a scheme known as the "active repentance regime", and the circumstances in which they chose to make statements in the first place, and how the criminal justice system dealt with them after their statements were made, is not known to the Court. However, during the criminal proceedings at the domestic level the applicant did not complain about the lack of opportunity to cross-examine the witnesses, and confined himself to saying that he was "ready to confront them" (see paragraphs 38 and 59 of the judgment). Nor did he raise arguments about this aspect of the proceedings on appeal before the domestic courts. His failure to do so will appear most surprising to anyone from a common-law system, but what is not surprising, given that background, is that when the applicant made an Article 6 complaint to the Court, it was dismissed at an early stage.

the formal designation of the FETÖ/PDY as a terrorist organisation by the courts at a date subsequent to the commission of alleged offences was not, in itself, sufficient to render a conviction contrary to Article 7 of the Convention (see *Yüksel Yalçınkaya*, cited above, § 253) (the "retrospectivity" argument). The second was the conclusion that the offence provided for in Article 314 § 2 of the Criminal Code, as defined by the legislation and case-law, had a legal basis that was sufficiently clear and foreseeable to comply with the requirements of Article 7 (ibid., §§ 246-49 (the "clarity/foreseeability of the general law" argument). The applicant continued to maintain those arguments before the Grand Chamber, but the Court in the present judgment has followed *Yüksel Yalçınkaya* on those points and does not re-open them (see paragraph 198). This left the applicant with, in real terms, only one viable option before the Grand Chamber: his *mens rea* argument under Article 7. It was the only available vehicle for ventilating his key complaint; and, somewhat like a train still parked on the tracks after a recent journey into Article 7 involving the same offence and the same respondent State, it was an obvious candidate for taking the applicant on a similar journey.

6. Given the above constraints upon the manner in which the applicant could advance his arguments, it was strategically advantageous, essential perhaps, for him to attempt before the Grand Chamber to bring himself within the scope of *Yüksel Yalçınkaya* and its analysis under Article 7. Accordingly, he argued that there was an "automaticity" about the way in which certain evidence was found to lead directly to the conclusion of guilt in his case, in the same way as the Bylock evidence had been treated (and condemned) in *Yüksel Yalçınkaya* - under Article 7. On its face, the applicant's argument based on the *Yüksel Yalçınkaya* reasoning was a seductively simple argument. His argument ran as follows: the domestic courts had treated the key evidence, namely the witnesses' evidence that he was a BBTM in the Gulen organisation and had used a codename, as automatic proof of guilt, without considering all the circumstances or "individualising" the analysis.

7. There is a third point. Some previous key Court pronouncements concerning the relationship between *mens rea*, individualised liability and criminal penalties had been made in the course of an Article 7 analysis. This may have appeared to support the idea that the applicant's complaint regarding *mens rea* should be dealt with under Article 7. However, in my respectful view, a closer interrogation of this case-law suggests that today's judgment does not merely apply previous case-law but steers the Article 7 case-law in a distinctly new direction.

8. Take, for example, the key trio of Italian cases, *Sud Fondi S.r.l. and Others v. Italy* (no. 75909/01, 20 January 2009), *Varvara v. Italy* (no. 17475/09, 29 October 2013), and *G.I.E.M. S.R.L. and Others v. Italy* ([GC], nos. 1828/06 and 2 others, 28 June 2018). The first point of note is that those three cases involved non-paradigmatic examples of the imposition of punishment within the meaning of Article 7, namely the confiscation of

land and property on the grounds of unlawful construction or development, in contrast to the present case, which involves a criminal trial for membership of a terrorist organisation leading to a lengthy sentence of imprisonment. Indeed, an important component of the analysis in those cases, starting in *Sud Fondi,* was first to ascertain whether the confiscation in question amounted to a "penalty" within the meaning of Article 7. Having answered this question in the affirmative, the Court went on to consider the circumstances in which the confiscations in question had been imposed. In *Sud Fondi,* what attracted the condemnation of the Court was the imposition of the "punishment" after an acquittal. In *Varvara*, the applicant had benefited from a decision not to prosecute on the ground that the offence of unlawful land development was statute-barred, but he was nonetheless subjected to confiscation of the buildings and plots of land covered by the impugned development plan. The Court found a violation of Article 7 on the basis that no one should be convicted on the basis of the criminality of another (see *Varvara*, cited above, §§ 63-73). The same reasoning was applied in *G.I.E.M. S.R.L. and Others*, where the Article 7 violation found in respect of some of the applicants was based on the fact that they had had no involvement at all in the pre-confiscation domestic proceedings (by reason of the domestic law concerning the separate legal personalities of companies). The confiscation of property was a sanction imposed by a criminal court as an automatic consequence of a finding of the offence of unlawful site development, and was therefore applied to them, despite their never having been parties to the relevant court proceedings, let alone found liable in those proceedings. As in *Varvara,* this was a breach of the principle that a person cannot be subjected to a criminal punishment on the basis of the criminal liability of another (see *G.I.E.M.*, §§ 71, 274).

9. For present purposes, what it is interesting about the above trio of cases is that it was the domestic law at general level that gave rise to the problem - that is, the legislation which provided for automatic confiscation in the given circumstances. The cases had nothing to do with a trial court's assessment of evidence regarding the particular *mens rea* of a defendant. The general pronouncements about *mens rea* in those cases must therefore be read in their context, which is one at some considerable distance from the present case.

10. The same may be said of the cases referenced at paragraph 192 of the present judgment. In *Khodorkovskiy and Lebedev v. Russia* (nos. 11082/06 and 13772/05, 25 July 2013), a tax case, a point is being made in the cited § 781 about allowing a national court's case-law to adjust to the changing conditions of modern society. In *Žaja v. Croatia* (no. 37462/09, §§ 91 and 92, 4 October 2016), what was in issue was how the phrase "persons resident" was interpreted in the legislation. In *Pantalon v. Croatia* (no. 2953/14, § 48, 19 November 2020), the question was again one of interpretation of the general law (namely, whether a "speargun" was included within the definition

of firearms). These are questions about the *scope* of the general law, not about how the evidence in a particular case was assessed by the trial court.

11. It is certainly true to say, as it was in some of those pre-*Yalçınkaya* cases, that the requirement that criminal offences be strictly defined by law would be thwarted if the domestic courts were to circumvent the law when interpreting and *applying* it to the specific facts of a case. What is perhaps more questionable is whether, when this problem of "application" presents itself in relation to the assessment of *mens rea*, it is necessarily an Article 7 problem.

12. A first step in this direction was taken by the majority in *Yüksel Yalçınkaya*. The majority conclusion in that case, to the effect that what had transpired in the domestic courts was a violation of Article 7, was reached by coupling the concept of individualised liability with the concept of foreseeability; the importance attributed by the trial court to the Bylock evidence was said to have "bypassed" proof of individual criminal liability in a manner which did not individualise the assessment of criminal liability and was not foreseeable (see *Yüksel Yalçınkaya*, cited above, §§ 262, 264 and 267).

13. In stark contrast, today's majority conclusion of an Article 7 violation no longer contains the language of "foreseeability". Instead, it states, at paragraph 193: "... Secondly, personal liability for punishment requires not only proof of the material acts, but also the existence of a mental link (*mens rea*) through which an element of liability may be detected in the conduct of the individual who physically committed the offence". At paragraph 212, setting out its conclusion on the application of the relevant principles, the judgment reads: "This failure by the domestic courts to conduct any assessment of the applicant's *mens rea* in the light of the specific evidence regarding his actions and role amounted to a fundamental breach of the requirement to conduct an individualised assessment of criminal liability". *Mens rea* here has thus become a stand-alone Article 7 requirement, uncoupled from foreseeability.

14. The judgment therefore goes two steps further than *Yüksel Yalçınkaya*. First, the requirement of *mens rea* (at least for the offence of membership of a terrorist organisation) is found to be a self-standing Convention requirement which is inherent in Article 7, not merely a domestic one. It has been severed from foreseeability. Secondly, given the different evidential context at the domestic level when one compares the Bylock evidence in *Yüksel Yalçınkaya* with the strands of evidence in the present case, the Court is moving significantly closer to an evaluation of how the domestic courts approached the evidence placed before them in an individual case. If *Yüksel Yalçınkaya* opened a door between Articles 6 and 7, today's judgment pushes it much further open. All of this development appears to be premised on an understanding of *mens rea* as being inherently - but also exclusively - linked with Article 7 concepts.

An alternative view of the relationship between *mens rea* and Articles 6 and 7

15. An alternative view might be that the concepts of individualised liability and *mens rea* have roles to play in both Articles 6 and 7, but that their role with regard to each is slightly different. On this view, Article 7 would be concerned with questions concerning *mens rea* at the level of the general law, whereas Article 6 would be concerned with questions of how *mens rea* was dealt with in the context of a particular criminal trial.

16. On this view, Article 7 would be the appropriate lens of focus for questions of the following kind: (i) whether the domestic law impermissibly allows a criminal punishment to be imposed without a prior finding of individualised criminal liability (see, for example, *Varvara*, *G.I.E.M.*); and (ii) whether the domestic law is sufficiently clear as to which acts or conduct or state of affairs fall within the offence ("foreseeability") (see, for example, the above-cited *Khodorkovskiy*, *Zaja* and *Pantalon* cases), which could include whether the domestic law was sufficiently clear (at a general level) as to what *mens rea* was required. In contrast, Article 6, the "fair trial" right, would be concerned with whether a trial court has failed to conduct a fair hearing specifically with regard to the *mens rea* ingredient of the offence in a particular trial, in much the same way as it might fail to conduct a fair hearing with regard to any other aspect of a case or ingredient of liability prescribed by the domestic law. On this view, Article 6 would be the appropriate lens of analysis for questions of the following kind: (i) whether the trial court failed to engage with the issue of *mens rea* in any meaningful way at all, thus abdicating the judicial function (on this issue) altogether; (ii) whether it gave any or any adequate reasons for its conclusion that the person had the relevant *mens rea*; and (iii) whether the trial court's method of analysis failed to have regard to the presumption of innocence in its evaluation of the evidence, individually and/or cumulatively. With regard to (ii) above, it is interesting to note that the majority in paragraph 212 of the judgment refer to "the absence of any meaningful explanation in the relevant domestic judgments as to how one of the essential elements of the offence, namely the *mens rea*, had been determined" and that the domestic courts "did not explain" how certain facts had led to the given conclusion. This sounds rather like a failure to give reasons, which is usually dealt with under Article 6. Yet somehow the majority subsumes it under an Article 7 analysis.

17. Some may argue that if the Court deals with *mens rea* outside an Article 7 frame of reference, it will necessarily move into the forbidden territory of evidence assessment. I do not believe this to be necessarily so, but I agree that the Court does have to be very careful not to overstep its role. Nonetheless, the Court has well-established case-law under Article 6 on the circumstances in which it may review the evidence-assessment process in a manner which is appropriate to its role, without trespassing into the exclusive

role of the domestic courts. The Court does so regularly, for example, in the "absent witnesses" line of cases: *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011, and *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015. It does so when it reviews a trial conducted in breach of a key procedural requirement, such as the right to legal representation (see, for example, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016, and *Doyle v. Ireland*, no. 51979/17, 23 May 2019). It is true that these concern procedural requirements clearly falling under Article 6, but the Court does not always end the analysis there and instead proceeds to examine the impact of the procedural flaw in the overall context of the evidence, albeit for a limited purpose, in keeping with its supervisory role. So, for example, in *Schatschaschwili* cited above (§ 124), the Court held:

> "... [I]ts [the Court's] starting-point for deciding whether an applicant's conviction was based solely or to a decisive extent on the depositions of an absent witness is the judgments of the domestic courts. ... It must further make its own assessment of the weight of the evidence given by an absent witness if the domestic courts did not indicate their position on that issue or if their position is not clear."

Yet the Court remains ever alert to what it may and may not do: see *Kohen and Others v. Turkey,* nos. 66616/10 and 3 others, § 59, 7 June 2022, where it stated:

> "... Furthermore, in carrying out that task [overall fairness assessment], the Court should not act as a court of fourth instance by calling into question the outcome of the trial or engaging in an assessment of the facts and evidence or the sufficiency of the latter justifying a conviction. These matters, in line with the principle of subsidiarity, are the domain of domestic courts."

18. The reality is that assessments of evidence and procedural requirements interact intimately in criminal trials, and the Court has a long tradition of carefully policing the boundary between fulfilling its legitimate role (with due regard to the principle of subsidiarity), on the one hand, and acting as a fourth-instance court, on the other. Bluntly put, there is a key difference between the Court assessing the evidence itself, and the Court assessing the manner in which a domestic court assessed the evidence. It may be a fine line in a particular case, but conceptually it is a distinct dividing line between what an international court can and cannot do. The relevance of this in the present context is that it does not follow that the choice is between Article 7 and forbidden territory; rather, there is a legitimate power of review under Article 6 that accommodates the type of exercise undertaken in the present case. Moreover, it is arguable that, were the Court to conduct the kind of analysis carried out in the present case under the umbrella of Article 6 instead, it might decrease rather than increase the danger of behaving as a fourth-instance court, on the basis that Article 6 case-law already contains strong protection against that risk. In principle, I fail therefore to understand why although the Court has the power to review the conduct of criminal trials

generally, this somehow excludes a review of how a trial court examined the specific issue of *mens rea*, sending that question down the Article 7 route instead.

19. It should not be forgotten that the Court also retains an exceptional jurisdiction to find a violation under Article 6 where it considers that the outcome was arbitrary. This is as close to fourth-instance review as the Court comes. There seems to be no reason why a trial court's assessment of *mens rea* would be excluded here either. It is interesting in this regard to consider what the Court held in *Navalny and Ofitserov v. Russia* (nos. 46632/13 and 28671/14, § 115, 23 February 2016) in the context of, it may be stressed, an Article 6 analysis:

> "... The Court considers that in the present case the questions of interpretation and application of national law go beyond *a regular assessment of the applicants' individual criminal responsibility* or the establishment of *corpus delicti*, matters which are primarily within the domestic courts' domain. It is confronted with a situation where the acts described as criminal fell entirely outside the scope of the provision under which the applicants were convicted and were not concordant with its intended aim. In other words, *the criminal law was arbitrarily and unforeseeably construed to the detriment of the applicants, leading to a manifestly unreasonable outcome of the trial*." (Emphasis added)

20. In sum, rather than seeing a trial court's flawed analysis of *mens rea* as necessarily falling within Article 7, as today's judgment does, the appropriate Convention provision under which the Court should review a trial court's analysis of whether the evidence established the applicant's *mens rea* is Article 6, not 7, provided of course that such review does not stray into "fourth-instance" scrutiny.

A bold new step: clear recognition of a Convention requirement of *mens rea*

21. Some final words may be useful with regard to the majority's clear identification of a self-standing Convention requirement of *mens rea* in terrorist cases, which is unconnected to "foreseeability". The majority claim that Article 7 of the Convention itself creates a requirement that the offence of membership of a terrorist organisation have an appropriate *mens rea.* This is a simple but significant statement. It is applying a Convention standard to the content of *substantive* criminal law at the domestic level. This raises many further questions, among them: Does this requirement apply to other offences also? If so, which offences? How is the dividing line to be drawn between offences which must have some form of *mens rea* and those which do not? Is it to be drawn with reference to the penalty or to the gravity of the offence, or both? What kind of *mens rea* is required in such cases: how far will the Court go in terms of indicating what is or is not acceptable in terms of domestic substantive law concerning *mens rea*? How exactly does this requirement of *mens rea* sit alongside the Court's tolerance of offences of "strict liability" or

"objective liability" in domestic systems, a form of liability the majority does not challenge (see paragraph 193 of the judgment, where the usual acceptance of strict/objective liability is referred to in the statement of general principles without further comment)? How does this requirement of *mens rea* in Article 7 interact with the presumption of innocence in Article 6 § 2? These are some of the questions necessarily left open by the present judgment.

22. Underlying all of these questions, at a deeper theoretical level, and ultimately of profound significance for the Convention system with regard to domestic criminal justice system, is whether the Court, in making this bold statement about a self-standing requirement of *mens rea,* has taken an important step away from interpreting the Convention as containing merely procedural guarantees in criminal trials, towards a new role in shaping the outlines of domestic substantive criminal law. And, if the answer to this is "yes", one may question whether it was necessary to take this step in the present case, in circumstances where the domestic law in question had already been deemed Article 7-compliant (including its *mens rea* element), at the general level, in *Yüksel Yalçınkaya*.

Conclusion

23. I raise the above issues in order to encourage further discussion of the conceptual underpinnings of Articles 6 and 7 both inside and outside the Court, with a view to the future development of the Court's case-law. I again wish to emphasise that I regard the majority judgment with the utmost of respect and share in its condemnation of how the applicant's case was dealt with by the domestic courts. My concern is that the frame of analysis adopted by the majority in the present judgment may not necessarily be the best way forward in future cases before the Court.