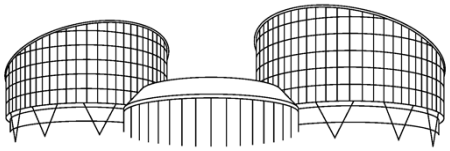

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ŞIK v. TURKEY (No. 2)

(Application no. 36493/17)

JUDGMENT

Art 5 § 1 (c) • Lack of reasonable suspicion • Detention of journalist in the absence of reasonable suspicion of disseminating propaganda in favour of terrorist organisations or assisting them, through newspaper articles and interviews and social media posts • Alleged offences coming within scope of public debate on facts and events already known, and of the exercise of Convention freedoms • No support for or advocacy of use of violence in the political sphere • No indication of wish to contribute to illegal objectives of terrorist organisations entailing the use of violence and terror for political ends Art 15 • No derogating measure applicable to the situation Art 5 § 4 • "Speedy review" • Period of thirteen months and seven days justified by exceptional caseload of the Constitutional Court following declaration of the state of emergency Art 10 • Freedom of expression • Unlawful nature of detention impacting on lawfulness of interference Art 18 (+ 5 and 10) • Existence of an ulterior purpose not demonstrated

STRASBOURG

24 November 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Şık v. Turkey (no. 2),

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

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Branko Lubarda,
Arnfinn Bårdsen,
Saadet Yüksel, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to:

the application (no. 36493/17) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Ahmet Şık ("the applicant"), on 9 May 2017;

the decision to give notice of the application to the Turkish Government ("the Government") on 3 July 2017;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the written comments received from the Council of Europe Commissioner for Human Rights ("the Commissioner for Human Rights"), who exercised his right to intervene in the proceedings (Article 36 § 3 of the Convention and Rule 44 § 2 of the Rules of Court);

the comments received from the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression ("the Special Rapporteur"), and also from the following non-governmental organisations acting jointly: ARTICLE 19, the Association of European Journalists, the Committee to Protect Journalists, the European Centre for Press and Media Freedom, the European Federation of Journalists, Human Rights Watch, Index on Censorship, the International Federation of Journalists, the International Press Institute, the International Senior Lawyers Project, PEN International and Reporters Without Borders ("the intervening non-governmental organisations"). The Section President had granted leave to the Special Rapporteur and the organisations in question to intervene under Article 36 § 2 of the Convention and Rule 44 § 3.

Having deliberated in private on 13 October 2020,

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

INTRODUCTION

1. The case concerns the placement in detention and continued detention of the applicant, an investigative journalist working for the daily newspaper

Cumhuriyet, in the context of criminal proceedings brought against the newspaper's managers and some of its journalists on account of the newspaper's editorial stance, which was critical of government policy in general and also of the means used by the authorities to combat illegal organisations. The applicant alleged a violation of Article 5 §§ 1, 3 and 4, Article 10 and Article 18 of the Convention.

THE FACTS

2. The applicant was born in 1970 and lives in Istanbul. He was represented by Mr F. İlkiz, a lawyer practising in Istanbul.

3. The Turkish Government ("the Government") were represented by their Agent.

4. At the material time the applicant was an investigative journalist and writer. He worked as a journalist and reporter on the national daily newspaper *Cumhuriyet* ("The Republic").

5. *Cumhuriyet* was established in 1924 and is one of the oldest newspapers in Turkey. It is known for its critical stance towards the current government and for its particular attachment to the principle of secularism. It is regarded as a serious newspaper of the centre-left.

I. THE APPLICANT'S PLACEMENT IN DETENTION

A. Judicial rulings

6. On 29 December 2016 the applicant was arrested at his home and taken into police custody by the Istanbul police. He was suspected of disseminating propaganda in favour of organisations considered by the Government to be terrorist organisations, including, in particular, the PKK (the Kurdistan Workers' Party), FETÖ/PDY ("Fethullahist Terror Organisation/Parallel State Structure") and the DHKP/C (People's Revolutionary Liberation Party/Front), through articles and interviews published in the daily newspaper *Cumhuriyet* and items posted on social media. The applicant was also accused of having, through his writings, denigrated the organs of the State, an offence under Article 301 of the Criminal Code.

7. On 30 December 2016 the applicant, accompanied by his lawyers, was questioned by the Istanbul public prosecutor about the accusations against him. The public prosecutor questioned him mainly about eleven tweets which he had posted on the Twitter social network and five articles which he had written and published on the *Cumhuriyet* website and in the newspaper's print edition.

8. The applicant replied that he had been placed in pre-trial detention in 2011 in connection with a criminal investigation which, in his view, was

very similar to that being conducted in the present case. He alleged that the judges hearing that case had been members of the network of Fethullah Gülen (FETÖ/PDY) who had deprived individuals of their liberty on the basis of charges founded on falsified evidence. He maintained that, as in 2011, the reason why he had been brought before the public prosecutor was unrelated to the possible existence of any criminal offences. He added that he regarded his questioning as interference with his activity as a journalist. The applicant's lawyers pointed out that the judicial authorities were not empowered to institute criminal proceedings under Article 301 without first obtaining the approval of the Minister of Justice.

9. Following the questioning, the public prosecutor sought a judicial order for the applicant's pre-trial detention on suspicion of disseminating propaganda on behalf of terrorist organisations such as the PKK, FETÖ/PDY and the DHKP/C. The prosecutor also took into consideration the nature of the offence, the state of the evidence and the maximum sentence for the offence.

10. Still on 30 December 2016, the applicant appeared before the Istanbul 8th Magistrate's Court and was questioned about his alleged acts and the suspicions against him. The applicant denied committing any offence. He maintained that his articles in *Cumhuriyet* and his posts on social media had not contained any propaganda in favour of a terrorist organisation or any call to violence, but had simply amounted to journalistic activity conveying information to the public on actual events in the context of freedom of expression.

11. At the close of the hearing the magistrate, taking into account the content of eight tweets posted by the applicant and five articles written by him, ordered his pre-trial detention. The magistrate considered, firstly, that there were strong suspicions that the applicant had committed the offence of disseminating propaganda in favour of two terrorist organisations, the PKK/KCK and FETÖ/PDY. He noted in that regard that the applicant had expressed views similar to those voiced by the members of terrorist organisations, describing those organisations' terrorist activities as a "war" or "struggle"; that he had presented those organisations as legitimate entities while seeking to portray Turkey as a State that supported terrorist organisations; that he had described the security forces' efforts to combat the terrorist organisations as illegal and even as terrorism, referring to the State agents as "murderers, mafiosi, violent [individuals]" while terrorist activities were continuing in south-east Turkey, with armed attacks being carried out targeting State officials, trenches being dug, barricades being erected and bombs being planted; and that the applicant had disseminated propaganda in favour of terrorist organisations by stating in his posts that the security forces were setting off bombs and inciting others to war while the terrorist organisations took responsibility for the attacks. In the magistrate's view, there was no contradiction in the claims that the applicant

had disseminated propaganda in favour of two very different, even rival, terrorist organisations, namely the PKK and FETÖ/PDY, since the investigations carried out following the attempted military coup and the information in the public domain showed that the two organisations, with the support of external forces, had acted in coordinated fashion during and after the attempted coup. He further noted that the applicant, in his defence submissions, had continued to make accusations against the State and its leaders. As justification for the applicant's placement in pre-trial detention the magistrate then referred to the nature of the alleged offence, the severity of the penalty laid down by law, the fact that the offence had been committed through the press, and the fact that protective measures other than pre-trial detention would clearly be inadequate since the applicant showed no remorse for his remarks and had continued throughout his questioning to employ the same rhetoric as the members of the above-mentioned terrorist organisations.

12. On 1 January 2017 the applicant lodged an objection against the order for his pre-trial detention. In a decision of 3 January 2017 the Istanbul 9th Magistrate's Court dismissed the objection, reiterating the reasons given in the impugned order.

B. Extension of the pre-trial detention

(a) By the magistrates' courts

13. On 30 January 2017, at the public prosecutor's request, the Istanbul 3rd Magistrate's Court ordered the applicant's continued pre-trial detention. The magistrate considered that the applicant's posts on his Twitter account and his articles in Cumhuriyet were apt to amount to propaganda in favour of the armed terrorist organisations the PKK/KCK and FETÖ/PDY and that there were therefore strong suspicions that the applicant had committed the alleged criminal offences. The magistrate also took into account the fact that the evidence had not yet all been gathered and that there was no fresh evidence favourable to the applicant that would justify ending his pre-trial detention, given the length of the sentence liable to be imposed if the offence was established and the period already spent in detention. Lastly, the magistrate considered that the applicant's release pending trial would be insufficient. On 9 February 2017 the applicant lodged an objection against the order of 30 January 2017, arguing that there was no evidence grounding a suspicion that he had disseminated propaganda in favour of a terrorist organisation, and maintaining that the articles and posts in question had formed part of his journalistic activities protected by freedom of expression. On 14 February 2017 the Istanbul 10th Magistrate's Court dismissed the objection, finding that the impugned order had complied with the law and the proper procedure and that there was no fresh evidence favourable to the applicant that would require his pre-trial detention to be ended.

On 2 March 2017 the Istanbul 10th Magistrate's Court examined of its own motion the lawfulness of the applicant's pre-trial detention and ordered its extension, reproducing verbatim the reasons given in the previous orders. On 20 March 2017 the applicant lodged an objection against the order of 2 March 2017, reiterating his grounds of objection and arguing that the fact of copying the reasons for a previous order was contrary to judicial ethics. On 24 March 2017 the Istanbul 11th Magistrate's Court dismissed the objection.

(b) By the Istanbul Assize Court

14. Beginning on 19 April 2017, the date of acceptance of the bill of indictment filed by the public prosecutor's office accusing the applicant of assisting terrorist organisations without being a member of them (an offence under Article 220 § 7 of the Criminal Code ("the CC")), the Istanbul Assize Court, which was hearing the case, reviewed the lawfulness of the applicant's pre-trial detention at maximum intervals of thirty days. The judges concerned noted that the offence of which the applicant was accused was among the offences listed in Article 100 § 3 of the Code of Criminal Procedure ("the CCP") – the so-called "catalogue offences". They took the view that if the applicant were released pending trial he was liable to abscond. They observed in that connection that in the previous investigations concerning *Cumhuriyet* journalists the suspects had fled, by lawful or unlawful means, as soon as an opportunity had arisen. The judges also took into consideration the risk of the deterioration of evidence, noting that the claimants and victims of the incidents in issue had not yet all been identified and/or that statements had not yet been taken from them.

15. At the close of the hearing of 9 March 2018 on the merits of the case, the Istanbul Assize Court ordered the applicant's release pending trial. The court considered that all the relevant evidence concerning the applicant had been gathered, that there was no longer any evidence concerning him that was liable to be concealed, and that there were no strong suspicions that he would put pressure on the witnesses or the other accused who had not yet given evidence. It concluded that pre-trial detention was henceforth a disproportionate measure and that a judicial supervision measure would be adequate and sufficient.

C. Content of the impugned articles and posts

16. The articles written by the applicant and published in the daily newspaper *Cumhuriyet* and the items posted by him on social media – as referred to by the public prosecutor in ordering the applicant's arrest and by the magistrate in ordering his pre-trial detention, and as taken into consideration by the Constitutional Court when called upon subsequently to rule on the lawfulness of the detention measure – are as follows.

1. The article of 14 March 2015 entitled "Either Apo [goes] to Kandil or we [go] to İmralı"

17. The full text of this article, which comprised an interview with Cemil Bayık, one of the leaders of the PKK, read as follows:

"Heading of the article: According to Cemil Bayık, joint chairman of the KCK's executive council, only Öcalan can persuade the PKK to lay down their weapons.

We met Cemil Bayık in Kandil. He told us that [the PKK leaders] needed to meet Öcalan for the [peace] process to move forward. 'If [the authorities] want', he said, they could take them to the island of İmralı. 'What we want', he said, 'is for Apo no longer to be held in İmralı. [The response to] that request is long overdue'.

According to Bayık, the only person who could convince the guerrilla fighters to lay down their weapons is Öcalan: 'We'll sit down at the negotiating table with anyone in the government. Those who have resolved issues like this reached agreements, or negotiated agreements, with fascist powers'. Bayık maintains that Erdoğan is the representative of the dictatorship in Turkey.

Question: Are you allowed to communicate directly with Abdullah Öcalan?

Answer: We've never had any direct communication. We made it clear that we wanted to contact him. During the Oslo process we were told that this was possible, but the promises never came to anything. The HDP delegation goes there [to İmralı], takes note of their discussions and, as the case may be, hands over our letters. It's the HDP delegation that acts as the intermediary. There's no other communication.

Sub-heading: We need to talk face to face.

Question: Do your demands include ... videoconferencing?

Answer: No. Videoconferencing wouldn't work. We need to see Abdullah Öcalan in person, face to face.

Question: Abdullah Öcalan can't come to see you. Will you go there? You wouldn't be allowed...

Answer: We can go there too. If they want they can take us there, but what we're really looking for is for our leader Apo no longer to be held in İmralı Prison, for him to be given back his freedom.

Question: In an interview with Banu Güven for the television station IMC you suggested that the decision to lay down weapons could be taken at an annual congress attended by Öcalan. Does that mean that Öcalan would have to be released?

Answer: Of course. No one will be able to persuade the guerrilla fighters unless the leader Apo comes and meets them. Although I'm the joint chairman of this movement, even I can't persuade them. The only person who can do it is Apo. If he comes and meets the guerrilla fighters and their leaders, it would be possible to persuade them. Nobody else can do it.

Sub-heading: Our influence is limited.

Question: Would it not be enough for the leaders to pass on Öcalan's decision to lay down weapons to the guerrilla fighters?

Answer: Our guerrilla force is obviously no ordinary guerrilla force. These are not mere soldiers. They [are fighting for an ideology]. They've had ideological training,

they're loyal to our ideals and to our leader Apo. Our influence is limited. They'll only be convinced if the leader comes to talk to them.

Question: To what extent is it realistic to demand that Abdullah Öcalan be released?

Answer: In my view, it's realistic. It's even overdue.

Question: How realistic, how likely is it?

Answer: There are also certain circumstances that are conducive to [this demand] being met. If the will is there, it's even easy to achieve. That decision lies with the political authorities, with the State. In Turkey, the authorities and the State are effective enough to create the perception they want among the public. If they want, they can easily create the perception that Apo needs to be released, without causing a reaction in society.

Sub-heading: We've done our duty

Question: Are we to understand that if this condition isn't met, the armed struggle in Turkey will carry on and the weapons won't be handed in?

Answer: The Turkish State and the government need to make significant efforts to put an end to the armed struggle. We began by conducting a political struggle in order to tackle the problems of this people. We never wanted an armed struggle. But we were left with no other option. We were unable to expose this issue, whose existence had been denied by the State. It was the armed struggle that served to highlight the issue in all its dimensions and to create a climate conducive to resolving it. Once we considered the armed struggle to have reached the necessary level, we began making political demands on this issue. We declared a unilateral ceasefire on several occasions to enable the groundwork [to be laid]. We've made all the necessary efforts on our side.

Sub-heading: No further efforts are required before signing

Question: What are those efforts?

Answer: We took initiatives that no other force in the world would have taken. If you look at similar problems around the world, you can see that ceasefires were declared under the auspices of a third party, that the guerrilla fighters came out of their trenches, the prisoners were freed and the war ended. Without third-party supervision, without an agreement between the parties, without a document signed by them, these stages would not have happened. Even without these conditions being met we made major unilateral concessions. It's not up to us to take any more steps – it's the turn of the State and the government. If they do it, we'll do what's required of us without hesitation. Our leader Apo said that if negotiations began, the parties would need to proceed in parallel, but it hasn't happened like that. On our side, we've made concessions, we've even taken numerous steps [in that direction], but the State and the government have not reciprocated as required.

Sub-heading: Turkey has never wanted [involvement by a] third party

Question: Is there a third party? Was there one in the past?

Answer: No, at the moment there isn't. At one time, during the Oslo process, there was one. But Turkey has never wanted a third party.

Question: When you say 'third party' are you talking about an independent body or about supervision by a State?

Answer: We were in touch with the leader Apo through the HDP delegation, before Apo made his historic declaration at the Nevruz [festival] in 2013. We sent the following message to Apo and to the State and the government: if we make a historic declaration proposing a democratic solution to the Kurdish question, then it has to be made clear what the mechanisms [of that solution] are. Our proposal was the presence of a third party.

Question: Did you mention any third party in particular?

Answer: No. It could have been the Turkish Parliament or a committee of Turkish non-governmental organisations. We presented several options. They didn't accept them and instead sought a bilateral solution. They said that they wanted a local, national solution. In reality, they were inventing excuses not to do it (*ipe un sermek*). Because there's no precedent for this kind of solution anywhere in the world. Turkey took no steps in this direction. They said that the process wouldn't work with a third party.

Sub-heading: It wasn't realistic

Answer (continued): As far as we were concerned it wasn't realistic. In order to find out whether or not they were willing to resolve the issue, we nevertheless accepted their proposal, as they had rejected the alternative [third-party involvement]. Because we want to find a solution. That's why we also agreed to those conditions. But we then realised that what they called a local or national [solution] wasn't aimed at finding a solution.

Sub-heading: They don't accept the Kurdish question

Question: Should we infer from your comments that the Turkish government or the State want to solve the problem of the PKK rather than the Kurdish question?

Answer: That's it exactly. The State and its government don't accept the existence of the Kurdish question. They don't accept that there is a people like the Kurdish people. In reality, this question needs to be addressed and solved as a political issue.

Sub-heading: Their argument has failed

Answer (continued): If you characterise the issue as 'terrorism', then your solution will inevitably be war. The Turkish State's actions are consistent with its argument that there is no Kurdish question, there's just the issue of terrorism. But that argument has failed. The PKK's struggle has highlighted the fact that this approach is untenable both in Turkey and internationally. All the countries in the world have also realised this. At the point we're at now, they can't leave this issue unresolved.

Sub-heading: We haven't committed any crime

Question: At the negotiating table, did ... the AKP regard the members of the PKK as criminals who should be granted amnesty or as important players in the Kurdish question, which extends beyond its borders and also includes international players?

Answer: Of course, we're criminals in the eyes of the Turkish government. But we haven't committed any crime. We're carrying on a struggle on behalf of the most natural rights of any people, but [the Turkish government] claim that no such people, and no such rights, exist. So we're regarded as criminals under their laws. If what we're doing is a crime then, yes, we have committed [that crime] and we'll continue to commit it. Until we've achieved our objective.

Sub-heading: Ankara's demands for a local solution are unrealistic

Question: What is your objective?

Answer: To secure for this people its natural rights. First of all, the Kurdish question is not just a problem for Turkey. It's not simply an issue between the Kurds and the Turkish State and its government. We have an issue that transcends those borders. The issue concerns Turkey, but it also concerns the Middle East and even the international community. Kurdistan is a divided country, a divided people, with each part under the sovereignty of a different State. Each State conducts its [own] policy in the part under its control. And those States conduct international relations with various world powers. From that perspective, the whole world is concerned by this issue, but there are also regional particularities which [are at the root] of this issue and which make it more complicated. The United States plays the leading role in the region. Turkey is a member of NATO and at the same time is a member of the Organisation of Islamic Cooperation and a candidate for [accession to] the European Union.

Sub-heading: All the forces in the world are concerned

Answer (continued): That's why this has become a question which concerns every grouping. Resolving an issue with Turkey in fact amounts to resolving an issue with the United States, NATO, the European Union and the Organisation of Islamic Cooperation. In sum, all the forces in the world are concerned by this issue. Turkey's obstinate insistence on finding a national and local solution is unrealistic.

Sub-heading: He specifically chose the date of 28 February

Question: On 28 February, at the meeting between the HDP and the AKP, a ten-point plan proposed by Öcalan was announced. Was this Öcalan's final word on the subject of the process?

Answer: No. Because you say your final word when you've achieved your objective. In that situation you get exhaustion and depression, the rot sets in. Apo and the PKK are looking to lead a revolution within the revolution.

Question: When I mentioned the 'final word', I meant that this ten-point declaration forced the AKP to face up to its responsibilities. What happens if it doesn't assume those responsibilities?

Answer: The leader asked us to insist that the declaration be made on 28 February. As we are a movement that is opposed to military coups, we wanted to make the declaration on 28 February. A joint declaration was signed by the parties and the joint text was announced to the public. The government delegation and the delegation of the HDP were photographed together. On the same photograph, in the same frame. That was significant, because it was the first time that the government had shown that it was facing up to its responsibilities. That wasn't an easy thing for Turkey to do, and it's very important.

Question: Indeed, but if the government doesn't assume its responsibilities, what will happen?

Answer: Öcalan will make an appeal, the PKK will announce that it's giving up its weapons, and the problem will be solved that way. It's a superficial trick designed to deceive society. By selling this false perception to society, they hope to win the elections. The Kurdish movement is not fooled.

Sub-heading: If there were democracy there would be no Kurdish issue

Question: So why do you stay at the [negotiating] table with the AKP?

Answer: We sit down at the [negotiating] table with whoever is in power. It's not surprising. Those who resolved similar problems around the world resolved them with fascist governments or dictators or negotiated with them. That's what's happening

here too. If there were a democratic government in Turkey, there wouldn't be a Kurdish issue or a democratic issue.

Question: Do Erdoğan and the AKP represent fascism in Turkey?

Answer: It's Erdoğan who represents AKP hegemony and dictatorship. It's impossible for the AKP to promote Erdoğan's dictatorship in Turkey and at the same time to claim to resolve the issue of Kurdistan.

Question: Is this all a political initiative aimed at nationalist voters?

Answer: On the one hand [the AKP] addresses the nationalist community, and on the other hand it provokes us and provokes the people, so that we'll say 'Enough is enough' and leave the negotiating table. If the AKP doesn't resolve the issue and continues to provoke us and to stall the process, we can move on unilaterally to a certain point in resolving the issue. If we receive further provocation and threats [the AKP] could prompt us to leave the table. It's made all these efforts, but they haven't succeeded.

Sub-heading: The AKP is counting votes

Question: What interest does the AKP have in all this? What does it stand to gain if you leave the [negotiating] table?

Answer: Of course [the AKP] stands to gain. It claims that it's the party that's addressing the issue while we're against [finding] a solution. They're pushing us to tipping point, pushing us to make [concessions]. They're patient, they work at it. If we leave the [negotiating] table [the AKP will say]: 'We wanted to resolve the issue, we were patient, but the PKK didn't want a solution, they wanted to carry on waging war. They weren't in favour of peace, they think of nothing but waging war'. That's how [the AKP] always operates."

2. The interview of 31 March 2015 entitled "Remarkable account given by activists to Ahmet Şık half an hour before being killed"

18. This interview, published on the evening of 31 March 2015 on the website of the newspaper *Cumhuriyet*, read as follows:

"Heading: The *Cumhuriyet* journalist Ahmet Şık spoke to the activists by telephone half an hour before their death. Why did they carry out this action? What do they want? Are they lawyers? What did they talk about to the prosecutor? They answered all these questions.

The activists B.D. and Ş.Y. answered Ahmet Şık's questions by telephone half an hour before being killed in the hostage-taking incident. Ahmet Şık's questions and their replies are set out here.

Question: Are you going to put an end to your action? What stage are the negotiations at?

Answer: We tweeted the service numbers of the police officers concerned taken from the investigation file. According to the file, the criminal bureau [the police inspectorate] found that three police officers out of the 21 officers suspected were especially implicated. We discovered that it was these three officers who may have fired at B.E.[1]. The prosecutor also gave us that information. In the negotiations we're

1. B.E., a 15-year-old demonstrator who died in hospital after being struck on the head by

asking for the identity of these three police officers to be disclosed and broadcast live. The negotiators also told us [that they were 99% sure that] the people who killed B.E. were police officers. We're asking for the public to be told the names live on air. Here, we've studied the files too. We've looked at photos of the suspects. In the criminal bureau report the three officers were already circled in red. One of them is called G.T. His service number is ... We also provided the service numbers of the other police officers and we want their names to be disclosed live on air.

Question: Do you think your demand will be met?

Answer: The names of B.E.'s killers [are known] but haven't been disclosed. Thanks to our action, the names will be announced and [the police officers] will face trial. The killers in the cases of A.İ.K. and E.S. were identified, but we know how that trial ended. The killers are never punished properly. That's why we want them to be tried by a [lay] jury. That's our second demand.

Question: What will happen if your demand isn't met?

Answer: Our demand is clear. The names must be announced live on air. The negotiators have to honour their commitments. The identity of the cops has to be disclosed and the officers have to confess to their crimes in a live broadcast. When that demand has been met we can negotiate on the other demands which we've already announced. If our [first] demand isn't met we'll do what we said at the beginning. We provided the police officers' service numbers. We want the names to be announced. Once that's been done we can put an end to our action. Now we're starting a final negotiation and we've given a deadline of half an hour [it's now 7.40 p.m.]. [If the police officers] don't admit to their crimes live on air, the negotiations will end. The telephone calls will end too and we'll punish the prosecutor.

Question: Was it also you who demanded that the head of the security directorate and the deputy chief public prosecutor give a live statement at midday?

Answer: Yes, that statement was made in line with our demand. When we began our action we gave a three-hour deadline. We were able to get in touch with the team of negotiators shortly before that expired. As the authorities promised to announce the identity of B.E.'s killers, we said that if that was done the negotiations would continue. The chief of police and the deputy chief public prosecutor then made a statement live on air and we extended the deadline. If they hadn't made that announcement the deadline wouldn't have been extended.

Question: When you entered the building, did you use lawyers' IDs? Reports that you were lawyers were also circulating. How did you get into the courthouse with weapons?

Answer: We're not saying anything about how we got in. No doubt that will emerge eventually but we're not giving any explanations at this stage. Rumours of this kind make lawyers a target. In fact, even without us putting on lawyers' robes or using lawyers' IDs, lawyers would be targeted in this case. Lawyers in this country have been targeted repeatedly. They've been put in prison and even killed because they [were identified to their] clients. So they won't suddenly become targets because of our action. Anyone who doesn't support the AKP and the established order in this country is already a target. We're not lawyers either, we're DHKP/C fighters. At the end of the day, we decided to carry out this action and we tried all kinds of methods. This action is a method [that we were forced to use].

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a teargas canister during the 2013 "Gezi Park" demonstrations in Istanbul.

Question: Does armed action deliver justice?

Answer: The revolutionaries have worked hard for justice in this country. They've carried out lots of actions to date. The revolutionaries have protested, the lawyers have insisted. But instead of prosecuting the killers they arrested the protesters. The protesters were investigated and tortured. We're demanding justice for the killing of B.E. But they only make use of the justice system when the interests of the established order are at stake, and to arrest those who seek justice. We're here today to deliver justice. The methods we use, and our action, are legitimate.

Question: You say that if your demand isn't met you'll punish the prosecutor. Is that legitimate?

Answer: We're trying to avoid that. Meeting our demand and ensuring that nothing happens to the prosecutor, [all that] is in their hands. After all, these are their own prosecutors and police officers. It is these prosecutors and police officers who protect their established order. If they don't want anything to happen to them, they just have to agree to our demand. We believe that the established order doesn't respect its own people. They use them and then discard them. It's up to them to decide what happens now. We're not making any further demands.

Question: What condition is the prosecutor in? Can we speak to him?

Answer: I can't let you speak to him. But he's fine. He's already spoken on the phone to another prosecutor whom he knows and to a senior police officer. He's in good health, he says so himself.

Question: Have you spoken to the prosecutor at all? According to [some of the media], this prosecutor has worked hard to find the perpetrators of B.E.'s killing.

Answer: Yes, we've spoken to him. The prosecutor tries to defend himself. But when you look at the file, all you find is the lawyers' applications. There's no sign of any efforts by the prosecutor to make progress in the case. We now know how the case has been conducted so far. The prosecutors haven't dealt with the case. It was the lawyers and the families who tried to find the video recordings. The revolutionaries took action several times to demand [that the case be dealt with]. But they were placed in police custody. They were tortured. They were arrested. No one can name a single step taken by the prosecutors in this case. Everyone knows what the judiciary does in cases like this. They just protect the State and its criminals. In this case as well the prosecutor is responsible for the impunity of the police. We've already said that to him.

Question: The murder of B.E. had already provoked a response among the great majority of the public. Hundreds of thousands of people who attended his funeral protested against that injustice. Does your action not destroy the legitimate basis [of the protests]?

Answer: B.E. was an ordinary person, but he was our kid. We knew him. We knew him personally, [he was] from our area. B.E. was a kid who grew up [with us]. He was our soul, our brother, our comrade. It was no accident that millions of people attended his funeral. The revolutionaries carried out actions for 360 days to draw attention to that injustice and provoke a public response. Lots of martyrs were killed during the June uprising, but none of the funerals were like that. Of course, B.E.'s age and the fact that he was still a child were a factor, but that huge gathering took place because of our demands for justice. As we said at the start, in deciding on this action [the hostage-taking] we've done [everything we could] up till now. We used democratic means to call for action to be taken. But since justice was not done we said that we

might deliver justice by taking up our weapons. Our legitimacy comes from our ideology."

19. When this interview was published in the print edition of *Cumhuriyet* on 1 April 2015, under the heading "This action is a method we were forced to use", it was preceded by an introduction written by the applicant, worded as follows:

"[The activist] was on the phone shortly before the bloody operation which put an end to the latest hostage-taking incident without leaving a single witness behind to tell the truth. When I rang the number for the second time without being sure that anyone would answer, a young voice said 'Hello'. I don't know which [of the two] it was. When I introduced myself and began asking my questions one after another, the negotiations could be heard in the background. [The activist] asked me to be quick, but he answered all my questions.

Although his words showed his determination, he kept repeating the same thing: 'If the police officers' identity is disclosed, our action will end'. That didn't happen. This simple demand, which the judicial authorities should already have met, was rejected. The operation, which was described as 'successful', resulted in the death of the prosecutor Mehmet Selim Kiraz and of Ş.Y. and B.D., who said that they had gone there to kill the prosecutor. This last interview is published here as a record."

3. Contribution to a seminar held from 23 to 26 September 2014

20. During a seminar on press freedom organised in Heybeliada (Turkey) in partnership with the European Parliament, the applicant reportedly made the following remarks:

"Working in the media wing of an organisation conducting an armed struggle does not make you a member of that organisation. As far as I'm concerned, all my colleagues who work in the PKK's media wing are journalists."

4. Items posted by the applicant on social media from his Twitter account @sahmetsahmet

21. The post of 28 November 2015:

"They chose to slaughter Tahir Elçi instead of arresting him. You're a mafia, you bunch of murderers."

22. The post of 17 February 2016:

"Do people who try to prove that the PYD is a terrorist organisation, while the United States and the EU refer to it as their ally against jihadist terrorism, not become ordinary suspects?"

23. The post of 11 December 2016:

"Instead of comparing the people who were burnt in the cellars of the houses in Cizre and those who were killed by a bomb in Istanbul, speak out against both. Both are acts of violence."

24. The post of 14 December 2016:

"A war has been going on with the PKK since 1984 in a particular region of the country, despite occasional interruptions."

25. The post of 20 December 2016 concerning the possibility that the killer of the Russian ambassador in Ankara may have been a member of an organisation:

"To the government and its supporters who are trying to prove that the murderer is a member of FETÖ, but not of Al-Nusra: what will you do about the fact that the killer is a police officer?"

A message, the date of which is unknown, invoked by the magistrate's court, but not taken up either by the indictment or by the Constitutional Court's judgment:

"If the act attributed to S.S.Ö. is a crime, shouldn't there be more suspects, starting with the person who resides in the Palace?"

5. The articles by the applicant mentioned in the detention order but not expressly referred to by the Constitutional Court

26. An article published on 8 July 2015 under the heading "What we're doing is journalism; what you're doing is treason", and another article published on 9 July 2015 under the heading "MİT had information on the Reyhanlı massacre but did not share that information with the police", both reported on remarks made by the public prosecutor Ö.Ş. alleging that the organisation MİT (the national intelligence agency) had concealed the Reyhanlı explosives attack from the judicial authorities. The prosecutor Ö.Ş. was subsequently arrested in the context of a criminal investigation concerning some judges and members of the security forces who were alleged to be militants of the organisation FETÖ, in connection with the affair known as "the MİT lorries".

27. An article was published on 13 February 2015 entitled "The secret in the lorries revealed". The article stated, citing recordings of telephone calls between the leaders of the Turkmen forces in Syria, that the consignment of weapons and ammunition transported from Turkey to Syria in lorries belonging to MİT had not been intended for Turkmen militia but for the jihadist organisation Ansar Al-Islam.

II. PROCEEDINGS ON THE MERITS OF THE ACCUSATIONS AGAINST THE APPLICANT

A. The indictment of 3 April 2017

28. On 3 April 2017 the Istanbul public prosecutor's office filed a bill of indictment with the Istanbul 27th Assize Court against seventeen individuals including the applicant. They were accused mainly of lending assistance to terrorist organisations without being members of them (an

offence under Article 220 § 7 of the Criminal Code ("the CC")). The public prosecutor considered that, by publishing articles that were glaringly at odds with the world view of its readers (some of which had been written by the applicant), the newspaper *Cumhuriyet* had conveyed manipulative and destructive information concerning the State. He maintained that the newspaper, in publishing statements by leaders and prominent figures of terrorist organisations, had become the champion of terrorist organisations such as FETÖ/PDY, the PKK/KCK and the DHKP/C (People's Revolutionary Liberation Party/Front). According to the public prosecutor, the newspaper had not acted within the limits of freedom of expression but had manipulated public opinion and disguised the truth, had acted in accordance with the aims of the terrorist organisations and had thus attempted to create domestic upheaval in order to render the country ungovernable.

29. In support of the charges against the applicant the Istanbul public prosecutor's office referred, among other material, to the following published items (the charges that were not subsequently taken into account by the Constitutional Court are not mentioned here).

(a) The article of 14 March 2015 containing an interview with one of the PKK's leaders, Cemil Bayık. The public prosecutor stressed that the applicant had referred to the terrorists several times as guerrilla fighters. He considered that, in view of its content and presentation, the article had pursued an aim that went beyond informing the public, that it contained violence and coercion and that it had been designed to convey to the public manipulative comments made by the PKK, in order to achieve a form of indoctrination. The public prosecutor inferred from this that the article amounted to propaganda in favour of the PKK.

(b) The articles of 31 March and 1 April 2015 concerning the incident in which a prosecutor had been held hostage in his office by left-wing extremists. In the view of the prosecuting authorities, the articles in question had not criticised the terrorists; instead, owing to their presentation on the front page of the newspaper together with a large photograph taken while the terrorists were holding a gun to the prosecutor's head, and their use of the adjectives "young and determined" to describe one of the terrorists, the articles had conveyed the latter's message to the public and intensified it with the use of images.

30. The public prosecutor's office also cited the applicant's contribution to a seminar on press freedom held from 23 to 26 September 2014 in Heybeliada (see paragraph 20 above), and, among other materials, the five social media posts referred to in paragraphs 21-25 above.

31. As to the classification of these acts, the public prosecutor pointed out that Article 220 § 6 of the CC provided that any person who committed an offence on behalf of an illegal organisation was to be sentenced for belonging to that organisation, even if he or she was not a member of it. In

his view the methods employed by individuals, the timing of their actions and the contacts which they established with the leaders of the illegal organisation all constituted evidence of their wish to act in concert with that organisation. He added that the position with regard to persons who were aware of the organisation's aims and had served it voluntarily should be assessed in the same way, and specified that the fact that the activities actually had a legitimate (legal) basis did not alter that position.

32. According to the public prosecutor, activities which in normal circumstances would be lawful, in view of the public's right to receive information and journalists' right to practise their profession, were subjected in all national and international systems to restrictions based on criteria such as national security, public order and public peace. It was clear that the following acts could not be regarded as lawful: participating, in the context of one's personal journalistic activities, in a campaign to manipulate public opinion conducted by an illegal organisation; attempting to present the leaders and members of illegal organisations as likeable individuals; publishing statements by the leaders of those organisations containing calls to violence and threats; and giving a platform to the activities of the terrorist organisations by accusing the State of links to international terrorism.

B. Decisions of the first and second-instance courts on the merits of the accusations

33. In the proceedings before the Istanbul Assize Court the applicant submitted his defence against the public prosecutor's charges. He argued mainly that he was being put on trial for his work as a journalist, and denied the accusations against him.

34. The applicant then submitted arguments concerning the articles referred to in the detention order and the bill of indictment and taken into consideration by the Constitutional Court.

35. The applicant submitted that his article of 14 March 2015 containing the interview with Cemil Bayık had remained within the bounds of ethical journalism, and that he had reproduced the words of the interviewee without adding or subtracting anything, merely correcting grammatical mistakes. In his view, the reason why that article had been referred to in the indictment was in order to establish a link between himself, the newspaper *Cumhuriyet* and the PKK. What actually troubled the prosecuting authorities was the content of Cemil Bayık's message in that interview; an interview like that would have been regarded as newsworthy anywhere in the world, and by publishing it he had simply been practising his profession as a journalist.

36. As to the interview of 31 March 2015 with the terrorists who had taken the public prosecutor, S.K., hostage and killed him, the applicant maintained that in conducting that interview he had sought to discover the reasons for the militants' action. As he was a journalist with *Cumhuriyet*, he

was not very familiar with the running of the newspaper's website, but was aware that the articles published in the newspaper were also posted on the website. As to the form in which the interview had been presented, on the front page and page 6 of the newspaper, the division of tasks within the newspaper and the different job descriptions meant that it was the editors who decided on the presentation of the articles and news items for publication, after making an overall assessment. The person who had written the article was not involved at that stage, in line with the newspaper's practice. If an attempt was made to establish responsibility on the basis of the way in which the interview had been presented in the newspaper, he was prepared to accept that responsibility.

37. With regard to his social media posts, the applicant argued that these should not be interpreted without taking into consideration their context and the content of the information to which they related.

38. In a judgment of 25 April 2018 the Istanbul Assize Court, taking the view that the offences of which the applicant was accused were proven, found him guilty of assisting the terrorist organisations the PKK, the DHKP/C and FETÖ without being a member of those organisations, under Article 220 § 7 of the CC. It sentenced him to seven years and six months' imprisonment. In giving reasons for its judgment the Assize Court referred to the evidence against the applicant, such as his posts referring to the need to try or punish the State at international level, for instance the posts concerning the "MİT lorries" affair, the interviews he had conducted with senior figures in the PKK/KCK portraying that organisation as being perfectly respectable or acting in democratic fashion, and his wish to see terrorist organisations like the DHKP/C and the PKK/KCK "legalised" and to portray them as innocent organisations.

39. As to the article of 14 March 2015 containing the interview with Cemil Bayık, entitled "Either Apo [goes] to Kandil or we [go] to İmralı", the Istanbul Assize Court noted that the applicant had published it during the period when the newspaper *Cumhuriyet* had allegedly begun assisting terrorist organisations. It observed that in the course of the interview the link between Abdullah Öcalan and the organisation (the PKK) had been mentioned; that the organisation's terrorists had been described as "guerrilla fighters" and thereby glorified; that the PKK's so-called expectations had been listed; that the ceasefire declared by the PKK had been portrayed as a concession to the State; and that the views of one of the terrorist organisation's leaders concerning the President of the Republic had been expounded. In the Assize Court's view, the interview had depicted the terrorist organisation as a peace-seeking entity which carried out actions merely because it was forced to and which had the capacity to crush the State but refrained from doing so.

40. As to the applicant's interview with the activists who had taken a public prosecutor hostage and killed him, the Assize Court considered that

the immediate publication of the interview under the heading "This action is a method we were forced to use", and its presentation together with a photograph on the newspaper's front page, constituted an act seeking to legitimise those violent actions and amounted to assisting a terrorist organisation.

41. The Assize Court further held that the applicant's social media posts had contained statements claiming that the PYD (a pro-Kurdish armed organisation in Syria) was not a terrorist organisation and that it was the State which was a mafia and a murderer.

42. Generally, the court noted that the above-mentioned articles and posts were characterised by their tendency to portray these organisations as legitimate and innocent rather than by any effort to inform the public or pursue the public interest.

43. The Assize Court classified the applicant's articles and posts as assistance to terrorist organisations, for the following reasons. The applicant had been a journalist and reporter with *Cumhuriyet* at a time when the newspaper was publishing material in support of terrorist organisations and when the recently recruited managers had encouraged the practice; the applicant's articles, which were aimed at a wide readership, had contained information and comments in support of the main arguments relied on by the terrorist organisations and their attempted actions against the State; these acts on the part of the applicant, combined with those of the other journalists and of the newspaper's management, had gone beyond mere propaganda in favour of those organisations; in his defence before the Assize Court, the applicant had adopted an accusatory attitude towards the State and the State system, and had persisted in this attitude despite warnings from the court; his defence before the court had been based chiefly on political statements echoing the main arguments of the terrorist organisations; and a complaint had been made to the prosecuting authorities concerning his remarks during the trial. The Assize Court found that there were no mitigating factors in the applicant's case, taking the view that he had committed the offence intentionally as he had chosen to interview individuals whom the terrorist organisations considered to be important, the interviews had been destructive and one-sided rather than shocking from the point of view of journalistic information, and the applicant had displayed no remorse.

44. The applicant and other convicted defendants appealed against the Istanbul Assize Court judgment of 25 April 2018.

45. In a judgment of 18 February 2019 the Istanbul Court of Appeal (Third Criminal Division) dismissed the applicant's appeal after examining the case on the merits. It held as follows:

> "... the impugned judgment did not contain any substantive or procedural irregularities. There were no deficiencies in the evidence taken or the other investigative steps carried out by the first-instance court. The impugned acts were

correctly characterised in accordance with the types of offences provided for by law. The sentences were fixed in accordance with the convictions and the law. Accordingly, the grounds of appeal advanced by the prosecutor's office and by the convicted persons are unfounded. ..."

C. The appeals to the Court of Cassation

46. In his submissions of 16 July 2019 the chief public prosecutor attached to the Court of Cassation sought the quashing of the judgment convicting the applicant of assisting terrorist organisations and requested that he be re-tried for the offence of disseminating propaganda in favour of terrorist organisations and/or the offence of denigrating the organs or institutions of the State. The chief public prosecutor sought the quashing of the judgment convicting the other *Cumhuriyet* journalists and managers on the grounds that there was no basis for their conviction.

47. In a judgment of 18 September 2019 the Court of Cassation quashed the appeal judgment convicting the applicant and his co-accused, basing its decision on the grounds advanced by the chief public prosecutor. In its reasoned judgment delivered on 27 September 2019 pointing out the particular features of the offence of assisting a terrorist organisation, the Court of Cassation emphasised that persons committing that offence, in addition to a general intentional fault, namely intent to carry out acts punishable under criminal law, had to have committed a specific intentional fault consisting in pursuing a particular objective. The court held that, for the offence of assisting a terrorist organisation to be established, the perpetrator had to have deliberately assisted such an organisation while being aware that the latter pursued the aim of committing criminal offences. The court specified that the expression "while being aware" also required direct intent on the part of the perpetrator. Hence, in the court's view, it was also necessary to ascertain whether the person concerned had acted with the intention of helping to achieve the illegal aims of the organisation in question.

48. As to the issue of the establishment of the facts on the basis of the evidence for and against the accused, the Court of Cassation referred to the general criminal-law principle whereby the accused should have the benefit of the doubt. The court pointed out that, for any person to be convicted, the commission of an offence had to be proved beyond doubt. A decision to convict could not be arrived at by interpreting to the detriment of the accused facts or allegations that were doubtful or not wholly clarified.

49. The Court of Cassation therefore concluded that the lower courts had erroneously characterised the offences in issue as "assisting a terrorist organisation".

50. However, the Court of Cassation considered that the applicant, unlike the other accused, should be tried for some of the acts in question under criminal-law provisions other than those concerning the offence of

assisting a terrorist organisation. With regard to the interview of 31 March 2015 with the activists of the DHKP/C who had taken the prosecutor M.S. Kiraz hostage and killed him, the court held that "the fact of contacting members of the terrorist organisation DHKP/C by telephone when they were engaged in a violent terrorist act that caused [public] outrage, and publishing statements and explanations by them which sought to legitimise their methods, including violence, force and threats, and encouraged the use of such methods" should be assessed under section 6(2) of the Prevention of Terrorism Act, which made it an offence to print or publish the written or oral statements of a terrorist organisation. As to the items posted by the applicant on Twitter on 17 February 2016 on the subject of the PYD and on 14 December 2016 on the subject of the "war" with the PKK, the Court of Cassation ordered the lower courts to assess whether those posts had constituted the offence of disseminating propaganda in favour of a terrorist organisation under Article 220 § 8 of the CC. The court also instructed the lower courts to examine whether the item posted by the applicant on 28 November 2015 on the subject of the killing of the lawyer Tahir Elçi was to be regarded as denigrating the institutions and organs of the State, an offence under Article 301 of the CC.

The case was remitted to the Istanbul Assize Court.

51. At the first hearing in the case, on 21 November 2019, the newly composed Istanbul Assize Court invited the applicant, like the other accused, to make a final statement before judgment was given. In a judgment of the same day the court departed from the Court of Cassation judgment of 18 September 2019 and confirmed its own judgment of 18 February 2019 convicting the accused.

52. The case is still pending before the plenary criminal divisions of the Court of Cassation.

III. THE INDIVIDUAL APPLICATION TO THE CONSTITUTIONAL COURT

53. On 30 January 2017 the applicant lodged an individual application with the Constitutional Court. He alleged a breach of his right to liberty and security and his right to freedom of expression and freedom of the press. He also maintained that he had been arrested and detained on grounds other than those provided for by the Turkish Constitution and the Convention.

54. In a decision of 2 May 2019 the Constitutional Court declared the application inadmissible as being manifestly ill-founded.

55. With regard to the applicant's complaint concerning the lawfulness of his initial and continued pre-trial detention, the Constitutional Court, in seeking to ascertain whether there had been a strong suspicion that the applicant had committed the offences with which he was charged, referred to the pre-trial detention order made by the magistrate on 30 December

2016. It noted the magistrate's findings to the effect that the applicant had depicted the security forces' efforts to combat terrorist organisations as terrorism, that he had manipulated the facts in order to present the State as an entity that cooperated with certain terrorist organisations and supplied weapons to them, that he had written articles and posts supporting the actions carried out by the PKK, the DHKP/C and FETÖ/PDY, and that he had thus sought to legitimise those actions, had gone beyond the aim of informing the public and had ensured that the points of view of the terrorist organisations were disseminated widely among the public.

56. As to the articles published on 31 March 2015 on the newspaper's website and on 1 April 2015 in the print edition, concerning the incident in which a public prosecutor had been taken hostage and killed, the Constitutional Court noted that the applicant had interviewed members of the organisation before they killed the prosecutor and while law-enforcement officers were still attempting to dissuade them from continuing with their action, and that he had published the interview on the newspaper's website on the evening of the killing and on the front page and page 6 of the print edition the following day, together with a photograph showing a gun being held to the prosecutor's head. The Constitutional Court held that it had been neither arbitrary nor unfounded for the investigating authorities to consider, taking into account the content of the interview and the manner in which it had been presented, that there was a strong suspicion that the applicant was guilty, given that he had interviewed the perpetrators of the action while they were actually committing it and had relayed their message to the public although it was clear that the organisation to which the perpetrators belonged had carried out the action in order to have its voice heard and to remain in the headlines.

57. The Constitutional Court also noted that the magistrate who had ordered the applicant's detention had taken into consideration the fact that the applicant, in presenting his interview with Cemil Bayık, one of the leaders of the PKK, had referred to the terrorists several times as "guerrilla fighters"; that it was clear from the content and presentation of the interview that the applicant, overstepping the limits of his task of informing the public, had relayed to the public the PKK's rhetoric concerning current events, a rhetoric which contained manipulative messages in support of violence and coercion and was designed to create a particular perception; and that the applicant had thus disseminated propaganda in favour of that organisation. The Constitutional Court also observed that, according to the detention order, the applicant – in his contribution to a seminar held from 23 to 26 September 2014 in Heybeliada and in the items he had posted on social media on 17 February 2016 concerning the organisation PYD, on 11 December 2016 concerning the bomb attacks in Cizre and Istanbul, on 14 December 2016 concerning the "war" with the PKK, and on 20 December 2016 concerning the possibility that the killer of the Russian

ambassador was a member of the organisation Al-Nusra or of FETÖ – had supported the actions of terrorist organisations and had attempted to legitimise those actions. The Constitutional Court held that it had been neither arbitrary nor unfounded for the investigating authorities to consider that there was a strong indication of the applicant's guilt, in view of the language used in the article, statement and posts in question and the impact that they had had on public opinion at the time of their publication.

58. On the basis of those suspicions the Constitutional Court considered that the applicant had posed a flight risk in view of the severity of the statutory penalty for the offences of which he had been accused, that not all the evidence had been gathered at the time of his arrest and that protective measures other than detention would have been insufficient.

59. In the light of its finding that there had been strong suspicions against the applicant and that his pre-trial detention had been a proportionate measure, the Constitutional Court held that there was no reason to reach a different conclusion regarding the applicant's claim that he had been placed in pre-trial detention solely on account of acts coming within the scope of his freedom of expression and freedom of the press. It therefore dismissed this complaint also.

60. The Vice-President of the Constitutional Court wrote a dissenting opinion expressing the view that there had been no reasonable or strong suspicion capable of justifying the applicant's arrest and detention. With regard to the applicant's interview with one of the perpetrators of the hostage-taking and killing of a public prosecutor, published on 31 March and 1 April 2015, he considered that, although interviewing terrorists while their action was in progress undeniably resulted in their message being conveyed to the public, a distinction had to be made between the offence of disseminating propaganda in favour of a terrorist organisation and journalism which disregarded professional ethics in search of a scoop. In the view of the Vice-President, the applicant could have been more sensitive in his presentation of the information in terms of the language, style and imagery used. However, conveying information on terrorist acts to the public inevitably involved informing society about the terrorists' aims. In covering this particular event, virtually all the media outlets concerned had provided the public with information on the terrorists' aims and the reasons behind their action; this was quite natural in the context of journalistic activity. Were it otherwise, any information concerning terrorist actions was liable to be regarded as propaganda in favour of a terrorist organisation. That would prevent the flow of information and the creation of a climate of healthy discussion in a democratic society on the subject of terrorism.

61. As to the applicant's interview with one of the PKK's leaders, Cemil Bayık, the dissenting judge considered that the approach taken by the majority – which had regarded the interview as possible propaganda in favour of a terrorist organisation owing to the presentation and content of

the interview and the use of the term "guerrilla fighters" – was problematic in that such a characterisation would severely restrict free independent journalism on the subject of the terrorist organisations.

62. The dissenting judge accepted that journalists, when reporting on a vital issue of immediate concern to the public and informing the public about terrorist organisations and terrorists, had to be careful not to use the kind of language and style that legitimised terrorism and terrorists. However, the terminology used in an interview was simply a matter of the editorial choices of the journalist or his or her newspaper. Poor choices were not the result of the offence of disseminating propaganda in favour of terrorism but were simply poor journalism. In the dissenting judge's view, the existence of propaganda in favour of terrorist organisations could not be inferred solely from a few words used in a text without taking the whole text into consideration. To do so would have a chilling effect on independent interviewing.

63. The dissenting judge also criticised the approach of the majority, who, in examining the existence of strong suspicions, had taken account of the way in which the articles and posts had been perceived by society at the time of the events, and their impact on people. He argued that it was not possible, on the basis of guesswork and suppositions, to attribute to the articles and posts in question meanings other than those attributed by an objective observer.

64. The dissenting judge observed that the applicant had not, in any of the impugned articles, news items or posts, used language that expressly incited others to the use of violence or to terrorist acts, even though his style had been sharply critical and even at times problematic from the point of view of journalistic ethics. In the judge's view the writings in question, which undoubtedly had news value, clearly came within the scope of public debate and were covered by freedom of expression and freedom of the press. He considered that the investigating authorities, by interpreting the applicant's remarks broadly, had attributed a meaning to them which went beyond their outward meaning.

65. The dissenting judge also took the view that there had been a breach of the applicant's freedom of expression and press freedom on account of the applicant's initial and continued pre-trial detention. In the judge's view, detaining individuals on the basis of suspicions of disseminating propaganda in favour of a terrorist organisation grounded merely on a few sentences within some articles had a chilling effect on freedom of expression and press freedom, rendering them meaningless and undermining the media's role as a public watchdog. In a free democratic society the press was expected not just to deliver journalism that had close links to the authorities and simply published official statements, but also to deliver independent journalism that investigated events and explained the background to them.

RELEVANT DOMESTIC LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT PROVISIONS OF THE CONSTITUTION

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

"Everyone has the right to personal liberty and security.

...

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

...

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

...

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

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

..."

II. RELEVANT PROVISIONS OF THE CRIMINAL CODE

67. The relevant parts of Article 220 of the Criminal Code ("the CC"), which concerns the offence of forming an organisation with the aim of committing a criminal offence, provide as follows:

"...

(6) Anyone who commits an offence on behalf of an [illegal] organisation shall also be sentenced for belonging to that organisation, even if he or she is not a member of it. The sentence to be imposed for membership may be reduced by up to half. This paragraph shall apply only to armed organisations.

(7) Anyone who assists an [illegal] organisation knowingly and intentionally (*bilerek ve isteyerek*), even if he or she does not belong to the hierarchical structure of the organisation, shall be sentenced for membership of that organisation. The sentence

to be imposed for membership may be reduced by up to two-thirds, depending on the nature of the assistance.

(8) Anyone who disseminates propaganda in favour of the organisation [formed with the aim of committing offences] by legitimising or condoning methods such as force, violence or threats shall be liable to a term of imprisonment of one to three years."

68. Article 314 of the CC, which concerns the crime of belonging to an armed organisation, provides as follows:

"1. Anyone who forms or leads an organisation with the aim of committing the offences listed in the fourth and fifth parts of this chapter [crimes against the State and the constitutional order] shall be sentenced to ten to fifteen years' imprisonment.

2. Any member of an organisation referred to in the first paragraph above shall be sentenced to five to ten years' imprisonment.

3. The provisions relating to the offence of forming an organisation with the aim of committing criminal offences shall apply in their entirety to this offence."

69. Article 301 of the CC, as amended by Law no. 5759 of 30 April 2008, reads as follows:

"(1) Any person who publicly denigrates (*aşağılayan*) the Turkish nation, the State of the Republic of Turkey, the Turkish Grand National Assembly, the Government of the Republic of Turkey or the judicial organs of State shall be liable to a term of imprisonment of between six months and two years.

(2) Any person who publicly denigrates the armed forces or the security forces of the State (*Devletin askeri ve emniyet teşkilatı*) shall be punished in accordance with the provisions of the first paragraph.

(3) The expression of critical opinions shall not constitute an offence.

(4) Prosecution of this offence shall be subject to the authorisation of the Minister of Justice."

III. RELEVANT PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE

70. Pre-trial detention is governed by Articles 100 et seq. of the Code of Criminal Procedure ("the CCP"). In accordance with Article 100, a person may be placed in pre-trial detention where there is factual evidence giving rise to strong suspicion that the person has committed an offence and where the detention is justified on one of the grounds laid down in the Article in question, namely: if the suspect has absconded or there is a risk that he or she will do so, and if there is a risk that the suspect will conceal or tamper with evidence or influence witnesses. For certain offences, in particular offences against State security and the constitutional order, the existence of strong suspicion is sufficient to justify pre-trial detention.

71. Article 101 of the CCP provides that pre-trial detention is ordered at the investigation stage by a magistrate at the request of the public prosecutor and at the trial stage by the competent court, whether of its own motion or at

the prosecutor's request. An objection may be lodged with another magistrate or another court against decisions ordering or extending pre-trial detention. Such decisions must include legal and factual reasons.

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

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

> "Compensation for damage ... may be claimed from the State by anyone ...:
>
> (a) who has been arrested or taken into or kept in detention under conditions or in circumstances not complying with the law;
>
> ...
>
> (d) who, even if he or she was detained lawfully during the investigation or trial, has not been brought before a judicial authority within a reasonable time and has not obtained a judgment on the merits within a reasonable time;
>
> ..."

74. Article 142 § 1 of the same Code reads as follows:

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

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

IV. CASE-LAW OF THE CONSTITUTIONAL COURT

76. In its decision of 4 August 2016 (no. 2016/12) concerning the dismissal of two members of the Constitutional Court and its decision of 20 June 2017 (*Aydın Yavuz and Others*, no. 2016/22169) concerning a person's pre-trial detention, the Constitutional Court provided information and assessments on the attempted military coup and its consequences. It carried out a detailed examination, from a constitutional perspective, of the facts leading to the declaration of the state of emergency. As a result of this examination, it found that the attempted military coup of 15 July 2016 had been a clear and serious attack both on the constitutional principles that sovereignty was unconditionally and unreservedly vested in the people, who exercised it through authorised organs, and that no individual or body could exercise any State authority not emanating from the Constitution, and also on the principles of democracy, the rule of law and human rights. According

to the Constitutional Court, the attempted military coup had been a practical illustration of the severity of the threats posed to the democratic constitutional order and human rights. After summarising the attacks carried out during the night of 15 to 16 July 2016, it emphasised that in order to assess the severity of the threat posed by a military coup, it was also necessary to consider the risks that might have arisen had the coup attempt not been thwarted. It found that the fact that the attempted coup had taken place at a time when Turkey had been under violent attack from numerous terrorist organisations had made the country even more vulnerable and considerably increased the severity of the threat to the life and existence of the nation. The Constitutional Court noted that in some cases it might not be possible for a State to eliminate threats to its democratic constitutional order, fundamental rights and national security through ordinary administrative procedures. It might therefore be necessary to impose extraordinary administrative procedures, such as a state of emergency, until such threats were eliminated. Bearing in mind the threats resulting from the attempted military coup of 15 July 2016, the Constitutional Court accepted the power of the Council of Ministers, chaired by the President, to issue legislative decrees on matters necessitating the state of emergency. In that context, it also emphasised that the state of emergency was a temporary legal regime, in which any interference with fundamental rights had to be foreseeable and the aim of which was to restore the normal regime in order to safeguard fundamental rights.

V. COUNCIL OF EUROPE MATERIALS

77. On 15 February 2017 the Commissioner for Human Rights published a memorandum on freedom of expression and media freedom in Turkey. The parts of this memorandum directly related to the present case are found at paragraphs 79-89 under the heading “Detentions on remand causing a chilling effect”.

78. Furthermore, the relevant Council of Europe and international texts on the protection and role of human-rights defenders, including journalists, are set out in the Aliyev v. Azerbaijan judgment (nos. 68762/14 and 71200/14, §§ 88-92, 20 September 2018) and in the Kavala v. Turkey judgment (no. 28749/18, §§ 74-75, 10 December 2019).

VI. NOTICE OF DEROGATION BY TURKEY

79. On 21 July 2016 the Permanent Representative of Turkey to the Council of Europe sent the Secretary General of the Council of Europe the following notice of derogation:

> “I communicate the following notice of the Government of the Republic of Turkey.

On 15 July 2016, a large-scale coup attempt was staged in the Republic of Turkey to overthrow the democratically-elected government and the constitutional order. This despicable attempt was foiled by the Turkish state and people acting in unity and solidarity. The coup attempt and its aftermath together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Republic of Turkey is taking the required measures as prescribed by law, in line with the national legislation and its international obligations. In this context, on 20 July 2016, the Government of the Republic of Turkey declared a State of Emergency for a duration of three months, in accordance with the Constitution (Article 120) and the Law No. 2935 on State of Emergency (Article 3/1b). ...

The decision was published in the Official Gazette and approved by the Turkish Grand National Assembly on 21 July 2016. Thus, the State of Emergency takes effect as from this date. In this process, measures taken may involve derogation from the obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms, permissible in Article 15 of the Convention.

I would therefore underline that this letter constitutes information for the purposes of Article 15 of the Convention. The Government of the Republic of Turkey shall keep you, Secretary General, fully informed of the measures taken to this effect. The Government shall inform you when the measures have ceased to operate.

..."

THE LAW

I. PRELIMINARY OBSERVATIONS CONCERNING THE DEROGATION BY TURKEY

80. In the Government's submission, all the applicant's complaints should be examined with due regard to the derogation of which the Secretary General of the Council of Europe had been notified on 21 July 2016 under Article 15 of the Convention. They submitted that in availing itself of its right to make a derogation from the Convention, Turkey had not breached the provisions of the Convention. In that context they argued that there had been a public emergency threatening the life of the nation on account of the risks caused by the attempted military coup and that the measures taken by the national authorities in response to the emergency had been strictly required by the exigencies of the situation.

81. The applicant contested the Government's argument. In his submission, the application of Article 15 of the Convention could not result in the removal of all the safeguards under Article 5. He submitted that there had been no reasonable suspicion that he had committed an offence.

82. The Court observes that the applicant's pre-trial detention took place during the state of emergency. It also notes that the criminal proceedings instituted against him during that period have extended beyond it.

83. At this stage the Court observes that in its judgment in the case of *Mehmet Hasan Altan v. Turkey* (no. 13237/17, § 93, 20 March 2018) it held that the attempted military coup had disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention. As to whether the measures taken in the present case were strictly required by the exigencies of the situation and consistent with the other obligations under international law, the Court considers it necessary to examine the applicant's complaints on the merits, and will do so below.

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Objection of failure to exhaust domestic remedies on account of the failure to bring a compensation claim

84. Regarding the applicant's complaints concerning his pre-trial detention, the Government stated that a compensation claim had been available to him under Article 141 § 1 (a) and (d) of the CCP. The Government contended that the applicant could and should have brought a compensation claim on the basis of those provisions.

85. The applicant contested the Government's argument. He asserted, in particular, that a compensation claim had not offered any reasonable prospect of success in terms of remedying the unlawfulness of his detention or securing his release.

86. As regards the period during which the applicant was in detention, the Court reiterates that for a remedy in respect of the lawfulness of an ongoing deprivation of liberty to be effective, it must offer a prospect of release (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 40, 6 November 2008, and *Mustafa Avci v. Turkey*, no. 39322/12, § 60, 23 May 2017). It notes that the remedy provided for in Article 141 of the CCP is not capable of terminating an applicant's pre-trial detention.

87. As to the period during which the applicant was released pending trial, the Court notes that he had already submitted his complaints under Article 5 of the Convention in the context of his application to the Constitutional Court. That court examined those complaints on the merits and dismissed them in its judgment of 2 May 2019.

88. The Court considers that, regard being had to the rank and authority of the Constitutional Court in the Turkish judicial system, and in view of the conclusion reached by that court concerning these complaints, a claim for compensation under Article 141 of the CCP had, and continues to have, no prospect of success (see, to similar effect, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 27, Series A no. 332, and *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 58, ECHR 2010). Accordingly, the Court considers that the applicant was not required to exercise this compensatory remedy, even after his release.

89. The objection raised by the Government in this regard must therefore be dismissed.

B. Objections concerning the individual application to the Constitutional Court

90. The Government, relying mainly on the Court's findings in its decisions in *Uzun v. Turkey* ((dec.), no. 10755/13, 30 April 2013) and *Mercan v. Turkey* ((dec.), no. 56511/16, 8 November 2016), alleged that the applicant had failed to use the remedy of an individual application before the Constitutional Court.

91. The applicant contested the Government's argument.

92. The Court reiterates that an applicant's compliance with the requirement to exhaust domestic remedies is normally assessed with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). Nevertheless, the Court accepts that the last stage of a particular remedy may be reached after the application has been lodged but before its admissibility has been determined (see *Karoussiotis v. Portugal*, no. 23205/08, § 57, ECHR 2011 (extracts); *Stanka Mirković and Others v. Montenegro*, nos. 33781/15 and 3 others, § 48, 7 March 2017; and *Azzolina and Others v. Italy*, nos. 28923/09 and 67599/10, § 105, 26 October 2017).

93. The Court observes that on 30 January 2017 the applicant lodged an individual application with the Constitutional Court, which gave its judgments on the merits on 2 May 2019.

94. Accordingly, the Court also dismisses this objection raised by the Government.

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

95. The applicant complained that his initial and continued pre-trial detention had been arbitrary. He alleged, in particular, that the judicial decisions ordering and extending his pre-trial detention had not been based on any concrete evidence grounding a reasonable suspicion that he had committed a criminal offence. In his submission, the facts on which the suspicions against him had been based related solely to acts coming within the scope of his activity as a journalist and, hence, of his freedom of expression.

96. In this regard he alleged a violation of Article 5 §§ 1 and 3 of the Convention, the relevant parts of which provide:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

97. The Government contested that argument.

A. Admissibility

98. The Court notes that these complaints are not manifestly ill-founded and are not inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

99. The applicant maintained that there were no facts or information that could satisfy an objective observer that he had committed the offences of which he was accused. The main facts on which the suspicions against him had been based were the articles and interviews he had produced as part of his activity as a journalist with the newspaper *Cumhuriyet*.

100. The applicant also pointed to the aspects of his initial and continued detention which he considered to be in breach of the provisions of domestic law and hence unlawful. Firstly, he alleged that the suspicions against him had been beset by uncertainties and inaccuracies. Although he had been arrested on suspicion of disseminating propaganda on behalf of three terrorist organisations (the PKK, FETÖ/PDY and the DHKP/C), and also of breaching Article 301 of the Criminal Code, the reasons given in the detention orders had referred only to the offence of propaganda in favour of two terrorist organisations (the PKK and FETÖ/PDY). Once the trial had begun, his continued detention had been based, not on suspicion of his having disseminated propaganda on behalf of terrorist organisations, but on suspicion of his having carried out activities on behalf of three terrorist organisations (the PKK, FETÖ/PDY and the DHKP/C).

101. Secondly, the applicant submitted that the facts on which the suspicions against him were based had been unclear, as he had also been accused of publishing articles in line with the editorial stance of the daily newspaper *Cumhuriyet*, which allegedly had close ties to the organisation FETÖ/PDY. In fact, according to the applicant, not only had *Cumhuriyet* repeatedly condemned FETÖ/PDY as a criminal organisation, the applicant himself had also exposed the illegal acts committed by the members of that organisation, in his book "The Imam's Army". His detention in the context of the criminal proceedings brought against him by judges who were members of FETÖ/PDY, in which he had been accused of assisting the organisation Ergenekon, had been the subject of his previous application to the Court (no. 53413/11). In a judgment of 8 July 2014 the Court had found a violation of Article 5 and Article 10 of the Convention in that case. The applicant pointed to the obvious contradiction between the accusations in the present case and those which had given rise to a violation of the Convention in 2014.

102. The applicant also challenged the reasons given by the judicial authorities for keeping him in pre-trial detention.

(b) The Government

103. The Government, referring to the principles established in the Court's case-law in this sphere (they cited *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no.182, and *İpek and Others v. Turkey*, nos. 17019/02 and 30070/02, 3 February 2009), stated at the outset that the applicant had been arrested and placed in pre-trial detention in the course of a criminal investigation instituted in the context of action to combat terrorist organisations.

104. According to the information in the investigation file, the basis for the investigation concerning the applicant and other suspects in the same proceedings had been the suspicion that the newspaper for which the applicant worked had been acting in accordance with the objectives of terrorist organisations such as FETÖ/PDY, the PKK/KCK and the DHKP/C, with a view to provoking civil war and rendering the country ungovernable before and after 15 July 2016.

105. The Government stressed that the organisation FETÖ/PDY was an atypical terrorist organisation of an entirely new kind. Firstly, the organisation in question had placed its members in all the State organisations and institutions, that is to say, in the judicial apparatus, the law-enforcement agencies and the armed forces, in an apparently lawful manner. Furthermore, it had created a parallel structure by setting up its own organisation in all spheres, including the mass media, the trade unions, the financial sector and education. Secondly, FETÖ/PDY, by insidiously placing its members in sections of the press that were not part of its own organisation, had attempted to steer the material published by them in order

to convey subliminal messages to the public and thus manipulate public opinion for its own aims.

106. In the Government's submission, the ultimate aim of the terrorist organisation the PKK had been established by Abdullah Öcalan and his friends in 1978, when they had founded the organisation. That aim was to establish an independent State of Kurdistan based on Marxist-Leninist principles and covering east and south-east Turkey and parts of Syria, Iran and Iraq. The KCK was a political model for reconstructing Kurdish society through administrative and judicial structures, in accordance with the PKK's ultimate goal. According to the Government, the PKK and its sub-groups had carried out terrorist activities that had infringed the right to life (several thousand people had been killed and wounded, including civilians and members of the security forces, in the period preceding the attempted coup), the right to liberty and security, the right to respect for one's home and the right to property, in several regions of Turkey. In particular, these organisations had stepped up the number of terrorist attacks in a bid to declare the supposed autonomy of certain provinces in south-east Turkey and to bring pressure to bear on the population of that region by preventing free movement (digging trenches, installing barricades and planting bombs at the exit and entry points of the towns and cities), and by using military weapons.

107. The Government further submitted that from the evidence that had been gathered during the criminal investigation, it was objectively possible to conclude that there had been a reasonable suspicion that the applicant had committed the offences of which he was accused. On the strength of the evidence obtained during the investigation, criminal proceedings had been instituted against the applicant and were currently pending before the domestic courts.

2. The third-party interveners

(a) The Commissioner for Human Rights

108. The Commissioner for Human Rights pointed out that excessive recourse to detention was a long-standing problem in Turkey. In that connection he noted that 210 journalists had been placed in pre-trial detention during the state of emergency, not including those who had been arrested and released after being questioned. One of the underlying reasons for the high numbers of journalists being detained was the practice of judges, who often tended to disregard the exceptional nature of detention as a measure of last resort that should only be applied when all other options were deemed insufficient. In the majority of cases where journalists had been placed in pre-trial detention, they had been charged with terrorism-related offences without any evidence corroborating their involvement in terrorist activities. The Commissioner for Human Rights

was struck by the weakness of the accusations and the political nature of the decisions ordering and extending pre-trial detention in such cases.

(b) The Special Rapporteur

109. The Special Rapporteur noted that since the declaration of a state of emergency, a large number of journalists had been placed in pre-trial detention on the basis of vaguely worded charges without sufficient evidence.

(c) The intervening non-governmental organisations

110. The intervening non-governmental organisations stated that since the attempted military coup more than 150 journalists had been placed in pre-trial detention. Emphasising the crucial role played by the media in a democratic society, they criticised the use of measures depriving journalists of their liberty.

3. The Court's assessment

(a) Relevant principles

111. The Court reiterates firstly that Article 5 of the Convention guarantees a right of primary importance in a "democratic society" within the meaning of the Convention, namely the fundamental right to liberty and security (see *Assanidze v. Georgia* [GC], no. 71503/01, § 169, ECHR 2004-II).

112. All persons are entitled to the protection of that right, that is to say, not to be deprived, or to continue to be deprived, of their liberty (see *Weeks v. the United Kingdom*, 2 March 1987, § 40, Series A no. 114), save in accordance with the conditions specified in paragraph 1 of Article 5 of the Convention. The list of exceptions set out in Article 5 § 1 of the Convention is an exhaustive one (see *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV), and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see *Assanidze*, cited above, § 170; *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 99, ECHR 2011; and *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 84, ECHR 2016 (extracts)).

113. Article 5 § 1 (c) of the Convention does not presuppose that the investigating authorities should have obtained sufficient evidence to bring charges at the point of arrest or while the applicants were in custody. The purpose of questioning during detention under Article 5 § 1 (c) is to further the criminal investigation by confirming or dispelling the concrete suspicion grounding the arrest (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 53, Series A no. 145-B). Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a

conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A; *Metin v. Turkey* (dec.), no. 77479/11, § 57, 3 March 2015; and *Yüksel and Others v. Turkey*, nos. 55835/09 and 2 others, § 52, 31 May 2016).

114. However, the "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary detention laid down in Article 5 § 1 (c) of the Convention. For that reason, the fact that a suspicion is held in good faith is insufficient in itself. There are in fact two aspects to the "reasonable suspicion" requirement, which are separate but overlapping: a factual aspect and an aspect concerning the classification as criminal conduct.

115. Firstly, as regards the factual aspect, the notion of "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will depend upon all the circumstances (see, among other authorities, *Fox, Campbell and Hartley v. the United Kingdom,* 30 August 1990, § 32, Series A no. 182, and *Merabishvili v. Georgia* [GC], no. 72508/13, § 184, 28 November 2017), but the Court must be able to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) of the Convention has been secured. It must therefore consider, in assessing the factual aspect, whether the arrest and detention were based on sufficient objective elements to justify a "reasonable suspicion" that the facts at issue had actually occurred and were attributable to the persons under suspicion (see *Fox, Campbell and Hartley*, cited above, §§ 32-34, and *Murray*, cited above, §§ 50-63). Consequently the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.

116. Secondly, the other aspect of the existence of a "reasonable suspicion" within the meaning of Article 5 § 1 (c) of the Convention, namely the classification as criminal conduct, requires that the facts relied on can be reasonably considered as falling under one of the sections describing criminal behaviour in the Criminal Code. Thus, there could clearly not be a "reasonable suspicion" if the acts or facts held against a detained person did not constitute a crime at the time when they occurred (see *Kandjov v. Bulgaria*, no. 68294/01, § 57, 6 November 2008).

117. Further, it must not appear that the alleged offences themselves were related to the exercise of the applicant's rights under the Convention (see, *mutatis mutandis*, *Merabishvili*, cited above, § 187). In that regard the Court emphasises that, since the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, among many other authorities, *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 171, 13 February 2020), a suspicion cannot be

regarded as reasonable if it is based on an approach consisting in "classifying as criminal conduct" the exercise of the rights and freedoms recognised by the Convention. Otherwise, the use of the notion of "reasonable suspicion" to deprive the persons concerned of their physical liberty would risk rendering it impossible for them to exercise their rights and freedoms under the Convention.

118. In that connection the Court reiterates that any deprivation of liberty should be in keeping with the purpose of Article 5 of the Convention, namely to protect the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in that Article extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see, among other authorities, *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162-64, ECHR 2009, and *Creangă v. Romania* [GC], no. 29226/03, § 84, 23 February 2012).

119. The Court also observes that it is at the time of arrest that the suspicions against a person must be "reasonable" and that, in cases of prolonged detention, those suspicions must remain "reasonable" (see, among many other authorities, *Stögmüller v. Austria*, 10 November 1969, p. 40, § 4, Series A no. 9; *McKay v. the United Kingdom* [GC], no. 543/03, § 44, ECHR 2006-X; and *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, § 90, 22 May 2014). Furthermore, the requirement for the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion that the arrested person has committed an offence – applies already at the time of the first decision ordering pre-trial detention, that is to say "promptly" after the arrest (see *Buzadji*, cited above, § 102).

(b) Application of these principles to the present case

120. The Court observes that the applicant was suspected of disseminating propaganda in favour of organisations considered as terrorist organisations or of assisting them, mainly on account of his articles and interviews published in the newspaper for which he worked and through his posts on social media. These are serious criminal offences which are punishable by imprisonment under Turkish law.

121. The Court's task under Article 5 of the Convention is to ascertain whether there were sufficient objective elements to satisfy an objective observer that the applicant could have committed the offences of which he was accused. In view of the seriousness of these offences and the severity of the potential sentence, the facts need to be examined with great care. In that connection it is essential that the facts grounding the suspicion should be justified by verifiable and objective evidence and that they can be

reasonably considered as falling under one of the sections describing criminal behaviour in the Criminal Code.

122. The Court notes in that regard that the dispute between the parties in the present case does not concern the wording of the text or headings of the articles and social media posts referred to in the decisions of the judicial authorities responsible for pre-trial detention. Instead it concerns the plausibility of certain, possibly criminal, acts with which the applicant was charged (the factual aspect), as well as the classification of the alleged acts as criminal conduct (aspect concerning the classification under criminal law).

(i) Factual aspect of the existence of "reasonable suspicion": plausibility of the acts of disseminating propaganda in favour of terrorist organisations or lending assistance to those organisations

123. The Court considers that the strong suspicion that the applicant had disseminated propaganda in favour of FETÖ/PDY or had lent assistance to that organisation raises an issue as to the plausibility of these criminal acts. In that connection it notes the applicant's claim that he had been persecuted in 2004-05 (by unlawful detention of almost one year) by judges who were allegedly members of FETÖ/PDY, on the grounds that he had criticised the actions of the members of that organisation, and his observation that it would be strange to now accuse him of lending assistance to that organisation (see paragraph 101 above).

124. The Court observes that, in charging the applicant with the offence of assisting FETÖ, the authorities responsible for the detention orders cited, in particular, three articles written by the applicant, namely the article of 8 July 2015 entitled "What we're doing is journalism; what you're doing is treason", the article of 9 July 2015 entitled "MİT had information on the Reyhanlı massacre but did not share that information with the police", and the article of 13 February 2015 entitled "The secret in the lorries revealed" (see paragraphs 26 and 27 above). These articles were not referred to expressly by the Constitutional Court in its judgment of 2 May 2019 dismissing the complaint that there had been no strong suspicion of the applicant's guilt. The Constitutional Court referred implicitly to these articles by noting the magistrate's findings to the effect that the applicant had manipulated the facts in order to portray the State as cooperating with certain terrorist organisations and supplying weapons to them; that he had written articles in support of the actions carried out by, among others, FETÖ/PDY; and that he had ensured that the points of view of the terrorist organisations were disseminated widely among the public.

125. In the Court's view, it is not inconceivable that a person may be suspected of assisting an illegal organisation which he or she has previously criticised. Nevertheless, it considers that such suspicions should be grounded on convincing and objectively verifiable evidence. It observes that

the three articles in question contained material which made a significant contribution to the public debate on current affairs in Turkey at the relevant time. The article of 13 February 2015 concerning the possible destination of a consignment of weapons sent by Turkey to Syria contained a record of the telephone calls between certain leaders of the Turkmen forces in Syria to whom the Turkish authorities claimed to have sent the weapons. The other two articles, concerning the bomb attack in Reyhanli, referred to an interview with the public prosecutor investigating the incident, in which he made comments and criticisms regarding the level of cooperation between the intelligence services in that affair.

126. The Court considers that, in the normal course of professional journalism, the rights and duties of an investigative journalist include conveying information to the public that is relevant to debates on matters of public interest, as the applicant did in these two articles. The fact that the alleged members of an illegal organisation, FETÖ/PDY, like other opponents of the government, used this type of information in their criticism of the government, or the fact that the public prosecutor investigating the Reyhanlı incidents was subsequently accused of membership of FETÖ/PDY, do not alter the fact that when they were published the two articles had journalistic information value and contributed to the public debate. Accordingly, those articles did not constitute grounds for charging the applicant with the criminal acts in question (propaganda in favour of that terrorist organisation, or lending assistance to it).

127. The judges' findings to the effect that the applicant may have disseminated propaganda simultaneously on behalf of the PKK and FETÖ/PDY, since the two organisations, with support from external forces, had acted in coordinated fashion during and after the coup attempt, were vague and imprecise in scope and do not compensate for the lack of evidence that the applicant lent assistance to FETÖ/PDY.

128. The Court also notes that the authorities concerned were unable to cite any specific facts or information capable of suggesting that the illegal organisations the PKK, FETÖ/PDY and the DHKP/C had issued requests or instructions to the applicant, an investigative journalist, so that he would publish this particular material with the aim of helping to prepare and carry out a campaign of violence or legitimising such violence.

(ii) Aspect of the classification as criminal conduct of the facts grounding the "reasonable suspicions"

129. The Court must also ascertain whether the facts relied on as grounds for the suspicions against the applicant could reasonably amount to an offence provided for by the CC at the time they occurred. It observes that the published material referred to by the judicial authorities in ordering and extending the applicant's pre-trial detention, as taken into consideration by the Constitutional Court in its judgment of 2 May 2019, can be divided into

four groups: (i) criticism of the political authorities' policies and of certain State institutions (assuming that they amounted to propaganda in favour of a terrorist organisation: the article of 13 February 2015 entitled "The secret in the lorries revealed", see paragraph 27 above, and the article of 8 July 2015 concerning the explosives attack in the town of Reyhanlı, see paragraph 26 above); (ii) interviews conveying the statements of alleged representatives of illegal organisations (the article of 14 March 2015 containing an interview with one of the PKK leaders, Cemil Bayık, on the conditions to be met in order for the PKK to lay down its weapons, see paragraph 17 above); (iii) the applicant's comments and criticisms concerning the measures taken by the administrative and judicial authorities to combat illegal organisations (the contribution to a seminar held from 23 to 26 September 2014, see paragraph 20 above; the post of 28 November 2015 concerning the death of Tahir Elçi, see paragraph 21 above; the post of 17 February 2016 concerning the PYD, see paragraph 22 above; the post of 11 December 2016 concerning the incidents in Cizre and Istanbul, see paragraph 23 above; the post of 14 December 2016 concerning the (so-called) war with the PKK, see paragraph 24 above; and the post of 20 December 2016 concerning the possibility that the killer of the Russian ambassador in Ankara was a member of an organisation, see paragraph 25 above); and (iv) delicate and sensitive information of public interest (the articles published on 31 March and 1 April 2015 containing a telephone interview with one of the individuals who had taken a public prosecutor hostage, see paragraphs 18-19 above).

130. The Court observes that the above-mentioned articles and posts grounding the suspicions against the applicant have some characteristics in common.

131. Firstly, it notes that the articles and posts constituted contributions by the applicant, an investigative journalist with *Cumhuriyet*, to various public debates on matters of general interest. They contained the applicant's assessment of current political developments, his analysis and criticism of various actions taken by government bodies, and his point of view on the legality and compatibility with the rule of law of the administrative and judicial measures taken against the alleged members or sympathisers of the illegal organisations. The topics addressed in these posts and articles – the necessity and proportionality of the measures taken by the government against the prohibited organisations, the appropriateness or otherwise of the government's domestic and external security policy, including in relation to illegal separatist organisations, and the views expressed by the alleged members of the illegal organisations challenging the accusations made against them – had already been the subject of wide-ranging public debate in Turkey and beyond, involving political parties, the press, non-governmental organisations, groups representing civil society and public international organisations.

132. Secondly, the Court notes that those articles and posts did not contain any incitement to commit terrorist offences, did not condone the use of violence and did not encourage insurrection against the legitimate authorities. While some of the published material may have reported points of view voiced by members of prohibited organisations, it remained within the bounds of freedom of expression, which requires that the public has the right to be informed of the different ways of viewing a situation of conflict or tension, including the point of view of illegal organisations (see *Nedim Şener v. Turkey*, no. 38270/11, § 115, 8 July 2014; *Şık v. Turkey*, no. 53413/11, § 104, 8 July 2014; and *Gözel and Özer v. Turkey*, nos. 43453/04 and 31098/05, § 56, 6 July 2010).

133. As regards the interview conducted by the applicant with one of the persons who had taken the prosecutor hostage, the Court considers it undeniable that the interview, carried out in the midst of a terrorist operation with one of the perpetrators, had news or information value. Taken overall, the interview, which amounted to the broadcasting of statements made by a third party, could not objectively have appeared to have as its purpose the propagation of the ideas of left-wing extremists, but on the contrary sought to expose to the public the violent attitudes of these young militants. Indeed, even if there is no doubt that the remarks made by one of the DHKP/C militants constituted an attempt to justify the act of terrorism in question, the Court observes that through his antagonistic questions suggesting that the militants' action was a counterproductive and harmful act in the pursuit of justice for B.E., a demonstrator who had allegedly died during a police operation, the applicant did distance himself from the actions of the DHKP/C militants, in no way presented them as legitimate and complied with his duties and responsibilities as an investigative journalist (see, to similar effect, *Jersild v. Denmark*, 23 September 1994, §§ 33-35, Series A no. 298).

134. As to the interview with Cemil Bayık, one of the PKK's leaders, the Court notes that the questions asked by the applicant sought to establish why the talks between the authorities and the PKK, aimed at ending that organisation's violent activities and persuading it to lay down its weapons, had failed, and to explore possible means of persuading the PKK to resume disarming. The questions asked by the applicant were dissociated from the remarks made by Cemil Bayık and did not contain any support for the reasons cited by the latter to justify the PKK's armed actions. The use of the term "guerrilla fighters", one of the definitions of which refers to fighters with an illegal organisation, did not in any way mean that the applicant approved of armed terrorist action.

135. Thirdly, the points of view expressed by the applicant himself in the articles and posts in question – considered, of course, separately from the remarks made by the militants of the illegal organisations who were interviewed – were broadly ones of opposition to the policies of the

government of the day and corresponded largely to those voiced by the opposition political parties and by groups or individuals whose political views were at variance with those of the political authorities.

136. Hence, detailed examination of the applicant's alleged acts, which at first glance were indistinguishable from the legitimate activities of an investigative journalist or a political opponent, shows that those acts fell within the exercise of his freedom of expression and freedom of the press, as guaranteed by domestic law and by the Convention. There is nothing to indicate that they were part of an overall plan pursuing an aim in breach of the legitimate restrictions imposed on those freedoms. The Court therefore considers that the acts in question enjoyed a presumption of conformity with domestic law and with the Convention.

(iii) Conclusion regarding Article 5 § 1 of the Convention

137. In the light of these observations, the Court considers that the applicant could not be reasonably suspected, at the time of his placement in detention, of having committed the offences of disseminating propaganda in favour of terrorist organisations or assisting those organisations. In other words, the facts of the case do not support the conclusion that a reasonable suspicion existed against the applicant. Accordingly, the suspicion against him did not reach the required minimum level of reasonableness. Although imposed under judicial supervision, the contested measures were thus based on a mere suspicion.

138. Moreover, it has likewise not been demonstrated that the evidence added to the case file after the applicant's arrest, in particular the evidence in the bill of indictment and the evidence produced while he was in detention, amounted to facts or information capable of giving rise to other suspicions justifying his continued detention. The fact that the first-instance and appeal courts accepted the facts relied on by the magistrate and the prosecution as evidence of the applicant's guilt does nothing to alter this finding.

139. In particular, the Court notes that the written material for which the applicant was accused and placed in detention came within the scope of public debate on facts and events that were already known, that it amounted to the exercise of Convention freedoms, and that it did not support or advocate the use of violence in the political sphere or indicate any wish on the applicant's part to contribute to the illegal objectives of terrorist organisations, namely to use violence and terror for political ends.

140. As regards Article 15 of the Convention and Turkey's derogation, the Court notes that the Turkish Council of Ministers, chaired by the President of the Republic and acting in accordance with Article 121 of the Constitution, passed several legislative decrees during the state of emergency placing significant restrictions on the procedural safeguards laid down in domestic law for anyone held in police custody or pre-trial

detention. Nonetheless, in the present case, it was under Article 100 of the CCP that the applicant was placed in pre-trial detention on charges relating to the offence set out in Article 220 of the Criminal Code. It should be noted in particular that Article 100 of the CCP, which requires the presence of factual evidence giving rise to strong suspicion that the person has committed an offence, was not amended during the state of emergency. Instead, the measures complained of in the present case were taken on the basis of legislation which was in force prior to and after the declaration of the state of emergency. Consequently, the measures complained of in the present case cannot be said to have complied with the conditions laid down by Article 15 of the Convention, since, ultimately, no derogating measure was applicable to the situation. To conclude otherwise would negate the minimum requirements of Article 5 § 1 (c) of the Convention.

141. The Court therefore concludes that there has been a violation of Article 5 § 1 of the Convention in the present case on account of the lack of reasonable suspicion that the applicant had committed a criminal offence.

142. Having regard to that finding, the Court considers it unnecessary to examine separately whether the reasons given by the domestic courts for the applicant's continued detention were based on relevant and sufficient grounds as required by Article 5 §§ 1 (c) and 3 of the Convention (see, to similar effect, *Şahin Alpay v. Turkey*, no. 16538/17, § 122, 20 March 2018).

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

143. The applicant alleged a violation of Article 5 § 4 of the Convention on the grounds that the Constitutional Court had not complied with the requirement of "speediness" in the context of the application he had brought before it to challenge the lawfulness of his pre-trial detention.

Article 5 § 4 of the Convention provides:

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

144. The Government contested that argument.

A. The parties' submissions

1. The Government

145. First of all the Government submitted that when the applicant had been released pending trial he had ceased to have victim status for the purposes of Article 5 § 4 of the Convention. Accordingly, his application to the Court should be rejected in this regard as being incompatible *ratione personae* with the provisions of the Convention.

146. Next, referring to statistics on the Constitutional Court's caseload, the Government stated that in 2012 1,342 applications had been lodged with that court; in 2013 that number had risen to 9,897, and in 2014 and 2015 respectively there had been 20,578 and 20,376 applications. Since the attempted military coup, there had been a dramatic increase in the number of applications to the Constitutional Court: a total of 103,496 applications had been lodged with it between 15 July 2016 and 9 October 2017. Bearing in mind this exceptional caseload for the Constitutional Court and the notice of derogation of 21 July 2016, the Government submitted that it could not be concluded that that court had failed to comply with the requirement of "speediness".

2. The applicant

147. The applicant reiterated his assertion that the Constitutional Court had not ruled "speedily" within the meaning of Article 5 § 4 of the Convention. He alleged that, owing to the considerable delay in reviewing the lawfulness of the pre-trial detention measures based on suspicions which he regarded as clearly improbable, an application to that court could no longer be considered effective in respect of these kinds of violations of the right to liberty.

B. The third-party interveners

1. The Commissioner for Human Rights

148. The Commissioner for Human Rights noted that the Constitutional Court's case-law concerning Article 5 of the Convention conformed to the principles established by the Court in its own case-law. While acknowledging the scale of the Constitutional Court's caseload since the attempted coup, he emphasised that it was essential for the proper functioning of the judicial system that that court should give its decisions speedily.

2. The Special Rapporteur

149. The Special Rapporteur likewise noted that since the declaration of the state of emergency the Constitutional Court had been faced with an unprecedented caseload.

C. The Court's assessment

1. Admissibility

150. The Court reiterates that it has found Article 5 § 4 of the Convention to be applicable to proceedings before domestic constitutional

courts (see, in particular, *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 254, 4 December 2018; see also *Smatana v. the Czech Republic*, no. 18642/04, §§ 119-24, 27 September 2007, and *Žúbor v. Slovakia*, no. 7711/06, §§ 71-77, 6 December 2011). Accordingly, having regard to the jurisdiction of the Turkish Constitutional Court, the Court has previously concluded that Article 5 § 4 is also applicable to proceedings before that court (see *Koçintar v. Turkey* (dec.), no. 77429/12, §§ 30-46, 1 July 2014).

151. The Court further reiterates that the primary purpose of Article 5 § 4 of the Convention is to secure to a person deprived of his or her liberty a speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or her release. The Court considers that the requirement of speediness of the review is therefore relevant while that person's detention lasts. While the guarantee of speediness is no longer relevant for the purpose of Article 5 § 4 after the person's release, the guarantee of efficiency of the review should continue to apply even thereafter, since a former detainee may well have a legitimate interest in the determination of his or her detention even after being released (see *Žúbor*, cited above, § 83).

152. In the present case the Court observes that the applicant lodged his individual application with the Constitutional Court on 30 January 2017 and that he was released pending trial on 9 March 2018. His release pending trial put an end to the alleged breach of Article 5 § 4 of the Convention resulting from the Constitutional Court's failure to speedily examine his complaint concerning the unlawfulness of his detention (see *Žúbor*, cited above, § 85, and the references cited therein). The Court is therefore called upon to examine in the present case the applicant's complaint of failure to comply with the speediness requirement under Article 5 § 4 in the Constitutional Court proceedings between the date on which the applicant's constitutional application was lodged and the date of his release pending trial. Accordingly, it rejects the Government's argument that this complaint is incompatible *ratione personae* with the provisions of the Convention.

153. The Court further finds that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

154. The Court reiterates the principles arising from its case-law concerning the requirement of "speediness" within the meaning of Article 5 § 4 of the Convention, as summarised, in particular, in its judgments in *Mehmet Hasan Altan* (cited above, §§ 161-63) and *Şahin Alpay* (cited above, §§ 133-35) and in its decision in the case of *Akgün* v. Turkey ((dec.), no. 19699/18, §§ 35-44, 2 April 2019). In those cases it noted that in the

Turkish legal system, anyone in pre-trial detention could apply for release at any stage of the proceedings and could lodge an objection if the application was rejected. It also observed that the question of detainees' continued detention was automatically reviewed at regular intervals of no more than thirty days. Accordingly, it held that it could tolerate longer periods of review by the Constitutional Court. However, in the case of *Mehmet Hasan Altan*, cited above, the period before the Constitutional Court to be taken into consideration was fourteen months and three days, and in the case of *Şahin Alpay*, cited above, it was sixteen months and three days; and in the case of *Akgün*, cited above, it was twelve months and sixteen days. Bearing in mind the complexity of the applications and the Constitutional Court's caseload following the declaration of a state of emergency, the Court considered that this was an exceptional situation. Consequently, although periods of twelve months and sixteen days, fourteen months and three days and sixteen months and three days before the Constitutional Court could not be described as "speedy" in an ordinary context, in the specific circumstances of those cases the Court held that there had been no violation of Article 5 § 4 of the Convention.

155. In the present case the Court notes that the period to be taken into consideration lasted for thirteen months and seven days and that it fell within the period of the state of emergency, which was not lifted until 18 July 2018. It considers that the fact that the Constitutional Court did not deliver its judgment dismissing the applicant's application until 2 May 2019, some two years and three months later, is not relevant in calculating the period of time to be taken into consideration from the standpoint of Article 5 § 4 of the Convention, since the applicant had already been released by that date. The Court therefore considers that its findings in the cases of *Akgün, Mehmet Hasan Altan* and *Şahin Alpay*, cited above, are also applicable in the context of the present application. It emphasises in that connection that the applicant's application to the Constitutional Court was complex, because this was one of a number of cases raising complicated issues concerning the pre-trial detention of a journalist on account of published material relating to organisations considered to be terrorist organisations, and because the applicant, like other journalists writing for *Cumhuriyet*, had pleaded his case extensively before the Constitutional Court, arguing not only that his detention had not been based on any valid grounds, but also that the accusations against him were unconstitutional. Moreover, the Court considers that account must also be taken of the exceptional caseload of the Constitutional Court following the declaration of the state of emergency in July 2016 during the state of emergency in force from July 2016 to July 2018, and of the measures taken by the national authorities to tackle the problem of that court's backlog (see *Mehmet Hasan Altan*, cited above, § 165, *Şahin Alpay*, cited above, § 137 and *Akgün*, cited above, § 41). In that connection the Court stresses the

distinction to be made between the present case and the case of *Kavala v. Turkey* in which the applicant had remained in pre-trial detention for the eleven months elapsing between the lifting of the state of emergency on 18 July 2018 and the delivery of the Constitutional Court's judgment on 28 June 2019 (see *Kavala v. Turkey*, no. 28749/18, § 195, 10 December 2019).

156. In the light of the foregoing considerations, although the review by the Constitutional Court in the present case could not be described as "speedy" in an ordinary context, in the specific circumstances of the present case the Court considers that there has been no violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

157. The applicant alleged mainly a breach of his right to freedom of expression on account of his initial and continued pre-trial detention. In particular, he complained of the fact that his journalistic output, conveying information and ideas to the public as part of a debate on matters of public interest and sometimes criticising certain government policies, without ever supporting or condoning the use of violence, had been considered as evidence in support of charges of assisting terrorist organisations or disseminating propaganda in favour of those organisations. He relied in that connection on Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

158. The Government contested the applicant's argument.

A. The parties' submissions

1. The Government

159. The Government submitted that the applicant lacked victim status since the criminal courts had not convicted him in a final judgment. For the same reason, the complaint under Article 10 of the Convention should be declared inadmissible for failure to exhaust domestic remedies.

160. As to the lawfulness of the interference, the Government submitted that the criminal offence in question had been clearly proscribed by the articles of the CC that made it an offence to aid and assist an organisation deemed to be criminal in nature or to disseminate propaganda in favour of such an organisation.

161. In the Government's submission, the interference complained of had pursued several aims for the purposes of the second paragraph of Article 10 of the Convention, namely the protection of national security and public safety and the prevention of crime and disorder.

162. As to whether the interference had been necessary in a democratic society, the Government submitted that the applicant had been detained and tried not for his journalistic activities but in order to answer charges of knowingly assisting organisations deemed to be criminal in nature, mainly the DHKP, the PKK and FETÖ/PDY. The applicant had been suspected of assisting those terrorist organisations by attempting to undermine public support for the proceedings instituted against persons suspected of being members thereof and to exert pressure on the members of the security forces and on judges to ensure that the proceedings did not result in the perpetrators' conviction.

2. The applicant

163. The applicant pointed out that he had been detained for a lengthy period of time. His placement in detention for allegedly assisting terrorist criminal organisations, on the basis of his work as a journalist, constituted in itself a breach of his freedom of expression. That deprivation of liberty had prevented him from carrying on his occupation as a journalist and had resulted, in his case just as in the case of other journalists, in self-censorship in the exercise of his professional activity, particularly when it came to expressing his opinions in public debate concerning the conduct of the political or judicial authorities, including with regard to the proceedings taken against persons suspected of belonging to organisations deemed to be criminal.

164. The applicant added that the judicial authorities had not adduced any evidence that he had in any way actively contributed to the violent actions allegedly planned and carried out by the illegal organisations in question. Moreover, it was not necessary in a democratic society to protect the judicial authorities against criticisms made in good faith or to imprison journalists who voiced such criticism in monitoring and commenting upon the measures taken against persons suspected of being members of those organisations.

165. The applicant also complained of the fact that the Government had opted for criminal-law sanctions, in breach of the right to freedom of expression, instead of responding to political criticism through the major communication channels available to them in order to inform the public.

B. The third-party interveners

1. The Commissioner for Human Rights

166. Relying mainly on the findings made during his visits to Turkey in April and September 2016, the Commissioner for Human Rights observed firstly that he had repeatedly highlighted the widespread violations of freedom of expression and media freedom in Turkey. He expressed the view that Turkish prosecutors and courts interpreted anti-terrorism legislation in a very broad manner. Many journalists expressing dissent or criticism against the government authorities had been placed in pre-trial detention purely on account of their journalistic activities, without any concrete evidence. The Commissioner for Human Rights thus rejected the Government's assertion that the criminal proceedings instituted against journalists were unconnected to their professional activities, finding that it lacked credibility in that often the concrete evidence included in investigation files concerning journalists related to their journalistic activities. He submitted that neither the attempted coup nor the dangers represented by terrorist organisations could justify measures entailing severe interference with media freedom, such as the measures he had criticised.

167. The Commissioner for Human Rights observed that the illegal organisations FETÖ/PDY and the PKK/KCK, which the applicant had been accused of assisting, were on opposite ends of the political spectrum.

2. The Special Rapporteur

168. The Special Rapporteur submitted that anti-terrorism legislation had long been used in Turkey against journalists expressing critical opinions about government policies. Nevertheless, since the declaration of the state of emergency, the right to freedom of expression had been weakened even further. Since 15 July 2016, 231 journalists had been arrested and more than 150 remained in prison, and the evidence produced against them was very vague or non-existent.

169. The Special Rapporteur stated that any interference would contravene Article 10 of the Convention unless it was "prescribed by law". It was not sufficient for a measure to have a basis in domestic law; regard should also be had to the quality of the law. Accordingly, the persons concerned had to be able to foresee the consequences of the law in their case, and domestic law had to provide certain safeguards against arbitrary interference with freedom of expression.

3. The intervening non-governmental organisations

170. The intervening non-governmental organisations submitted that restrictions on media freedom had become significantly more pronounced and prevalent since the attempted military coup. Stressing the important role

played by the media in a democratic society, they stated that journalists were often detained for dealing with matters of public interest. They complained on that account of arbitrary recourse to measures involving the detention of journalists, which were also designed to ensure self-censorship.

C. The Court's assessment

1. Admissibility

171. The Court considers that the Government's objections set out in paragraph 159 above, and contested by the applicant, raise issues that are closely linked to the examination of whether there has been an interference with the applicant's rights and freedoms under Article 10 of the Convention. It therefore decides to join them to the merits.

172. The Court further notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

(a) Fundamental principles

173. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 38, Series A no. 313; *Castells v. Spain*, 23 April 1992, § 42, Series A no. 236; *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; and *Jersild*, cited above, § 37).

174. Specifically, freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society (see *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103, and *Castells*, cited above, § 43).

175. Although the press must not overstep certain bounds, in particular in respect of the prevention of disorder and the protection of the reputation of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijsels v. Belgium*, 24 February 1997,

§ 37, *Reports of Judgments and Decisions* 1997-I; The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 65, Series A no. 30; and Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216). Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204). Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick*, cited above, § 38; *Thoma v. Luxembourg*, no. 38432/97, §§ 45-46, ECHR 2001-III; and *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V).

176. Furthermore, there is little scope under Article 10 of the Convention for restrictions on political speech or on debate concerning questions of public interest (see *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 60, 8 July 1999, and *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V). Moreover, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media (see *Castells*, cited above, § 46).

177. Freedom of political debate, which is at the very core of the concept of a democratic society, also includes the free expression by prohibited organisations of their views, provided that these do not contain public incitement to commit terrorist offences, or condone the use of violence. The public has the right to be informed of the different ways of viewing a situation of conflict or tension; in that regard the authorities must, whatever their reservations, allow all parties to express their point of view. In order to assess whether the publication of material emanating from prohibited organisations entails a risk of incitement to violence, consideration must be given, first and foremost, to the content of the material in question and the background against which it is published, for the purposes of the Court's case-law (see, to similar effect, *Gözel and Özer*, cited above, § 56).

178. In this connection it is apparent from the Court's case-law that where the views expressed do not comprise incitement to violence – in other words unless they advocate recourse to violent actions or bloody revenge, justify the commission of terrorist offences in pursuit of their supporters' goals or can be interpreted as likely to encourage violence by expressing deep-seated and irrational hatred towards identified persons – Contracting States must not restrict the right of the general public to be informed of them, even on the basis of the aims set out in Article 10 § 2, that is to say the protection of territorial integrity and national security and the prevention of disorder or crime (see *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 60, 8 July 1999; *Gözel and* Özer, cited above, § 56; *Nedim Şener*, cited above, § 116; and *Şık*, cited above, § 105).

(b) Whether there was interference

179. The Court has previously found that certain circumstances which have a chilling effect on freedom of expression do in fact confer on those concerned – persons who have not been finally convicted – the status of victim of interference in the exercise of their right to that freedom (see, among other authorities, *Dilipak v. Turkey*, no. 29680/05, §§ 44-47, 15 September 2015). It has made the same finding in relation to the detention of investigative journalists for almost a year under criminal proceedings brought for very serious crimes (see *Nedim Şener*, cited above, §§ 94-96, and *Şık*, cited above, §§ 83-85).

180. The Court observes in the present case that criminal proceedings were brought against the applicant for acts characterised as propaganda in favour of terrorist organisations, on the basis of facts which consisted in his presentation and assessment of current political developments in his capacity as an investigative journalist with the daily newspaper *Cumhuriyet*. This characterisation of the facts also featured in the bill of indictment filed when the applicant was placed in pre-trial detention, in which the prosecuting authorities accused him of aiding and assisting terrorist organisations, an offence carrying a heavy penalty under the Criminal Code.

181. The Court also notes that the applicant was kept in pre-trial detention for approximately thirteen months in the context of these criminal proceedings. It observes that the judicial authorities which ordered and extended the applicant's detention considered that there was serious and credible evidence that he was guilty of terrorism-related acts.

182. The Court considers that the applicant's pre-trial detention in the context of the criminal proceedings against him, for offences carrying a heavy penalty and directly linked to his work as a journalist, amounted to an actual and effective constraint and thus constituted "interference" with the exercise by the applicant of his right to freedom of expression guaranteed by Article 10 of the Convention (see *Nedim Şener*, cited above, § 96, and *Şık*,

cited above, § 85). On the basis of this finding, the Court dismisses the Government's objection as regards the applicant's lack of victim status.

183. For the same reasons, the Court likewise dismisses the Government's objection of failure to exhaust domestic remedies in respect of the complaints under Article 10 of the Convention (see, *mutatis mutandis*, *Yılmaz and Kılıç v. Turkey*, no. 68514/01, §§ 37-44, 17 July 2008).

(c) Whether the interference was justified

184. Such interference will breach Article 10 of the Convention unless it satisfies the requirements of the second paragraph of that Article. It therefore remains to be determined whether the interference was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 and was "necessary in a democratic society" in order to achieve them.

185. The Court reiterates that the expression "prescribed by law", within the meaning of Article 10 § 2 of the Convention, requires firstly that the interference should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences, and that it should be compatible with the rule of law. A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see, among many other authorities, *Müller and Others v. Switzerland*, 24 May 1988, § 29, Series A no. 133; *Ezelin v. France*, 26 April 1991, § 45, Series A no. 202; and *Margareta and Roger Andersson v. Sweden*, 25 February 1992, § 75, Series A no. 226-A).

186. In the present case the applicant's arrest and detention amounted to interference with his rights under Article 10 of the Convention (see paragraph 182 above). The Court has already found that the applicant's detention was not based on reasonable suspicion that he had committed an offence for the purposes of Article 5 § 1 (c) of the Convention, and that there has therefore been a violation of his right to liberty and security under Article 5 § 1 (see paragraph 141 above). It also notes that according to Article 100 of the Turkish Code of Criminal Procedure, a person may be placed in pre-trial detention only where there is factual evidence giving rise to strong suspicion that he or she has committed an offence, and considers in this connection that the absence of reasonable suspicion should, *a fortiori*, have implied an absence of strong suspicion when the national authorities were called upon to assess the lawfulness of the applicant's detention. The Court further reiterates that sub-paragraphs (a) to (f) of Article 5 § 1 of the Convention contain an exhaustive list of permissible

grounds on which persons may be deprived of their liberty and that no deprivation of liberty will be lawful unless it falls within one of those grounds (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 88, 15 December 2016).

187. The Court further observes that the requirements of lawfulness under Articles 5 and 10 of the Convention are aimed in both cases at protecting the individual from arbitrariness (see paragraphs 112, 114 and 118 above as regards Article 5, and paragraph 185 above as regards Article 10). It follows that a detention measure that is not lawful, as long as it constitutes interference with one of the freedoms guaranteed by the Convention, cannot be regarded in principle as a restriction of that freedom prescribed by national law.

188. Accordingly, the interference with the applicant's rights and freedoms under Article 10 § 1 of the Convention cannot be justified under Article 10 § 2 since it was not prescribed by law (see *Steel and Others v. the United Kingdom*, 23 September 1998, §§ 94 and 110, *Reports* 1998-VII, and, *mutatis mutandis*, *Huseynli and Others v. Azerbaijan*, nos. 67360/11 and 2 others, §§ 98-101, 11 February 2016). The Court is therefore not required to examine whether the interference in question had a legitimate aim and was necessary in a democratic society.

189. Accordingly, there has been a violation of Article 10 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

190. Lastly, the applicant alleged that his detention had been designed to punish him for his criticisms of the government or for the information he had conveyed to the general public which had displeased the political authorities. He contended that the purpose of his initial and continued detention had been to subject him to judicial harassment on account of his journalistic activities. He relied in that regard on Article 18 of the Convention taken together with Articles 5 and 10.

191. Article 18 of the Convention provides:

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

A. Admissibility

192. The Government submitted that Article 18 of the Convention did not have an autonomous role and could only be applied in conjunction with other provisions of the Convention. In their view, the complaints under Article 18 of the Convention should be declared inadmissible for the same

reasons that they had put forward concerning the applicant's other complaints.

193. The applicant contested that argument.

194. The Court observes that it has found a violation of Article 5 § 1 of the Convention on account of the applicant's initial and continued detention in the absence of reasonable suspicion that he had committed the offences of which he was accused (see paragraph 139 above), and also, on the basis of the same facts, a violation of Article 10 on account of the unjustified interference with the applicant's freedom of expression. Taking the view that the complaint under Article 18 of the Convention is closely linked to the complaints under those provisions, that it is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds, the Court declares it admissible.

B. Merits

1. The parties' submissions

(a) The applicant

195. In the applicant's submission, a number of features of the case demonstrated that the undeclared aim of his placement in pre-trial detention for serious offences had in fact been to punish and harass him for his critical commentaries on the actions of the government and its agents, and for the content of the remarks made by the persons he had interviewed, despite the fact that he had in no way subscribed to the ideas expressed by them. He submitted that it was very common practice in Turkey to use pre-trial detention against journalists who criticised government policies. The poor situation with regard to press freedom in the country had been commented on in reports and statements by international observers including the member States and various bodies of the Council of Europe and the European Union. The Commissioner for Human Rights had also criticised the applicant's placement in detention in his memorandum of 15 February 2017.

196. The applicant alleged in particular that one of the undeclared aims of his pre-trial detention had been to punish him, and the newspaper *Cumhuriyet* for which he worked, for having revealed facts which the government had sought to conceal in a bid to prevent the public from receiving information that did not match the official version presented by the political authorities. The facts referred to in the orders for his detention, and that of his fellow journalists from *Cumhuriyet*, as the basis for the suspicions had provoked an immediate and vehement response from the members of the government. For instance, when *Cumhuriyet* had brought to light the affair concerning the lorries belonging to the intelligence services alleged to have transported weapons to armed Islamist groups in Syria (a

process to which he had contributed through an article containing an interview with the public prosecutor O.G.), the President of the Republic had accused the newspaper of espionage and had stated: "Whoever wrote that article will pay dearly, I will not let the matter rest there". He added that *Cumhuriyet's* former publication director, C.D., and the head of the newspaper's Ankara office, E.G., had been arrested for espionage but had been released after a Constitutional Court judgment had found their detention to be unlawful in the absence of strong suspicions of guilt. Following that judgment, the President of the Republic had stated as follows: "I will not comment on the Constitutional Court's judgment, but I am not obliged to accept it. I will not abide by this judgment, I will not comply with it".

197. The applicant submitted that another undeclared reason for his placement in detention was that the judicial authorities regretted the release pending trial of the former publication director, C.D., who had moved abroad after being released. Following an assassination attempt C.D. had left the country, stating that his life was in danger and that he would remain abroad until the state of emergency had been lifted. In the orders concerning the pre-trial detention of the journalists who had been accused, the judges had stated that "the content of earlier investigation files show[ed] that the suspects [had] fled, by lawful or unlawful means, as soon as an opportunity [had arisen]".

198. Furthermore, the public prosecutor in charge of the investigation concerning the journalists and managers of *Cumhuriyet*, including the applicant, had, from the beginning of the investigation until the filing of the bill of indictment (signed by a different prosecutor), himself faced charges and was being tried for membership of one of the illegal organisations (in this instance, FETÖ) which the applicant was accused of assisting. There had been no prospect that this prosecutor, who himself feared being convicted of belonging to that illegal organisation, would conduct the judicial investigation in an objective and fair manner.

(b) The Government

199. The Government contested the applicant's argument. They submitted that the system for the protection of fundamental rights and freedoms under the Convention rested on the assumption that the authorities of the High Contracting Parties acted in good faith. It was for the applicant to demonstrate convincingly that the authorities' real aim had differed from the one proclaimed. A mere suspicion was not sufficient to prove that Article 18 had been breached.

200. The Government argued that the criminal investigation in question had been conducted by independent judicial authorities. The applicant had been placed in pre-trial detention on the basis of the evidence that had been gathered and placed in the case file. Contrary to the applicant's assertion,

that evidence was in no way linked to the fact that he had criticised the government's policies or that the newspaper for which he worked had adopted an editorial line opposed to those policies. In accordance with the rule of law, no political party or State body, including the government, could intervene or issue instructions when it came to instituting investigations or ordering pre-trial detention, which were matters for the judicial authorities alone.

201. In the Government's submission, the applicant had not furnished any evidence to show that his pre-trial detention had been imposed with a hidden intention. Furthermore, the criminal proceedings against the applicant were still pending and the allegations made in that regard would be verified at the end of those proceedings.

2. The third-party interveners

(a) The Commissioner for Human Rights

202. In the view of the Commissioner for Human Rights, it was difficult to see how the use of pre-trial detention against journalists in Turkey could be linked to one of the legitimate aims provided for in the Convention in that regard. Some of the criminal-law provisions concerning State security and terrorism were open to arbitrary application owing to their vague wording and the overly broad interpretation of the concepts of terrorist propaganda and support for a terrorist organisation, with those concepts encompassing statements and articles that clearly did not incite violence. In the aftermath of the attempted coup many journalists had faced unsubstantiated terrorism-related charges under such provisions, in connection with the legitimate exercise of their right to freedom of expression. The detention and prosecution of journalists under such grave charges resulted in a strong chilling effect on wholly legitimate journalistic activities and contributed to self-censorship among those who wished to participate in public debate. In the Commissioner's view, numerous instances of judicial actions targeting not only journalists but also human rights defenders, academics and members of parliament exercising their right to freedom of expression indicated that criminal laws and procedures were currently being used by the judiciary to silence dissenting voices.

(b) The intervening non-governmental organisations

203. The intervening non-governmental organisations submitted that Article 18 of the Convention would be breached where an applicant could show that the real aim of the authorities was not the same as that proclaimed. They pointed out that the restriction of freedom of expression and political criticism was not one of the legitimate purposes of pre-trial detention enumerated in Article 5 of the Convention.

204. According to these organisations, where restrictions on applicants' freedom of expression formed part of a wider campaign to silence and punish anyone engaged in critical journalism, under problematic criminal laws that were increasingly restrictive of fundamental rights and freedoms, the Court should find a violation of Article 18 of the Convention. An analysis of the comments made by high-ranking State officials and pro-government media could assist in identifying the actual motivation of the State in prosecuting journalists.

205. The intervening non-governmental organisations further argued that following the attempted military coup on 15 July 2016 the government had misused legitimate concerns in order to redouble its already significant crackdown on human rights, *inter alia* by placing dissenters in pre-trial detention.

3. The Court's assessment

206. The Court refers to the general principles concerning the interpretation and application of Article 18 of the Convention as they were recently set out, particularly in its judgments in *Merabishvili* (cited above, §§ 287-317) and *Navalnyy v. Russia* ([GC], nos. 29580/12 and 4 others, §§ 164-65, 15 November 2018).

207. The Court observes at the outset that the applicant's main complaint was that he had been specifically targeted because of published materials (press articles and social media posts) which had all been considered to oppose the government. It notes that he also maintained that his initial and continued pre-trial detention had pursued an undeclared aim, namely to silence criticism of the government and prevent the public from receiving information that did not match the government's official version.

208. The Court notes that in determining whether the predominant purpose pursued by the applicant's detention was an "ulterior purpose", as alleged by the applicant in this case, it applies its usual test of proof "beyond reasonable doubt", examines all the elements in its possession, wherever they may come from, and if necessary, obtains others of its own motion. It also adopts conclusions that are supported by an independent evaluation of all the evidence, including any inferences it may draw from the facts and the submissions of the parties. The Court may also combine these conclusions with circumstantial evidence, such as information on the main facts, contextual facts or a sequence of events from which conclusions may be drawn about the main facts, and with reports and statements by international observers, non-governmental organisations or the media, as well as decisions of other national or international courts (see *Merabishvili*, cited above, §§ 311-17, and *Navalnyy*, cited above, § 165). The Court must also take into account the sequence and pattern of the events in dispute as a whole, bearing in mind that the predominant purpose of the measures taken against the applicant may change and what might initially appear to be a

legitimate aim or purpose may prove less plausible over time, and that corroborating contextual evidence may be indicative of a continuing tendency on the part of the public authorities to restrict the Convention freedoms of persons in political opposition (see *Navalnyy*, cited above, §§ 171-72 and §-175).

209. On this last point, the Court notes that the measures in question in this particular case, as well as those taken in the context of criminal proceedings against other opposition journalists in Turkey, have been strongly criticised by the third parties involved. However, since the political process and the jurisdictional process are fundamentally different, it must base its decision on evidence, according to the criteria established in its judgments in *Merabishvili* (cited above, §§ 310-17) and *Navalnyy* (cited above, § 165), and on its own assessment of the facts specific to the case (see *Khodorkovskiy v. Russia*, no. 5829/04, § 259, 31 May 2011; *Ilgar Mammadov*, cited above, § 140; and *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 155, 17 March 2016).

210. In the present case the Court has concluded above that the charges against the applicant were not based on a "reasonable suspicion" within the meaning of Article 5 § 1 (c) of the Convention. It has found in particular that the measures taken against the applicant were not justified by reasonable suspicions based on an objective assessment of the alleged acts; instead, they were essentially based on written material which could not reasonably be considered as behaviour criminalised under domestic law but was related to the exercise of Convention rights, and in particular the right to freedom of expression. The Court considers, indeed, that detention based on such a serious charge had a chilling effect on the applicant's willingness to express his views in public and was liable to create a climate of self-censorship affecting him and all journalists reporting and commenting on the running of the government and on various political issues of the day.

211. Nevertheless, whilst the Government failed to substantiate their argument that the measures taken against the applicant were justified by reasonable suspicions, leading the Court to find a violation of Article 5 § 1 and Article 10 of the Convention, this would not by itself be sufficient to conclude that Article 18 has also been violated (see *Navalnyy*, cited above, § 166). Indeed, as the Court pointed out in *Merabishvili* (cited above, § 291), the mere fact that a restriction of a Convention right or freedom does not meet all the requirements of the clause that permits it does not necessarily raise an issue under Article 18. Separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case. There is still a need to examine the question whether – in the absence of a legitimate purpose – there was an identifiable ulterior one (see *Navalnyy*, cited above, § 166).

212. The Court observes in the instant case that the stated aim of the measures imposed on the applicant was to carry out investigations into the campaigns of violence conducted by members of separatist or leftist movements and, to a lesser extent, the campaign leading to the attempted coup in 2016, and to establish whether the applicant had indeed committed the offences of which he was accused. Given the serious disruption and the considerable loss of life resulting from these events, it considers it perfectly legitimate to carry out investigations into these incidents. In addition, it must not be overlooked that the attempted coup led to a state of emergency being declared throughout the country.

213. The Court observes that there appears to be nothing untoward in the chronological sequence of the acts of which the applicant was accused and the opening of the investigation concerning him. The acts of which the applicant was accused in the investigation which was opened at the end of 2016 had occurred, for the most part, in 2015 and 2016. It cannot therefore be said that an excessive length of time elapsed between the impugned acts and the opening of the criminal investigation in the course of which the applicant was placed in pre-trial detention (see, conversely, *Kavala*, cited above, §§ 225-28).

214. The Court is prepared to accept that statements made in public by members of the government or the President concerning the criminal proceedings against an applicant could, in some circumstances, constitute evidence of an ulterior purpose behind a judicial decision (see *Kavala*, cited above, § 229; *Merabishvili*, cited above, § 324; and *Tchankotadze v. Georgia*, no. 15256/05, § 114, 21 June 2016). However, the Court notes in the present case that the statements by the President of the Republic referred to above related to a specific affair concerning the destination of lorries belonging to the intelligence services and used to transport weapons, and were not directed against the applicant himself but rather against the newspaper *Cumhuriyet* as a whole under the editorial direction of C.D., its publication director at the time. Moreover, it should be noted that the Constitutional Court ruled in favour of C.D. and another of *Cumhuriyet*'s managers at the time, finding that the suspicions against them were unconstitutional. It is true that the statement by the President of the Republic to the effect that he would not abide by the Constitutional Court's ruling, was not bound by it and would not comply with it was clearly in contradiction with the basic tenets of the rule of law. However, such an expression of dissatisfaction does not in itself amount to evidence that the applicant's detention was ultimately motivated by reasons incompatible with the Convention.

215. As to the fact that a prosecutor who was himself charged with membership of the organisation FETÖ participated in the judicial investigation concerning the applicant, including the drafting of the bill of indictment, the Court considers that this fact in itself does not constitute

decisive evidence of a violation of Article 18 of the Convention, as the applicant's initial and continued detention was based on orders made by a magistrate or by one or more members of the Assize Court, rather than on a decision of the public prosecutor's office. Furthermore, when this situation came to light the prosecutor in question was removed from the investigation before the bill of indictment was filed.

216. That being said, the Court accepts that his detention based on such a serious charge had a chilling effect on the applicant's willingness to express his views in public and was liable to create a climate of self-censorship affecting him and all journalists reporting and commenting on the running of the government and on various political issues of the day. Nevertheless, this finding is likewise insufficient by itself to conclude that there has been a violation of Article 18.

217. The Court further observes that the Constitutional Court subjected the applicant's complaints under Articles 5 and 10 of the Convention to thorough scrutiny and delivered its judgments in the case following in-depth discussion, as demonstrated by the detailed dissenting opinion.

218. It follows that the elements relied on by the applicant in support of a violation of Article 18 of the Convention, taken separately or in combination with each other, do not form a sufficiently homogeneous whole for the Court to find that the applicant's detention pursued a purpose not prescribed by the Convention and representing a fundamental aspect of the case.

219. In the light of the foregoing, the Court considers that it has not been established beyond reasonable doubt that the applicant's pre-trial detention was ordered for a purpose not prescribed by the Convention within the meaning of Article 18. Accordingly, in the present case there has been no violation of Article 18 of the Convention in conjunction with Articles 5 and 10.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

220. 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

221. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage for each month spent in pre-trial detention.

222. The Government submitted that the amount claimed was excessive in the light of the Court's case-law on this issue, and that the claim should be dismissed.

223. With regard to non-pecuniary damage, the Court considers that the violations of the Convention have indisputably caused the applicant substantial damage. Accordingly, ruling on an equitable basis, it awards him EUR 16,000 under that head.

B. Costs and expenses

224. The applicant did not seek reimbursement of any costs and expenses incurred before the Convention institutions or the domestic courts. That being so, the Court considers that no sum is to be awarded to him on that account.

C. Default interest

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

FOR THESE REASONS, THE COURT,

1. *Joins to the merits*, unanimously, the Government's preliminary objections in respect of the complaint under Article 10 and *dismisses* them;

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

3. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention;

4. *Holds*, unanimously, that there is no need to examine the complaint under Article 5 § 3 of the Convention;

5. *Holds*, unanimously, that there has been no violation of Article 5 § 4 of the Convention;

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

7. *Holds*, by six votes to one, that there has been no violation of Article 18 of the Convention;

8. *Holds*, by six votes to one,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 16,000 (sixteen thousand 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, in respect of non-pecuniary damage;

(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*, by six votes to one, the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 24 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_1} {signature_p_2}

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President

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

(a) Partly concurring and partly dissenting opinion of Judge S. Yüksel;
(b) Partly dissenting opinion of Judge E. Kūris.

J.F.K.
S.H.N.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE YÜKSEL

226. I voted with the majority in the present case in favour of finding a violation of Article 5 § 1 of the Convention, and voted against the finding of a violation regarding the applicant's complaint under Article 10 of the Convention.

227. As regards the applicant's complaint under Article 5 § 1 of the Convention, while I agree with the majority's position on the outcome, I respectfully dissociate myself from certain parts of the reasoning and approach adopted in the judgment, for the reasons set out below.

228. The case mainly concerns the placement in detention and continued detention of an applicant who is a journalist. In my view, in the present case, it is necessary to distinguish between two facts: the detention of a journalist in the context of criminal proceedings and the opening of criminal proceedings. With regard to the detention of a journalist, I subscribe to the outlines of the judgment and I believe that the use of such a measure must be exceptional unless there are compelling reasons.

229. The pre-trial detention of the applicant was ordered in December 2016 primarily on suspicion of disseminating propaganda in favour of terrorist organisations (see paragraph 11 of the judgment). Subsequently, his continued pre-trial detention was ordered on suspicion of disseminating propaganda in favour of terrorist organisations or assisting those organisations. I must express my concerns about this new classification of the criminal charges, namely as regards the charge of assisting terrorist organisations. In this connection I simply refer to the judgment of the Court of Cassation concerning the present case (see paragraphs 47-50 of the judgment). Indeed, from the outset the charges against the applicant were poorly classified, particularly in relation to the offence of assisting a terrorist organisation. Taking into account the applicant's relevant activities, I can accept that there was reasonable suspicion in relation to the offence of disseminating propaganda in favour of terrorist organisations. However, because the present judgment addresses the issue of the existence of reasonable suspicion in relation to both charges – disseminating propaganda in favour of terrorist organisations and assisting terrorist organisations – together, without making a distinction (in the light of paragraphs 1 and 3 of Article 5 taken together), and because I have serious doubts as to the presence of reasonable suspicion in relation to the offence of assisting terrorist organisations, I voted with the majority in favour of finding a violation of Article 5 § 1 of the Convention. Thus, I believe that there was a failure of classification on the part of the domestic courts, and share the view of the majority that the suspicion against the applicant did not reach the required minimum level of reasonableness in relation to the offence of assisting terrorist organisations.

230. As regards the applicant's complaint under Article 10 of the Convention, the majority considered that the interference with the applicant's rights and freedoms under Article 10 of the Convention could not be justified under the second paragraph of that provision, on the ground that it was not "prescribed by law". In reaching this conclusion, the majority merely relied on the finding of a violation of Article 5 § 1 of the Convention, without carrying out a further examination under Article 10 (see paragraphs 187-88 of the judgment). I have already expressed my disagreement with this approach in my concurring opinions in the cases of *Ragıp Zarakolu v. Turkey* (no. 15064/12, 15 September 2020) and *Sabuncu and Others v. Turkey* (no. 23199/17, 10 November 2020). In the present case, however, I voted against the finding of a violation of Article 10, for the following reason.

The applicant conducted an interview in the midst of a terrorist operation with one of the hostage-takers who had taken a prosecutor hostage and subsequently murdered him, and another interview with one of the PKK's leaders. In my view, it is understandable that these interviews and some of the applicant's other activities (certain social media posts, etc.) may not be considered just to be a matter of freedom of the press and may be the subject of a criminal investigation in order to ascertain whether they fall within the scope of that freedom. I accept that an extensive freedom of expression must apply to journalistic activities. But this freedom is also accompanied by duties and responsibilities, resulting in particular from the principle of responsible journalism, which is one of the principles developed in our Court's established case-law. In this regard, I refer to the following rulings of the Court which emphasise responsible journalism.

231. In the case of *Jersild v. Denmark* (23 September 1994, Series A no. 298), the Court found a violation of Article 10 of the Convention after carefully examining the journalist's attitude during the report in question (see paragraph 31 *in fine* of that judgment). In the judgments in *Sürek v. Turkey (no. 1)* ([GC], no. 26682/95, ECHR 1999-IV) and *Sürek v. Turkey (no. 3)* ([GC], no. 24735/94, 8 July 1999), the Court found that there had been no violation of Article 10, emphasising the duties of the journalists, and especially of the editors-in-chief of newspapers (see, in particular, § 63 of the *Sürek (no. 1)* judgment and § 41 of the *Sürek (no. 3)* judgment). In *Falakaoğlu and Saygılı v. Turkey* (nos. 22147/02 and 24972/03, § 34, 23 January 2007), the Court found no violation of Article 10, stressing the danger of providing a forum for leaders of criminal organisations and thus allowing the dissemination of terrorist propaganda. In *Saygılı and Falakaoğlu v. Turkey (no. 2)* (no. 38991/02, § 28, 17 February 2009), the Court found that the publication of statements by terrorist organisations could be subject to penalties if the message given was not a peaceful one.

232. Having regard to the above-mentioned case-law of the Court, the opening of criminal proceedings against the applicant in the present case

could be seen as justified. I do not wish to prejudice the outcome of the criminal proceedings pending before the domestic courts. Thus, in my opinion, it is premature to rule on those charges and there was no need to examine separately the interference with Article 10; accordingly, I do not agree with the majority's conclusion as to the violation of Article 10 of the Convention. In the light of the above, I consider that it was unnecessary to examine this complaint separately.

PARTLY DISSENTING OPINION OF JUDGE KŪRIS

My voting against points 7 and 9 of the operative part of the judgment was based on the reasons set out in my partly dissenting opinion in *Sabuncu and Others v. Turkey* (no. 23199/17, 10 November 2020).