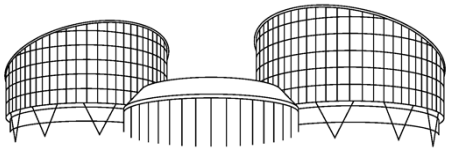

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF KAVALA v. TURKEY

(Application no. 28749/18)

JUDGMENT

Art 15 • Derogation • Limits

Art 5 § 1 (c) • Detention on the basis of suspicion that the applicant had committed the offences of attempting to overthrow the Government or the constitutional order "by force and violence" • Lack of reasonable suspicion that the applicant had had violent intentions • Case file concerned acts related to the mere exercise of rights guaranteed by the Convention or normal activism on the part of a human-rights defender • Derogation could not remove the requirement that suspicions had to be reasonable

Art 5 § 4 • "Speedy" review • Long period that could not be adequately justified by the Constitutional Court's exceptional workload following the state of emergency • Significant periods of delay both before and after the state of emergency was lifted

Art 18 • Extended detention of a human-rights defender with the ulterior purpose of reducing him to silence • Chilling effect on civil society

Art 46 • Execution of judgments • Individual measures • Immediate release of applicant

STRASBOURG

10 December 2019

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Table of Contents

PROCEDURE **3**

THE FACTS **4**

I. THE CIRCUMSTANCES OF THE CASE 4

A. The Gezi Park events 5

1. General context 5

2. Information submitted by the Government 6

3. Information transmitted by the Commissioner for Human Rights 6

B. The attempted coup of 15 July 2016 and the declaration of a state of emergency 7

C. The applicant's placement in pre-trial detention 8

D. Extension of the pre-trial detention 15

E. The indictment of 19 February 2019 17

1. First part of the bill of indictment 18

2. Second part of the bill of indictment 20

3. Third part of the bill of indictment 29

F. The applicant's individual application before the Constitutional Court 30

G. Other information provided by the applicant 32

H. The application to the United Nations Working Group on Arbitrary Detention 33

II. RELEVANT DOMESTIC LAW AND PRACTICE 34

A. The Turkish Constitution 34

B. Relevant provisions of the Criminal Code 34

C. Relevant provisions of the Code of Criminal Procedure ("the CCP") 35

D. Legislative decrees nos. 667 and 668 36

III. COUNCIL OF EUROPE MATERIALS 36

IV. THE URGENT APPEAL PROCEDURE AND THE WORKING GROUP ON ARBITRARY DETENTION 38

V. NOTICE OF DEROGATION BY TURKEY 39

THE LAW **39**

I. SCOPE OF THE APPLICATION 39

II. PRELIMINARY QUESTION CONCERNING THE DEROGATION BY TURKEY 40

III. THE GOVERNMENT'S PRELIMINARY OBJECTIONS 41

A. Objection under Article 35 § 2 (b) of the Convention 41

B. The objection based on failure to exhaust domestic remedies 42

IV. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 3 OF THE CONVENTION 44

A. Admissibility 45

B. Merits 45

1. The parties' submissions 45
2. The Court's assessment 49
V. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION ON ACCOUNT OF THE LACK OF A SPEEDY JUDICIAL REVIEW BY THE CONSTITUTIONAL COURT 59
A. Admissibility 59
B. Merits 60
1. The parties' submissions 60
2. The third parties 61
C. The Court's assessment 62
1. Relevant principles 62
2. Application of these principles 64
VI. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION 68
A. Admissibility 68
B. Merits 69
1. The parties' submissions 69
2. The third-party interveners 70
3. The Court's assessment 71
VII. OTHER COMPLAINTS UNDER ARTICLE 5 §§ 3 AND 4 OF THE CONVENTION 76
VIII. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION 77
FOR THESE REASONS, THE COURT 78
CONCURRING OPINION OF JUDGE BOŠNJAK 81
PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE YÜKSEL 88

In the case of Kavala v. Turkey,

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

Robert Spano, *President,*
Marko Bošnjak,
Julia Laffranque,
Valeriu Griţco,
Egidijus Kūris,
Arnfinn Bårdsen,
Saadet Yüksel, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 15 October and 12 November 2019,

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

PROCEDURE

1. The case originated in an application (no. 28749/18) 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 Mehmet Osman Kavala ("the applicant"), on 8 June 2018.

2. The applicant was represented by Mr K. Bayraktar, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. Relying on Article 5 of the Convention, the applicant alleged, in particular, that his arrest and pre-trial detention had not been justified and had been carried out in bad faith. He also complained that the Constitutional Court had not ruled speedily on the lawfulness of his pre-trial detention. Under Article 18 of the Convention, he submitted that his rights had been restricted for purposes other than those prescribed in the Convention. In this connection, he argued that the detention measure imposed on him amounted to a form of judicial harassment, the purpose of which was to exert a dissuasive effect on human-rights defenders.

4. On 23 August 2018 the Court decided to apply Rule 41 of the Rules of Court and grant the applicant's request for priority treatment of the application. Under its new prioritisation policy, effective since 22 May 2017, cases where applicants have been deprived of their liberty as a direct consequence of an alleged violation of Convention rights, as in the present case, are to be given priority.

5. On 30 August 2018 the complaints under Article 5 §§ 1 (c), 3 and 4 and Article 18 of the Convention were communicated to the Government, and the remainder of the application was declared inadmissible, in accordance with Rule 54 § 3.

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

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

8. In addition, written comments were submitted to the Court by the following non-governmental organisations: PEN International, Turkey Human Rights Litigation Support Project and the Association for Freedom of Expression ("the intervening non-governmental organisations"). The Section President granted leave to the organisations in question to intervene under Article 36 § 2 of the Convention and Rule 44 § 3.

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

10. On 25 June 2019 the Government submitted further observations and informed the Court that the Constitutional Court had decided to dismiss the applicant's individual application. In a letter dated 26 June 2019 the Court invited the applicant to submit comments on the matter. The applicant did not submit observations on this point. On 10 July 2019 the Government sent a copy of the Constitutional Court's judgment.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1957 and lives in Istanbul. He is currently being held in detention.

12. The applicant, a businessman, is a human-rights defender in Turkey. He has been involved in setting up numerous non-governmental organisations ("NGOs") and civil-society movements which are active in the areas of human rights, culture, social studies, historical reconciliation and environmental protection.

In 2002 he set up the limited public company Anadolu Kültür, which works to promote peace, reconciliation and human rights by supporting artistic and cultural initiatives, particularly those organised outside Turkey's major cultural centres. Several of this NGO's projects, organised in collaboration with the Turkish local authorities, have received support from many internationally known arts foundations and from the European Union.

13. In her written observations, the Commissioner for Human Rights explained that the applicant has been a long-standing and trusted partner of many international bodies working on human rights in Turkey, including the Commissioner's Office. She indicated that, like all four Commissioners since the inception of the Office, she has been in contact with many of the NGOs he helped to found or with him personally. In her view, he and these

NGOs have been reliable and objective sources of information about the human-rights situation in Turkey, always displaying the highest level of professionalism, dedication and respect for human rights. She added that during their numerous dealings with them, neither she nor her predecessors had received any indication of any incitement to violence or crime, or justification and trivialisation of violence on their part.

14. The applicant was arrested in Istanbul on 18 October 2017. He was suspected of having committed two offences under Article 312 (attempting to overthrow the Government) and Article 309 (attempting to overthrow the constitutional order) of the Criminal Code. The accusations against the applicant were related to the Gezi Park events which occurred between May and September 2013 (Article 312 of the Criminal Code) and the attempted coup of 15 July 2016 (Article 309 of the Criminal Code).

A. The Gezi Park events

1. General context

15. In September 2011 the Istanbul Metropolitan Municipal Council (*Istanbul Büyükşehir Belediye Meclisi)* adopted a plan to pedestrianise Taksim Square in Istanbul. This plan included blocking traffic routes around Taksim Square and rebuilding barracks (demolished in 1940) in order to create a shopping centre in the new premises. These barracks were to be built on the site of Gezi Park, one of the few green spaces in the centre of Istanbul. Professional bodies such as the Chamber of Architects and the Chamber of Landscape Architects brought numerous administrative proceedings in an attempt to have the project set aside. In 2012 several demonstrations were organised to protest against the planned destruction of Gezi Park. Platforms bringing together several associations, trade unions, professional bodies and political parties, including the "Taksim Solidarity" (*Taksim Dayanışma*) collective, were accordingly set up to coordinate and organise the protests.

16. Following the start of demolition work in Gezi Park on 27 May 2013, about fifty environmental activists and local residents occupied the park in an attempt to prevent its destruction. The protest movements were initially led by ecologists and local residents objecting to the destruction of the park. On 31 May 2013, however, the police intervened violently to remove the persons occupying the park. There were confrontations between the police and the demonstrators. The protests then escalated in June and July and spread to several towns and cities in Turkey, taking the form of meetings and demonstrations which sometimes led to violent clashes. Four civilians and two police officers were killed, and thousands of people were wounded.

2. Information submitted by the Government

17. The Government considered that the incidents which occurred in Gezi Park ("the Gezi Park events") had admittedly originated in a movement opposing the decisions about the park's future and the use of force by the police, but that they had subsequently been transformed into an insurrection (« *kalkışma* ») backed by numerous terrorist organisations. In this connection, they alleged that flags and posters of terrorist organisations, including the PKK (the Kurdistan Workers' Party) or the DHKP-C (People's Revolutionary Liberation Party Front), had been displayed in several areas where the demonstrations took place, and that members of these organisations had mingled with the demonstrators in order to sow terror.

18. The Government also noted that the Gezi Park events had occurred between 28 May and 25 September 2013 and that 3,611,208 persons had taken part. 5,513 individuals had been arrested and 189 persons had been placed in detention; 697 law-enforcement officers and 4,329 civilians had been injured, and four civilians and two police officers had lost their lives. They indicated that violent demonstrators had committed multiple acts of vandalism, targeting, according to the official figures, 292 company premises, 116 police vehicles, 271 private vehicles, 14 buildings belonging to the Justice and Development Party (the ruling party, "the AKP") and numerous public buildings.

19. According to the Government, foreign media had also shown a keen interest in the events and had broadcast them live, presenting them to the international community as peaceful demonstrations organised by environmental protection groups and contesting the legitimacy of the democratically elected Government. Falsified images and false information on social media had also given the impression that the police had systematically committed acts of torture or even murder. In addition, the prosecutors' offices had opened numerous criminal investigations into the Gezi Park events, in relation to offences such as homicide, the illegal possession or swapping of dangerous substances, the display of symbols openly challenging State sovereignty, disseminating propaganda in support of terrorist organisations, damage to public property, grievous bodily harm, membership of an armed terrorist organisation, etc.

3. Information transmitted by the Commissioner for Human Rights

20. The Commissioner for Human Rights considered that her Office could provide an objective overview of the Gezi events on account of the extensive work conducted by it during the relevant period. She explained that her predecessor had visited Turkey immediately after the events of 1 to 5 July 2013, where he had met not only various civil society actors who had been involved in these events, but also the Turkish authorities, including the

Minister of Justice, the Undersecretary of the Ministry of the Interior and the then Governor of Istanbul. Moreover, he had published his conclusions on these events in a report focusing on the conduct of law-enforcement officials in Turkey (see Report by Nils Muižnieks, Commissioner for Human Rights, following his visit to Turkey from 1 to 5 July 2013, CommDH(2013)24, 26 November 2013, https://rm.coe.int/16806db680).

21. According to the Commissioner for Human Rights, these events were triggered as a result of the excessive use of force against a small number of peaceful protestors trying to stop the cutting of trees in Gezi Park in Istanbul and the construction of a shopping centre on Taksim Square at the end of May 2013. Another important factor was the failure of the mainstream media to report on the initial events owing to self-censorship. The initial confrontation led to a wave of demonstrations against the government across Turkey, unprecedented both in their geographic scope and in the numbers of participants. During the initial phases of the events, participation was wide-ranging, including professional associations such as the Chambers of Architects and Engineers, Bar Associations and Medical Associations, trade unions, and many NGOs active in different sectors, such as the environment, women's rights, LGBTI rights, and human rights in general, as well as citizens' platforms and other spontaneous initiatives co-ordinating the participation of civil society. Among these, "Taksim Solidarity" was considered to be the most representative and had played a very prominent role during these events. Accordingly, the Commissioner's predecessor had also met representatives of this platform during the above-mentioned visit. The applicant was not part of this civil-society platform.

22. The Commissioner for Human Rights submitted that the Gezi events had also been marked by heavy-handed interventions by the authorities. The Commissioner's Office had received a large number of serious, consistent and credible allegations of human-rights violations committed by law-enforcement officials against peaceful demonstrators or bystanders. According to the Commissioner, the overwhelming majority of these allegations had not been effectively investigated by the Turkish judiciary on account of the long-standing pattern of impunity for the security forces in Turkey.

B. The attempted coup of 15 July 2016 and the declaration of a state of emergency

23. The applicant was also suspected of having sought to overthrow the constitutional order. This second charge was related to the attempted coup of 15 July 2016.

24. During the night of 15 to 16 July 2016 a group of members of the Turkish armed forces calling themselves the "Peace at Home Council" attempted to carry out a military coup aimed at overthrowing the

democratically installed parliament, government and President of Turkey. During the attempted coup, soldiers under the instigators' control bombarded several strategic State buildings, including the Parliament building and the presidential compound, attacked the hotel where the President was staying, held the Chief of General Staff hostage, attacked television channels and fired shots at demonstrators. During the night of violence, more than 250 people were killed and more than 2,500 were injured. The day after the attempted military coup, the national authorities blamed the network linked to Fetullah Gülen, a Turkish citizen living in Pennsylvania (United States of America) and considered to be the leader of an organisation described by the Turkish authorities as FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure"). Several criminal investigations were subsequently initiated by the appropriate prosecuting authorities in respect of suspected members of that organisation.

25. On 20 July 2016 the government declared a state of emergency for a period of three months as from 21 July 2016; the state of emergency was subsequently extended for further periods of three months by the Council of Ministers, chaired by the President.

26. On 21 July 2016 the Turkish authorities gave notice to the Secretary General of the Council of Europe of a derogation from the Convention under Article 15.

27. During the state of emergency, the Council of Ministers, chaired by the President, passed thirty-seven legislative decrees (nos. 667-703) under Article 121 of the Constitution. The legislative decrees also placed significant restrictions on the procedural safeguards laid down in domestic law for anyone held in police custody or pre-trial detention (for example, extension of the police custody period, restrictions on access to case files and on the examination of objections against detention orders).

28. On 18 July 2018 the state of emergency was lifted.

C. The applicant's placement in pre-trial detention

29. As indicated above (see paragraph 14), on 18 October 2017 the applicant was arrested in Istanbul and placed in police custody. He was suspected of having sought to overthrow the constitutional order and the Government through force and violence.

30. Later that day, following a request by the Istanbul public prosecutor, the applicant's office was searched in his presence. During the search, nine USB keys, three computer hard drives and a mobile telephone were seized.

31. On 20 October 2017 the Istanbul 10th Magistrate's Court decided to restrict access to the investigation file, in accordance with Article 153 of the Code of Criminal Procedure. In its decision the magistrate's court held that, given the nature of the alleged offence and the evidence submitted to the

file, examination of the investigation file by the suspect and his lawyers would jeopardise the conduct of the investigation.

32. An objection to this decision, submitted on 1 February 2018 by the applicant's representatives, was dismissed on 9 February 2018.

33. In the meantime, on 25 October 2017 the Istanbul public prosecutor decided to extend the applicant's custody by seven days, in accordance with Article 91 of the Code of Criminal Procedure ("CCP") and Articles 10 and 11 of Legislative Decree no. 684 on the measures taken in the context of the state of emergency.

34. On 30 October 2017 M.P., a witness against the applicant, gave statements to the police (see also paragraphs 36, 53 and 62 below).

35. On 31 October 2017 the applicant, assisted by his lawyers, was questioned about the accusations against him by police officers from the anti-terrorist branch of the Istanbul Security Headquarters. According to the Government, before this interview the applicant had been informed in detail of the offences with which he was charged and about the evidence gathered.

36. According to the record of this interview, the applicant was questioned about the Gezi Park events, about his relations with journalists, academics, numerous human-rights defenders and members or heads of NGOs, and about his alleged contacts with Professor H.J.B., former director of the Wilson Center in the United States. The Government indicated that a criminal investigation was pending against Prof. H.J.B. in connection with the attempted coup of 15 July 2016; in particular, he is suspected of having instigated it.

The relevant parts of the record of the applicant's questioning read as follows:

> "[The police officers read out statements by M.P., who accused the applicant of acting for G.S. [an American businessman and founder of the Open Society Institute] in Turkey and of having organised and financed the "Gezi insurrection", and asked questions about his alleged ties to terrorist organisations.]
>
> Mr Kavala: These are unfounded and defamatory statements ... I work actively with three NGOs, Anadolu Kültür, the Foundation for an Open Society and TESEV, and I take part in meetings organised in the context of their activities. However, I did not take part in any international meeting about the Gezi Park events prior to their occurrence. As you can see from my emails, I merely added my voice to the demands that Gezi Park remain a public part and I supported the activities to that end. I am convinced that parks are essential sites in urban life. In addition, my office and the building where I was born are located on the Elmadağ district, near the park; as a result, I regularly use this park on my daily travels. It is for this reason that I took part in peaceful activities to defend the environment ... I have no other aim than to protect Gezi Park as a public park. I do not have any links to the organisations in question. I am against the activities carried out by these organisations for other purposes.
>
> I know that NGOs are carrying out activities to ensure that Gezi Park remains a public park. So far as I am aware, the Solidarity Taksim collective, set up following the involvement of the union of Turkish Chambers of Architects, was responsible for

organising and coordinating the events. I was not part of this group. I took part in the movement in a personal capacity, and did not take any steps to mobilise the NGOs ...

The allegation that I provided financial support to the campaign [in question] is incorrect. My only contribution was to supply young trees. I was previously accused of having conducted fund-raising activities in order to provide gas masks. As a result, an inspection was carried out in the premises of the Foundation for an Open Society. However, no evidence was found to corroborate these allegations."

The police officers read out transcripts of a telephone conversation with F.B.G. on 24 July 2013, and asked the applicant for information about his ties with that individual and about his bid to obtain financial support from European Union funds as part of his plans to set up a news channel.

The applicant replied that F.B.G. was a journalist who had lost her job and wanted to set up a news channel, and that she had asked for his backing. He added that it had proved impossible to implement this project. In response to the question about the financial support requested by F.B.G., the applicant replied as follows:

".. The Europe in question refers to the grants paid to NGOs by the European Commission. So far as I remember, this conversation took place after the Gezi events..."

The applicant was also questioned about a telephone conversation with O.K. The police officers read out an extract from this conversation in which the following phrase was used: "the lobby has taken a decision about the place where the meeting will be held" ("*lobinin toplantının nerede yapılacağı konusunda karar aldığı"*). The applicant replied as follows:

"I did indeed have this conversation. I have known O.K. for a long time. He is the founder of the *Bir Zamanlar* publishing company, which publishes books on history and cultural history ... The lobby discussed in the conversation is a woman, Lori Z., who is a member of [an ONG]".

The police officers also asked the applicant several questions about his telephone conversations with O.Y., who wished to organise an exhibition about the Gezi events in Brussels, with C.M.U., who had set up a film production company and was hoping for financial backing from the Foundation for an Open Society, and with G.T., director of the Foundation for an Open Society, who was planning to organise a campaign about the events of 1915. In this connection, the applicant was asked about a telephone conversation which he had had with O.K. on 19 August 2013:

"It appears from your telephone conversation that a large-scale event was planned to mark the centenary of the so-called Armenian genocide of 1915, and that in order to mitigate the backlash it was decided to present this event as a way of boosting tourist revenue. During this conversation, why did you make comments about the strength of the demonstrations about the so-called Armenian genocide which would be organised in our country?"

The applicant: I did indeed have this conversation. It was a conversation that I had with O.K. about the participation of American citizens of Armenian origin in the 2015

commemorations ... O.K. made a joke and said that this group's arrival would provide an occasion to boost tourist revenue and have the genocide recognised. However, it is clear from this conversation that the aim of the visit was not to obtain recognition of the genocide from the Turkish Government, but to [enable this group] to share a moment of emotion .... Furthermore, several groups composed of individuals of Armenian origin ... took part in the 2015 commemorations and there was no tension. The then Prime Minister, R.T. Erdoğan, issued a message of condolence."

The applicant was questioned about a telephone conversation he had had on 7 September 2013 with A.G., an activist and member of the Association for Human Rights, concerning allegations of breaches of the rights of Turkey's Alevi community.

The applicant was also asked about a telephone conversation he had had on 24 September 2014 with a foreign journalist concerning an academic conference on the Gezi events. It was stated that the applicant had held a telephone conversation on 25 October 2013 with an individual named I.P., with a view to using the Gezi Park events to exert political pressure on the authorities. This conversation reads as follows:

"I.P.: Hello, Osman, I'm going to ask you a question. What are we going to talk about tomorrow at six o'clock?

Applicant: What are we going to talk about?

I.P.: Did I understand correctly? That's why I'm doing this [I'm asking this question].

Applicant: O.K. We could talk about [the following topics]; before the local elections [local elections were held in Turkey on 30 March 2014], our dream is actually to see a more transparent, more participatory model of local government emerge following the Gezi events; that is, the energy that has emerged from this [the events in Gezi Park] should continue to be an element of democratic opposition or to function as a means of democratic pressure ("*demokratik muhalefet unsuru olarak veya demokratik baskı aracı olarak işlev görmeye devam etmesi*")... Now, to realize these dreams or plans, we have thought of some things, to see what the new political equation will be or how political alliances could be formed, while also of course thinking a bit about certain aspects that are related to the objectives at the outset. In other words, if we start thinking about this, what model can best serve these objectives? What political actors could be useful for these objectives, and without focusing too much on names, are there a few things we could do? For example, [could we] support municipal council candidates who accept such and such requests? That is, how can we make progress in strengthening transparency within municipalities in an institutional way and civil society's control over these bodies ["*belediyelerin kurumsal olarak şeffaflaşmalarına ve sivil toplumun denetimine açık olmalarına imkan verecek bir takım adımlar nasıl atılabilir*"]? After all this, we will probably achieve something [.] But we can ask ourselves the question how things will go if the AKP wins the elections again. [On the other hand,] we can also ask ourselves another question: if the CHP [the main opposition party] candidate is not sensitive to these issues, what will happen then [?] Here we will probably [address these topics]; i.e. we will see if we can achieve something around these themes.

I.P.: You asked, 'Should we invite another person?' That's why I'm asking this question.

Applicant: Do you have someone in mind?

I.P.: I have friends who were in the park collective [this must refer to one of the Gezi Park collectives]. There are even people who are part of *Çarşı*'s group [a group of supporters of the Beşiktaş football team]. These are friends who organized the 'Come in September' meeting. They are still active in several Park collectives and are continuing their actions [it seems that the Gezi Park collectives in some districts did not disperse even after the events had ended]. I wonder if we could invite one of these people.

Applicant: As you wish."

The police officers read out transcripts of telephone conversations between third parties, dated 16 September 2013, 18 September 2013, 4 October 2013 and 4 February 2014, in which the speakers had spoken of their intention to ask the applicant for money. The applicant replied that he did not know the individuals concerned and that he had not provided them with any financial support.

The police officers also showed the applicant photographs taken in the course of surveillance operations against him, showing that the applicant had met: A.H.A., a member of the management board of Anadolu Kültür, on 3 August 2013; A.Z., a journalist, on 12 August 2013 (with other persons); B.F., president of an association bringing together music producers, and other persons, on 18 August 2013; and U.K., a financial adviser, on 6 September 2013. The applicant confirmed that he had indeed met those persons.

The applicant was asked about meetings with representatives of foreign countries and telephone conversations with academics, journalists and NGO representatives. He was also questioned about: several incoming calls from the number "123456"; photos taken with his mobile phone during the Gezi events; the funeral of S.E., a politician of Kurdish origin; messages exchanged by him on 2 October 2017 with A.F.I., an academic and journalist, and with A.E., a journalist, with regard to the financial difficulties encountered by a daily newspaper and the possibility of obtaining financial support from European Union funds; an exchange of messages and a meeting, on 9 May 2017, with C.D., a journalist who lived in Germany and was subject to criminal proceedings in Turkey for, among other charges, divulging documents that were classified as secret (spying) and attempting to overthrow the constitutional order; and a visit by a delegation of the EUTCC (EU Turkey Civic Commission) which included members of the European Parliament, academics and journalists [this visit had taken place between 13 and 19 February 2017]. Furthermore, he was questioned about a message in which he had stated as follows:

"[o]ne might even say that it is problematical to compare DAESH [a terrorist organisation with a Salafist jihadist ideology] to the PKK and to [claim that], while DAESH's Salafist ideology is legitimate, the nationalist and leftist ideology advocated by the PKK is illegitimate and irreligious. However, the limits of the ideas which coincide with the PKK's political aims but do not support terrorism are much wider

than in the other [Salafist ideology] ("*Halbuki, PKK'nın siyasi hedefleriyle çakışan ama terör destekçisi olmayan düşünce alanının sınırları öbüründen çok daha geniştir*")."

The applicant was also questioned about his relations with H.J.B., whom the prosecutor's office suspected of having been one of the instigators of the attempted coup and of having stayed at Istanbul's Büyükada Hotel on that occasion. He replied that he was acquainted with H.J.B., an academic and director of the Wilson Center in the United States, and that he had contacts with the latter's sister, K.B., who was a professor of anthropology at the University of Columbia and wished to organise an exhibition on the theme of shared sacred sites. He also explained that he had met H.J.B. at dinner in an Istanbul restaurant on 18 July, and that they had spoken briefly.

The police officers also quoted from an interview with the applicant, broadcast by Web TV on YouTube on 4 August 2015, in which he had stated:

"Ultimately, although some people compare the PKK to DAESH or similar organisations, nowadays the PKK is an organisation which is capable of conducting a rational policy and this is what comes across in their negotiations ... This is a major responsibility for the Government, but in certain situations, an opposition movement, an armed opposition movement, plays an important role in determining policy ..."

In reply, the applicant emphasised that he had been referring in this interview to the negotiations between the leaders of the PKK and the Government in Oslo [in the context of secret meetings which had been held in Norway at the beginning of the 2010s].

Lastly, the applicant explained that he had spoken several times with the then Prime Minister, and had worked with the director of prison services in order to improve prison conditions. He also specified that he had always supported the State institutions and that he had attempted to ensure coordination between them and the NGOs.

37. On 1 November 2017 the public prosecutor's office called for the applicant to be placed in pre-trial detention for "attempting to overthrow the constitutional order through force and violence" (Article 309 of the Criminal Code) and for "attempting to overthrow the Government or to prevent, through force and violence, the authorities from exercising their functions" (Article 312 of the Criminal Code). In justifying the suspicions in relation to the Gezi events, the prosecutor's office alleged in its application for placement in detention that the applicant had led and organised the demonstrations more usually known as "the Gezi events", which were in fact an insurrection in which all the terrorist organisations (FETÖ/PDY and the PKK, as well as the DHKPC and MLKP, two extremist left-wing armed organisations) had actively participated with the aim of overthrowing the Government and preventing it, through force and violence, from exercising its functions. With regard to the charge concerning the attempted coup, the public prosecutor's office relied on

evidence from the case file which, in its opinion, showed that the applicant had had intensive and unusual contacts with foreign nationals and especially with H.J.B., whom the prosecutor's office suspected of having been one of the instigators of the attempted coup and of having stayed in the Büyükada Hotel on that occasion. The prosecution's argument was based, in particular, on reports from base transceiver stations indicating that on 18 July 2016 the applicant's mobile telephone and that of H.J.B. had emitted signals from the same station.

38. On the same date the applicant, assisted by his two lawyers, was brought before the Istanbul 1st magistrate's court. Before it, he denied the accusations against him. He explained that he campaigned for peace and for the protection of human rights and that, in order to achieve these aims, he had worked in collaboration with members of NGOs, intellectuals, civil servants and politicians. He added that he had always drawn public attention to the dangerous and obscure nature of the activities carried out by the Gülenist organisation [Fetullah Gülen's network]. He repeated his statements about the intercepted telephone conversations, the photographs taken during the physical surveillance operations, the reports from the base transceiver stations and other evidence that had been included in the case file.

At the close of the hearing, the magistrate ordered that the applicant be placed in pre-trial detention, on the grounds that there existed concrete evidence ("*somut deliller*") indicating that he had been the instigator of the "Gezi events", which were in fact an insurrection, supported by numerous terrorist organisations with the aim of overthrowing the Government; that the applicant had provided financial support to persons who had taken part in the demonstrations; and that he had been in contact, *inter alia*, with one of the instigators of the attempted coup, Professor H.J.B. He also referred to the existence of strong suspicions against the applicant, the nature of the offences with which he had been charged and the fact that these offences were among those listed in Article 100 § 3 of the CCP – namely, the so-called "catalogue offences", for which a suspect's pre-trial detention was deemed justified in the event of strong suspicion – and to the danger of absconding. He further noted that a judicial review measure would be insufficient at this stage and that it would not correspond to the aim pursued.

39. On 8 November 2017 the applicant lodged an objection against the order for his pre-trial detention. In support of the objection, he argued that there was no concrete evidence that could justify a measure of pre-trial detention. In particular, he submitted that the prosecution's argument that the Gezi events could have been orchestrated by a single individual or organisation was simply not credible. He reiterated the statements that he had made, as recorded by the police (see paragraph 36 above) and by the magistrate's court (see paragraph 38 above). In addition, emphasising that

his placement in detention had been ordered about five years after the Gezi events, he challenged the magistrate court's argument that a judicial supervision measure would be insufficient at this stage and would not serve the aim pursued.

40. On 13 November 2017, without commenting on any of the arguments raised by the applicant, the Istanbul 2nd magistrate's court dismissed an appeal lodged before it by the applicant against the decision to maintain his detention, on the grounds that the contested decision had complied with the procedure and the law.

D. Extension of the pre-trial detention

41. According to the Government, on 8 and 29 November, 28 December 2017, 2 January, 7 March, 8 March, 26 June, 6 August, and 9 and 3l August 2018 the applicant submitted applications for provisional release. Those applications were examined by the competent magistrates' courts and dismissed by decisions of 13 and 30 November 2017, 22 January, 9 March, l9 March, 9 July, 13 and 31 August 2018 respectively. The Government argued that the applicant's requests for provisional release had been examined by the relevant courts within a maximum period of 30 days, as required by Article 3 of Emergency Legislative Decree no. 668, which had entered into force on 27 July 2016. They added that the magistrates issued their decisions without holding hearings, in accordance with Article 6 of Emergency Legislative Decree no. 667 (see paragraph 73 above).

42. According to the Government, the magistrates, in their decisions extending the applicant's detention, had referred not only to the evidence mentioned in the decision of 1 November 2017, but also to a report by the Financial Crimes Investigation Committee ("MASAK"). The courts had also indicated that the alleged offences were among the so-called 'catalogue' offences listed in Article 100 of the Code of Criminal Procedure; that pre-trial detention was a proportionate measure in view of the length of the sentence provided for by law; and that alternative measures to detention were insufficient, given the risks of absconding and of damage to evidence.

43. According to the Government, on 26 October, 24 November and 2l December 2018, then on 18 January and 15 February 2019, the competent courts examined, of their own motion, whether to maintain the applicant in detention. The Government indicated that, in accordance with Article 10l § 3 of the CCP, the applicant's court-appointed lawyers were able to attend the review hearings on 26 October and 24 November 2018 and 15 February 2019, and were able to submit oral arguments against the applicant's continued detention.

44. It appears from the case file that:

- On 30 November 2017 the magistrate's court ruled – in the context of the examination, of its own motion, on the applicant's detention – on a request for release dated 29 November 2017, thus also acting in accordance with Article 6 (i.) of Legislative Decree no. 667 and Article 3(ç) i. of Legislative Decree no. 668 (see paragraph 73 above). It stated that the public prosecutor had requested that the contested measure be maintained, and it granted that request. It considered that there existed concrete evidence giving rise to a strong suspicion that the offence in question had been committed, and it emphasised the seriousness of this offence and the fact that all the evidence had not yet been gathered. Further, considering that the alleged offence was among the so-called 'catalogue' offences listed in Article 100 of the Code of Criminal Procedure, it concluded that pre-trial detention was a proportionate measure in view of the length of the sentence provided for by law, and that a judicial supervision measure would be insufficient.

- On 22 December 2017 the magistrate's court, ruling of its own motion and relying essentially on the grounds set out in its decision of 30 November 2017, ordered that the applicant be maintained in pre-trial detention.

- On 27 December 2017 the applicant submitted a request for release pending trial and for a hearing. Relying on Article 5 of the Convention and on the Court's case-law in this area, he argued that there was no legitimate and proportionate evidence that could justify his continued pre-trial detention. He also reiterated his previous statements concerning the elements cited as evidence by the prosecution. He also challenged the decisions maintaining his pre-trial detention, arguing that they had not been properly reasoned.

- On 22 January 2018 the magistrate's court, ruling of its own motion and relying essentially on the grounds set out in its decision of 30 November 2017, ordered that the applicant be maintained in pre-trial detention.

- On 5 February 2018 the magistrate's court dismissed the objection lodged by the applicant against the decision to extend the pre-trial detention, on the grounds that the contested decision had been compatible with the procedure and the law.

- On 17 February 2018 the magistrate's court, ruling of its own motion and relying essentially on the grounds set out in its decision of 30 November 2017, ordered that the applicant be maintained in pre-trial detention.

- On 9 March 2018 the magistrate's court dismissed the objection lodged by the applicant against the decision to extend the pre-trial detention, on the grounds that the contested decision had been compatible with the procedure and the law.

- On 19 March, 18 April, 16 May, 11 June, 9 July and 3 August 2018 the magistrate's court, ruling of its own motion and relying essentially on the grounds set out in its decision of 30 November 2017, ordered that the applicant be maintained in pre-trial detention.

- On 13 August 2018, relying essentially on the grounds set out in its previous decisions, the magistrate's court dismissed the objection lodged by the applicant. Furthermore, it also listed in its decision the evidence which, in its view, indicated that the suspicions against the applicant were well-founded, including the MASAK report (report by the Financial Crimes Investigation Committee – see paragraph 42 above).

- On 31 August, 28 September, 26 October, 24 November and 21 December 2018 the magistrate's court, ruling of its own motion and relying essentially on the grounds set out in its decision of 30 November 2017, ordered that the applicant be maintained in pre-trial detention.

- On 18 January 2019 the magistrate's court, ruling of its own motion and relying essentially on the grounds set out in its decision of 30 November 2017, ordered that the applicant be maintained in pre-trial detention and held that there was evidence indicating that the suspect could abscond.

45. On 5 February 2019 it was decided to disjoin the criminal investigation into the accusation under Article 309 of the Criminal Code (attempted overthrow of the constitutional order) from the investigation into the accusation under Article 312 (attempting to overthrow the Government). In addition, in another decision issued on the same date, it was decided that the offence under Article 309 of the Criminal Code would be the subject of a separate investigation (no. 2017/196115).

At the date of adoption of the present judgment, the prosecutor's office had not yet lodged a bill of indictment against the applicant in relation to the accusation of attempted overthrow of the constitutional order (Article 309 of the Criminal Code).

46. On 15 February 2019 the magistrate's court, ruling of its own motion and relying essentially on the grounds set out in its decision of 30 November 2017, ordered that the applicant should remain in pre-trial detention.

E. The indictment of 19 February 2019

47. On 19 February 2019 the Istanbul public prosecutor filed a bill of indictment in respect of the applicant and 15 other suspects, including actors, NGO leaders and journalists. He accused them, in particular, of having attempted to overthrow the government by force and violence within the meaning of Article 312 of the Criminal Code, and of having committed numerous breaches of public order – damaging public property, profanation

of places of worship and of cemeteries, unlawful possession of dangerous substances, looting, etc.

48. The bill of indictment in question is a voluminous document of 657 pages. In their written observations, the Government submitted a summary, divided into three main parts.

The indictment may be summarised as follows:

1. First part of the bill of indictment

49. In the first part of the bill of indictment, the prosecutor's office set out the context underlying the Gezi events. It specified at the outset that it would present "elements which [would] show that the Gezi insurrection [had been] organised by Turkish "distributors" trained by Serbian "exporters" (who [were] professional revolutionaries), with financial support from the West" ("*Gezi kalkışmasının Batı finansörlüğünde, Sırp profesyonel devrim ihracatçılarının eğittiği Türkiye distribütörleri tarafından organize edildiğine dair elde edilen bulgular"*, see p. 29 of the act of indictment).

According to the prosecutor's office, the methods developed by Gene Sharp [an American political scientist, known for his extensive writings on non-violent struggle] had influenced several resistance movements across the world, including the Occupy movement, the orange revolution in Georgia [this was probably a reference to the "rose revolution" in Georgia in 2003], and even the so-called "Arab spring" events which had occurred in countries such as Egypt, Tunisia and Yemen. It perceived significant similarities between those events and the Gezi events: all had allegedly been planned in advance on the basis of a well-defined scenario ("*planlı bir senaryonun ürünü"*); all had been deliberately directed by individuals who were backed by international players ("*uluslararası aktörlerden destek alan şahıslarca bilinçli bir şekilde yönlendirildiği"*); social media, which enabled the public to communicate with a view to organising anti-government demonstrations, had been widely used; and the symbols, slogans and images already used in the above-mentioned episodes had been reemployed in the Gezi events. In particular, G.S., who was well-known as an international financial speculator, had allegedly backed the civil unrest in eastern bloc and Arab countries through the intermediary of the Open Society Institute, which conducted its activities in Turkey via the Foundation for an Open Society. The bill of indictment was worded as follows:

> "... G.S.'s influence on the Gezi insurrection has been widely covered in the press and discussed in political and social circles; it is thus understood that G.S., founder of the Open Society Institute, played a leading role in the Gezi insurrection, as he had already done in the context of insurrections in other countries."

The prosecutor's office also alleged that the founders of the political movement *Otpor* had visited Turkey on numerous occasions in 2012 and

2013. [This movement, whose name means "resistance" in Serbian, advocates non-violent action; it is generally considered as one of the key players in toppling Slobodan Milošević's regime in Serbia].

The prosecutor's office listed the dates of the overseas trips which, in its view, the applicant had organised with a view to coordinating the Gezi events (particularly to Belgium, Germany and the United States). It also alleged that the applicant had been in Hungary on 5 and 6 April 2013, and that in July 2012 he had spent 25 days abroad and had made several trips with the other defendants or with A.F.I., an academic.

The prosecutor's office quoted long extracts from transcripts of telephone conversations in which other defendants had referred to a visit to Turkey by I.V. – co-founder of the *Otpor* movement and founder of an NGO known as CANVAS (Centre for Applied Nonviolent Action and Strategies) – and their contacts with non-violent movements across the world.

The prosecutor's office provided a list of 198 types of non-violent actions which, it alleged, had been used during the Gezi events: "the standing man" ["*duran adam"*, literally, "the man who stops"; this is a form of peaceful demonstration, first used in the Gezi events, which consists in remaining standing for a long period without moving], "the man who plays the piano" [during the Gezi events, a German pianist played the piano on Taksim Square], etc. It concluded that the defendants had intended to generalise non-violent actions throughout Turkey and that there existed a parallel between the Gezi events and those in 2000 which had led to the overthrow of the Serbian government.

The prosecutor's office alleged that the applicant had received money from the Foundation for an Open Society, and that it was established that I.V. – a co-founder of the *Otpor* movement – had been in Turkey before and after the Gezi events. It argued that videos existed of demonstrations in Gezi Park as far back as 2011, in which M.A.A., an actor who was one of the defendants, called on the population to gather in Gezi Park on 11 November 2011 and spoke of an "Istanbul uprising". According to the prosecutor's office, these elements showed that the Gezi events had been planned in advance, in line with a well-defined scenario.

At the end of the first part of the bill of indictment, the prosecutor's office provided a chronological summary of the incidents which occurred before and during the Gezi events.

It then described the events which had led, in its opinion, to the overthrow of two former Egyptian presidents. Alleging that Europe and the United States had violently suppressed similar demonstrations in their own countries, it criticised their attitude towards Muslim and anti-globalisation countries, finding it to be hypocritical. It concluded as follows:

> "It may thus be considered that the Gezi insurrection occurred against the background of globalist thinking [*küresel düşünce*] described above. Such actions

sometimes achieve their aim. It is agreed that the political aim of those actions was to harass the government formed by the Justice and Development Party, and especially the Prime Minister ....

In the light of this information, it is established that the Gezi insurrection was led and promoted by globalist structures which are likely to control armed terrorist organisations or illegal structures that appear to be legal ..., [which are] likely to manipulate the public in order to achieve their aim .... [In this connection], it is established that the Gezi insurrection was planned and staged by the defendants... In the current global situation, the fact that such events do not occur in countries which are considered as allies or strategic partners but which are governed by an anti-democratic regime or a monarchy confirms the validity of this argument.

Moreover, the fact that similar actions succeeded in changing the existing political structure in Georgia, Ukraine, Tunisia, Egypt, Libya, Syria, Bahrain, Algeria, Jordan and Yemen shows that the events in question are not merely preparatory steps but are in fact operational actions ....”

2. Second part of the bill of indictment

50. In the second part of the bill of indictment, the prosecutor’s office listed the acts that it accused the applicant and the other suspects of having committed prior to and during the Gezi Park events, and the evidence that it considered relevant. It alleged that the applicant had supported the Gezi insurrection, and that his aim had been to generalise such actions across Anatolia and to popularise so-called “civil disobedience”, with the aim of creating generalised chaos in the country. It held that this evidence showed that the Foundation for an Open Society, to which the applicant belonged in his capacity as a member of the administrative board, had provided financial backing for the Gezi events. It also argued that the applicant had organised secret and public meetings with persons who had played an active role in organising those events, and that he had cultivated relationships with several individuals with a view to setting up a media outlet.

51. With regard to the charges against the applicant, the prosecutor’s office gave an overview of the activities conducted by the Foundation for an Open Society, and alleged that the “branches” to which the defendants belonged amounted to a *sui generis* structure, and that their aim was to immobilise the Government. It argued that G.S. was the external branch of this structure and that the applicant was its leader and coordinator at national level. In this connection, it reiterated its allegation that the applicant had intended to create a private television channel. It considered that the applicant had directed the Gezi events through the intermediary of individuals who had infiltrated the “Taksim Solidarity” collective and other NGOs, with a view to creating an “impression of victimisation” (*mağduriyet algısı*) and generalising the “civil disobedience” actions being conducted by professional activists, and that the ultimate aim of this operation had been to force the Turkish government to resign under pressure from foreign

countries and, if possible, to prepare the ground for triggering a civil war (p. 92 and 93 of the bill of indictment).

Quoting from the transcripts of numerous telephone conversations between the applicant and certain other defendants, the prosecutor's office argued that the defendants had acted in a coordinated manner in order to generalise purportedly non-violent action across the country, had controlled and directed the "Taksim Solidarity" collective, had organised meetings with several persons, including artists and politicians, had held meetings with individuals working for the European Union, the European Commission and the European Court of Human Rights (ECHR), and had helped to organise exhibitions and round tables, as well as film and video recordings, with the aim of ensuring public support for the Gezi events.

The prosecutor's office also stated that in July 2012 and April 2013 M.A.A. (an actor who was one of the defendants) had appeared in "Mi Mineur", a theatre play in which the population was called upon to rise up against the dictator of an imaginary country.

The prosecutor's office further referred to several articles in the daily press describing the applicant as "a red billionaire" and the "Turkish G.S.".

In the same part of the bill of indictment, the prosecutor's office also included long extracts from transcripts of telephone conversations in which the applicant and the other defendants had discussed the progress of the actions during the Gezi events, had referred to examples of non-violent movements in various countries, had discussed participation in festivals and funding for these various activities, had considered how the NGOs that were led by the applicant, specifically the Foundation for an Open Society and the limited company Anadolu Kültür, could put together films or videos about the Gezi events, and had discussed the preparation of a documentary film entitled *Video Occupy*.

In particular, the prosecutor's office cited a telephone conversation of 21 June 2013 (p. 159), the relevant parts of which read as follows:

> "H.H.G.: The resistance is continuing and perhaps you have seen that many strange things are happening in various places ... a little... probably very soon, there is a risk that the movement will run out of steam ... we spoke with the same team about how we could reinvigorate the movement, give it a wider impact and deeper roots by increasing participation ....
>
> The applicant: OK.
>
> H.H.G.: In reality, the main aim is to bring together the initial team with a team of 40 persons, including B.T., who is part of the "Taksim Solidarity" collective ... some people think that we should generalise [the movement] in Anatolia... I shall send you the programme and the provisional list of participants...
>
> The applicant: OK.
>
> H.H.G.: I can receive an email from you. Professor (T.T.) sent a message [asking] to shorten the length of the programme and about the date. We would definitely like to have you as part of this team.....

The applicant: OK.

H.H.G.: [We must] grow and to become more representative, [since] Taksim Solidarity and the other city collectives are unable to agree on common ground... Some people think that [we] should find a common position and widen [the movement].

The applicant: I agree.

H.H.G.: Some think that [we] should generalise [the movement] across Anatolia.

The applicant: I agree.

H.H.G.: We need an action plan for each of us ... a meeting is being planned.

The applicant: OK.

H.H.G.: Some people want to organise a meeting at Garage Istanbul ... Could we perhaps ask for your support regarding Cezayir [a restaurant managed by the applicant in Istanbul]?

The applicant: For Cezayir there's no problem - that can be arranged if it's available.

H.H.G.: OK. I'm now going to send you the draft programme and the provisional list of participants.

The applicant: I agree.

H.H.G.: We will speak further on the basis of those documents".

The prosecutor's office alleged that the applicant, in his capacity as a leader of the Foundation for an Open Society and of Anadolu Kültür, had conducted numerous activities with a view to setting up "people's forums", training activists in carrying out non-violent actions such as those organised by the *Otpor* movement, gaining the support of European Union countries for securing a ban on the sale of tear gas to Turkey, and keeping the European Court of Human Rights informed about those events.

The prosecutor's office quoted from reports by the MASAK detailing banking operations by Anadolu Kültür, and alleged that these documents showed that the company in question had made several bank transfers to individuals, commercial companies and NGOs working in the fields of art, human rights and minorities, and that it had received financial support from several foundations, international organisations and universities, such as the Civitas Foundation, the University of Columbia and the Council of Europe. It stated that the 120 foundations supported by Anadolu Kültür included a foundation that had been dissolved following the declaration of the state of emergency on account of its presumed links with the organisation FETÖ/PYD.

The prosecutor's office claimed that the physical surveillance operations in respect of the applicant had made it possible to establish that on 16 July 2013 he had met the legal director of the German Consulate. It also alleged that another defendant (T.K.) had met with a French journalist on 5 July 2013, that the applicant had met a member of the European Parliament on

26 July 2013, and that a telephone conversation had taken place with a former representative of the European Commission of the European Union. It further stated that during a telephone conversation with an academic, the applicant had also mentioned the visit of the Council of Europe Commissioner for Human Rights.

The prosecutor's office also alleged that the applicant had contacted journalists and business leaders with a view to setting up a new media outlet and that, in particular, he had contacted Germany, England, other European countries and the Guardian Foundation in order to obtain funding.

The prosecutor's office also quoted from a telephone conversation of 16 June 2013, the relevant parts of which read:

> "... O.E.: You saw an absolutely unbelievable evening on television. Thirty thousand people marched from Kartal [a district in Istanbul] to here... It's incredible. All the way to Mecidiyekoy [a district of Istanbul], every district is out on the streets .... Now I am back on Taksim again, I have been covered in [tear] gas. This cannot be stopped ....
>
> The applicant: Yes, yes. What kind of action, how can it be organised in a planned way? In other words, protests are arising spontaneously. How can they be planned? They are happening every week.
>
> O.E.: In fact, we did plan this .... The people cannot be stopped. There is no one to negotiate with. Yesterday I said during a programme on a German channel that T. Erdoğan [the then Prime Minister] was going to say something, that he was going to speak at a meeting. We will see what he says. The people are listening attentively and all of his remarks provoke indignation.
>
> The applicant: Yes. He hasn't spoken yet, has he?
>
> ...
>
> The applicant: He has not yet spoken. But even the governor's statements increase the human losses. A. was with a 14-year-old girl who was in a terrible state. The doctors say that it's not clear if she will survive ....
>
> The applicant: ... The events so far have been very serious. This has gone beyond authoritarian actions ...."

According to the prosecutor's office, the applicant had criticised the then prime minister during this conversation. He had stated that the prime minister was a populist who defended the theory of an international conspiracy, although in reality there was international pressure. He had also supported O.E.'s proposals to organise weekly meetings on the theme of "Law and Justice", and had criticised the police operations.

The prosecutor's office also referred to a conversation between the applicant and another defendant, the actor M.M.A., on 6 June 2013. It alleged that, in the course of this conversation, there had been an exchange about a group of football supporters, and that the applicant had stated that this group ought to be encouraged, in order to demonstrate that people from various backgrounds were taking part in the demonstrations. It also indicated that, during the same conversation, the applicant had raised the

question of police violence and his conversations with the then Minister of Justice on the subject.

52. The prosecutor's office also referred to the statements made to the press by the "Taksim Solidarity" collective during the Gezi events, the meetings organised by various NGOs during this period, and to the activities conducted in various towns in Turkey in support of the Gezi events.

53. With regard to the presumed links between the FETÖ/PDY organisation and the defendants, the prosecutor's office alleged that the organisation had supported the Gezi events. In support of its argument, it referred to:

– a message of 30 December 2013 in which the applicant had stated as follows: "for the time being, we need the *cemaat* [literally, the word '*cemaat*' means "community"; however, at the relevant time, this term was commonly used to describe the followers of Fetullah Gülen, the presumed head of the FETÖ/PDY organisation] as much as [we need] the Government. Through them, we are informed about acts of corruption and infiltration within the justice system";

– a telephone conversation between S.C.A., one of the defendants, and a columnist from the *Zaman* daily newspaper [considered by the Turkish authorities as a news media allied to the FETÖ/PDY organisation], in the course of which S.C.A. had criticised the newspaper's attitude towards the Gezi events and the columnist had stated: "we fully support the Gezi events ...";

– an undated telephone conversation during which A.H.A., a former president of the Foundation for an Open Society, had told his interlocutor that he was going to "have dinner with Hoca Efendi [Fetullah Gülen]'s men ...";

– several telephone conversations between the defendants and journalists working for the *Zaman* newspaper;

– the prosecution of the head of the security police, who had allegedly ordered police officers to set fire to the tents erected in Gezi Park on 29 May 2013 and to use tear gas against the demonstrators, and who had been dismissed on 20 July 2016 under an emergency legislative decree on account of his presumed links to the FETÖ/PDY organisation.

The prosecutor's office also cited statements by a police officer (H.G.), questioned as a witness, who stated that he had seen the applicant among the demonstrators during the Gezi events and that the persons around him were seeking his advice, and statements from another witness, M.P., who said that G.S., the applicant and several NGOs and representatives of political parties had supported the Gezi events, and that, under the pretext of human-rights violations, those persons had intended to cause chaos in the country (see paragraphs 34 above and 62 below).

The prosecutor's office also listed several acts which, in its view, had been intended to put Turkey in an awkward position at international level ("*Türkiye'yi Uluslararası alanda zor durumda bırakmak için yapılan faaliyetler"*):

– the organisation of an exhibition in Brussels about the Gezi events;

– the preparation of a report about the Gezi events, intended for submission to the European Parliament;

– support for individual applications lodged with the European Court of Human Rights concerning the use of tear gas during demonstrations;

– telephone conversations about cooperation and the exchange of information with various bodies of the Council of Europe, including the Commissioner for Human Rights and the Secretariat General of the Council of Europe ;

– telephone conversations concerning several reports by Amnesty International.

54. In the same part of the bill of indictment, the prosecutor's office communicated, in no particular order, the evidence against the applicant, which may be classified and summarised as follows:

Firstly, it indicated that between 2001 and 2006 the applicant had been one of the advisers to the Foundation for an Open Society, and that he had also sat on the administrative boards of that foundation and of the company Anadolu Kültür, which received funding from G.S. It then cited the transcripts of multiple telephone conversations which had taken place during the Gezi events and had concerned, in particular:

– the opening of a bank account, in the context of a public fundraising campaign to purchase gas masks for the demonstrators taking part in the Gezi events;

– providing a table so that the demonstrators gathered in Gezi Park could assemble;

– the plan to create a group of representatives of the Gezi demonstrators, which would be responsible for negotiating with the Government;

– meetings with the then Minister of Justice, who was considered by the speakers to be a decent statesman;

– the organisation of multiple meetings during the Gezi events;

– relationships with several foreign nationals.

The prosecutor's office also alleged that, during a telephone conversation, the applicant had described the then Prime Minister as a liar.

It also referred to a telephone conversation between the applicant and B.T., a member of the "Taksim Solidarity" collective, on 31 May 2013 (following the security forces' intervention against the demonstrators in Gezi Park, there had been numerous violent confrontations on that date), the relevant parts of which read as follows:

> "... B.T.: Many people have been injured; several people are in intensive care, [the police] have put up barriers everywhere. I am not there, and I won't be going. The

situation is catastrophic. Osman, if you have friends on the Wise Persons' Commission [at the end of 2012 and in January 2013, a commission made up of 63 individuals from various backgrounds was set up by the Government to accompany the peace process, known as the "solution process", which had been launched in order to find a peaceful and permanent solution to the "Kurdish question"], they could be asked to make a joint statement. I mean, this is no longer a situation which can go along with the peace process, some people (*Yani bu barış süreci ile birlikte gidecek bir durum değil artık, birilerinin*).

The applicant: Yes, yes, yes.

B.T.: I've written something and I've sent it to you.

The applicant: But what is important is to hold a press conference in Cezayir for those living abroad, for the journalists.

...

The applicant: "OK! You said that there had been one death – are you serious?

B.T.: There has been a death. We don't know the cause of death; some say that the victim had a heart attack ... But there has been a death. (Taksim) Solidarity is preparing a document; the attack began at 5 a.m. The people gathered there included five masked individuals who were throwing stones at the police. In other words, there was provocation, and now Solidarity's document will come out. [The document will state that this attack] was not carried out by our members and [that we] hope that those individuals [who were throwing stones at the police] will be identified. The public did not use violence at all.

...

B.T.: "I myself have written to the Wise Persons, to L., M. and O. It would maybe be useful to put pressure on the Wise Persons, because they have met for the peace process. The Government has declared war on the people.

The applicant: Yes, yes. ...

The applicant: It is necessary to continue lodging criminal complaints ..."

The prosecutor's office also referred to telephone calls from foreign numbers, the origin of which, it alleged, remained unknown.

In support of its allegations, it mentioned numerous telephone conversations between the applicant and individuals from various backgrounds, without however indicating how they were relevant to its accusations against him. It cited, in particular, conversations between the applicant and:

– A.F.I., a journalist and academic, about an article that he had written which was due to be published in *Libération*. During this conversation, the applicant had severely criticised the then Prime Minister for making a distinction between lifestyles that he considered "legitimate" and those that he regarded as "illegitimate". It emerged from this conversation that members of the Prime Minister's party had expressed their dissatisfaction *vis-à-vis* the Prime Minister's position. The applicant, who described the Prime Minister as a "successful fascist leader" ("*başarılı faşist lider*") and mentioned the risk of harassment run by unmarried couples, had made the

following remark to A.F.I.: "They [presumably, the members of the ruling party] must get rid of this person". Furthermore, he had claimed that [Turkey had] a "dictatorial regime" and that the Prime Minister must not be allowed to become President of the Republic.

In the indictment, a report of this telephone conversation was cited. It appears that at 1.15 p.m. on 8 November 2013 A.F.I. telephoned the applicant. The transcript of this telephone conversation reads as follows:

A.F.I.: "Now I am doing one thing; I sent an article to *Libération* [and] to *Radikal 2* [a weekly publication, annexed to the daily newspaper *Radikal*, which publishes articles by intellectuals] about the Imam of Turkey.

The applicant: O.K.

A.F.I.: I need something related to the title [of the article] about Erdoğan, so that another version can be published in *Libération* explaining these events more... They will publish [this article] next week, I am preparing it... What bothers me, worries me more, is a very dangerous word used by Erdoğan, [who said that] there are legitimate lifestyles ("*meşru hayat*") and illegitimate lifestyles ("*gayrimeşru hayat*").

The applicant: I don't believe you, I haven't been following [the news] – he even said that!" ....

A.F.I.: He said so in Finland,

The applicant: Ah, well! ... I missed it!

A.F.I.: Yes, I will address this subject.... The members of the AKP [the Prime Minister's party] want to restrict him; he [Prime Minister] says worse things when he is abroad.

The applicant: Yes.

A.F.I.: In other words, the members of the AKP are also in a confused state ("*şaşkın*") ... one of their own even told me that the man has gone mad.

The applicant: If this man does something about it, [he] will become a successful fascist leader ...

A.F.I.: They can't pass... a law.

The applicant: Perhaps he could be placed under tutelage ("*ya da hacir altına*") ...

A.F.I.: ... They can't do that...

The applicant: Or he would be placed under tutelage, i.e. one of these options.

A.F.I.: Yes, they are unable to adopt a law, but because of this man, they will encounter many difficulties; [for example], the zealous ("*işgüzar*") prefect of Adana [a city in Turkey] will conduct searches, the zealous neighbour will denounce [his neighbours].

The applicant: ... It is a headache ("*bela*") so... it is a headache in our eyes, but this man does not consider it like that.

A.F.I.: No, when events happen, they will say that it is an interference in lifestyles. Many AKP members are in shock ....

The applicant: That's what I'm saying, that's what I'm saying, that's the AKP...

A.F.I.: They're going to put him under tutelage ...

The applicant: They must get rid of this man after all this, because...

A.F.I.: I completely agree!

The applicant: ... if a boy and a girl have been together in such places, [if such information becomes known], their lives are ruined ... in Turkey, there are many ways to harass [someone]...

A.F.I.: I know that of course. They try to present it as the activity of a terrorist organization ("*terör örgütüne sardırmaya çalışıyorlar"*), it's like it was a terrorist [activity] ("*sanki terör*")... when girls and boys get together, a terrorist organization [is formed] ("*kızlı erkekli yerlerde terör örgütü"*).

The applicant: Yes.

...

A.F.I.: I see that the *cemaat* (see paragraph 53 above) is also very disturbed ... Their problem is about the houses of *Işık* [Fetullah Gülen network's student housing], the students' houses.

The applicant: Yes, yes!

A.F.I.: These houses, they're also illegal; they're not legal student residences.

The applicant: Yes, yes!

A.F.I.: After the preparatory courses ("*dershane*"), they [this presumably refers to the members of the Gulenist network] think that he [the Prime Minister] is obsessed with these houses ...

The applicant: Yes, it is a possibility, yes.

...

The applicant: In the end, there is a climate in which the man [this presumably refers to the Prime Minister] wants to do something, this could only be a dictatorial regime, what else could it be? Okay, he's not going to get involved in everything; but, when it comes to the subjects he considers important...

A.F.I.: The subjects he considers to be important perhaps from a moral and political point of view.

The applicant: Okay, he wants to do what he wants.

A.F.I.: Yes.

The applicant: In general, we act according to the laws, but.

A.F.I.: Yes, Yes.

The applicant: [But] I have to do what I want about certain issues, that's it!

A.F.I.: Yes, yes, yes. That's right. That's right.

The applicant: No! If he [this presumably refers to the Prime Minister] said that, then he should not be allowed to become President of the Republic, though I said [earlier] that he would become President of the Republic.

A.F.I.: It seems to me that this is the case. If he became president of the Republic, he would start harassing the Government."

– R.T., a politician and former judge at the European Court of Human Rights, about the possibility of putting up a joint opposition candidate for

the local elections which were due to be held on 30 March 2014 in the Beyoğlu district;

– A.E., a journalist who was working at the relevant time for the daily newspaper *Cumhuriyet*, about that newspaper's financial situation (this conversation had taken place on 2 October 2017).

The prosecutor's office also mentioned a telephone conversation by the applicant on 17 February 2017 about organising a visit by a delegation from the EU Turkey Civic Commission (EUTCC), composed primarily of members of the European Parliament, academics and journalists [this visit took place between 13 and 19 February 2017].

In addition, the prosecutor's office quoted from an interview given by the applicant to a Web TV on YouTube on 4 August 2015 (see paragraph 36 above), as well as another interview in which the applicant had stated:

> "From now on, will the (PKK) activists be required to leave Turkey in order to lay down their weapons?"

3. Third part of the bill of indictment

55. In the third part of the bill of indictment, the prosecutor's office referred, in particular, to the evidence that it had gathered in respect of the other defendants, included photographs of the symbols used and provided information about them, quoted from articles published during the Gezi events, and submitted photographs of the damage caused by acts of vandalism.

It concluded as follows:

> "... before the Gezi insurrection, known as the "Gezi Park events", all of the defendants had been trained with a view to overthrowing the government; they began to implement their plan in May 2013; legal and illegal structures, as well as illegal structures that were ostensibly legal and seemingly independent of each other, began to act by converging around a single aim; all the defendants sought to incite the public to take to the streets by organising so-called "non-violent" actions that were intended to gain public sympathy; they made numerous appeals and tried to increase participation in collective demonstrations by claiming that the police had intervened violently in the demonstrations; their aim was to plunge the country and society into chaos, as had occurred during the 1960 and 1980 *coups d'état*, by providing left-wing terrorist organisations with a favourable environment and attempting to overthrow the government of the Republic of Turkey or to prevent it from exercising its functions; they very probably wished to force the Government to resign and to hold early elections, as in certain foreign countries; should this attempt fail, they intended to lay the groundwork for a civil war and a *coup d'état*, as in Syria and Egypt; the armed terrorist organisation FETÖ/PDY made similar attempts; after the Gezi insurrection had ended ... the armed terrorist organisation FETÖ/PDY took to the stage with the aim of achieving the same goal; in the light of the evidence in the case file, the suspects committed the offences with which they are charged."

The prosecutor's office called for the sentences provided for in the Criminal Code to be imposed on the applicant and the other defendants.

56. On 4 March 2019 the assize court accepted the bill of indictment and agreed to the applicant's committal for trial; the trial process thus began. The criminal proceedings are still pending before that court.

F. The applicant's individual application before the Constitutional Court

57. On 29 December 2017 the applicant lodged an individual application with the Constitutional Court. He alleged, *inter alia*, a violation of Article 5 (lack of reasonable suspicion, absence of relevant and sufficient reasons, lack of access to the investigation file, no public hearing when his applications for release were examined, etc.) of the Convention. He also submitted that his deprivation of liberty had been imposed with a view to dissuading human-rights defenders from carrying out activities to protect rights and freedoms. In particular, referring to the requirement of rapidity imposed by Article 5 § 4 of the Convention, he asked that his application be given priority.

58. In the context of the proceedings before the Constitutional Court, the Ministry of Justice submitted its observations on 4 January 2019.

59. On 22 May 2019 the Constitutional Court deliberated on the applicant's application. On the following day it published the outcome of its deliberations on its internet site. It declared the applicant's complaint concerning the lawfulness of the order for his pre-trial detention admissible, but found that there had been no violation of Article 19 of the Constitution. It also dismissed the applicant's complaint based on the lack of a public hearing when his requests for release had been examined.

60. On 28 June 2019 the Constitutional Court's judgment was published in the Official Gazette. With regard to the lawfulness of the order placing the applicant in pre-trial detention, it concluded, by ten votes to five, that there had been no violation of Article 19 of the Constitution. In so doing, the Constitution Court noted, *inter alia*, that numerous violent acts had been committed during the Gezi events, civilians and police officers had lost their lives, thousands of persons had been injured and several criminal investigations had been opened against the persons responsible for these acts. It considered that, by virtue of his social status and having regard to his national and international contacts, the applicant had been in a position to foresee the consequences of those events and the fact that the demonstrations in question would degenerate into violence. It considered that, taken together, the following elements - listed in the decisions relating to the applicant's pre-trial detention and in the bill of indictment (see paragraphs 67-69 of the judgment) - were sufficient to give rise to a strong suspicion concerning his responsibility with regard to the acts of violence committed during the Gezi events and the ultimate aim of those acts, namely the overthrow of the Government: the content of the conversation

between the applicant and H.H.G. (see paragraph 51 above); the fact that the applicant had mentioned the political repercussions of the Gezi events during a telephone conversation; the fact that he had given assistance to the demonstrators by providing premises for meetings and equipment, including gas masks; the fact that he had organised meetings and taken part in them; the fact that he had provided financial backing to persons who supported these events; and the fact that he had worked to obtain public support for the Gezi events. The Constitutional Court concluded that in the light of these elements, the finding that there existed factual evidence giving rise to a strong suspicion that the alleged offence has been committed seemed neither arbitrary nor unjustified.

As to the complaint regarding the lack of a public hearing when examining the applications for release, the Constitutional Court pointed out that in the period between 1 November 2017 (the date on which the applicant was placed in pre-trial detention) and 30 April 2019 (the date on which his applicants were present at the hearing) – which lasted more than seventeen months –, the applicant had not been brought before the courts which were required to decide on the extension of his pre-trial detention. Holding that the applicant had had the opportunity to bring an action for damages, it nonetheless declared this complaint inadmissible for failure to exhaust the ordinary remedies.

In their dissenting opinions, three of the judges in the minority held, in particular, after examining the evidence in the case file, that there was not strong evidence in the present case that the applicant had committed an offence. They considered that the mere fact that the applicant had taken part in the Gezi events and provided support to peaceful demonstrations or non-violent actions could not be regarded as an act punishable under criminal law, in so far as everyone had the right to take part in such demonstrations. They also stated that the case file was not sufficient to establish that the applicant had been involved in committing violent acts. They added that in its previous judgments in cases concerning the Gezi events, the Constitutional Court had held on several occasions that there had been a violation of the right to peaceful assembly, and had even held that the disproportionate use of force by the police, against a demonstrator who had not participated in violence, was likely to have a dissuasive effect on the exercise of the right to freedom of peaceful assembly. They also criticised the fact that the applicant had been placed in pre-trial detention four years after the Gezi events. In particular, they emphasised that the evidence had been gathered during the initial phase of the investigation and it did not appear from the case materials that the authorities had gathered significant new evidence in the subsequent phases of the investigation that was likely to alter its course. Two of the three also considered that the evidence in the file did not prove that offences punishable under Articles 309 and 312 of the Criminal Code had been committed. In particular, they stressed that one of

the material elements constituting the alleged offences was the use of "force" or "violence".

Further, the fourth dissenting judge, without ruling on the reasonableness of the suspicions against the applicant, noted that a large part of the evidence had been gathered in 2013. In his view, the fact of ordering the placement in detention of a suspect more than four years after the events could not be considered as a "necessary" measure.

Lastly, the fifth dissenting judge criticised the manner in which the majority had examined the individual application. He emphasised that in its judgment the Turkish Constitutional Court should have ruled on the link between the evidence in the case file and the constituent elements of the offence, namely "force and violence" and "criminal intent". Referring to the relevant case-law of the Constitutional Court, he stated that that court ought to have examined the items of evidence one by one, but that in the present case, it had, on the contrary, taken a holistic approach. He added that the main problem in the majority decision was, in his view, the question of the proportionality of the measure. In his opinion, the fact of placing a suspect in pre-trial detention four years after the events in question could not be considered as a proportional measure. In this connection, he considered that the courts had provided stereotyped reasons to justify this measure.

G. Other information provided by the applicant

61. The applicant submitted to the Court two statements made by the President of the Republic.

The first statement was made by the President of the Republic on 21 November 2018 at a public meeting with local elected officials. The relevant parts of the statement read as follows:

> "Did you ever think of that? Someone financed terrorists in the context of the Gezi events. This man is now behind bars. And who is behind him? The famous Hungarian Jew G.S. This is a man who encourages people to divide and to shatter nations. G.S. has huge amounts of money and he spends it in this way. His representative in Turkey is the man of whom I am speaking, who inherited wealth from his father and who then used his financial resources to destroy this country. It is this man who provides all manner of support for these acts of terror..."

The second declaration was made on 3 December 2018 following the press statement published on the occasion of the G20 Summit [the Group of Twenty (G20) is a forum of nineteen countries, including Turkey, and the European Union; the thirteenth G20 summit was held on 30 November and 1 December 2018]. The relevant parts of this statement read as follows:

> "I have already disclosed the names of those behind Gezi. I said that its external pillar was G.S., and the national pillar was Kavala. Those who send money to Kavala are well known. And now they have taken the decision to close the foundation, to leave Turkey, and so on; this is how they have occupied our agenda."

62. The applicant also mentioned statements made by M.P. to the relevant prosecutor's office on 22 November 2018 (see, in particular, paragraphs 34, 36 and 53 above). He alleged that in those statements M.P. had complained about the fact of his previous statements being used to justify the opening of a criminal investigation against the applicant. According to the applicant, M.P. explained that he had met members of the Security Directorate on several occasions to discuss his academic research and had replied to their questions. However, he denied having made an incriminating statement. M.P. stated that he taken an active part in the Gezi events, which, in his view, were legitimate and fair demonstrations, and that he had been injured during disproportionate police interventions. He refuted the version that these demonstrations had been directed and financed by international institutions. In this connection, he denied having established a link between the applicant and an international conspiracy.

63. The applicant submitted that the Gezi protest movements had been the subject of numerous academic studies, from various perspectives, and that none of this research had shown that those events had been premeditated by foreign forces. He submitted six published articles about the Gezi Park events to the Court.

64. The applicant also referred, *inter alia*, to the following documents:

- "Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and submitted to a national referendum on 16 April 2017", adopted by the Venice Commission at its 110th plenary session (Venice, 10-11 March 2017),

- Resolution no. 2156 (25 April 2017) of the Parliamentary Assembly of the Council of Europe, entitled "Functioning of Democratic Institutions in Turkey".

H. The application to the United Nations Working Group on Arbitrary Detention

65. The Government argued that the applicant had submitted the same allegations to the United Nations High Commission on Human Rights and more specifically to its Working Group on Arbitrary Detention ("the Working Group"). In this connection, they communicated to the Court a letter entitled "Joint urgent appeal under the special procedures", which had been sent to the Turkish Government on 2 November 2017 and signed by the Vice-Chair of the Working Group on Arbitrary Detention, the UN Special Rapporteur on minority issues, the UN Special Rapporteur in the field of cultural rights, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the UN Special Rapporteur on the situation of human-rights defenders.

66. The letter concerned the applicant's arrest and detention. Its authors summarised the information they had received about the applicant's

detention and, in particular, the public statements made in this respect by the President of Turkey on 24 October 2017. Referring to the information forwarded to them concerning the applicant's arrest and placement in detention, they called on the Government, in accordance with Articles 9, 10 and 14 of the International Covenant on Civil and Political Rights not to deprive him of his liberty arbitrarily and to take all necessary measures to ensure that he was tried by independent and impartial courts.

In the urgent appeal, the United Nations Human Rights Council, by virtue of the powers vested in it, invited the Government to submit their observations on a number of points concerning the applicant's deprivation of liberty. The relevant part of the letter reads:

> *"We would like to inform your Excellency's Government that after having transmitted an urgent appeal to the Government, the WG may transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not."*

67. The Government specified that they had transmitted their observations on the above-mentioned points.

For his part, the applicant explained that this application had been made without his knowledge and that he had never taken part in the proceedings in question.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Turkish Constitution

68. 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. Il 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.
>
> ...
>
> 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. ..."

B. Relevant provisions of the Criminal Code

69. Article 309 § 1 of the Criminal Code is worded as follows:

> "Anyone who attempts to overthrow by force and violence the constitutional order provided for by the Constitution of the Republic of Turkey or to establish a different

order in its place, or *de facto* to prevent its implementation, whether fully or in part, shall be sentenced to aggravated life imprisonment."

70. Article 312 § 1 of the Criminal Code provides:

"Anyone who attempts to overthrow the Government of the Republic of Turkey by force and violence or to prevent it, whether fully or in part, from discharging its duties shall be sentenced to aggravated life imprisonment."

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

71. A detailed description of the relevant provisions of the CCP concerning pre-trial detention are to be found in the Court's judgments in the cases of *Agit Demir v. Turkey* (no. 36475/10, § 30, 27 February 2018) and *Mehmet Hasan Altan v. Turkey* (no. 13237/17, §§ 71-73, 20 March 2018).

72. The relevant parts of Article 100 §§ 1 and 2 of the CCP provide:

"1. If there are facts giving rise to a strong suspicion that the [alleged] offence has been committed and to a ground for pre-trial detention, a detention order may be made in respect of a suspect or an accused. Pre-trial detention may only be ordered in proportion to the sentence or preventive measure that could potentially be imposed, bearing in mind the significance of the case.

2. In the cases listed below, a ground for detention shall be presumed to exist:

(a) if there are specific facts grounding a suspicion of a flight risk ...;

(b) if the conduct of the suspect or accused gives rise to a suspicion

i. of a risk that evidence might be destroyed, concealed or tampered with,

ii. of an attempt to put pressure on witnesses or other individuals ..."

For certain offences listed in Article 100 § 3 of the CCP (the so-called "catalogue offences"), there is a statutory presumption of the existence of grounds for detention. The relevant passages of Article 100 § 3 of the CCP read:

"(3) If there are facts giving rise to a strong suspicion that the offences listed below have been committed, it can be presumed that there are grounds for detention:

(a) for the following crimes provided for in the Criminal Code (no. 5237 of 26 September 2004):

...

11. crimes against the constitutional order and against the functioning of the constitutional system (Articles 309, 310, 311, 313, 314 and 315);

..."

Article 101 of the CCP provides that reasons must be given for extending detention and for finding that alternative measures would be insufficient.

D. Legislative decrees nos. 667 and 668

73. Two successive legislative decrees (nos. 667 and 668), which entered into force on 23 July 2016 and 27 July 2016 respectively, had the effect of amending certain investigative measures and procedural acts. Under Article 6 § 1 (ı) of legislative decree no. 667, the question of continued detention, objections lodged against detention and applications for release "may" be examined on the basis of the file. Under Article 3 § 1 (ç) of legislative decree no. 668, applications for release submitted by a detained person are examined on the basis of the file when the court, of its own motion, examines [detention orders] every thirty days in application of Article 108 of the Code of Criminal Procedure.

III. COUNCIL OF EUROPE MATERIALS

74. The relevant Council of Europe and international texts on the protection and role of human-rights defenders are set out in the *Aliyev v. Azerbaijan* judgment (nos. 68762/14 and 71200/14, §§ 88-92, 20 September 2018).

In particular, on 6 February 2008 at its 1017th meeting the Committee of Ministers adopted a Declaration on Council of Europe action to improve the protection of human-rights defenders and promote their activities. The relevant parts of the Declaration read as follows:

> "The Committee of Ministers of the Council of Europe ...
>
> ...
>
> 1. Condemns all attacks on and violations of the rights of human rights defenders in Council of Europe member States or elsewhere, whether carried out by state agents or non-state actors;
>
> 2. Calls on member States to:
>
> (i) create an environment conducive to the work of human rights defenders, enabling individuals, groups and associations to freely carry out activities, on a legal basis, consistent with international standards, to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorised by the European Convention on Human Rights;
>
> (ii) take effective measures to protect, promote and respect human rights defenders and ensure respect for their activities;
>
> ...
>
> (vi) ensure that their legislation, in particular on freedom of association, peaceful assembly and expression, is in conformity with internationally recognised human rights standards and, where appropriate, seek advice from the Council of Europe in this respect;
>
> (vii) ensure the effective access of human rights defenders to the European Court of Human Rights, the European Committee of Social Rights and other human rights protection mechanisms in accordance with applicable procedures;

(viii) co-operate with the Council of Europe human rights mechanisms and in particular with the European Court of Human Rights in accordance with the ECHR, as well as with the Commissioner for Human Rights by facilitating his/her visits, providing adequate responses and entering into dialogue with him/her about the situation of human rights defenders when so requested;

..."

75. On 26 June 2018 the Parliamentary Assembly adopted Resolution 2225 (2018) on protecting human rights defenders in Council of Europe member States, which in the relevant parts read as follows:

"1. The Parliamentary Assembly recalls its Resolutions 1660 (2009) and 1891 (2012) on the situation of human rights defenders in Council of Europe member State and its Resolution 2095 (2016) and Recommendation 2085 (2016) on strengthening the role and protection of human rights defenders in Council of Europe member States. It pays tribute to the invaluable work of human rights defenders for the protection and promotion of human rights and fundamental freedoms. Human rights defenders are "those who work for the rights of others" – individuals or groups who act, in a peaceful and legal way, to promote and protect human rights, whether they are lawyers, journalists, members of non-governmental organisations or others.

...

3. The Assembly notes that in the majority of Council of Europe member States, human rights defenders are free to work in an environment conducive to the development of their activities. Nevertheless, it notes that over the past few years the number of reprisals against human rights defenders has been on the rise. New restrictive laws on NGO registration and funding have been introduced. Many human rights defenders have been subject to judicial, administrative or tax harassment, smear campaigns and criminal investigations launched on dubious charges, often related to alleged terrorist activities or purportedly concerning national security. Some of them have been threatened, physically attacked, arbitrarily arrested, detained or imprisoned. Others have even been assassinated. As a result, the space for human rights defenders' action is becoming more and more restricted and less safe.

4. The Assembly condemns these developments and reaffirms its support for the work of human rights defenders, who often put at risk their security and life for the promotion and protection of the rights of others, including the most vulnerable and oppressed groups (migrants, refugees and members of minorities – national, religious or sexual), or in order to combat impunity of State officials and corruption. ....

5. The Assembly therefore calls on member States to:

5.1. respect the human rights and fundamental freedoms of human rights defenders, including their right to liberty and security, a fair trial and their freedoms of expression and assembly and association;

5.2. refrain from any acts of intimidation or reprisal against human rights defenders and protect them against attacks or harassment by non-State actors;

...

5.6. ensure an enabling environment for the work of human rights defenders, in particular by reviewing legislation and bringing it into line with international human rights standards, refraining from organising smear campaigns against defenders and other civil society activists and firmly condemning such campaigns where organised by non-State actors;

5.7. encourage human rights defenders to participate in public life and ensure that they are consulted on draft legislation concerning human rights and fundamental freedoms, as well as that concerning the regulation of their activities;

5.8. refrain from arbitrary surveillance of human rights defenders online and other communications;

...

5.10. fully co-operate with the Council of Europe Commissioner for Human Rights in addressing individual cases of persecution and reprisals against human rights defenders;

5.11. evaluate the sufficiency, as measured by concrete results, of their efforts taken to protect human rights defenders since the adoption of the United Nations Declaration on Human Rights Defenders and the Committee of Ministers' Declaration on Council of Europe action to improve the protection of human rights defenders and promote their activities. ..."

76. In Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007, at the 1006th meeting of the Ministers' Deputies, the Committee of Ministers underlined the importance of NGOs in the following terms:

"Aware of the essential contribution made by non-governmental organisations (NGOs) to the development and realisation of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies; ...

Noting that the contributions of NGOs are made through an extremely diverse body of activities which can range from acting as a vehicle for communication between different segments of society and public authorities, through the advocacy of changes in law and public policy, the provision of assistance to those in need, the elaboration of technical and professional standards, the monitoring of compliance with existing obligations under national and international law, and on to the provision of a means of personal fulfilment and of pursuing, promoting and defending interests shared with others;

Bearing in mind that the existence of many NGOs is a manifestation of the right of their members to freedom of association under Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms and of their host country's adherence to principles of democratic pluralism ..."

IV. THE URGENT APPEAL PROCEDURE AND THE WORKING GROUP ON ARBITRARY DETENTION

77. For the procedure before the Working Group, see *Peraldi v. France* ((dec.), no. 2096/05, 7 April 2009).

78. The Working Group has developed an "urgent action" procedure for cases in which there are sufficiently reliable allegations that a person may be detained arbitrarily and that the continuation of the detention may entail a

serious threat for his or her health, physical or mental integrity or life. In such cases, the Working Group sends to the government of the State concerned, through diplomatic channels, an urgent appeal requesting that it take appropriate measures to ensure that the detained person's right not to be deprived arbitrarily of his or her liberty, the right to fair proceedings before an independent and impartial tribunal, and the right to life and to physical and mental integrity are respected.

79. The "special procedures" are mechanisms ("mandates") introduced by the UN Human Rights Council to address the specific situation in a country, or a particular issue giving rise to serious human-rights violations in all regions of the world. The role of these mandate-holders is thus to examine, oversee, advise and report on human-rights situations in specific countries or territories (country-specific mandates), or on serious occurrences of human-rights violations anywhere in the world (thematic mandates). In particular, they can respond to individual complaints, conduct studies, provide advice on technical cooperation to the State concerned, or engage in general advocacy work. In the context of these activities, they generally receive information about specific allegations of human-rights violations and send urgent appeals or letters of allegation to governments, requesting clarification.

V. NOTICE OF DEROGATION BY TURKEY

80. On 21 July 2016 the Permanent Representative of Turkey to the Council of Europe sent the Secretary General of the Council of Europe the notice of derogation. The text of the notice is set out in the *Mehmet Hasan Altan* judgment (cited above, § 81).

THE LAW

I. SCOPE OF THE APPLICATION

81. The Government observed at the outset that the Court had asked them to submit observations on whether the proceedings brought before the Constitutional Court in response to the individual application lodged by the applicant were compatible with the condition of "speediness" within the meaning of Article 5 § 4 of the Convention. They alleged, however, that in the application form of 8 June 2018 the applicant had not raised any such complaint.

82. The applicant contested that assertion.

83. The Court reiterates that, under its well-established case-law, the wording of Article 34 indicates that a "claim" or complaint in Convention terms comprises two elements, namely factual allegations and the legal arguments underpinning them. These two elements are intertwined because

the facts complained of ought to be seen in the light of the legal arguments adduced and vice versa (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 110, 20 March 2018). The scope of a case before the Court remains circumscribed by the facts as presented by the applicant. If the Court were to base its decision on facts not covered by the complaint, it would rule beyond the scope of the case and exceed its jurisdiction by deciding matters which were not "referred to" it, within the meaning of Article 32 of the Convention. In such situations the question of respect for the principle of equality of arms might also arise. Conversely, the Court would not be deciding outside the scope of a case if it were, by applying the *jura novit curia* principle, to recharacterise in law the facts being complained of by basing its decision on an Article or provision of the Convention not relied on by the applicants (*ibid.,* §§ 123-124).

84. The Court observes that in his application form lodged with the Court on 8 June 2018, the applicant, relying explicitly on Article 5 § 4 of the Convention, expressed his complaint under this provision in the following terms:

> "The documents which constitute the basis for the applicant's detention are not accessible... This situation... amounts to a flagrant violation of the principle of equality of arms. In spite of this fact, the magistrate's court examined the applications for extensions to the applicant's detention on the basis of this case file, and the duration of the applicant's detention exceeds 7 months ... The applicant has therefore lodged an application with the Constitutional Court, which ought to have delivered its verdict rapidly (*süratle*) and has, however, not yet issued its judgment. Thus, it has become necessary to lodge an application with the European Court of Human Rights."

85. This indicates that the applicant not only referred to Article 5 § 4 of the Convention: he also specified that the Constitutional Court "ought to have delivered its verdict rapidly". Moreover, in his observations to the Court, the applicant indicated that the Constitutional Court, which ought to carry out a speedy review, had not yet issued its verdict, although sixteen months had elapsed since he had lodged his individual appeal. In the Court's opinion, in the light of the circumstances of the case it is entirely normal that this complaint overlaps with the arguments concerning the ineffectiveness of the individual application. This does not mean that the applicant has not raised this complaint before it.

Accordingly, the Court concludes that the applicant raised the complaint under Article 5 § 4 of the Convention. It therefore rejects the Government's preliminary objection concerning the scope of the case.

II. PRELIMINARY QUESTION CONCERNING THE DEROGATION BY TURKEY

86. The Government indicated at the outset that all of 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. In this connection, 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 noted 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.

87. The applicant submitted that there had been a violation of Articles 5 and 18 of the Convention. He contested the Government's argument that the Gezi events had been linked to the attempted coup of 15 July 2016. He further emphasised that although the state of emergency had been lifted in July 2018, his arbitrary detention had not yet ended and he had still not been brought before a judge.

88. The Court notes the applicant's argument as to the applicability of the derogation in question to the facts of the case. It is true that the facts giving rise to the suspicions against the applicant in relation to the Gezi Park events (Article 312 of the Criminal Code) largely preceded the declaration of the state of emergency. In addition, the applicant's pre-trial detention has been extended on numerous occasions since the state of emergency was lifted on 18 July 2018.

At this juncture, the Court would reiterate that, in its judgment in the case of *Mehmet Hasan Altan* (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.

III. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

89. The Court notes that the Government contended that the applicant had submitted his complaints to another procedure of international investigation or settlement within the meaning of Article 35 § 2 (b) of the Convention, and that he had not exhausted the domestic remedies available to him in domestic law.

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

90. The Government argued that the applicant had submitted his complaints to another procedure of international investigation or settlement within the meaning of Article 35 § 2 (b) of the Convention, namely the United Nations Working Group on Arbitrary Detention ("the WGAD"). Article 35 § 2, in so far as relevant, reads as follows:

"... 2. The Court shall not deal with any application submitted under Article 34 that:

...

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

91. The applicant contested the Government's argument. He argued, firstly, that the subject-matter of the present application was different from that being dealt with by the Working Group. He added that, in any event, the application to the WGAD had been made by third persons, and that he himself had not lodged any individual application before any international body. In his view, the fact that proceedings had been opened and conducted without his supervision or at the initiative of third parties could not deprive him of his right to lodge an application with the Court.

92. The Court observes that it has previously examined the procedure before the WGAD and concluded that this Working Group was indeed a "procedure of international investigation or settlement" within the meaning of Article 35 § 2 (b) of the Convention (see *Peraldi*, cited above).

93. In the present case, the Court notes, firstly, that the letter sent by the three UN Special Rapporteurs and the Deputy President of the WGAD concerning the applicant's detention formed part of the special proceedings introduced by the Office of the UN High Commissioner for Human Rights (see paragraphs 78-79 above). Admittedly, as indicated in the relevant letter, dated 2 November 2017, an urgent appeal may give rise to the opening of a regular procedure, in the context of which the WGAD is called upon to issue an opinion as to whether or not the deprivation of liberty was arbitrary (see paragraph 66 above). However, it has not been established that the WGAD has opened such a procedure.

94. Secondly, the Court further observes that it has not been established that the applicant or his close relatives lodged any appeal before the United Nations bodies (compare *Peraldi* (dec.), cited above, where the applicant's brother had submitted a request to the Working Group, asking it to examine the applicant's situation rather than his own), or that they had actively participated in any proceedings before them. In this connection, it reiterates that, under its case-law, if the complainants before the two institutions are not identical (see *Folgerø and Others v. Norway* (dec.), no. 15472/02, 14 February 2006), the "application" to the Court cannot be considered as being "substantially the same as a matter that has ... been submitted..."

95. The Government's objection under Article 35 § 2 (b) of the Convention must accordingly be dismissed.

B. The objection based on failure to exhaust domestic remedies

96. The Government argued that the applicant had not exhausted all the domestic remedies available to him. They indicated that the applicant had

lodged an individual application with the Constitutional Court on 29 December 2017 and that the proceedings were pending before that court on the date that their observations were filed. They submitted that the fact of applying to the Court without waiting for the outcome of an application before the Turkish Constitutional Court was not compatible with the principle of subsidiarity, which, in the Government's view, was a fundamental principle of the Convention and of the individual protection system provided by that instrument. They also argued that if this principle were not respected, a large number of applications could be lodged with the Court without any appeal in fact being submitted to a national court. They considered that this situation could weaken the effectiveness of the protection system set out in Convention and undermine public confidence in the Court.

97. The Government also noted that the Court had examined the procedure for lodging individual applications with the Constitutional Court on numerous occasions, and had recognised it as an effective domestic remedy with regard to complaints under Article 5 (they referred, among other cases, to *Mercan v. Turkey* (dec.), no. 56511/16, §§ 21-30, 8 November 2016).

98. Emphasising the requirement of "speediness", the applicant contested that argument and argued that, given the time taken to examine his individual application, that remedy had become ineffective.

99. The Court notes at the outset that the length of time taken to examine an application challenging the lawfulness and proper conduct of detention is not in itself sufficient to draw a conclusion as to the effectiveness or otherwise of the procedure before the Turkish Constitutional Court. Admittedly, as emphasised by the Government, the principle of subsidiarity encapsulates a norm of power distribution between the Court and the member States, with the ultimate aim of securing to every person who finds himself or herself within the jurisdiction of a State the rights and freedoms provided by the Convention. In other words, in accordance with Article 1 of the Convention, it is the national authorities which are the primary guarantors of human rights, subject to the supervision of the Court. It is in the name of rapid and efficient, and thus *a priori* effective, protection of the rights of individuals that the principle of subsidiarity legitimises the primary responsibility of the member States. Since the system of national protection implies confidence in the national judicial authorities, who are normally better placed to intervene than the international judge, this principle thus incorporates the very idea of the effectiveness of rights, whose primary guarantors are ultimately the national authorities. It follows that where the system of national protection is incapable of responding effectively to complaints under Article 5 of the Convention, the Court may draw general or case-specific conclusions.

100. The Court also reiterates that the 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. 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 *Mehmet Hasan Altan*, cited above, § 107). In this connection, it notes that that it has already examined the remedy of an individual application to the Constitutional Court under Article 5 of the Convention, in particular in the context of *Koçintar v. Turkey* ((dec.), no. 77429/12, 1 July 2014). In that case, after examining the remedy in question, it found that none of the material in its possession suggested that an individual application to the Constitutional Court was not capable of affording appropriate redress for the applicant's complaint under Article 5 of the Convention, or that it did not offer reasonable prospects of success (see *Mehmet Hasan Altan*, cited above, § 132).

101. The Court sees no reason in the present case to depart from the above-mentioned conclusion as to the effectiveness of an individual application to the Constitutional Court.

102. In short, the Court notes that the applicant, who lodged an individual application before the Turkish Constitutional Court, gave that court an opportunity to remedy the alleged violation. The Constitutional Court published its judgment on 28 June 2019 in the Official Gazette (see paragraph 60 above) before the Court had ruled on the admissibility of the present case.

Accordingly, it also dismisses this objection raised by the Government.

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

103. The applicant complained about his initial and continued pre-trial detention, which he considered arbitrary. He argued that there had been no evidence grounding a reasonable suspicion that he had committed a criminal offence necessitating his pre-trial detention. He also maintained that the domestic courts had given insufficient reasons for their decisions imposing and extending his placement in pre-trial detention.

He complained that in those respects there had been a violation of Article 5 §§ 1 (c) and 3 of the Convention, the relevant parts of which provide:

> "1. 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 brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

104. The Government contested this argument.

A. Admissibility

105. The Court 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. It therefore declares them admissible.

B. Merits

1. The parties' submissions

(a) The applicant

106. The applicant submitted that there were no facts or information that could satisfy an objective observer that he had committed the offences of which he was accused. The items of evidence produced by the Government to justify his pre-trial detention were superficial and inconsistent. Taking the view that there existed an element of bad faith and abuse of power on the part of the authorities, he alleged that his initial pre-trial detention and its extension were not only illegal but also arbitrary. In his view, there was no connection between the charges and the evidence that the investigating authorities had gathered and included in the case file.

107. The applicant drew the Court's attention to the fact that the bill of indictment in respect of the charge under Article 312 of the Criminal Code was filed sixteen months after his placement in detention. He considered that this delay was a further illustration of the absence of reliable evidence capable of justifying his detention. He also emphasised that, to date, no indictment had yet been filed in respect of the charge under Article 309 of the Criminal Code.

108. The applicant alleged that following his placement in detention, no evidence that could justify the charges had been obtained. He alleged that the only evidence submitted against him was the transcripts of his telephone conversations, and these had been obtained in breach of the relevant legislation. His alleged "intensive contacts" with H.J.B., who was considered by the investigating authorities as one of the instigators of the

attempted coup, formed the main evidence underpinning the charges concerning the attempted coup. However, although he had certainly known the individual in question since 2000, he denied having had such contacts with him, or having exchanged telephone calls with him. The applicant argued that this allegation was based on the fact that his mobile telephone and that of H.J.B. had emitted signals from the same base receiver station. In fact, this station covered a large central district in which many hotels and his office were located. In his opinion, this element alone was therefore insufficient to substantiate the prosecution's argument, especially since, as the case file showed, his mobile phone was being tapped at the relevant time, and the investigating authorities could therefore have obtained direct evidence had such intensive contacts genuinely occurred.

109. As to the witness M.P., cited by the Government, the applicant submitted, firstly, that his defence lawyer had not had the right to question that individual, and that his identity had been kept secret and had not been communicated to the defence lawyer during the criminal investigation. In this connection, he referred to the Court's case-law, from which he concluded that the statement of an anonymous witness could only be used to justify a decision to place an individual in detention if the rights of the defence were respected. In his submission, this had not been the case here. He further claimed that, in his statements to the prosecutor's office on 22 November 2018 (see paragraph 62 above), this same witness had denied having established a link between the applicant and an international conspiracy.

110. The applicant noted that statements by a police officer were included in the bill of indictment. However, this witness, who was also mentioned as a plaintiff in the same document, had been convicted of the unlawful killing of a demonstrator, A.I.K. The latter individual had died as a result of police violence against him during the Gezi events in Eskişehir.

111. In the applicant's submission, the arguments of the Government and of the prosecutor's office were inconsistent. The Government acknowledged that the Gezi events had originated in a movement opposing the decisions taken about the park's future and the use of force by the security forces (see paragraph 17 above). For its part, the prosecutor's office viewed them as a premeditated insurrection, planned and staged by the applicant and international actors in line with a previously determined scenario.

112. Lastly, the applicant stated that he was known for his devotion and loyalty to democracy and to the rule of law, as he had always demonstrated in the context of the major projects that he had coordinated in civil society, and for the importance that he attached to cooperation between civil-society organisations and State institutions. He alleged that he had been only one demonstrator among the millions who had taken part in the Gezi events, and

that he had no links to the attempted *coup d'état* or with any of the groups that were deemed to have organised it.

(b) The Government

113. The Government submitted that the applicant's initial and continued pre-trial detention had complied with domestic legislation. They noted that on 1 November 2017 the applicant was placed in pre-trial detention by the magistrate's court because there were serious grounds for considering that he had committed two different offences. He was accused, firstly, of having been the instigator and leader of the demonstrations known to the public as the "Gezi events", which, in the Government's view, were aimed at overthrowing the Government and had been actively supported by all the terrorist organisations; and, secondly, of having taken part in the attempted coup.

114. According to the Government, the magistrate's court held in its detention order that there were serious grounds for believing that the applicant had committed the offences of which he was accused. In reaching that conclusion, the court had examined the search-and-seizure reports that had been placed in the investigation file, as well as several other items of evidence therein, including transcripts of telephone conversations, the physical surveillance reports, reports on digital reviews, photographs, the applicant's statement, information from open sources and the witness statements.

115. The Government stated that, with regard to the "Gezi events", the Istanbul general prosecutor's office had opened a criminal investigation and that, in this context, the judicial authorities had ordered the monitoring of the applicant's telephone communications. They added that, as part of the investigation into the applicant, the statements made by the witness known as M.P. had been recorded on 31 October 2017, and that this witness had made statements regarding the applicant's interest in the "Gezi events".

116. The Government further specified that, in addition, photographs of the applicant and the persons he had met had been taken during the physical surveillance operation, which had been ordered by the competent courts. They submitted that these photographs made it possible to establish that on several occasions the applicant had met individuals who were linked to the "Gezi events" and to the attempted coup.

117. According to the Government, a search had been conducted at the applicant's workplace. His mobile telephone, seized on that occasion, had been examined. The photographs and messages found on it showed, in particular, that the applicant had held conversations with a person who had relationships with the armed terrorist organisation FETÖ/PDY and with another person who was being sought for serious crimes (spying, attempt to overthrow the State and support for the armed terrorist organisation FETÖ/PDY). The authorities had further established the existence of

telephone signals showing that the applicant had met H.J.B. – who was under criminal investigation for the attempted coup –, who had stayed in Diyarbakir and Istanbul before, during and after the attempted coup. The judges had also taken account of information from open sources and statements made by the applicant during a programme broadcast on a Web TV.

118. The Government argued that, in view of these elements, there were sufficient reasonable grounds to suspect the applicant of having committed the offences of which he was accused, and that there existed sufficient facts and information to persuade an objective observer that the applicant had committed the alleged offences.

119. Lastly, the Government specified that the charges relating to the Gezi events and the attempted coup ought to be assessed together. They further considered that the Court ought also to have due regard to the derogation notified on 21 July 2016 under Article 15 of the Convention. According to the Government, the offences with which the applicant was charged were linked to the declaration of the state of emergency in Turkey and the attempted coup, which had resulted in the notice of derogation.

(c) The third-party interveners

(i) The Commissioner for Human Rights

120. The information transmitted by the Commissioner for Human Rights with regard to the Gezi events has already been set out in paragraphs 20-22 above.

121. The Commissioner for Human Rights also submitted observations on the charges brought against the applicant in connection with the Gezi events. In her view, participation in the Gezi events had been extremely heterogeneous. She considered that the thesis that the Gezi events could have been orchestrated by a single person or organisation had no credibility. The extensive examination of the events by the Commissioner's Office did not suggest in any way that the mainstream public demands of the protestors extended to an unlawful and violent overthrow of the Government and the constitutional order, or that these demonstrations could be seen as an attempt to hinder the government from carrying out its duties through violence (an offence punishable with an aggravated life sentence). She emphasised that violent groups had undoubtedly joined the demonstrations on several occasions and increased tensions with the police, but that the available information pointed to the fact that the overwhelming majority of protestors had demonstrated peacefully.

122. Referring to the findings on her predecessor's 2013 Report (see paragraph 20 above), the Commissioner for Human Rights explained that numerous proceedings had been brought by the administrative and judicial authorities against persons or groups who had been involved non-violent

actions during the Gezi demonstrations. Criminal investigations had been opened in respect of health workers; fines had been imposed on TV stations; journalists had been dismissed under Government pressure; and numerous repressive measures had been taken against professional associations, academics and businesses because of their involvement in the Gezi events. The Commissioner also noted that a new wave of criminal proceedings appeared to have been recently initiated against many persons in different provinces, more than five years after the events. She also stated that, following the imposition of the state of emergency, the administrative and judicial authorities had taken numerous decisions restricting freedom of peaceful demonstration and that the criminal proceedings which are the subject-matter of the present case, brought in respect of an activist working to promote human rights, were merely a further illustration of this intolerant attitude towards non-violent demonstrations which had followed the Gezi events.

123. Based on these findings, the Commissioner concluded that the response of the Turkish judiciary to the Gezi events displayed, on the whole, a lack of adherence to international standards, in particular to the Convention and the case-law of the Court, both in terms of the impunity shown towards the security forces and a lack of respect for the right to peaceful demonstrations. The degree of evidence required to substantiate the thesis of a conspiracy against the Government and the Turkish State was not reached, and there was a risk that those proceedings would result in a "judgment of intentions".

(ii) The intervening non-governmental organisations

124. The intervening non-governmental organisations did not make submissions on this complaint. However, they did criticise the applicant's initial and continued detention.

2. The Court's assessment

(a) Relevant principles

125. The Court reiterates that a person may be detained under Article 5 § 1 (c) of the Convention only in the context of criminal proceedings, for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence (see *Jėčius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX, and *Mehmet Hasan Altan*, cited above, § 124).

126. In order for an arrest on reasonable suspicion to be justified under Article 5 § 1 (c), it is not necessary for the police to have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant is in custody (see *Brogan and Others v. the United Kingdom*, 29 November

1988, § 53, Series A no. 145-B). Nor is it necessary that the person detained should ultimately have been charged or taken before a court. The object of detention for questioning is to further a criminal investigation by confirming or discontinuing suspicions which provide the grounds for detention. 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).

127. However, the "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard laid down in Article 5 § 1 (c). The fact that a suspicion is held in good faith is insufficient. The words "reasonable suspicion" mean the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182; see also *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, § 88, 22 May 2014; and *Rasul Jafarov v. Azerbaijan*, no. 69981/14, §§ 117-118, 17 March 2016). Accordingly, when assessing the "reasonableness" of the suspicion, the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) has been secured. Consequently the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence (ibid., § 34 *in fine*).

128. The term "reasonableness" also means the threshold that the suspicion must meet to satisfy an objective observer of the likelihood of the accusations.

As a rule, problems in this area arise at the level of the facts. The question then is whether the arrest and detention were based on sufficient objective elements to justify a "reasonable suspicion" that the facts at issue had actually occurred (see *Włoch v. Poland*, no. 27785/95, §§ 108-09, ECHR 2000-XI). In addition to its factual side, the existence of a "reasonable suspicion" within the meaning of Article 5 § 1 (c) requires that the facts relied on can be reasonably considered 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; *Mammadli v. Azerbaijan,* no. 47145/14, § 52, 19 April 2018; and *Aliyev*, cited above, § 152).

129. 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 v. Georgia* [GC], no. 72508/13, § 187, 28 November 2017).

130. With regard to statements by indirect witnesses, the Court is aware of the importance of such evidence in the fight against organised crime. However, the sometimes ambiguous nature of such statements and the risk that a person might be accused and arrested on the basis of unverified allegations that are not necessarily disinterested must not be underestimated. For these reasons, hearsay evidence must be supported by objective evidence. This is especially true when a decision is being made whether to prolong detention pending trial: while a suspect may validly be detained at the beginning of proceedings on the basis of statements by indirect witnesses, such statements necessarily become less relevant with the passage of time, especially where no further evidence is uncovered during the course of the investigation (see *Labita v. Italy* [GC], no. 26772/95, § 156 et seq., ECHR 2000-IV).

131. The Court would also reiterate that the suspicions against a person at the time of his or her arrest must be "reasonable" (see *Fox, Campbell and Hartley*, cited above, § 33). This applies *a fortiori* when a suspect is detained. The reasonable suspicion must exist at the time of the arrest and initial detention (see *Ilgar Mammadov v. Azerbaijan*, cited above, § 90). Furthermore, the requirement for the judge or other judicial officer to give relevant and sufficient reasons in support of detention – in addition to the persistence of reasonable suspicion – already applies at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 102, 5 July 2016).

132. In addition, any deprivation of liberty should be in keeping with the purpose of Article 5, 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 Article 5 § 1 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 *Creangă v. Romania* [GC], no. 29226/03, § 84, 23 February 2012). The Court is therefore required to verify whether the way in which domestic law is interpreted and applied in the cases before it is consistent with the Convention (see, *mutatis mutandis*, *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II).

133. The notion of arbitrariness varies to a certain extent depending on the type of detention involved. The Court has indicated that arbitrariness may arise where there is an element of bad faith on the part of the authorities; where the order to detain and the execution of the detention do not genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1; where there is no relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention; and where there was no relationship of proportionality between the ground of detention relied upon and the

detention in question (for a detailed recapitulation of these principles, see *James, Wells and Lee v. the United Kingdom*, nos. 25119/09 and 2 Others, §§ 191-195, 18 September 2012).

134. The Court's task is to determine whether the conditions laid down by paragraph (c) of Article 5 § 1, including the pursuit of the prescribed legitimate purpose, have been fulfilled in the case brought before it. In this context it is not normally for the Court to substitute its own assessment of the facts for that of the domestic courts, which are better placed to assess the evidence adduced before them (see *Mergen and Others v. Turkey*, nos. 44062/09 and 4 others, § 48, 31 May 2016; *Mehmet Hasan Altan*, cited above, § 126; and *Alparslan Altan v. Turkey*, no. 12778/17, § 128, 16 April 2019).

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

135. The Court observes that the applicant was placed in pre-trial detention on account of a "strong suspicion" – within the meaning of Article 100 of the CCP (see paragraph 72 above) – that he had committed two separate offences: attempting to overthrow the Government by force and violence, an offence under Article 312 of the Criminal Code, and attempting to overthrow the constitutional order through force and violence, an offence under Article 309 of the Criminal Code. These are two serious offences, punishable with the highest penalty in Turkish criminal law, namely an aggravated life sentence.

136. That being noted, the Court's task is to verify whether there existed sufficient objective elements that could lead an objective observer to reasonably believe that the applicant might have committed the offences with which he has been charged. In this connection, it is beyond dispute that suspicions must be justified by verifiable and objective evidence and it must not appear that the alleged offences were related to the exercise of the applicant's rights under the Convention.

137. The Court reiterates that in examining whether a reasonable suspicion existed for the arrest and detention of the applicant (see paragraphs 126-128 above), the starting-point for its analysis must be the national courts' decisions on his initial and continued detention (see paragraphs 37-46 above). Moreover, given that the Constitutional Court has assessed the legality of the applicant's pre-trial detention on the basis of Article 19 of the Constitution (see paragraph 60 above), which is a remedy to be exhausted in the Turkish legal system, the Court is called upon to assess whether the reasoning adduced by that latter court, which also had regard to the bill of indictment, adequately demonstrated that a reasonable suspicion existed in support of the applicant's pre-trial detention at the point in time when the national courts ordered this measure.

138. The Court will examine in turn the evidence produced to justify the suspicions against the applicant in respect of the two alleged offences.

(iii) Reasonableness of the suspicions concerning the Gezi Park events (Article 312 of the Criminal Code)

139. The Court notes that the applicant was suspected of being the instigator and leader of the Gezi events, which, in the public prosecutor's view, were aimed at overthrowing the Government by force and violence, the offence set out in Article 312 of the Criminal Code.

140. The Court does not consider it necessary to dwell on the public prosecutor's legal classification of the Gezi events. Its task is to verify whether there existed sufficient objective elements that could lead an objective observer to reasonably believe that the applicant might have committed the offence in question. However, in view of the nature of the relevant charges, it will have regard to the information communicated about those events by the parties and by the Commissioner for Human Rights, in so far as it is relevant for assessing the reasonableness of the suspicions against the applicant (see, *mutatis mutandis*, *Rasul Jafarov*, cited above, § 120).

141. With regard to the Gezi events, the Court notes that the parties and the Commissioner for Human Rights submitted general information about these mass demonstrations. It attaches weight to the findings of the Office of the Commissioner for Human Rights in respect of those events, given that the previous Commissioner travelled to Turkey in July 2013, where he met various civil-society actors who had been involved in the Gezi Park events as well as the Turkish authorities, including the Minister of Justice, the Undersecretary of the Ministry of the Interior and the then Governor of Istanbul. He subsequently published his conclusions about those events in a 2013 report (see paragraph 20 above).

142. In this connection, as the Commissioner for Human Rights has indicated, it is clear that violent groups joined the demonstrators and committed acts of violence. The Court must therefore take into account the circumstances surrounding each case brought before it, in particular the authorities' concerns relating to the large number of deaths and injuries which occurred during those events and the public unrest caused. In this regard, it notes the information supplied by the Government to the effect that four civilians and two police officers lost their lives, thousands of people were wounded and numerous acts of vandalism were committed. The Court considers that in such circumstances it is perfectly legitimate for the authorities to investigate the incidents in question, in order to identify the perpetrators of these violent acts and to bring them to justice.

143. It should be noted, however, that during the police interviews with the applicant, no question was put to him about his possible involvement in committing the acts of violence which occurred during those events. Nor is there evidence in the file, particularly in the decisions on the initial and continued detention, or in the bill of indictment, to the effect that he had used force or violence, had instigated or led the violent acts in question or

had provided support for such criminal conduct. Although it refers to 'concrete evidence', the magistrate's detention order of 1 November 2017 (see paragraph 38) does not contain any materials which would satisfy an objective observer that there existed a reasonable suspicion that the applicant had participated in or supported such acts. Nor do any of the subsequent detention orders extending the applicant's detention refer to such material evidence. In the Court's opinion, this fact is of the utmost importance in this case, in that one aspect of the *actus rea* constituting the offence with which the applicant was charged – under Article 312 of the Criminal Code – was the use of "force" or "violence" to overthrow the Government.

144. As to the bill of indictment, the Court notes that this is a voluminous document which compiles all of the evidence gathered by the prosecution, and especially lengthy extracts from transcripts of numerous telephone conversations, some of which are irrelevant to the offences in question.

145. The Court notes, in particular, that in the bill of indictment the prosecutor's office described the Gezi events as the result of action by a group of individuals who were influential in civil society and who had acted behind the scenes. According to the prosecutor's office, this group of individuals formed "a *sui generis* structure" and was led in Turkey by the applicant, who was himself supported by foreign actors, and specifically an American businessman. Against this background the prosecution accused the applicant of leading this criminal association, by exploiting numerous civil-society actors and coordinating them in secret, with a view to planning and launching an insurrection against the Government.

146. This approach on the part of the prosecutor's office led it to list several acts allegedly committed by this "*sui generis* structure" and to attach them, in an unverifiable manner, to a criminal aim, namely an attempt to overthrow the Government through force and violence. However, the facts imputed to the applicant, which were used as the basis for the questions put to him in the interview and with which he was subsequently charged by the prosecutor's office, are either legal activities, isolated acts which, at first sight, are unrelated to each other, or activities which were clearly related to the exercise of a Convention right. In any event, they were non-violent activities.

147. The record of the police questioning of 31 October 2017 indicates that the suspicions against the applicant were based on the following evidence: the statements made by M.P. (made after the applicant's arrest and the day before he was placed in detention, see paragraph 34 above); several telephone conversations that the applicant had during or after the Gezi events with journalists, the founder of a publishing house, individuals wishing to organise cultural activities and leaders of NGOs; several telephone conversations, after the Gezi events, with various third parties;

meetings which occurred during the events between the applicant and the leaders of certain NGOs, journalists and representatives of foreign countries; interviews in which the applicant participated, in preparation for the visit by a delegation from the EUTCC, which occurred in 2017, that is, well after the events in question and the attempted coup; exchanges of messages between the applicant and several persons on various subjects; and the relationship between the applicant and H.J.B, an American academic.

148. The Court notes, in particular, that the file shows that the applicant acknowledges having played an active part in the demonstrations organised in Gezi Park in so far as they were conducted peacefully, that he recognises having provided assistance to the non-violent demonstrators, and that he does not deny that he had talks with individuals who played an important role in these events. In this connection, it notes that some of the evidence cited in the prosecution documents (the interview record and the bill of indictment) is inconclusive, since it sheds no light on which of the applicant's actions amounted to criminal conduct; nor does it provide justification for the suspicions against him. The bill of indictment indicates that M.P. did not refer to any specific factual event in his statements as recorded by the police, but instead set out a conspiracy theory, devoid of ascertainable facts (see paragraphs 36 and 53 above). Moreover, this same witness subsequently submitted that he had not made any incriminatory statement against the applicant (see paragraph 62 above). Nor do the telephone conversations which took place with third persons in September 2013 and February 2014 contain any element suggesting that the applicant had funded a general uprising against the Government. The physical surveillance operations also show that the applicant had met a representative of a foreign country during the Gezi events (see paragraph 36 above). The Court does not see how this meeting, or those with the journalists or European delegations, could in themselves amount to a fact justifying the suspicions in question.

149. Furthermore, like the Commissioner, the Court observes that numerous legal actions and non-violent activities were presented in the bill of indictment as evidence of the alleged criminal intent of the applicant, who was accused of having committed serious offences. In consequence, it finds that the credibility of the prosecution's arguments is considerably weakened.

150. As to the relations between the applicant and the NGOs referred to in the bill of indictment, the Court notes that none of the parties dispute that the NGOs in question are lawful organisations which continue to conduct their activities freely (compare with *Mergen and Others*, cited above, § 51). With regard to the individuals with whom the applicant was in contact or with whom he had telephone conversations, and who were charged with various offences, the mere existence of contacts between the applicant and

those individuals can hardly be used to justify inferences as to the nature of their relations. In addition, it must not be overlooked that, in the absence of a criminal conviction, those individuals, described in the prosecution documents as members of a criminal association which had conspired against the Government, enjoy the presumption of innocence under Article 6 § 2 of the Convention. In any event, the Court finds no sign in the conversations in question of any indication that the applicant, in collaborating with those individuals, was seeking to transform peaceful demonstrations into a widespread and violent anti-Government insurrection.

151. Equally, the Court cannot overlook the fact that the applicant was arrested four years after the Gezi events and the opening of the criminal investigation in 2013. The Government has failed to submit any argument explaining this considerable lapse of time between the circumstances giving rise to the suspicions and the applicant's placement in detention. In addition, the applicant was indicted and charged about five and a half years after these events. However, it does not appear from the case file that, following the opening of the criminal investigation, the authorities gathered important new evidence that was likely to change the direction of this investigation or indicating that the applicant was the main instigator of these events.

152. The Court also notes that the questions put to the applicant during the police interview indicate, among other things, that the police had not merely asked him about the Gezi events. Many of the questions concerned a variety of subjects, especially the applicant's conversations with journalists, a commemorative event held in 2015 and the visit of an EUTCC delegation. The Court perceives no link between the suspicions against the applicant and these elements. This is equally true in respect of some of the applicant's messages and of certain television programmes in which he took part, which are referred to in the prosecution documents. The Court considers that these elements are neither directly nor indirectly linked to the Gezi events, and that they are therefore irrelevant in evaluating the reasonableness of the suspicions against the applicant. In reaching this finding, it also has regard to the Government's failure to provide any factual comment on the role of those statements in the present case.

153. In such circumstances, the Court concludes – in the absence of facts, information or evidence showing that he had been involved in criminal activity – that the applicant could not reasonably be suspected of having committed the offence of attempting to overthrow the Government, within the meaning of Article 312 of the Criminal Code. In particular, the above-mentioned facts are not sufficient to raise suspicions that the applicant had sought by force and violence, which form the constituent element of the offence set out in Article 312 of the Criminal Code, to organise and fund an insurrection against the Government (compare, *mutatis mutandis*, *Lukanov v. Bulgaria*, 20 March 1997, § 44, Reports of Judgments and Decisions 1997-II; see also *Rasul Jafarov,* cited above, § 130).

It follows that no specific facts or information giving rise to a suspicion justifying the applicant's initial and continued detention in respect of the charge under Article 312 of the Criminal Code was mentioned or produced during the pre-trial proceedings, and that the other evidence cited in the bill of indictment has not been shown to constitute such facts or information.

(iv) Reasonableness of the suspicions in respect of the attempted coup (Article 309 of the Criminal Code)

154. With regard to the accusations concerning the attempted coup of 15 July 2016, the Court observes that these were predominantly based on the existence of "intensive contacts" between the applicant and H.J.B., who, according to the Government, was the subject of a criminal investigation for participation in organising an attempted coup.

In the Court's view, however, the evidence in the case file is insufficient to justify this suspicion. The prosecutor's office relied on the fact that the applicant maintained relationships with foreign nationals and that his mobile telephone and that of H.J.B. had emitted signals from the same base receiver station. It also appears from the case file that the applicant and H.J.B. met in a restaurant on 18 July 2016, that is, after the attempted coup, and that they greeted each other briefly. In the Court's opinion, it cannot be established on the basis of the file that the applicant and the individual in question had intensive contacts. Further, in the absence of other relevant and sufficient circumstances, the mere fact that the applicant had had contacts with a suspected person or with foreign nationals cannot be considered as sufficient evidence to satisfy an objective observer that he could have been involved in an attempt to overthrow the constitutional order.

155. In the Court's opinion, it is quite clear that a suspicion of attempting to overthrow the constitutional order by force and violence must be supported by tangible and verifiable facts or evidence, given the nature of the offence in question. However, it does not appear from the decisions of the domestic courts which ordered the applicant's initial and continued detention, or from the bill of indictment, that the applicant's deprivation of liberty was based on a reasonable suspicion that he had committed the offences with which he was charged.

(v) Conclusion

156. For the reasons set out above, the Court considers that the evidence submitted to it is insufficient to support the conclusion that there was a reasonable suspicion against the applicant at the time of his initial detention. Furthermore, it has not been shown that the evidence added to the case file following the applicant's arrest and throughout the period of his continued detention falling within the scope of this case amounted to facts or information giving rise to a suspicion justifying the applicant's initial and continued detention. Accordingly, it has not been demonstrated in a

satisfactory manner that the applicant was deprived of his liberty on the basis of a "reasonable suspicion" that he had committed a criminal offence.

157. In particular, in view of the nature of the charges against him, the Court observes that the authorities are unable to demonstrate that the applicant's initial and continued pre-trial detention were justified by reasonable suspicions based on an objective assessment of the acts in question. It further notes that the measures were essentially based not only on facts that cannot be reasonably considered as behaviour criminalised under domestic law, but also on facts which were largely related to the exercise of Convention rights. The very fact that such acts were included in the bill of indictment as the constituent elements of an offence in itself diminishes the reasonableness of the suspicions in question.

158. Turning to Article 15 of the Convention and the derogation by Turkey, the Court refers to its above finding that the evidence before it is insufficient to support the conclusion that there was a reasonable suspicion against the applicant. That being so, 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.

Admittedly, the Council of Ministers, chaired by the President and acting in accordance with Article 121 of the Constitution, passed several legislative decrees placing significant restrictions on the procedural safeguards laid down in domestic law for anyone held in police custody or pre-trial detention (such as extension of the police custody period, and restrictions on access to case files and on the examination of objections against detention orders). Nonetheless, in the present case, it was in application of Article 100 of the CCP that the applicant was placed in pre-trial detention on charges relating to the two offences set out in Articles 309 and 312 of the Criminal Code. It should be noted in particular that Article 100 of the CCP, which requires the presence of "factual elements giving rise to a strong suspicion that the [alleged] offence has been committed") 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, and which, moreover, is still applicable.

In consequence, the measures complained of in the present case cannot be said to have been strictly required by the exigencies of the situation (see, *mutatis mutandis*, *Mehmet Hasan Altan*, cited above, § 140). To conclude otherwise would negate the minimum requirements of Article 5 § 1 (c) regarding the reasonableness of a suspicion justifying deprivation of liberty and would defeat the purpose of Article 5 of the Convention.

159. 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 an offence.

160. Having regard to the above 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, *mutatis mutandis*, *Ilgar Mammadov*, cited above, § 102).

V. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION ON ACCOUNT OF THE LACK OF A SPEEDY JUDICIAL REVIEW BY THE CONSTITUTIONAL COURT

161. Relying on Article 5 § 4 of the Convention, the applicant submitted that the Constitutional Court had not complied with the requirement of "speediness" in the context of the individual application he had brought before it to challenge the lawfulness of his pre-trial detention.

Article 5 § 4 of the Convention provides:

> "4. 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."

162. The Government contested the applicant's argument.

A. Admissibility

163. 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, §§ 119-124, 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 (see, for example, *Koçintar*, cited above, §§ 30-46), the Court concludes that Article 5 § 4 is also applicable to proceedings before that court.

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

B. Merits

1. The parties' submissions

(d) The applicant

165. The applicant reiterated his assertion that the Constitutional Court had not ruled "speedily" within the meaning of Article 5 § 4 of the Convention; in his opinion, this fact made the remedy ineffective.

(e) The Government

166. The Government submitted that Turkish law contained sufficient legal safeguards enabling detainees to challenge effectively their deprivation of liberty. They noted that detainees could apply for release at any stage of the investigation or the trial and that an objection could be lodged against any decisions rejecting such applications. The question of a suspect's continued detention was automatically reviewed at regular intervals of no more than thirty days.

167. Further, referring to statistics on the Constitutional Court's caseload, the Government stated that 1,342 applications had been lodged with that court in 2012; in 2013 this number had risen to 9,897, and in 2014 and 2015 there had been 20,578 and 20,376 applications respectively. Since the attempted military coup of 15 July 2016, 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".

168. With regard to the present case, the Government emphasised that the applicant had applied to the Court on 8 June 2018, that is, only six months after having lodged his individual application with the Constitutional Court on 29 December 2017. They explained that at the time their observations were submitted, fourteen months had elapsed. In view of the above-cited case-law of the Court, they argued such a lapse of time could not be considered as excessive. They further argued that on 5 November 2018 the Constitutional Court had requested observations from the Ministry of Justice, and that it had received them on 4 January 2019.

169. Referring to *Mehmet Hasan Altan*, cited above, and *Şahin Alpay v. Turkey* (no. 16538/17, 20 March 2018), the Government indicated that the grounds taken into account by the Court in those judgments, resulting in findings of no violations of the requirement of Article 5 § 4 of the Convention, were equally valid in the present case.

2. The third parties

(a) The Commissioner for Human Rights

170. While acknowledging the scale of the Constitutional Court's caseload since the attempted coup, the Commissioner for Human Rights emphasised that it was essential for the proper functioning of the judicial system that that court should give its decisions speedily.

171. With regard to the time taken to examine cases brought before the Constitutional Court by detainees, the Commissioner referred to a number of contextual elements which, in her view, had the effect of extending this time period and were likely to cast doubt on the effectiveness of the individual application procedure. She considered that, notwithstanding the challenges posed by them, the individual applications were examined with considerable delay. In her view, the time taken by the Turkish Constitutional Court to examine the present case could not satisfy the requirement of "speediness", given the circumstances of the case. In particular, she submitted that the extension of the applicant's detention had had very adverse effects on his personal situation, and that it was also likely to have a dissuasive effect on other civil-society actors.

172. The Commissioner also noted that the statistics of the Constitutional Court indicated that it had received 15,976 applications concerning the right to liberty and security of the person between September 2012 and September 2018, while rendering only 104 judgments finding a violation of this right in the same period. She further noted that, in the case of *Mehmet Hasan Altan*, it was not until more than five months after the delivery of the Constitutional Court's judgment – finding a violation of the rights to liberty and security, freedom of expression and freedom of the press – that the applicant had been released. In particular, she noted that, in spite of a "final" and "binding" judgment by the highest judicial body, the assize court had dismissed the request for M.H. Altan's release and had thus challenged the authority of the Constitutional Court. The Commissioner further noted that M.H. Altan had been sentenced by the assize court to an aggravated life sentence on the basis of evidence that the Turkish Constitutional Court and this Court had found insufficient to justify his initial pre-trial detention. She added that this conviction had nonetheless subsequently been upheld on appeal. She considered that, throughout this process, the judges of the lower courts had been encouraged in this approach by a consistent discourse at the highest political level.

173. According to the Commissioner, the considerations detailed above were an indication that the Turkish courts continued deliberately to ignore and disregard the spirit of the judgments and the case-law of the Constitutional Court in pre-trial detention cases, which raised a problem with regard to the fundamental principles of the rule of law and legal certainty. In her view, the result was a situation where the Constitutional

Court was constrained to act as an appeal court for detention decisions, a role that it could not be expected to fulfil. This situation also went against the spirit of the individual application procedure and jeopardised the effectiveness of the Turkish Constitutional Court as a domestic remedy as a whole.

174. In consequence, in the opinion of the Commissioner for Human Rights, it was not realistic to expect that the Turkish Constitutional Court's workload would diminish, in view of the systemic nature of this problem. She added that in the absence of far-reaching general measures to ensure a much better compliance with this case-law by the public prosecutors and criminal courts, unreasonable delays were inevitable.

(b) The intervening non-governmental organisations

175. The intervening non-governmental organisations also criticised the delay in question.

C. The Court's assessment

1. Relevant principles

(a) General principles concerning the "speediness" requirement

176. The Court reiterates that in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their detention, Article 5 § 4 also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it proves unlawful (see *Mooren*, cited above, § 106, *and Idalov v. Russia* [GC], no. 5826/03, § 154, 22 May 2012; see, as the most recent authority, *Ilnseher v. Germany* [GC], cited above, §§ 251-256).

177. The Court reiterates that Article 5 protects against arbitrary deprivation of liberty (see *Nakhmanovich v. Russia*, no. 55669/00, §§ 70-71, 2 March 2006, and *Stašaitis v. Lithuania*, no. 47679/99, § 67, 21 March 2002). The principle of "protection from arbitrariness" is realised through more specific guarantees, both substantive and procedural. Procedural safeguards are contained primarily in §§ 3 and 4 of Article 5 and are based on the philosophy of effective judicial control in matters of detention. "Effectiveness" of such control, in turn, has a time element: delayed judicial review of detention would not be effective (see *Shcherbina v. Russia*, no. 41970/11, § 62, 26 June 2014). The Court considers that, in respect of judicial review of the deprivation of liberty of a detained person, it is essential that this review be carried out speedily. The passage of time will inevitably erode the effectiveness of the review.

178. According to the Court's case-law, Article 5 § 4 refers to domestic remedies that are sufficiently certain, otherwise the requirements of accessibility and effectiveness are not fulfilled. The remedies must be made available during a person's detention with a view to that person obtaining a speedy judicial review of the lawfulness of his or her detention capable of leading, where appropriate, to his or her release (see *Suso Musa v. Malta*, no. 42337/12, § 51, 23 July 2013).

179. The question whether the right to a speedy decision has been respected must – as is the case for the "reasonable time" stipulation in Article 5 § 3 and Article 6 § 1 of the Convention – be determined in the light of the circumstances of each case, including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter (see *Mooren*, cited above, § 106, with further references; *S.T.S. v. the Netherlands*, no. 277/05, § 43, ECHR 2011; and *Shcherbina*, cited above, § 62).

180. In order to determine whether the requirement that a decision be given "speedily" has been complied with, it is necessary to perform an overall assessment where the proceedings were conducted at more than one level of jurisdiction (see *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B, and *Mooren*, cited above, § 106). Where the original detention order or subsequent decisions on continued detention were given by a court (that is to say, by an independent and impartial judicial body) in a procedure offering appropriate guarantees of due process, and where the domestic law provides for a system of appeal, the Court is prepared to tolerate longer periods of review in proceedings before a second-instance court (see *Lebedev v. Russia*, no. 4493/04, § 96, 25 October 2007, and *Shcherbina*, cited above, § 65). These considerations apply *a fortiori* to complaints under Article 5 § 4 concerning proceedings before constitutional courts which were separate from proceedings before ordinary courts (see *Žúbor*, cited above, § 89).

(b) Relevant principles concerning the Constitutional Courts

181. The Court reiterates that, according to its settled case-law, Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of applications for release from detention. Nevertheless, a State which offers a second level of jurisdiction must in principle accord to the detainees the same guarantees on appeal as at first instance (see *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B; and *Khudobin v. Russia*, no. 59696/00, § 124, ECHR 2006-XII (extracts); and *S.T.S.*, cited above, § 43). The same applies to constitutional courts – such as the Turkish Constitutional Court – which decide on the legality of detention and order the release of the person concerned if the detention is not lawful (see *Smatana*, cited above, § 123; *Žúbor*, cited above, §§ 71-77; and *Mercan* , cited above, § 24, 8 November 2016).

182. The Court also notes that proceedings before the Turkish Constitutional Court are conducted in a different legal context to those in which the ordinary courts conduct proceedings and that, accordingly, the special features of those proceedings must be taken into account in assessing compliance with the "speediness" requirement of Article 5 § 4 (see, to the same effect, *Ilnseher*, cited above, § 270). Admittedly, the Constitutional Court, like the criminal courts, reviews the lawfulness of a complainant's detention. However, in doing so, it does not act as a "fourth-instance" body, but determines solely whether the decisions ordering the contested detention complied with the Constitution (see *Şahin Alpay*, cited above, § 135, and *Ilnseher*, cited above, §§ 270-271).

183. The Court observes that in the Turkish legal system, anyone in pre-trial detention may apply for release at any stage of the proceedings and may lodge an objection if the application is rejected. He or she can thus have the lawfulness of the detention reviewed by the ordinary courts even while an appeal to the Constitutional Court is pending. In the Court's opinion, this is an element to be taken into account in the overall assessment of whether a decision has been given speedily. In a system of that kind, the Court can tolerate longer periods of review by the Constitutional Court (see *Ilnseher*, cited above, §§ 273-274; see also, in the particular context of the Turkish Constitutional Court, *Alpay*, cited above, § 137, and *Mehmet Hasan Altan*, cited above, § 165).

184. In the Court's view, this possibility does not exempt the Constitutional Court from its obligation under Article 5 § 4 to decide speedily on the lawfulness of the applicant's detention in order to guarantee that the right to a speedy decision remains practical and effective (see *Ilnseher*, cited above, § 273), especially as the exhaustion of this remedy unlocks the possibility of lodging an application with the Court. Consequently, as far as the Court is concerned, the time taken by the Turkish Constitutional Court to examine individual appeals is intrinsically linked to the right of individual petition within the meaning of Article 34 of the Convention.

2. Application of these principles

185. In the present case, the Court notes that the applicant lodged an individual application with the Constitutional Court on 29 December 2017 and that the Constitutional Court examined the case on 22 May 2019 and published the result of its deliberations on 23 May 2019. It notes that the final judgment was published on 28 June 2019.

One year, four months and twenty-four days – including ten months and five days after the state of emergency was lifted – elapsed between the date on which the individual application was lodged with the Constitutional Court and the date on which that court published the result of its deliberations on its internet site.

Regard should also be had to the time elapsed between the above date and the date on which the final judgment was published (see *E. v. Norway*, 29 August 1990, § 66, Series A no. 181-A; see, to the same effect, *Mehmet Hasan Altan*, cited above, § 164, and *Şahin Alpay*, cited above, § 136). According to the Court's established case-law, the relevant period for the purposes of Article 5 § 4 of the Convention begins when an appeal is lodged with a court and ends on the day on which the decision is communicated to the applicant or to his lawyer, where the decision is not delivered in public (see *Smatana*, cited above, §§ 117-119; see also *Ilnseher*, cited above, § 257). It follows that the period to be taken into consideration amounts to one year, five months and twenty-nine days.

186. Having summarised the judgments delivered in respect of Turkey concerning the speediness of the Constitutional Court's judicial review of the lawfulness of detention measures, the Government primarily argued that the duration in question could be explained by that court's considerable workload following the declaration of a state of emergency.

187. The Court points out that a backlog of court business does not entail a Contracting State's international liability if the State takes appropriate remedial action to deal with an exceptional situation of this kind with the requisite promptness. Admittedly, having regard to the complexity and the diversity of the legal questions raised by the cases brought before the Turkish Constitutional Court after the attempted coup, and having regard to their very large number, it seems normal that this constitutional court took a certain time to obtain a comprehensive view of these questions and to rule by way of leading judgments (see *Akgün v. Turkey* (dec.), no. 19699/18, §§ 35-44, 2 April 2019).

188. The Court has already noted that the rapid resources deployed following the backlog created after the attempted coup seems to have produced significant results. In 2018 the Constitutional Court ruled on 35,395 individual applications, which made it possible to keep the volume of pending cases under control, in spite of the large number of new applications (see *Akgün*, cited above, § 43). Nonetheless, in the Court's opinion, the excessive workload of the Constitutional Court cannot be used as perpetual justification for excessively long procedures, as in the present case. It is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of Article 5 § 4 of the Convention (see *G.B. v. Switzerland*, no. 27426/95, § 38, 30 November 2000).

189. In this connection, the Court notes that it has already held that a period of one year and sixteen days cannot be considered "speedy" for the purposes of Article 5 § 4 of the Convention (see *Akgün*, cited above, § 38), without however concluding that there had been a violation of that provision. In its previous judgments concerning the "speediness" requirement, it has borne in mind the Constitutional Court's caseload

following the declaration of a state of emergency, and found that this was an exceptional situation. It also had regard to the fact that these cases were the first of a series of cases raising new and complicated issues concerning the right to liberty and security and freedom of expression following the attempted military coup (see *Mehmet Hasan Altan*, cited above, § 165). Those aspects were absent in the present case.

190. The Court can accept that in the present case the issues before the Turkish Constitutional Court were also complex (compare with *Mehmet Hasan Altan*, cited above, § 165). However, there is nothing in the material before the Court to suggest that either the applicant or his counsel contributed to prolonging the Constitutional Court's judicial review of the measure in question. In addition, following the applicant's lodging of his individual application on 29 December 2017 the Constitutional Court remained inactive for about ten months until 5 November 2018 – the date on which the Court asked the Government to submit its observations on the case – in spite of the applicant's request to obtain priority processing of his case (the file contains no information on the follow up given to that request). The procedural delays in the present case were thus attributable to the authorities.

191. Admittedly, the Court found it acceptable in the cases of *Mehmet Hasan Altan* (cited above, §§ 161-163), *Şahin Alpay* (cited above, §§ 133-135) and *Akgün* (decision, cited above) that the Constitutional Court's review might take longer. Notwithstanding the clear length of proceedings in those cases, lasting one year, two months and three days (*Mehmet Hasan Altan,* cited above, § 164), one year, four months and three days (*Şahin Alpay,* cited above, § 136) and one year and sixteen days (*Akgün*, cited above, § 38), it found that the speediness requirement under Article 5 § 4 had been complied with. Nevertheless, it stated that this finding did not mean that the Constitutional Court has carte blanche when dealing with any similar complaints raised under Article 5 § 4 of the Convention. It suffices to note in this connection that the length of the procedure in the present case exceeds all of the time periods observed in the above-cited cases.

192. The Court further reiterates that where an individual's personal liberty is at stake, it has very strict standards concerning the State's compliance with the requirement of speedy review of the lawfulness of detention (see *Idalov*, cited above, § 157). That is especially true in the present case, where the applicant has been held in pre-trial detention without the possibility of appearing before a court for more than one year and seven months (see the findings of the Turkish Constitutional Court in paragraph 60 above) and all his requests for release have been rejected for the same stereotyped reasons (see paragraphs 40 and 44 above). In addition, it appears from the case file that the restriction on access to the investigation file ordered on 20 October 2017 by the magistrate's court (see paragraph 31 above) remained valid until the adoption of the bill of indictment on

4 March 2019 (see paragraph 56 above). It should not be overlooked that the complaints relating to these circumstances, lodged on the basis of Article 5 §§ 3 and 4 of the Convention, were submitted to the Court by the applicant separately (see paragraphs 103 above and 233 below).

193. In consequence, the Court considers that in the context of the relevant proceedings the Turkish Constitutional Court, which has a primordial role at national level in protecting the right to liberty and security, failed to take proper account of the importance of the right in question (contrast with *Ilnseher*, cited above, § 269). In addition, it cannot overlook the fact that the applicant was arrested on 18 October 2017 and that the bill of indictment in respect of some of the charges against him was filed only on 19 February 2019. This means that for sixteen months after he had been placed in detention, the applicant was held without having been charged by the prosecutor's office. As the Commissioner for Human Rights has pointed out, the extension of the applicant's detention could have a dissuasive effect on the non-governmental organisations whose activities are related to matters of public interest (see, *mutatis mutandis*, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 164, 8 November 2016). In the present case, however, speedy judicial review of this measure by the Constitutional Court could have dispelled any doubts about the necessity of placing the applicant in detention or extending the measure in question for such a long period.

194. The Court concludes that the time-period in question is extremely long and cannot be described as "speedy" within the meaning of Article 5 § 4 of the Convention.

195. In addition, with regard to the derogation by Turkey, the Court notes at the outset that the state of emergency was lifted on 18 July 2018 and that more than eleven months subsequently elapsed before the Turkish Constitutional Court delivered its judgment. It considers that such a period can hardly be reconciled with the requirement of promptness, particularly given the period of more than six months that had already elapsed during the state of emergency, in the course of which no procedural step had been taken. In consequence, the overall duration in question cannot in any way be justified by the special circumstances of the state of emergency.

196. In conclusion, having regard to the total duration of the Constitutional Court's review of legality in the context of the individual application and to what was at stake for the applicant, the Court concludes that the proceedings by which the Turkish Constitutional Court ruled on the lawfulness of the applicant's pre-trial detention cannot be considered compatible with the "speediness" requirement of Article 5 § 4.

There has therefore been a violation of this Article.

VI. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

197. Relying on Article 18, the applicant complained that his Convention rights had been restricted for purposes other than those prescribed in the Convention. In particular, he submitted that his placement in detention had been intended to punish him as a critic of the Government, to reduce him to silence as an NGO activist and human-rights defender, to dissuade others from engaging in such activities and to paralyse civil society in the country.

198. The Court observes that the applicant's contention in this context is that there was an ulterior purpose behind his pre-trial detention. It notes that the complaint under Article 18 relates to a fundamental aspect of the present case that has not been examined under Article 5 of the Convention. It therefore considers that this complaint falls to be examined under Article 18 of the Convention in conjunction with Article 5 § 1. Article 18 provides as follows:

> "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

199. The Government considered 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, given that there had been no violation of any of the provisions of the Convention, the complaint under that provision had to be rejected as incompatible *ratione materiae* with the provisions of the Convention.

200. The applicant contested that argument.

201. The Court observes that it has found a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion that the applicant had committed the offences of which he was accused. Considering that the complaint under Article 18 is closely linked to the complaint under that provision, it dismisses the Government's objection concerning the compatibility *ratione materiae* of this complaint.

In conclusion, this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

202. The applicant reiterated his allegation that his pre-trial detention and its extension had pursued an ulterior purpose, namely to silence him as an NGO activist and human-rights defender, to dissuade others from engaging in such activities and to paralyse civil society in the country.

203. The applicant noted that the previous Commissioner for Human Rights had concluded, in his memorandum on freedom of expression and media freedom in Turkey, that the heightened level of judicial harassment targeting, *inter alia*, human-rights defenders (including the applicant himself) as a result of measures taken by the Government, posed a severe threat to democracy in Turkey.

204. As regards the question of proving the existence of an ulterior purpose in the context of Article 18 of the Convention, the applicant, referring to the *Merabishvili v. Georgia* judgment (cited above), submitted that the Court was not required to seek direct evidence or follow special rules and criteria when examining complaints under Article 18. In his view, it could not have recourse to a rigid application of the principle *affirmanti incumbit probatio* in cases concerning that Article. In that regard, consideration should be given to the difficulties faced by applicants in proving their allegations. The applicant contended that he was not under an obligation to submit a document providing proof of the violation of Article 18, in so far as the burden of proof in proceedings before the Court, which examined all the material before it, was not borne by one or the other party.

205. The applicant further submitted that, in the bill of indictment of February 2019, open accusations had been made regarding the activities and funding of NGOs. In his view, a number of national and international organisations had been presented therein as accomplices in the criminal offence of which he was accused. Immediately after he had been placed in detention, the Foundation for an Open Society, which had provided support to numerous NGOs and projects, had closed its office and brought its activities to an end. In such circumstances, NGOs would find it more difficult to conduct awareness-raising activities in the human-rights field in Turkey by means of reliable and safe cooperation with international organisations. Moreover, the fact that NGOs had wished to submit observations in the present case was an additional illustration of the adverse impact of the measure in question.

206. Lastly, the applicant submitted that the two accusatory statements made by the President of Turkey before the national and international media

after his placement in detention demonstrated that he was being held for political reasons.

(b) The Government

207. 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. In this respect, they considered that a mere suspicion was not sufficient to prove that Article 18 had been breached.

208. The Government argued that the criminal investigation and the proceedings in question were being 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 submissions, that evidence was not in the least related to the fact that the applicant was an NGO activist, and it was sufficient to justify the measures taken against him. In addition, they emphasised that the fact of the applicant being a human-rights defender did not in itself grant him immunity from a criminal investigation. They considered that, in the circumstances of the case, if it were accepted that the authorities had used their powers for some other purpose than those defined, any person in the applicant's position would be able to make similar allegations. In reality, it would have been impossible to prosecute a suspect with the applicant's profile without far-reaching political consequences.

209. In the Government's argument, the applicant had not submitted any evidence demonstrating that the contested pre-trial detention was imposed with a hidden objective. They also indicated that the proceedings against the applicant were still pending and that the allegations in this context would be ascertained at the end of the proceedings. In the Government's view, the applicant's prejudices were not sufficient to conclude that the whole legal machinery of Turkey in the present case was being misused and that, from beginning to end, the authorities had been acting in bad faith and in blatant disregard of the Convention. The Government considered that this was a very serious claim which required incontrovertible and direct evidence.

2. The third-party interveners

(a) The Commissioner for Human Rights

210. The Commissioner considered that the present case was a clear illustration of the increasing pressure on civil society and human-rights defenders in Turkey in recent years. This pressure had notably included a series of specific attacks by politicians and a general political discourse

targeting civil-society activists, in particular by suggesting that reporting on alleged human-rights violations perpetrated by the authorities furthered the aims of terrorist organisations and was by extension an attack on the Turkish State. According to the Commissioner, these statements frequently resulted in actions by public officials to restrict such work. For example, the police and local authorities had started to prevent NGOs, including Amnesty International, from visiting certain areas of the country following a statement by the President of the Republic in April 2016 whereby NGOs publishing reports on the human-rights situation needed to be "countered".

211. In addition, the Commissioner pointed out that severe restrictions had also been imposed on the day-to-day functioning of NGOs, including, for example, an indiscriminate and indefinite ban in Ankara on all public events focusing on the human rights of LGBTI persons. She noted that this ban was being maintained despite the lifting of the state of emergency.

212. The Commissioner's Office had also published several statements on the situation of human-rights defenders in Turkey in 2017, for example concerning the sentencing of M.Ç., another partner of the Commissioner's Office; the detention of T.K., the Chair of Amnesty International Turkey; or the unjustified arrest and criminal proceedings against eight human-rights defenders participating in a digital security and information management workshop in Istanbul in July 2017. The Commissioner also drew the Court's attention to the arrest on 16 November 2018 of thirteen prominent academics and human-rights defenders.

(b) The intervening non-governmental organisations

213. The intervening non-governmental organisations argued that in recent years the situation concerning human-rights defenders, journalists and NGOs in Turkey had become increasingly serious, as illustrated by the present case.

214. They stated 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 alleged 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. In their submission, this amounted to a violation of Article 18 of the Convention.

3. The Court's assessment

215. 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) and *Navalnyy v. Russia* ([GC], nos. 29580/12 and 4 Others, §§ 164-165, 15 November 2018).

216. The Court observes at the outset that the applicant's main complaints are that he was specifically targeted because of his activities as a human-rights defender and that his pre-trial detention and its extension had pursued an ulterior purpose, namely to silence him as an NGO activist and human-rights defender, to dissuade others from taking part in such activities and to paralyse Turkey's civil society.

217. The Court notes that the measures in question, and the criminal proceedings brought against other human-rights defenders, have been heavily criticised by the third-party interveners. However, as the political process and adjudicative process are fundamentally different, the Court must base its decision on "evidence in the legal sense", in accordance with the criteria laid down by it in the *Merabishvili* judgment (cited above, §§ 310-317), and its own assessment of the specific relevant facts (see *Khodorkovskiy v. Russia*, no. 5829/04, § 259, 31 May 2011, cited above, § 259; *Ilgar Mammadov*, cited above, § 140; and *Rasul Jafarov*, cited above, § 155).

218. 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. This conclusion obviates the need for any discussion on a plurality of purposes. However, whilst the Government failed to substantiate their argument that the aims of the measures taken against the applicant were justified by reasonable suspicions, in breach of that provision, this would not by itself be sufficient to conclude that Article 18 has also been violated (see *Navalnyy*, cited above, § 166).

219. Indeed, as the Court pointed out in the *Merabishvili* case (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).

220. The Court considers that, in the present case, it can be established to a sufficient degree that such proof follows from the combination of the relevant case-specific facts. In particular, the Court refers to all the material circumstances to which it has had regard in connection with its assessment of the complaint under Article 5 § 1 (see paragraphs 135-158 above). In this connection, it would emphasise, in particular, the conclusion reached above, to the effect that the measures taken against the applicant were not justified by reasonable suspicions based on an objective assessment of the alleged acts, but were essentially based not only on facts that cannot be reasonably considered as behaviour criminalised under domestic law, but also on facts

which were largely related to the exercise of Convention rights (see paragraph 157 above). It also considers that some of these circumstances are particularly relevant in the context of the present complaint.

221. The Court observes that the stated aim of the measure imposed on the applicant was to carry out investigations into the Gezi events and the attempted coup, 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 two events, it is 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.

222. However, it would appear that, from the outset, the investigating authorities were not primarily interested in the applicant's presumed involvement in the public disorder which occurred in the course of the Gezi events and the attempted coup. During the police interview, the applicant was asked many questions which, at first sight, had no connection with these events. For example, his telephone conversation on 24 July 2013 with F.B.G., a journalist, concerned a request for support with a view to setting up a news channel. His conversations with O.K., founder of a publishing house, about the organisation of commemorative activities in 2015, and with A.G. and I.P., concerned the problems of the Alevi community and transparency in local-authority activities respectively. Equally, some of the questions put to the applicant concerned his meetings with representatives of foreign countries, his telephone conversations with academics, journalists, NGO representatives, or the visit of an EUTCC delegation. The Government have not submitted any comments on the relevance of this evidence in assessing the "reasonableness" of the suspicions in the present case.

223. The Court notes that the bill of indictment does not make up for the deficiency described above. This document, 657 pages in length, does not contain a succinct statement of the facts. Nor does it specify clearly the facts or criminal actions on which the applicant's criminal liability in the Gezi events is based. It is essentially a compilation of evidence – transcripts of numerous telephone conversations, information about the applicant's contacts, lists of non-violent actions –, some of which have a limited bearing on the offence in question. It is important to note, as emphasised above (see paragraph 145), that the prosecutor's office accused the applicant of leading a criminal association and, in this context, of exploiting numerous civil-society actors and coordinating them in secret, with a view to planning and launching an insurrection against the Government. However, there is nothing in the case file to indicate that the prosecuting authorities had objective information in their possession enabling them to suspect, in good faith, the applicant at the time of the Gezi events (compare with *Rashad Hasanov and Others v. Azerbaijan*, nos. 48653/13 and

3 others, § 123, 7 June 2018). In particular, the prosecution documents refer to multiple and completely lawful acts that were related to the exercise of a Convention right and were carried out in cooperation with Council of Europe bodies or international institutions (exchanges with Council of Europe bodies, helping to organise a visit by an international delegation). They also refer to ordinary and legitimate activities on the part of a human-rights defender and the leader of an NGO, such as conducting a campaign to prohibit the sale of tear gas to Turkey or supporting individual applications.

224. In the Court's view, the inclusion of these elements undermines the prosecution's credibility. In addition, the prosecution's attitude could be considered such as to confirm the applicant's assertion that the measures taken against him pursued an ulterior purpose, namely to reduce him to silence as an NGO activist and human-rights defender, to dissuade other persons from engaging is such activities and to paralyse civil society in the country.

225. The Court notes, moreover, that the time-frame of the case reveals certain aspects which could prove important in its analysis under Article 18.

226. In this connection, it notes that the applicant was arrested on 18 October 2017, that is, more than four years after the Gezi events and more than a year after the attempted coup, on charges related to these events. Admittedly, progress in the investigation may have enabled the relevant services to obtain evidence that would justify the use of the contested measures at the relevant time. However, as noted above (see paragraph 151), there is no evidence in the case file to explain this considerable lapse of time.

227. Furthermore, the case file indicates that between the date on which the applicant was placed in detention and the date on which the bill of indictment was filed, two items of evidence were added to the file: the statements by M.P. and a report by the MASAK (see paragraphs 34, 42 and 44 above). The Court has already examined the relevance of M.P.'s statements and has observed that this witness did not cite any concrete fact and that, in addition, he had subsequently affirmed that he had not made any incriminatory statement in respect of the applicant (see paragraphs 62 and 147 above). The report by the MASAK listed the banking operations carried out with a view to providing financial support to certain legal NGOs. It was neither alleged nor established that these activities had been carried out in violation of the legislation in force at the relevant time.

228. In addition, the Court considers it crucial in its assessment under Article 18 of the Convention that several years elapsed between the events forming the basis for the applicant's detention and the court decisions to detain him. No plausible explanation has been advanced by the Government for this lapse of time. Furthermore, and importantly, the bulk of the evidence relied upon by the prosecutor in support of his request for the applicant's pre-trial detention, which began on 1 November 2017, had

already been collected well in advance of that date; the Government have not provided any cogent explanation for this chronology of events. Moreover, notwithstanding the lapse of more than four years between the Gezi events and the applicant's detention, the Government have been unable to furnish any credible evidence which would allow an objective observer to plausibly conclude that there existed a reasonable suspicion in support of the accusations against the applicant. Finally, the Court points out that after the applicant's placement in detention, he was not officially charged until 19 February 2019, that is, five and a half years after the facts, and solely in relation to the Gezi events. The Government have also failed to demonstrate that any investigative acts of significance took place in relation to the Gezi events between the time the applicant was initially detained in November 2017 and subsequently charged in February 2019.

229. It is also significant that those charges were brought following the speeches given by the President of the Republic on 21 November and 3 December 2018. On 21 November 2018 the President stated: "Someone financed terrorists in the context of the Gezi events. This man is now behind bars. And who is behind him? The famous Hungarian Jew G.S. This is a man who encourages people to divide and to shatter nations. G.S. has huge amounts of money and he spends it in this way. His representative in Turkey is the man of whom I am speaking, who inherited wealth from his father and who then used his financial resources to destroy this country. It is this man who provides all manner of support for these acts of terror..." On 3 December 2018 the President openly cited the applicant's name and stated as follows: "I have already disclosed the names of those behind Gezi. I said that its external pillar was G.S., and the national pillar was Kavala. Those who send money to Kavala are well known ..." The Court cannot overlook the fact that when these two speeches were given, the applicant, who had been held in pre-trial detention for more than a year, had still not been officially charged by the prosecutor's office. In addition, it can only be noted that there is a correlation between, on the one hand, the accusations made openly against the applicant in these two public speeches and, on the other, the wording of the charges in the bill of indictment, filed about three months after the speeches in question (see, *a contrario*, *Merabishvili*, cited above, § 324, and *Tchankotadze v. Georgia*, no. 15256/05, § 114, 21 June 2016).

230. In the Court's opinion, the various points examined above, taken together with the speeches by the country's highest-ranking official (quoted above), could corroborate the applicant's argument that his initial and continued detention pursued an ulterior purpose, namely to reduce him to silence as a human-rights defender. Moreover, the fact that the prosecutor's office referred in the bill of indictment to the activities of NGOs and their financing by legal means, without however indicating in what way this was relevant to the accusations it was bringing, is also such as to support that

assertion. The Court is also aware of the concerns expressed by the Commissioner for Human Rights and the third-party interveners, who consider that the applicant's detention is part of a wider campaign of repression of human-rights defenders in Turkey.

231. Indeed, at the core of the applicant's Article 18 complaint is his alleged persecution, not as a private individual, but as a human-rights defender and NGO activist. As such, the restriction in question would have affected not merely the applicant alone, or human-rights defenders and NGO activists, but the very essence of democracy as a means of organising society, in which individual freedom may only be limited in the general interest, that is, in the name of a "higher freedom" referred to in the *travaux préparatoires* (see *Navalnyy*, cited above, §§ 51 and 174). The Court considers that the ulterior purpose thus defined would attain significant gravity, especially in the light of the particular role of human-rights defenders (see paragraph 74-75 above) and non-governmental organisations in a pluralist democracy (see paragraph 76 above).

232. In the light of above-mentioned elements, taken as a whole, the Court considers it to have been established beyond reasonable doubt that the measures complained of in the present case pursued an ulterior purpose, contrary to Article 18 of the Convention, namely that of reducing the applicant to silence. Further, in view of the charges that were brought against the applicant, it considers that the contested measures were likely to have a dissuasive effect on the work of human-rights defenders. In consequence, it concludes that the restriction of the applicant's liberty was applied for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence, as prescribed by Article 5 § 1 (c) of the Convention.

In view of the foregoing, the Court concludes that there has been a violation of Article 18 in conjunction with Article 5 § 1 of the Convention.

VII. OTHER COMPLAINTS UNDER ARTICLE 5 §§ 3 AND 4 OF THE CONVENTION

233. Relying on Article 5 §§ 3 and 4 of the Convention, the applicant complained of the length of his detention. He also alleged that he had been unable to access the investigation file and that the courts had examined his appeals without holding a hearing. He submitted that this had prevented him from effectively challenging the decisions on his initial and continued pre-trial detention.

234. With regard to the complaint about the length of the proceedings, the Court refers to its previous conclusion (see paragraph 159), in which it found that the deprivation of liberty to which the applicant was subjected cannot be considered compatible with Article 5 § 1 of the Convention. This finding covers the entire period of the applicant's detention. The Court

reiterates that, in other cases in which it has found a breach of Article 5 § 1 of the Convention in respect of certain periods of pre-trial detention, it has held that there was no need to examine separately the merits of the complaints under Article 5 § 3 of the Convention which referred to these same periods (see, to similar effect, *Holomiov v. Moldova*, no. 30649/05, § 131, 7 November 2006; see, *mutatis mutandis*, *Zervudacki v. France*, no. 73947/01, §§ 60-61, 27 July 2006; and *Lütfiye Zengin and Others v. Turkey*, no. 36443/06, § 92, 14 April 2015).

With regard to the applicant's other complaints under Article 5 § 4 of the Convention, the Court notes that in its analysis of the alleged lack of a speedy judicial review by the Constitutional Court, it took sufficient account of the circumstances complained of by the applicant (see paragraph 192 above).

In the light of those considerations, the Court considers that there is no need to examine separately the admissibility or the merits of the other complaints mentioned above (see paragraph 233) and based on Article 5 §§ 3 and 4 of the Convention.

VIII. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

235. 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."

236. The Court notes that the applicant stated in the application form that he wished to obtain monetary compensation in respect of the non-pecuniary damage he had sustained through the violations of the Convention. The applicant also asked that he be released at the earliest possible date.

237. With regard to the claim in respect of just satisfaction, the Court notes that in the letter sent by it to the applicant's representative during the communication stage of the proceedings it was clearly pointed out that an indication, at an earlier stage of proceedings, of the applicant's wishes concerning just satisfaction did not redress the failure to articulate a "claim" for just satisfaction in the observations. In consequence, in the light of the general principles and its established practice, the Court considers that the indication of a wish by the applicant for eventual monetary compensation as expressed at the initial non-contentious stage of the procedure before it does not amount to a "claim" within the meaning of Rule 60 of the Rules of Court (see the general principles set out in the *Nagmetov v. Russia* judgment [GC], no. 35589/08, §§ 57-61, 30 March 2017). Furthermore, it is uncontested that no "claim" for just satisfaction was made during the

communication procedure in the proceedings before the Chamber in 2018. Accordingly, the Court does not make any award to the applicant under this head.

238. Concerning the measures to be adopted by the respondent State, subject to supervision by the Committee of Ministers, to put an end to the violations found, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (see, *inter alia*, *Şahin Alpay*, cited above, § 173, and the case-law cited therein).

239. Nevertheless, where the nature of the violation found is such as to leave no real choice as to the measures required to remedy it, the Court may decide to indicate only one individual measure, as it did in the cases of *Assanidze* (cited above, §§ 202-203), *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, § 490, ECHR 2004-VIII), *Aleksanyan v. Russia* (no. 46468/06, §§ 239-240, 22 December 2008), *Fatullayev v. Azerbaijan* (no. 40984/07, §§ 176-177, 22 April 2010), *Del Río Prada v. Spain* ([GC], no. 42750/09, §§ 138-139, ECHR 2013) and *Şahin Alpay* (cited above, § 195). In the light of this case-law, it considers that any continuation of the applicant's pre-trial detention in the present case will entail a prolongation of the violation of Article 5 § 1 and of Article 18 in conjunction with this former provision, as well as a breach of the obligations on respondent States to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention.

240. In those conditions, having regard to the particular circumstances of the case and the grounds on which the Court has based its findings of a violation (see paragraphs 159 and 232 above), it considers that the Government must take every measure to put an end to the applicant's detention and to secure his immediate release (see, *mutatis mutandis*, *Ilaşcu and Others*, cited above, § 490; see also *Fatullayev*, cited above, § 177).

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible as regards the complaints under Article 5 §§ 1 and 3 (lack of reasonable suspicion and of relevant and sufficient reasons), Article 5 § 4 (lack of a speedy judicial review by the Constitutional Court) and Article 18 of the Convention;

2. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion that the applicant had committed an offence;

3. *Holds*, unanimously, that there has been a violation of Article 5 § 4 of the Convention on account of the lack of a speedy judicial review by the Constitutional Court;

4. *Holds*, unanimously, that there is no need to examine the complaint under Article 5 §§ 1 (c) and 3 of the Convention as to the alleged failure to provide reasons for the applicant's pre-trial detention;

5. *Holds*, by six votes to one, that there has been a violation of Article 18 of the Convention taken in conjunction with Article 5 § 1;

6. *Holds*, unanimously, that there is no need to examine separately the admissibility or merits of the complaints under Article 5 §§ 3 and 4 (length of pre-trial detention, alleged absence of an effective remedy on account of the lack of access to the investigation file, examination of the appeal against pre-trial detention without a hearing);

7. *Holds*, by six votes to one, that the respondent State is to take all necessary measures to put an end to the applicant's detention and to secure his immediate release;

8. *Dismisses*, unanimously, the applicant's claim for just satisfaction.

Done in English and French, and notified in writing on 10 December 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
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) Concurring opinion of Judge Bošnjak;
(b) Partly concurring and partly dissenting opinion of Judge Yüksel.

R.S.
S.H.N.

CONCURRING OPINION OF JUDGE BOŠNJAK

1. In the present case, I agree with the finding that there have been violations of Article 5 § 1, Article 5 § 4 and Article 18 of the Convention. While I share the position of the majority with regard to the outcome, I disagree with certain arguments and, at times, with the approach they have adopted.

(a) Violation of Article 5 § 1 of the Convention

2. Under Article 5 § 1 (c) of the Convention, the applicant argues that there was no evidence grounding a reasonable suspicion that he had committed a criminal offence necessitating his pre-trial detention. In order to examine this complaint, I believe it is fundamental to examine whether the decisions by the domestic courts ordering and extending his detention adduced sufficient elements to satisfy an objective observer that the applicant may have committed the criminal offences for which detention was ordered.[1] I would argue that in examining the existence of reasonable suspicion, no regard should be had to elements that were external to the domestic courts' consideration at the time when detention was ordered and, later, extended.

3. As the standard of reasonable suspicion refers to an objective observer and therefore implies impartiality, it is precisely the domestic court which must act as this objective observer when ordering or extending detention in a given case. If the domestic court, acting as an objective observer, is to be satisfied that reasonable suspicion exists, the elements submitted to it in this respect must be articulable, in the sense that they specify the act the suspect has allegedly committed and explain the evidentiary link between the suspect and that act. A mere suspicion on the part of the investigative authorities will not suffice.[2] The elements satisfying the standard of reasonable suspicion must exist and must be available to an objective observer prior to a procedural act for which reasonable suspicion is required (such as a detention order or search and seizure warrant).[3] Under no circumstances can evidence subsequently collected, or other elements

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[1] Compare, for example, *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, § 88, 22 May 2014.

[2] From a comparative perspective, see, for example, *Terry v. Ohio* (US Supreme Court), 392 U.S. 1 (1968). In this respect, I would argue that the US standard of "probable cause" is very much in line with this Court's interpretation of "reasonable suspicion"; the same position is advanced by Van Kempen, P.H.P.H.M.C. (ed.): Pre-Trial Detention (Intersentia 2012), p. 33.

[3] From a comparative perspective, see, for example, for the US legal system, *Devenpeck v. Alford* (US Supreme Court) 543 U.S. 146 (2004); for the Canadian legal system, *R. v. Fenney* (Supreme Court of Canada), 1997 CarswellBC 1015 (1997); and for the French legal system, Court of Cassation, Criminal Division, 1 October 2003 (03-82.909).

subsequently produced, substitute for the initial lack of reasonable suspicion.

4. In the present case, the applicant has been detained since 1 November 2017 on suspicion of alleged involvement in the Gezi Park events (which allegedly constitute an offence under Article 312 of the Turkish Criminal Code) as well as of alleged involvement in the attempted *coup d'état* (which allegedly constitutes an offence under Article 309 of the Turkish Criminal Code). I have serious doubts as to whether the elements adduced in support of the initial detention order and of all subsequent orders extending the applicant's detention are articulable enough to specify the acts (and not merely their legal characterization) that the applicant allegedly committed. Be that as it may, it is very clear from those detention decisions that there is no evidentiary basis linking the applicant in an articulable way to any of the alleged offences.

5. I respectfully disagree with the approach adopted by the majority in assessing the complaint under Article 5 § 1 in so far as it is based on elements external and/or posterior to the domestic courts' detention decisions. Thus, the majority analysis takes into account the information on the Gezi Park events as submitted by the parties and by the Commissioner for Human Rights (see paragraph 140 of the judgment). Furthermore, it extensively examines the bill of indictment in respect of the Gezi Park events (see paragraphs 144-150). Finally, it attaches weight to the content of the interview conducted with the applicant on 31 October 2017 (see paragraphs 143, 147, 148 and 152), as well as the fact that after the applicant's arrest and detention, the authorities did not apparently gather any important new evidence indicating that the applicant was the main instigator of the Gezi Park events (see paragraph 151). I would argue that none of these arguments should have been taken into consideration when assessing the existence of reasonable suspicion.

6. As regards the submissions of the parties and of the Commissioner for Human Rights in the proceedings before the Court, these submissions did not constitute part of the domestic decision-making process on detention and can therefore neither confirm nor refute the existence of reasonable suspicion. While the content of these submissions does not alter the Court's findings in the present case, one could imagine a future scenario where the respondent Government would produce particularly convincing elements demonstrating reasonable suspicion which would otherwise not be discernible from the domestic decisions on detention. Would the Court then find that the reasonable suspicion standard has been met? The logic of the arguments in the present judgment would suggest that it should. I strongly believe it should not. Alternatively, if an applicant were to produce, in his submissions to the Court, strong evidence rebutting reasonable suspicion, would the Court hold that the applicant's detention was not Convention-compliant although reasonable suspicion had been perfectly demonstrated in

the domestic court's order to detain him? Although such new evidence could support a conclusion that the detention was no longer justified, I hold that it could not retroactively render it unlawful from the outset.

7. In my opinion, the same goes for the bill of indictment, which is extensively presented and analysed in the present judgment. The indictment was filed on 19 February 2019, that is, four days after the last detention order of relevance in this case (see paragraph 46 of the judgment). It is therefore clear that the applicant was not detained on the basis of the indictment, and that the facts and evidence set out therein could not, even in theory, satisfy the standard of reasonable suspicion for the purpose of detention. In the majority reasoning (see paragraph 137), the alleged relevance of the bill of indictment is based on the fact that the Constitutional Court, which decided on the applicant's individual application on 22 May 2019, had regard to that prosecutorial document. However, the Constitutional Court apparently conducted an autonomous assessment of the existing evidence, not relying specifically on the bill of indictment and its assertions (see paragraph 60).

8. The majority's analysis of the bill of indictment implicitly indicates that a subsequent prosecutorial document could possibly substitute for an initial lack of reasonable suspicion. I strongly believe that it cannot, based on the arguments outlined in point 3 of this separate opinion. In this connection, I wish to underline that the requirement that reasonable suspicion exist prior to the procedural decision for which it is required is an important, but not the only impediment to such an approach. Specifically, prosecutorial documents are submissions by one of the parties to the criminal proceedings. As such, they cannot in themselves qualify as the findings of an objective observer, a quality that is required in examining the existence of reasonable suspicion. They can be taken into account in as much as the elements they contain have been expressly embraced by a judicial decision on detention, which must also have demonstrated an articulable link between the act allegedly committed by the suspect and the evidence submitted in support of that claim. Nothing similar happened in the present case.

9. Since the submissions and acts of the investigative and prosecution authorities cannot in themselves constitute reasonable suspicion, it is in my opinion irrelevant to examine the questioning of the applicant prior to his detention. The judgment's examination in paragraphs 143, 147, 148 and 152 unnecessarily suggests that it could be important. Similarly, emphasizing (in paragraph 151) the fact that the authorities failed to gather any new evidence during the applicant's detention creates a wrong impression that incriminating evidence against the applicant, if subsequently collected and submitted in the domestic proceedings, could substitute for the lack of initial reasonable suspicion. This is obviously incompatible with the antecedence requirement as an element of the reasonable suspicion standard.

10. While I cannot share many of the majority's arguments for finding that the applicant's detention was not justified by reasonable suspicion, I wish to explain why, in my opinion, their conclusion is nevertheless correct. In this exercise, I take the domestic courts' detention decisions and the facts and evidence underpinning them as the sole elements of my analysis. In this respect, I observe that the initial decision of 1 November 2017 ordering the applicant's detention is of central importance. The subsequent decisions extending the applicant's detention mainly referred to the evidence cited in that decision, adding also a report by the Financial Crimes Investigation Committee ("MASAK") – see paragraphs 38 and 42-46 of the judgment.

11. Regarding the alleged suspicion that the applicant acted as an instigator of the Gezi Park events, the detention decisions offered nothing more than the fact that the applicant was in contact with the organisers of the demonstrations, that he discussed those events with them and that he provided financial support to those persons. The applicant does not dispute the existence of such contacts or even this support. What is in dispute between the parties is whether there exists a reasonable suspicion that the applicant assisted the organisers in their alleged attempt to overthrow the Government by force and violence, this in turn being a constitutive element of the crime proscribed by Article 312 of the Turkish Criminal Code. However, none of the detention decisions contains any evidentiary elements which could constitute an articulable link between the applicant's acts, which were largely undisputed, and an alleged attempt to overthrow the Government by violence or force. While it is questionable whether the Constitutional Court's judgment could in any way substitute for the above-mentioned insufficiencies in the decisions ordering and extending the applicant's detention, inasmuch as it apparently added further arguments in respect of the alleged reasonable suspicion, I believe that those additional arguments (see paragraph 60 of the present judgment) would not warrant the conclusion by a prudent person, or one of reasonable caution,[4] that the applicant attempted to overthrow the Government by force and violence.

12. This conclusion is all the more pertinent with regard to the other reproach made against the applicant, namely that he participated in the attempted *coup d'état*. In this part, I can adhere to the arguments of the majority as outlined in paragraph 154 of the judgment, since these are largely based on the content of the corresponding detention decisions.

13. In this case, the Court has unanimously held that the domestic courts' decisions ordering and extending the applicant's detention were not based on reasonable suspicion. I believe that this finding in and of itself calls for the immediate release of the applicant, irrespective of the further findings on his Article 18 complaint. No one can be deprived of liberty in a

[4] The standard introduced in comparative law by *Brinegar v. US* (US Supreme Court) 338 U.S. 160 (1949), and confirmed relatively recently in *Maryland v. Pringle* (US Supreme Court) 540 U.S. 366 (2003).

criminal case if no reasonable suspicion has been demonstrated for his detention.

(b) Violation of Article 5 § 4 of the Convention

14. Relying on Article 5 § 4 of the Convention, the applicant complains that the Constitutional Court did not comply with the requirement of speediness when examining his individual application regarding the lawfulness of his pre-trial detention. I voted with some unease to find a violation. To be specific, this case is rather difficult to distinguish from that of *Şahin Alpay v. Turkey* (no. 16538/17, 20 March 2018), where in rather similar circumstances the Constitutional Court took only twenty-one days less than in the present case to examine the lawfulness, and yet there the Court found no violation. Furthermore, the Court itself adopted its judgment in the present case one year, five months and four days after the application was lodged, which means that more time has elapsed in Strasbourg than before the Constitutional Court. Since there are good reasons on the Court's side for such a length of examination, an equivalent conclusion could perhaps be reached for the Constitutional Court. Since the Article 5 § 4 complaint was not central to this case and the finding on this point does not alter the applicant's legal or factual position, it might have been more appropriate for the Court not to examine this complaint separately.

15. However, as the Chamber took a vote on this complaint, I decided to join the other members of the composition in their finding, bearing in mind the absolute total of almost seventeen months, coupled with the fact that personal liberty was at stake in a situation where presumption of innocence applies. In such circumstances, I tend to believe that the time that elapsed between the introduction of the individual application and the publication of the judgment was incompatible with the speediness requirement.

(c) Violation of Article 18 of the Convention

16. Under Article 18 of the Convention, the applicant claims that his Convention rights under Article 5 of the Convention have been restricted for purposes other than those prescribed by the Convention. The majority found that the Article 5 interference in the applicant's case pursued an ulterior purpose of reducing him to silence in his capacity as a human-rights defender and an NGO activist, this in turn likely having a dissuasive effect on the work of human-rights defenders in Turkey. They claim that the restriction in question would affect the very essence of democracy. I tend to disagree that such an ulterior purpose and such dissuasive effect have been established in the present case to a standard beyond reasonable doubt as asserted in paragraph 232 of the judgment.

17. In the present case the applicant and the Government are in dispute regarding the background to the applicant's detention. While the applicant

considers himself to be a human-rights defender and a prominent NGO figure who has been targeted by the impugned measure for precisely this reason, the Government in their turn consider the applicant to be one of the main actors in attempts to overthrow the constitutional order through unconstitutional means. For the reasons presented above in points 2-13 of the present concurring opinion, I believe that the Government failed to produce articulable elements in support of their version. However, a lack of reasonable suspicion does not in itself mean that there exists an ulterior purpose that is incompatible with the Convention within the meaning of its Article 18.[5] It may well be that in a given case, in spite of the absence of objective elements justifying reasonable suspicion, the authorities of a respondent State continue, perhaps irrationally, to cultivate completely subjective suspicions against an individual. Such wholly subjective suspicions would not in themselves indicate an unacceptable ulterior purpose or even constitute a violation of Article 18.

18. Furthermore, the lack of objective persuasiveness in the Government's version, as established in the present case, does not automatically lend support to that advocated by the applicant. His background in human-rights advocacy and the alleged dissuasive effect of his detention on the NGO scene or on the essence of democracy in Turkey have not been subjected to any empirical examination by the Chamber and have not, for this reason, been demonstrated. In contrast to the Court's judgment in *Navalnyy v. Russia* ([GC], nos. 29580/12 and 4 Others, 15 November 2018), the Chamber in the present case was not presented with any direct evidence that the applicant was selected and subjected to the interference in question precisely for his human-rights background or his role in society.

19. Admittedly, some indirect support for the applicant's version can be derived from the way in which his interview was conducted by the investigative authorities (see paragraphs 221 and 222 of the judgment) as well as from the text of the bill of indictment (see paragraph 223). Certain elements, in so far as they intend to criminalise actions which obviously fall within the sphere of civil society, are particularly worrisome and unacceptable in a democratic society. However, as the interference under scrutiny here is the applicant's (continued) detention and since neither the conduct of the police interview nor the bill of indictment form any basis for that interference, I tend to believe that, as such, they cannot demonstrate the existence of an ulterior purpose behind the interference, as asserted by the applicant.

20. Nevertheless, I believe that the Convention-compliant purposes of pre-trial detention are limited. If none of those purposes can reasonably be

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[5] In this respect, see also *Merabishvili v. Georgia* [GC], no. 72508/13, § 291, 28 November 2017.

demonstrated in a given case, it is apparent that the authorities of the respondent State interfered with an individual's personal liberty for an ulterior purpose. Whatever that ulterior purpose was, it cannot be considered as compatible with the Convention, which in turn indicates a violation of Article 18.

21. While reasonable suspicion is a precondition for pre-trial detention, it does not, as such, refer to its purpose. In its case-law, the Court has accepted four bases for continued detention, namely: (a) the risk that the accused will fail to appear for trial, (b) the risk that the accused, if released, would take action to prejudice the administration of justice, or (c) commit further offences, or (d) cause public disorder.[6] From a comparative-law perspective, having regard to democratic States governed by the rule of law, the grounds for detention vary from country to country. However, both comparative grounds as well as the bases recognised in the Court's case-law can be translated into two main purposes: (i) ensuring the proper conduct of criminal proceedings, and (ii) protection of the public against the danger that the suspect presumably represents.

22. It is safe to conclude that neither of these two purposes was at stake in the applicant's case. The applicant was arrested more than four years after the Gezi Park events and more than a year after the attempted *coup d'état*. Almost all the evidence adduced against him was collected at the time of those events. No explanation has been given as to why the authorities had waited for years to arrest him, although in their view they had had enough evidence at hand to initiate criminal proceedings. Even after the applicant's arrest, the conduct of the authorities and other facts, as succinctly described in paragraphs 227 and 228 of the judgment, do not lead me to believe that they detained the applicant either for the purpose of ensuring the proper conduct of criminal proceedings or to protect the public against the danger he allegedly represents.

23. Since it has not been demonstrated that the applicant's pre-trial detention pursued any of the purposes compatible with the Convention, the restriction of the applicant's right to liberty was apparently applied for a purpose which, whatever its exact content, was incompatible with the Convention. I therefore agree that there has also been a violation of Article 18.

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[6] See *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 88, 5 July 2016.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE YÜKSEL

- I -

1. As regards the applicant's complaint under Article 5 § 1 of the Convention, I concur with the finding that, in the particular circumstances of the present case, there has been a violation of that Article, but I cannot subscribe to the reasoning set out in the judgment.

2. The case-law of the Court does not define what is to be regarded as "reasonable" and states that it will depend upon all the relevant circumstances. Thus, an assessment of whether there existed "reasonable suspicion" justifying the applicant's detention is very delicate. I should like to start by noting that the notion of "reasonable suspicion" was defined by the Court as "the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence" (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182) In this regard, the fact that a suspicion is held in good faith is insufficient (see *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 116, 17 March 2016). Furthermore, the existence of reasonable suspicion requires that the facts relied on can reasonably be considered as criminal behavior under domestic law. In the present case, as was pointed out in the judgment, "The Court must ... take into account ... the authorities' concerns relating to the large number of deaths and injuries which occurred during those events and the public unrest caused. In this regard, it notes the information supplied by the Government to the effect that four civilians and two police officers lost their lives, thousands of people were wounded and numerous acts of vandalism were committed. The Court considers that in such circumstances it is perfectly legitimate for the authorities to investigate these incidents, in order to identify the perpetrators of these violent acts and to bring them to justice" (see paragraph 142 of the judgment). The applicant was suspected of being the instigator and leader of the Gezi events, which, as stated in the judgment, gradually transformed into violent demonstrations against the Government. The applicant was therefore placed in pre-trial detention on charges relating to the two offences set out in Articles 309 and 312 of the Criminal Code.

In cases concerning the investigation and prosecution of serious offences, the Court affords some leeway to the national authorities. Yet this leeway is not unlimited, in particular in cases where the Court is called upon to examine a complaint under Article 5 of the Convention. Even the exigencies of dealing with terrorist crimes cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 § 1 (c) is impaired (see *Fox, Campbell and Hartley*, cited above, § 32; *Murray v. the United Kingdom*, 28 October 1994, § 51, Series A

no. 300-A; and *O'Hara v. the United Kingdom*, no. 37555/97, § 35, ECHR 2001-X).

3. Although the bill of indictment, the decisions relating to the applicant's pre-trial detention, and the Constitutional Court's judgment could be considered as three groups of relevant documents for the assessment of the applicant's complaints under Article 5 § 1, the majority, in its assessment of those complaints, relies specifically and heavily on the bill of indictment. I disagree with this approach. In my view, in its assessment the majority should instead have relied on the decisions ordering the applicant's pre-trial detention.

Firstly, I would refer to the case-law of the Court which states that "... it is not normally for the Court to substitute its own assessment of the facts for that of the domestic courts, which are better placed to assess the evidence adduced before them" (see *Mergen and Others v. Turkey*, nos. 44062/09 and 4 others, § 48, 31 May 2016, and *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 126, 20 March 2018). To the extent that the approach in the present judgment is in line with the dissenting opinions of the Constitutional Court's judgment, it should be noted that the dissenting judges made their assessment on the basis of whether there was "strong suspicion", which is a higher standard of protection than "reasonable suspicion". Pursuant to Article 19 (3) of the Constitution, individuals may be detained provided that there are strong presumptions that they have committed an offence.

4. Secondly and most importantly, I believe that in assessing the "reasonableness" of a suspicion, the Court generally relies on the order placing an applicant in detention and the judicial decisions on extending that detention (see *Rasul Jafarov*, cited above, §§ 119-120, and *Merabishvili v. Georgia* [GC], no. 72508/13, § 222, 28 November 2017). Indeed, the Court must be satisfied that the arrested person was reasonably suspected of having committed the alleged offence, based on the reasons set out in the decisions ordering and extending the applicant's detention.

Although, as stated above, our case-law holds that the "reasonableness" depends upon all the relevant circumstances, in the instant case we have before us "very special circumstances" that require sufficient reasoning from the national judiciary. In this respect, I believe that the lack of adequate reasoning in the initial decision to detain the applicant and the subsequent decisions extending his detention could be considered as the basis of finding a violation of Article 5 § 1. Taking into account the lack of reasoning and lack of application of the proportionality standard in the context of the circumstances of the present case, the domestic courts failed to demonstrate that the applicant had instigated the violent events and thus to justify the reasonable suspicion of his having committed the related offence. In addition, by using stereotyped and formulaic reasons, they also failed to provide sufficient reasoning to justify the extension of the applicant's pre-trial detention.

In conclusion, I believe that there has been a violation of Article 5 § 1, on the procedural ground stemming merely from the lack of adequate reasoning provided by the domestic courts.

5. As to the applicant's complaint under Article 5 § 4 of the Convention, I voted with my colleagues in finding of a violation of this provision, notwithstanding the excessive workload of the Constitutional Court. In my view, even if the applicant was also suspected of having committed an offence under Article 309 of the Criminal Code (attempting to overthrow the constitutional order), the present judgment considers this case to be more concerned with the Gezi Park events and not, strictly speaking, a "post-15 July case", and thus puts emphasis on the duration of the Constitutional Court's review after the state of emergency was lifted. I must point out that, having regard to the Court's approach as developed in the cases of *Mehmet Hasan Altan* (cited above), *Şahin Alpay v. Turkey* (no. 16538/17, 20 March 2018), and *Akgün v. Turkey* ((dec.) [Committee], no. 19699/18, 2 April 2019), I have doubts whether the conclusion would have been the same had the case concerned the measures taken following the attempted *coup d'état* of 15 July 2016.

– II –

6. With regard to the applicant`s complaint under Article 18 in conjunction with Article 5 § 1 of the Convention, I disagree with the view of the majority that there has been a violation of this provision. The majority considers it to have been established "beyond reasonable doubt" that the measures complained of in the present case pursued an ulterior purpose, contrary to Article 18 of the Convention.

7. Having regard to the burden-of-proof requirement in establishing that the measures complained of in the present case pursued an ulterior purpose, contrary to Article 18 of the Convention, I do not perceive sufficient grounds to conclude that this provision has been violated. The Court must base its decision on "evidence in the legal sense", in accordance with the criteria laid down by it in the above-cited *Merabishvili* judgment (§§ 309-317), and its own assessment of the specific relevant facts (see *Khodorkovskiy v. Russia*, no. 5829/04, § 259, 31 May 2011; *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, § 140, 22 May 2014; and *Rasul Jafarov*, cited above, § 155).

8. It appears from the Court's case-law that in cases where there is a complaint under Article 18, in conjunction with Article 5 of the Convention, the Court primarily examines whether the applicant's deprivation of liberty pursued an aim that is compatible with the Convention (see *Rasul Jafarov*, cited above, §§ 153-163, and *Khodorkovskiy*, cited above, §§ 254-261). The Court then examines whether there is proof that the authorities' actions were actually driven by improper motives. Examination of this second limb

depends on the specific circumstances of the case and I believe that such reasons were not present in the instant case, for the following reasons.

Firstly, I attach particular importance to the special role of human-rights defenders in promoting and defending human rights, including their cooperation with the Council of Europe, and their contribution to the protection of human rights in the member States. However, in my view, this case, which is the first Turkish case in which the Court has examined the detention of an activist, cannot easily be proposed as a case about human-rights activism in general in Turkey. In the context of the present case, the applicant's activities must be assessed as part of a wider analysis. In this respect, I do not agree with the majority's conclusion that the initial and continued detention of the applicant pursued an ulterior purpose, namely to reduce him to silence as a human-rights defender and NGO activist.

Secondly, I am sceptical of the link between the applicant's detention and the special role of human-rights defenders in promoting and defending human rights. As the majority noted, the applicant is an activist who played an important role in the Gezi Park events. He was accused of promoting those events, with civil disobedience as a starting point, and then of encouraging the spread of these actions across the country, with the aim of creating generalised chaos, by providing physical facilities, financial support and international contacts. As noted by the majority, given the serious disruption and the considerable loss of life resulting from these events, it was perfectly legitimate to carry out investigations into these incidents (see paragraph 221 of the judgment).

It is clear from the Court's case-law that the status of an activist cannot be treated as a guarantee of immunity (see, *mutatis mutandis, Khodorkovskiy*, cited above, § 258). The mere fact that the applicant has been prosecuted or placed in pre-trial detention does not automatically indicate that the aim pursued by such measures was to restrict political debate (see *Merabishvili*, cited above, § 323-325). I do not discern sufficient evidence in the case file materials to substantiate such a serious allegation.

Thirdly, the applicant did not produce any persuasive and concrete evidence suggesting that the present case was an illustration of pressure on civil society and human-rights defenders in Turkey in recent years, or that the use of a detention measure for that purpose was systematic. In the same domestic case criminal proceedings have been initiated against sixteen persons; some of the suspects in the same case are being tried, but have already been released pending trial. Thus, the applicant's situation can be viewed in isolation.

Fourthly, it appears from the case file that the applicant's pre-trial detention has been examined on several occasions by national courts and, in particular, by the Constitutional Court. Even if I consider that the reasoning provided by the domestic courts was insufficient, this does not mean that the

applicant's initial detention and continued detention did not have a legitimate aim.

9. In the light of the foregoing and without prejudice to a possible subsequent examination by the Court once the criminal proceedings against the applicant have been completed, I consider that in the present case there is insufficient evidence capable of supporting the applicant's allegation that the entire judicial mechanism of Turkey acted in line with a political agenda in instituting criminal investigations against him.