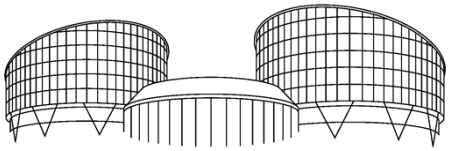

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF SABUNCU AND OTHERS v. TURKEY

(Application no. 23199/17)

JUDGMENT

Art 15 • Derogation • Limits
Art 5 § 1 (c) • Lack of reasonable suspicion • Prolonged detention of journalists/publishers owing to unreasonable equation of their editorial stance, covered by freedom of the press, with propaganda in favour of terrorist organisations • Alleged offences coming within scope of legitimate political opposition and exercise of Convention freedoms • Interpretation of criminal law resulting in anyone expressing a view opposed to those promoted by the authorities being characterised as a terrorist or a person assisting terrorists • Prosecuting authorities' reference to the notion of "asymmetric warfare" entailing a similar risk
Art 5 § 4 • "Speediness" • Periods of seven to sixteen months justified by the exceptional caseload of the Constitutional Court following the declaration of the state of emergency
Art 10 • Freedom of expression • Unlawful nature of detention impacting on lawfulness of interference
Art 18 (+ 5 and 10) • Existence of an ulterior purpose not demonstrated

STRASBOURG

10 November 2020

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

In the case of Sabuncu and Others v. Turkey,

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

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Egidijus Kūris,
Ivana Jelić,
Arnfinn Bårdsen,
Saadet Yüksel,
Peeter Roosma, *judges,*
and Hasan Bakırcı, *Section Deputy Registrar,*

Having deliberated in private on 29 September 2020,

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

PROCEDURE

1. The case originated in an application (no. 23199/17) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by ten Turkish nationals, Mr Mehmet Murat Sabuncu, born in 1969, Mr Akın Atalay, born in 1963, Mr Önder Çelik, born in 1956, Mr Turhan Günay, born in 1946, Mr Mustafa Kemal Güngör, born in 1959, Mr Ahmet Kadri Gürsel, born in 1961, Mr Hakan Karasinir, born in 1963, Mr Hacı Musa Kart, born in 1954, Mr Güray Tekin Öz, born in 1949, and Mr Bülent Utku, born in 1955 ("the applicants"), on 2 March 2017.

2. The applicants were represented by Mr F. İlkiz, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 8 June 2017 the Government were given notice of the application.

4. The applicants and the Government each filed written observations on the admissibility and merits of the case.

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

6. In addition, written comments were submitted to the Court by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression ("the Special Rapporteur"), and also by the following non-governmental organisations acting jointly: ARTICLE 19, the Association of European Journalists, the Committee to Protect Journalists, the European Centre for Press and Media Freedom, the European Federation of Journalists, Human Rights Watch, Index on Censorship, the International Federation of Journalists, the International Press Institute, the International Senior Lawyers Project, PEN International

and Reporters Without Borders ("the intervening non-governmental organisations"). The Section President had granted leave to the Special Rapporteur and the organisations in question to intervene under Article 36 § 2 of the Convention and Rule 44 § 3.

7. The Government replied to the intervening parties' comments.

8. In correspondence of 11 July 2019 the Government informed the Court that the Constitutional Court had delivered its judgment on the applicants' individual applications. The applicants submitted comments on that judgment.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants are journalists with the national daily newspaper *Cumhuriyet* ("The Republic") or managers of the Cumhuriyet Foundation, the principal shareholder of the company that publishes the newspaper.

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

A. The applicants' placement in detention

1. Police custody

11. On 31 October 2016 the applicants, with the exception of Akın Atalay, who was abroad at the time, were taken into police custody by the Istanbul police. They were suspected of committing offences on behalf of organisations considered by the Government to be terrorist organisations, including, in particular, the PKK/KCK (the Kurdistan Workers' Party / Kurdistan Communities Union) and an organisation referred to by the Turkish authorities as "FETÖ/PDY" ("Fethullahist Terror Organisation / Parallel State Structure"), and of disseminating propaganda on their behalf.

12. The same day, on the instructions of the Istanbul public prosecutor's office, the Istanbul police carried out searches at the applicants' homes and seized computers and other IT equipment belonging to them.

13. Still on 31 October 2016, the applicants in police custody lodged an objection challenging their detention and seeking their release. In a decision of 2 November 2016 the Istanbul 4th Magistrate's Court dismissed the objection.

14. The applicants concerned were questioned at the police station about their alleged acts. They denied belonging to or assisting any illegal organisation.

15. On 4 November 2016 the nine applicants in police custody appeared before the Istanbul public prosecutor ("the public prosecutor") and were again questioned about their alleged acts. The public prosecutor asked them questions relating mainly to articles published in *Cumhuriyet* and to the newspaper's editorial stance. He asked the applicants whether they had been instructed by the leaders of illegal organisations, and in particular FETÖ/PDY, to align the newspaper's editorial stance with criticisms directed by alleged members of the latter organisation against the political authorities. He also questioned them about the newspaper's funding and its advertising revenue.

16. During questioning the applicants concerned rejected the allegations that they had acted in concert with outside sources in publishing articles in the newspaper, and denied belonging to any illegal organisation. They contended that the criminal investigation – which, in their view, called into question the assessment of political events and the defence of public freedoms carried out by the journalists of *Cumhuriyet* – amounted to a breach of freedom of expression and freedom of the press.

17. Following this questioning the public prosecutor requested the competent judge to place the applicants, with the exception of Akın Atalay, in pre-trial detention, on the grounds that they were suspected of assisting criminal organisations without being members of them and of disseminating propaganda in favour of those organisations (offences under Article 220 §§ 7 and 8 of the Criminal Code ("the CC")), while acting in full association with them from a moral and factual point of view.

18. On 11 November 2016 the applicant Akın Atalay returned to Turkey. On his arrival in the country he was taken into police custody. On the following day, 12 November 2016, he was brought before the Istanbul magistrate.

2. Placement in pre-trial detention

(a) Regarding all the applicants

19. On the night of 4 November 2016 the applicants, with the exception of Akın Atalay, appeared before the Istanbul 9th Magistrate's Court and were questioned about their alleged acts and the suspicions against them. At the end of the hearing, on 5 November 2016, the magistrate, echoing the approach taken in the public prosecutor's observations and on the basis of the latter's allegations, and taking into consideration the content of several articles that had appeared in *Cumhuriyet* and some comments made on social media, ordered the pre-trial detention of the applicants concerned.

The applicant Akın Atalay was placed in pre-trial detention at the close of the hearing on 12 November 2016, on the same grounds.

The magistrate considered, in relation to all the applicants, that articles containing implicit propaganda in favour of the armed terrorist

organisations FETÖ and the PKK had been published in the daily newspaper *Cumhuriyet*, and that there were strong suspicions that the suspects had been responsible for the newspaper's ongoing activities consisting in promoting and disseminating propaganda on behalf of those terrorist organisations. The magistrate considered in that connection that the applicants were under investigation for offences including assisting illegal organisations (Article 220 § 7 of the CC) and disseminating propaganda in favour of them (Article 220 § 8 of the CC) and for acts potentially coming within the scope of the offence of carrying out activities on behalf of terrorist organisations without being members of them, an offence under Article 220 § 6 of the CC. The magistrate referred to the fact that this offence was among those listed in Article 100 § 3 of the Code of Criminal Procedure ("the CCP") – the so-called "catalogue offences" – for which a suspect's pre-trial detention was deemed justified in the event of strong suspicion.

20. The magistrate also considered that if the applicants were released pending trial they were liable to abscond. He observed in that connection that in the previous investigations concerning *Cumhuriyet* journalists the suspects had fled, by lawful or unlawful means, as soon as an opportunity had arisen. The magistrate also referred to the risk of deterioration of the evidence if the applicants were released pending trial, and the risk that alternative measures to detention might be insufficient to ensure the suspects' participation in the criminal proceedings.

(b) Önder Çelik, Mustafa Kemal Güngör, Hakan Karasinir, Hacı Musa Kart, Güray Tekin Öz, Bülent Utku, Ahmet Kadri Gürsel and Turhan Günay

21. Regarding these eight applicants the Istanbul magistrate considered, like the public prosecutor, that their placement in pre-trial detention was justified by the existence of strong suspicions that they had committed the alleged offences.

The magistrate noted at the outset that the applicants Güray Tekin Öz, Hakan Karasinir, Hacı Musa Kart and Mustafa Kemal Güngör were members of the board of management of the Cumhuriyet Foundation; Bülent Utku was a member of the board of management and a level 2 authorised signatory of the media company Yenigün; Önder Çelik was a member of the board of management of the Cumhuriyet Foundation and of the board of Yenigün; Ahmet Kadri Gürsel was an editorial adviser to the newspaper *Cumhuriyet*; and Turhan Günay was a member of the board of Yenigün. The magistrate observed that according to the statements of the applicant Önder Çelik, the media company Yenigün was the company responsible for publishing *Cumhuriyet*, and that the Cumhuriyet Foundation ranked above Yenigün and the newspaper *Cumhuriyet* in the institutional hierarchy. In other words, the foundation was the institution which held the trademark and publishing rights in relation to the newspaper, and leased the

right to use the name *Cumhuriyet* to the media company Yenigün. In the light of these observations the magistrate considered that the articles and news items published in the daily newspaper *Cumhuriyet* indeed came under the responsibility of the members of the board of management of the Cumhuriyet Foundation and the board of the media company Yenigün, and hence of the applicants in question.

22. The magistrate further noted that, when the eight suspects had joined the board of the foundation and that of the media company following the elections in 2013 and early 2014, *Cumhuriyet*'s editorial stance had changed noticeably. The newspaper, contrary to the foundation's aims, had then engaged in manipulation against the State; had attempted to influence public opinion in a manner at odds with the world view of its usual readership; had published false information resulting from the machinations of destructive separatist movements and from the statements of the leaders of terrorist organisations containing calls to violence; had attempted to portray the terrorist organisations as legitimate; and had alleged that the State had links to terrorist organisations.

23. Without accusing any of the applicants of writing a specific article, the magistrate, like the public prosecutor, referred to certain articles written by other journalists allegedly under the influence of the applicants and published during the period when the latter had occupied managerial positions in the Cumhuriyet Foundation. The articles referred to were the following.

(i) An article dated 14 March 2015 containing an interview with one of the leaders of the PKK and allegedly amounting to propaganda in favour of that organisation, describing its militants as "guerrilla fighters" and reporting on the comments made by the PKK leaders concerning certain topical issues (and in particular the PKK's conditions for laying down its weapons).

(ii) Articles published on 1 April 2015 entitled "Remarkable account given by activists half an hour before being killed (by police officers)" and "This action [the kidnapping] is a method we were forced to use". The articles had consisted solely of an interview with one of a group of left-wing extremists who had taken a public prosecutor hostage in his office in a bid to expose the law-enforcement officers who had killed a demonstrator. After hearing the demands of the militants for the identity of the police officers who had allegedly killed the demonstrator B. to be disclosed in a live television broadcast and for the police officers concerned to face trial and not benefit from impunity, the reporter, A.S., had challenged the interviewee by questioning whether violence by the militants would solve the problem. Shortly afterwards, the militants concerned and the public prosecutor whom they had taken hostage died during a rescue operation by the security forces. It was alleged that the articles in question had conveyed the terrorists' message to the public by printing a large photograph of them

(taken while they were holding a gun to the head of their hostage) and by using the adjectives "young and determined" to describe one of the terrorists after interviewing one of the militants who had been involved in the kidnapping.

(iii) An article published on 2 June 2015 concerning Selahattin Demirtaş, which stated that the PKK was mindful of environmental and gender equality issues.

(iv) An article published on 25 July 2015 entitled "War at home, war in the world", in which the security forces' actions to combat terrorist organisations were described as "war".

(v) An article published on the day of the attempted military coup of 15 July 2016, entitled: "He went missing for a week ... we've discovered where Erdoğan was", which gave details of the place where the President had been on holiday.

(vi) An interview with one of the PKK's leaders, M. Karayilan, published on 21 December 2015 under the heading "If they don't agree to autonomy, we'll consider separation", which reported that Mr Karayilan described the PKK's terrorist acts as "resistance" and the State's anti-terrorist action as a "civil war that the State can't win".

(vii) An article of 18 July 2016 entitled "Danger on the streets", referring to the presence of radical groups among the persons protesting against the coup attempt and reporting that, during the demonstrations against the attempted coup, some demonstrators had damaged monuments commemorating the victims of violence against minorities or had attacked members of the Alevi minority. It was alleged that the article had attempted to divide society by provoking distrust towards the demonstrators.

(viii) An article of 19 July 2016 entitled "The witch hunt has begun", reporting on the criticisms and proposals of the main opposition political party, the CHP (*Cumhuriyet Halk Partisi* – People's Republican Party). The latter had stated that any action against possible supporters of the coup should be carried out in compliance with the rule of law, that all the political parties should take a critical look at their own conduct in order to ascertain how a religious sect could have infiltrated the State apparatus to such an extent, and that political leaders should refrain from stirring up hostility in society. The article had also criticised the dismissal of large numbers of civil servants suspected of belonging to the Gülenist movement. It was alleged that the article had questioned the extent and legitimacy of the action against the instigators of the attempted coup.

(ix) An article of 19 July 2016 entitled "No one at the rallies is talking about democracy", reporting on the demonstrators' anti-democratic demands. The article was alleged to have denigrated citizens voicing their reactions to the attempted coup.

(x) An article of 8 July 2015 entitled "What we're doing is journalism; what you're doing is treason", reporting on remarks made by the public

prosecutor Ö.Ş. alleging that the organisation MİT (the national intelligence agency) had concealed the Reyhanli attack from the judicial authorities, in the following terms: "MİT had information on the Reyhanli massacre but did not share that information with the police". The prosecutor Ö.Ş. had subsequently been arrested in connection with a criminal investigation concerning some judges and members of the security forces who were alleged to be militants of the organisation FETÖ, and relating to the affair known as "The MİT lorries".

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

(c) Mehmet Murat Sabuncu

24. In the case of the applicant Mehmet Murat Sabuncu, the magistrate noted that he was the editor-in-chief of the daily newspaper *Cumhuriyet*. The magistrate considered, like the public prosecutor's office, that his placement in pre-trial detention was justified on the basis of strong suspicions that he had committed the alleged offences.

25. The magistrate referred, in particular, to his findings concerning the change in the editorial stance of the newspaper *Cumhuriyet* following the election of the other applicants to the board of management of the Cumhuriyet Foundation and the board of the media company Yenigün in 2013 and early 2014. In the magistrate's view the applicant Mehmet Murat Sabuncu should be held responsible for the articles and headings published in *Cumhuriyet*, in his capacity as the newspaper's publication director. (The publication director was appointed by the board of management of the Cumhuriyet Foundation.) By way of example the magistrate cited the same materials relied on in relation to the other applicants (see paragraph 23 above). According to the magistrate, this material had been aimed at persistently undermining the State's efforts to combat the PKK and FETÖ/PDY; had gone beyond the aim of criticism and reporting; had conveyed false information resulting from the machinations of destructive separatist movements and from the statements of the leaders of terrorist organisations containing calls to violence; had attempted to portray the terrorist organisations as legitimate, innocent and victims of the authorities' actions; and had alleged that the State had links to terrorist organisations.

(d) Akın Atalay

26. On 12 November 2016, the day after his return to Turkey, the applicant Akın Atalay was brought before the Istanbul 9th Magistrate's

Court. The magistrate ordered his pre-trial detention on the same grounds as those cited in the case of the other applicants. Like the public prosecutor, the magistrate considered that Akın Atalay's placement in pre-trial detention was justified by the existence of strong suspicions that he had committed the offences alleged by the public prosecutor. Reiterating the considerations outlined in the order he had issued for the detention of the applicants Önder Çelik, Mustafa Kemal Güngör, Hakan Karasinir, Hacı Musa Kart, Güray Tekin Öz, Bülent Utku, Ahmet Kadri Gürsel, Turhan Günay and Mehmet Murat Sabuncu (see paragraphs 21 and 25 above), the magistrate found that, following the changes to the composition of the board of management of the Cumhuriyet Foundation, including Akın Atalay's appointment as chairman of the executive committee, the newspaper *Cumhuriyet* had begun targeting State institutions and had published a large number of articles that could be regarded as propaganda in favour of terrorist organisations and were liable to give the public a favourable impression of those organisations. In the magistrate's view, even if the investigation did not relate to any articles written by Akın Atalay himself, there was a strong suspicion of guilt on the part of the senior members of the foundation's board of management, including the applicant, on account of their influence over the impugned material. The magistrate referred in that connection to the articles published in *Cumhuriyet* which had likewise been mentioned in his order for the detention of the applicants Önder Çelik, Mustafa Kemal Güngör, Hakan Karasinir, Hacı Musa Kart, Güray Tekin Öz, Bülent Utku, Ahmet Kadri Gürsel and Turhan Günay (see paragraph 23 above).

(e) The applicants' objection

27. On 14 November 2016 the applicants collectively lodged an objection against the orders for their pre-trial detention.

28. In a decision of 18 November 2016 the Istanbul 10th Magistrate's Court dismissed the objection. The magistrate considered that the suspects could be held responsible for the propaganda activities in favour of terrorist organisations because they had allegedly assisted the latter in achieving their aims.

B. Extension of the pre-trial detention

29. On 2 December 2016 the applicants, with the exception of Akın Atalay, lodged an application for release pending trial. In a decision of the same day the Istanbul 7th Magistrate's Court refused the application. On 12 December 2016 the applicants concerned lodged an objection against that decision which was dismissed by the Istanbul 8th Magistrate's Court on 16 December 2016.

30. In the meantime, on 12 December 2016, the applicant Akın Atalay had lodged an application for release pending trial. The Istanbul 6th Magistrate's Court refused the application on the same day. On 19 December 2016 the applicant lodged an objection against that decision which was dismissed on 21 December 2016 by the Istanbul 7th Magistrate's Court.

31. On 30 December 2016 and 30 January 2017 the Istanbul 12th Magistrate's Court, on the basis of the examination of the file (a procedure permitted during the state of emergency), ordered the continued pre-trial detention of all the applicants. The magistrate considered that the case file contained specific evidence demonstrating the existence of strong suspicions that the applicants had committed the alleged offences. He noted that the evidence had not yet all been gathered and that the offences of which the applicants were accused were among those listed in Article 100 § 3 of the CCP (the so-called "catalogue offences"). The magistrate further considered that, in view of the seriousness of the alleged offences, there was a risk that the applicants would abscond if they were released pending trial. He also took into consideration the risk of deterioration of the evidence, noting that the claimants and victims of the incidents in issue had not yet all been identified and/or that statements had not yet been taken from them.

32. On 11 January and 1 February 2017 the applicants lodged appeals against the orders of 30 December 2016 and 30 January 2017 for their continued pre-trial detention. The appeals were dismissed on 17 January and 3 February 2017 respectively by the Istanbul 13th Magistrate's Court. The magistrate found that the impugned orders had complied with the procedure and the law, that the reasons for the orders continued to apply and that no new evidence had been added to the file capable of leading to reconsideration of the applicants' continued detention.

33. On 6 April 2017, after the public prosecutor's office had filed the bill of indictment with the Istanbul 27th Assize Court on 3 April 2017, the applicants applied to that court for release pending trial. On 19 April 2017 the Assize Court rejected their application and ordered their continued pre-trial detention. The court considered that the case file contained specific evidence demonstrating the existence of strong suspicions that the applicants had committed the alleged offences, and that it was even likely that those suspicions would be reinforced by further evidence. The Assize Court considered that the applicants were liable to abscond if they were released, that their continued pre-trial detention complied with the criteria laid down by the Court with regard to Article 5 of the Convention, that their detention was proportionate, and that no new evidence had been added to the file capable of leading to reconsideration of their continued pre-trial detention.

On 25 April 2017 the applicants lodged an objection against that order and applied for release pending trial. On 28 April 2017 the Istanbul

27th Assize Court rejected the applications for release on the grounds that the order of 19 April 2017 had not contained any irregularities and had complied with the procedure and the law. It transferred the objection to the Istanbul 1st Assize Court. In a decision of 4 May 2017 that court dismissed the applicants' objection, finding that the case file contained specific evidence demonstrating the existence of strong suspicions that the applicants were guilty, that there was a risk that they would abscond, and that the current length of their pre-trial detention was not disproportionate in view of the prison sentences they were liable to incur.

34. On 25 April and 17 May 2017 the applicants applied to the Istanbul 27th Assize Court for release pending trial. In an order of 18 May 2017 the Assize Court, taking into consideration the nature and content of the offences of which the applicants were accused and the state of the evidence against them, ordered their continued pre-trial detention and rejected the applications of 25 April and 17 May 2017.

35. On 28 July 2017, at the close of the first hearing, held from 24 to 28 July 2017, the Istanbul 27th Assize Court ordered the release pending trial of the applicants Önder Çelik, Turhan Günay, Mustafa Kemal Güngör, Hakan Karasinir, Hacı Musa Kart, Güray Tekin Öz and Bülent Utku, after taking statements in their defence against the charges filed by the public prosecutor's office on 3 April 2017. The court considered that there was sufficient information in the case file concerning their responsibility in their capacity as members of the board of management of the Cumhuriyet Foundation and the board of the media company Yenigün, and that these accused had no connection with the other accused who had been summoned but who had failed to appear for trial. The court therefore considered that all the relevant evidence in the case concerning these applicants had been gathered and that, in view of the sentences to which the applicants were liable, the risk of their absconding was no longer relevant.

36. Also on 28 July 2017, the Istanbul 27th Assize Court ordered the continued pre-trial detention of the applicants Mehmet Murat Sabuncu and Akın Atalay. The court held that the offence of which they were accused in the indictment, namely assisting an armed organisation, could take a variety of forms and that the evidence in the case file should be assessed as a whole, bearing in mind that the activities of these applicants, acting in collaboration with the accused who were absent (those who had been summoned but had failed to appear, including C.D., former publication director of *Cumhuriyet*), were at odds with the values laid down in the constitution of the Cumhuriyet Foundation. The objections lodged by the applicants Mehmet Murat Sabuncu and Akın Atalay against the order of 28 July 2017 were rejected by the Istanbul 28th Assize Court in a final decision of 23 August 2017. The court held that "the impugned order complied with the procedure and the law".

37. At the close of the second hearing on 11 September 2017, the third hearing on 25 September 2017, the fourth hearing on 31 October 2017, and the fifth hearing on 25 December 2017, the Istanbul 27th Assize Court ordered the continued pre-trial detention of the applicants Mehmet Murat Sabuncu and Akın Atalay, on exactly the same grounds as those set out in its order of 28 July 2017 (see paragraph 36 above). The two applicants lodged objections against the orders of 11 September, 25 September and 31 October 2017. Their objections were rejected by the Istanbul 28th Assize Court in final decisions dated 12 October and 17 November 2017. The Assize Court referred to "the evidence demonstrating the existence of strong suspicions of guilt, the nature and content of the offences in question, the state of the evidence and the fact that there [had] been no change in the state of the evidence".

38. In the meantime, at the close of the third hearing on 25 September 2017, the Istanbul 27th Assize Court ordered that the applicant Ahmet Kadri Gürsel be released pending trial. The court found that the evidence relating to him had been gathered and that there were no grounds to suspect that he would put pressure on the accused who had failed to appear or on the witnesses whose evidence had not yet been heard.

39. At the close of the hearing held on 9 March 2018, the Istanbul 27th Assize Court ordered the release pending trial of the applicant Mehmet Murat Sabuncu. The court found that the evidence concerning the accused had been gathered; that there was no longer a risk that he would tamper with the evidence; that there was no longer a strong suspicion that he would put pressure on the accused who were absent or on the witnesses who had not yet been heard; that his continued pre-trial detention would be a disproportionate measure for the accused; and that the same benefits would be achieved by judicial supervision in the form of an order barring the applicant from leaving the country.

40. On conclusion of the hearing of 24 and 25 April 2018 the Istanbul 27th Assize Court, after convicting the applicant Akın Atalay, among others, of the offence of assisting armed terrorist organisations under Article 220 § 7 of the CC, ordered his release until such time as his conviction became final, and issued an order barring him from leaving the country. The court considered that the reasons for his continued detention referred to in the previous orders no longer applied and that, in view of the sentence imposed on the applicant, the risk of his absconding was no longer relevant.

C. The indictment of 3 April 2017

1. Regarding all the accused

41. On 3 April 2017 the Istanbul public prosecutor's office filed a bill of indictment with the Istanbul 27th Assize Court against nineteen individuals including the applicants. They were accused mainly of lending assistance to

terrorist organisations without being members of them (offence under Article 220 § 7 of the CC). With regard to the applicants it was primarily alleged that, over a period of three years leading up to the attempted coup of 15 July 2016, the editorial stance of *Cumhuriyet* had changed as a result of their influence, running counter to the editorial principles to which the newspaper had adhered for ninety years.

42. The public prosecutor considered that, by publishing articles which were glaringly at odds with the world view of its readers, the newspaper had conveyed manipulative and destructive information about the State. He maintained that the newspaper had published statements by leaders and prominent figures of terrorist organisations and had attempted to undermine Turkey's credibility internationally, in particular by alleging that the government had ties to international terrorist organisations and that the National Intelligence Organisation (MİT) had supplied arms to extremist groups in Syria. In the view of the prosecutor's office, since 2013 and under the leadership of C.D., former editor-in-chief of *Cumhuriyet*, the newspaper had become the champion of terrorist organisations such as FETÖ/PDY, the PKK and the DHKP/C (People's Revolutionary Liberation Party/ Front). According to the public prosecutor, the newspaper had not acted within the bounds of freedom of expression since its managers had attempted, deploying the tactics of "asymmetric warfare", to manipulate public opinion in order to slander the government and the President of the Republic. The prosecutor maintained that the newspaper, by manipulating and disguising the truth, had acted in accordance with the aims of the terrorist organisations and had thus attempted to create domestic upheaval in order to render the country ungovernable.

43. In order to demonstrate that the publication of the articles and headings in question had resulted from a process whereby teams with close links to the above-mentioned illegal organisations had taken control of the newspaper's editorial policy, the public prosecutor's office referred to the witness evidence which it had gathered against the applicants. That evidence, given either by former *Cumhuriyet* journalists who had left the newspaper following the change of management after the events referred to in the bill of indictment, or by journalists who still worked for the newspaper but currently occupied non-managerial positions, indicated in general that following the death in 2010 of the publication director I.S. (who had socialist leanings), the newspaper's management had gradually been changed by the foundation, with Kemalist and nationalist journalists being replaced by journalists who shared the vision of the Gülenist movement and the United States, that the new management had had no hesitation in publishing articles containing points of view similar to those defended by organisations such as FETÖ and the PKK, and that the management had had the final say over the titles of articles, sometimes changing the titles proposed by the authors. The great majority of these witnesses took over the

management of the newspaper *Cumhuriyet* following the applicants' placement in detention.

The relevant parts of the main witness statements against the applicants can be summarised as follows.

(i) A.K. (news coordinator of the newspaper *Cumhuriyet*): This witness had worked as the newspaper *Cumhuriyet*'s news coordinator since 1994. In a statement to the public prosecutor he said that the board of management of the Cumhuriyet Foundation appointed the publication director, who in turn appointed the editor-in-chief. A body known as the executive committee, which did not feature in the foundation's constitutive instrument, had been created by the new board of management. [The applicant] Akın Atalay had been appointed as chairman of the committee. The publication director was the only person authorised to intervene in an article due to be published in the newspaper and was responsible for choosing the article headings. As a rule, the journalists were not responsible for the headings. The heading "Incomplete democracy" had been added by the then publication director. A.K. explained that the publication of the statements of leaders of the PKK's armed terrorist organisations had reflected the preferences of the publication director. A.K. himself had not been in favour. He considered it possible that the articles on the "MİT lorries" and the "former prosecutor C.K.", published under the name of the previous publication director, C.D., may have demonstrated that the "*cemaat*" (the Gülenist community) regarded *Cumhuriyet* under its publication director, C.D., as the most appropriate newspaper in which to air their views following the closure, or loss of credibility, of their own media outlets.

(ii) The witness A.A. (a journalist with the newspaper *Cumhuriyet*): This witness stated that he had joined the newspaper in 2006 and had been working as a journalist in its social and political affairs department for about ten years. He explained that even if the text of an article had been written by a journalist, the heading could be changed by the editors. In his article published by the newspaper under the heading "Incomplete democracy" he had emphasised the fact that the main political forces had been present at the pro-democracy gathering held in Yenikapı, and that during the gathering there had been a call to join forces against the military coup. The editorial team had given the article the heading "Incomplete democracy" because the Peoples' Democratic Party ("the HDP", a pro-Kurdish party) had not been invited to take part. He had thought that the heading might offend people and might give rise to legal liability, and had said this to the publication director. A.A. added that he had occasionally received criticism from readers regarding, for instance, the increase in the number of news items relating to the political party the HDP, which upset some readers. As a Kemalist, he too had felt uncomfortable with the news items published by the newspaper concerning the PKK. He explained that the publishing policy was determined by the board of management of the foundation and the

newspaper's editorial board. In particular, the foundation's board of management had the authority to determine the "oppositional" nature of the newspaper's editorial stance.

(iii) M.İ. (a journalist with the newspaper *Cumhuriyet*): This witness said that he had worked as a journalist with *Cumhuriyet* since 1993. He stated that the executive committee of the Cumhuriyet Foundation's board of management did not intervene directly in journalists' work but could do so through the publication director. When I.T. had begun working for the newspaper, the witness had gathered from his articles that he had close links to the "*cemaat*". He would have preferred not to work with I.T., but that had been the choice of the management at that time. Sensitive articles written by the journalists were published in the newspaper after being assessed by the editors. The articles on the "MİT lorries" and the "former prosecutor C.K." had been published in *Cumhuriyet* because FETÖ/PDY's own newspapers had no longer enjoyed a good reputation.

(iv) R.Z. (journalist and editor): This witness stated that after the death of İ.S. in 2010 the newspaper *Cumhuriyet* had changed direction as a result of the changes in the composition of the foundation's board of management. Kemalist and nationalist journalists had been dismissed and journalists with ties to the Gülenists and susceptible to American influence had been recruited.

(v) M.F. (journalist and editor): This witness stated that the turning-point in the change of the newspaper's editorial policy had been the death of İ.S in 2010. The recent coverage concerning Fethullah Gülen and Kandil was the result of that change.

(vi) İ.Y. (former editor-in-chief and former publication director of *Cumhuriyet*): This witness explained that he had been the newspaper's editor-in-chief from 1992 to 2000. He had resigned in 2000 and had been publication director until 2014. In his view, the articles published after C.D.'s appointment as publication director had been at odds with the publishing principles set out in the foundation's constitution. He said that it was Akın Atalay who had recommended C.D. as publication director. The foundation was responsible for appointing the journalists, after consultation with the editors-in-chief.

(vii) A.C. (former member of the foundation's board of management): This witness stated that one of the newspaper's principles had been violated when the remarks made by the head of the terrorist organisation FETÖ, Fethullah Gülen ("[They] called my humble home a mansion"), had been published together with his photograph on the newspaper's front page, above the *Cumhuriyet* logo.

(viii) T.A. (journalist and editor): This witness stated that a comparison of the headings used by the newspapers associated with FETÖ/PDY and those printed in *Cumhuriyet* could create the impression that they had been written in coordination with each other.

(ix) L.E. (journalist and editor): This witness stated that the interview by H.Ç. (a journalist with *Cumhuriyet*) published by the newspaper *Zaman* under the heading "I would not describe the Gülenist community as a terrorist organisation" was one of the most tangible pieces of evidence that the newspaper *Cumhuriyet* had been taken over by that organisation. The fact that the newspapers *Zaman* and *Cumhuriyet* had printed the headings "The knotty problem of Azaz" and "Bomb at the heart of the State" within a day of each other had been arranged entirely by Fethullah Gülen. Persons who had not been approved by Fethullah Gülen were not invited to the Abant meetings. The name "Peace [at Home] Council" had been determined by Fethullah Gülen himself and supplied to *Cumhuriyet*.

2. Specific individual charges

(a) The applicant Mehmet Murat Sabuncu

44. The prosecutor's office accused the applicant Mehmet Murat Sabuncu of having been in contact with certain individuals, including a former judge who had since been arrested and twenty-three other suspects, thirteen of whom had used the encrypted messaging application ByLock and had subsequently been placed under investigation on suspicion of membership of the organisation FETÖ/PDY.

45. The prosecutor's office further maintained that during the period when the applicant had been the publication director of *Cumhuriyet*, starting on 1 September 2016, he had been responsible for articles in the newspaper which the prosecutor described as "manipulative", both in terms of the choice of articles and the exaggerated tone used in them in order to indoctrinate the public. The prosecutor's office based its accusations in this regard on the allegedly provocative content of an article published on 22 October 2016 according to which members of the ruling party, the AKP, had asked for restrictions on the carrying of weapons by State officials or party sympathisers to be eased in order to quell a possible coup attempt, with the attendant risk that the persons carrying the weapons might also intervene during peaceful political demonstrations.

46. The prosecutor's office also referred to the following items published during the two-month period when the applicant Mehmet Murat Sabuncu had not had sole responsibility for publication but had worked in tandem with *Cumhuriyet*'s editors-in-chief.

(i) The article written by the journalist Aydin Engin and published on 13 July 2016, two days before the attempted coup, under the heading "Peace in the world, but what about at home?". The article had criticised President Erdoğan's alleged policy of tension and hostility directed, at domestic level, against citizens of Kurdish origin and former leaders of the ruling party in particular, and, at international level, against the leaders of neighbouring countries or of politically allied States, and had referred to a committee

formed by the instigators of the attempted coup known as the "Peace at Home Council". According to some informants, the article had thus announced the date of the planned coup.

(ii) The article published on 15 July 2016, the day of the attempted coup, entitled "He went missing for a week ... we've discovered where Erdoğan was", which allegedly gave details of the President's whereabouts on the day before the attempted coup.

(iii) The article published on 18 July 2016 entitled "Danger on the streets", which referred to the presence of certain radical groups among the persons protesting against the attempted coup and which had allegedly attempted to sow divisions among the demonstrators.

(iv) The article of 19 July 2016 entitled "The witch hunt has begun", which had allegedly raised doubts as to the legitimacy of the actions taken against suspected members of FETÖ/PDY and other terrorist organisations which had infiltrated the State apparatus.

(v) Another article published on 19 July 2016 under the heading "No one at the rallies is talking about democracy". The article reported that, at the demonstrations organised by the ruling party, the AKP, the anti-coup demonstrators had shouted several religious or pro-Ottoman slogans or had engaged in the practice of *dhikr* (*zikr*, the rhythmic repetition of the name given to God in Islam) rather than calling for democracy. It was alleged that the article had sought to humiliate citizens who had voiced their reaction to the attempted coup, and had undermined the sense of unity and solidarity expressed at the Yenikapi rally (a rally organised by President Erdoğan and attended by the leaders of the other political parties with the exception of the pro-Kurdish party the HDP, which had not been invited) by using the expression "incomplete democracy".

(vi) The publication of a series of news items and interviews on the alleged disappearance while in police custody of Hurşit Külter, leader of the local branch of the pro-Kurdish party the DBP (*Demokratik Bölgeler Partisi* – Democratic Regions Party). The publication of these items had allegedly enabled the PKK to use this as a subject for propaganda, although Hurşit Külter had subsequently turned up in Syria.

47. The prosecutor's office also accused the applicant Mehmet Murat Sabuncu of posting tweets expressing support for the journalists who had been dismissed or prosecuted for working for the pro-Kurdish newspaper *Özgür Gündem* or the pro-Gülenist newspaper *Zaman* and containing extracts from an interview with Gülen's family claiming that the latter had been slandered by the political authorities following the coup attempt. The applicant was also accused of posting tweets containing extracts from an interview given by Gülen himself to the BBC in which he had stated that he was not opposed to a process of dialogue and negotiation with Öcalan and the PKK in order to resolve the Kurdish problem. The prosecutor's office

considered that these tweets had served to denigrate the security forces' operations against FETÖ/PDY and the PKK.

The tweets posted on the Twitter account @muratsabuncum, and taken into consideration by the Constitutional Court in its assessment of the present case, read as follows.

(i) "We stand side-by-side with our colleagues from *Özgür Gündem*" (20 June 2016).

(ii) "We have an honourable duty to oppose all pressure on journalism, past and present. The people knocking on the door of *Radikal* in the past are now knocking on *Zaman*'s door. Unacceptable" (14 December 2014).

(iii) "We refuse ... *Cumhuriyet* will not comply with the publishing ban concerning the events of 17 December" (a ban on publishing allegations of corruption made by certain public prosecutors, alleged to be members of FETÖ, against four government ministers) (26 November 2014).

(iv) "A police raid on the premises of the opposition newspaper is unacceptable" (30 October 2014).

(v) "For the first time I've witnessed a statesman calling on an independent authority (the BDDK) to sink a bank. Only in the new Turkey." (The BDDK is the banking regulation and supervisory authority.) (15 October 2014).

(vi) "A disgrace ...@evrenselgzt: M.B. and the editor-in-chief of the newspaper *Taraf*, M.Ş.Ç., charged and a prison sentence of 28-52 years sought" (22 May 2014).

(vii) "M.A. [M.H.A.], H.Ş.T. ... They lost their jobs with the *Star* newspaper after a telephone call from the Prime Minister. Democracy is still a long, long way off here" (18 March 2014).

(viii) "According to Gülen's family, those who don't know what it's like to live with very little have slandered him" (9 March 2014).

(ix) "One of the key points to emerge from the BBC interview with Gülen is that he is not against dialogue and negotiation with Öcalan and Kandil to find a solution to the Kurdish question" (27 January 2014).

(b) The applicant Akın Atalay

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

(i) The article of 14 March 2015 containing an interview with one of the leaders of the PKK and allegedly amounting to propaganda in favour of that organisation, describing its militants as "guerrilla fighters", and reporting on the comments made by the PKK leaders concerning certain topical issues.

(ii) The articles of 1 April 2015 concerning the incident in which a public prosecutor had been held hostage in his office by left-wing extremists. The articles in question had allegedly conveyed the terrorists'

message to the public by printing a large photograph of them (taken while they were holding a gun to the head of their hostage) and by using the adjectives "young and determined" to describe one of the militants.

(iii) The article of 2 June 2015 concerning Selahattin Demirtaş, which stated that the PKK was mindful of environmental and gender equality issues.

(iv) The article published on 25 July 2015 under the heading "War at home, war in the world", in which the security forces' actions to combat terrorist organisations were described as "war".

(v) An article published on 12 July 2016, three days before the attempted coup, written by the applicant Ahmet Kadri Gürsel and entitled "Erdoğan wants to be our father". The article criticised the President's habit of forcing people whom he met to stop smoking, and alleged that this habit was part of his tendency to impose his totalitarian views on society. It proposed that people should refuse to comply by not putting out their cigarettes. The article was alleged to have conveyed a message designed to cause disorder in Turkey and to have predicted the coup attempt.

(vi) The other article published on 15 July 2016, the date of the attempted coup, entitled "He went missing for a week ... we've discovered where Erdoğan was", which gave details of the place where the President had been on holiday.

(vii) The article published on 18 July 2016 entitled "Danger on the streets", which referred to the presence of certain radical groups among the persons protesting against the attempted coup and which allegedly attempted to divide society by arousing distrust towards the demonstrators.

(viii) The interview with one of the PKK leaders, M. Karayılan, published on 21 December 2015 under the heading "If they don't agree to autonomy, we'll consider separation", which reported on the views expressed by Mr Karayilan, who described the PKK's terrorist acts as "resistance" and the State's anti-terrorist actions as a "civil war" that the State could not win.

(ix) The article of 19 July 2016 entitled "The witch hunt has begun", which raised doubts as to the legitimacy of the action taken against the instigators of the coup attempt.

(x) The article entitled "No one at the rallies is talking about democracy", which allegedly sought to humiliate citizens expressing their reactions to the attempted coup.

(xi) The article about the MİT lorries and the article concerning the explosives attack on the town of Reyhanlı. It was alleged that the articles, by stating that public officials may have committed criminal offences and provided assistance to certain terrorist groups, had tarnished Turkey's image abroad.

The tweets posted by the applicant Akın Atalay on the Twitter account @av_akinatalay and taken into consideration by the Constitutional Court in

its assessment of the present case, in so far as they related to the closing-down of the television stations and newspapers allegedly belonging to the organisation FETÖ/PDY, read as follows.

14 December 2014:

(i) "If we remain silent now, we'll no longer have the right or the opportunity to speak out. We condemn the raid of the publishing groups Zaman and Samanyolu and the detentions."

(ii) "Some people refer to the past of the *Cemaat* ("Community") media outlets and say 'What right have you got now to talk about solidarity?'".

(iii) "It's not for us to assess whether individuals are worthy of their rights and freedoms by examining their actions, past and present."

(iv) "We defend freedom of the press, not of individuals. We protect freedom itself, not a particular person or group. Yes, we're being tested again."

(v) "It's only when you take care not just of those who think like you and are close to you, but also those who think differently, or even those who have hurt you, that you have the right to say [I am a champion of freedom and a democrat]."

(vi) "Even if we knew that today's victims would not question their own actions in defending illegal acts in the past, our position would not change ...".

(vii) "When Hrant was killed, we were 'the Armenian'; yesterday we were the 'supporter of Ergenekon'. Today we're the 'supporter of the *Cemaat*' and tomorrow, if necessary, we'll be 'the supporter of the AKP'. The fact is, we're just democrats ..."

27 October 2015:

(i) "They question or criticise us, saying 'These members of the *Cemaat* have done you the greatest harm and injustice. Why are you defending them now?'".

(ii) "Yes, this newspaper [*Cumhuriyet*] was treated very unjustly and suffered great harm. The media close to the *Cemaat*, in cooperation with the present government, were also involved in this illegal activity. We believe that this fact makes the upholding of rights, the law and freedoms more precious and more meaningful."

(iii) "We're not expecting any thanks for doing this. Nowadays, our attitude is not determined by the identity or (criminal) record of the victim of the illegal act."

(iv) "Moreover, human rights, the law, rights and freedoms are for everyone, not just for the innocent."

(v) "We should recall Mary Magdalene's words: 'Let he who is without sin cast the first stone'."

28 October 2015:

(i) "Let us take note: *Bugün TV* was closed down by the police at 4.33 p.m. today."

(ii) "Be in no doubt: the police closed down *Kanaltürk* and *Today TV*, not on the orders of the prosecutor or of a court, but on the orders of the administrator."

(iii) "Work instructions given by the person appointed to run the company should be carried out by the company's employees, not by the police."

(iv) "Since the police also intervene in the internal affairs of company bosses concerning workers' rights, and carry out their orders, where does this method lead?"

(v) "@cumhuriyetgzt friends, be warned ☺! If you don't follow our management instructions we'll call the police straight away!"

28 October 2015:

(i) "The first action of the administrators of the İpek Medya group was to end the broadcasts of two television channels and the distribution of two newspapers."

(ii) "Are there no regulations governing the powers and responsibilities of administrators appointed under Article 133 of the CCP? Can they just manage in arbitrary fashion?"

(iii) "Article 133 of the CCP regulates the appointment of an administrator in the context of criminal proceedings."

(iv) "The powers and responsibilities of administrators and the way in which they must fulfil their duties are set out in the Turkish Civil Code.

If you go through the Articles one by one you'll understand the situation without the need for any comment."

(v) "Article 403 of the Civil Code: 'The administrator shall be appointed to carry out certain tasks or to manage a person's property. Unless otherwise indicated the provisions of the present law on trustees shall apply to administrators'. Article 458: 'The appointment of an administrator shall not exclude a person's capacity to act'."

(vi) "Article 460: 'If an administrator is placed in charge of managing and supervising property, he or she may only perform the tasks required for that purpose."

(vii) "The ability of administrators to perform other tasks depends on the special powers conferred on them by the persons whom they represent."

(viii) "Article 467: 'The administrator shall be liable for any damage he or she causes to the person represented as a result of a failure to properly perform his or her duties'".

(ix) "@Medetdersim, either we didn't explain ourselves properly or you insist on not understanding: we are not defending the *Cemaat*, we're defending freedom of the press, of the law, our own freedom ...".

5 March 2016:

(i) "It is illegal to hand over management of the newspaper *Zaman* to an administrator. We oppose the move in a determined, implacable, absolute manner ...".

(ii) "We were politically at odds with the *Cemaat*. They committed a great many injustices against numerous opponents by manipulating the law to suit their own political views."

(iii) "The political authorities take illegal control of a religious community's newspaper and wind it up. We're asked for our reaction."

(iv) "If you expect us to say 'Oh, they're reaping what they sowed' or 'Let them destroy one another', you don't know us."

(v) "We realise that to protect our own rights we have to protect rights and the law as regards our competitors and even our enemies. End of story."

(vi) "Even if we strongly suspect that if they [the Gülenists] were to regain their positions of strength in the future they would again act illegally, that is no excuse for us to remain silent now."

(viii) "There's no excuse for not speaking out about illegal acts. The victim's history, criminal record and lack of self-criticism are secondary."

(c) The applicants Önder Çelik, Mustafa Kemal Güngör, Hakan Karasinir, Hacı Musa Kart, Güray Tekin Öz, Bülent Utku, Ahmet Kadri Gürsel and Turhan Günay

49. According to the bill of indictment filed by the prosecutor's office, these eight applicants, on account of their positions within *Cumhuriyet*, were to be considered criminally responsible for the following acts, in addition to those referred to in the detention orders.

(i) The publication of an interview with Fethullah Gülen on 23 May 2015 under the heading "The son-in-law called my humble home (*fakirhane*) a mansion (*malikhane*)". This was alleged to constitute propaganda in favour of a terrorist organisation.

(ii) The use by the newspaper *Cumhuriyet*, on two occasions, of the same heading as the daily newspaper *Zaman* (regarded as having close ties to the organisation FETÖ). The first article, published on 16 February 2016 under the title "The knotty problem of Azaz", reported on a missile attack on civilian targets in the Syrian city of Azaz, allegedly led by Russian forces; the second article, published in February 2016 under the heading "Bomb at the heart of the State", reported on a car-bomb attack in the centre of Ankara close to buildings belonging to the senior command of the armed forces.

(iii) The participation of certain journalists working for the newspaper *Cumhuriyet* in the "Abant meetings", together with testimony to the effect that only individuals approved by Fethullah Gülen were invited to those seminars.

(iv) The publication of the article by the journalist Aydin Engin on 13 July 2016, two days before the attempted coup, entitled: "Peace in the world, but what about at home?", which referred to a committee formed by the instigators of the attempted coup known as the "Peace at Home

Council". According to some informants, the article had announced the date of the planned coup attempt.

(v) The statement made by a *Cumhuriyet* journalist, H.Ç., in an interview published in the daily newspaper *Zaman*, in which he said that he "would not describe the Gülenist community as a terrorist organisation".

(vi) The publication of the article of 12 July 2016, three days before the attempted coup, written by the applicant Ahmet Kadri Gürsel and entitled "Erdoğan wants to be our father", which allegedly conveyed a message designed to cause disorder in Turkey and predicted the coup attempt.

(vii) The fact that the United States correspondent of the website *haberdar.com* had also been *Cumhuriyet*'s US correspondent for two years, and had allegedly published articles setting out some of the views of the organisation FETÖ/PDY.

(viii) The fact that allegedly false and manipulative information posted on the Twitter accounts @fuatavni and @jeansbiri (Twitter feeds of whistleblowers critical of the government to which members of FETÖ allegedly contributed) had been reproduced in a special section of the newspaper *Cumhuriyet*, thus enabling the information to be circulated widely among the public.

D. Judicial decisions on the merits of the charges against the applicants

50. The applicants submitted defence pleadings to the Istanbul Assize Court in response to the prosecution's charges. The court also took witness evidence against the applicants, primarily from journalists or former journalists of *Cumhuriyet*, who confirmed the inferences drawn by the prosecutor's office with regard to the alignment of the newspaper's editorial stance with the views of members of the organisation FETÖ/PDY.

51. In a judgment of 25 April 2018 the Istanbul Assize Court found the acts of which the applicants were accused in the indictment to be established, and found them guilty of assisting a terrorist organisation without being members of it, under Article 220 § 7 of the CC. Accordingly, it sentenced the applicant Mehmet Murat Sabuncu to seven years and six months' imprisonment, the applicant Akın Atalay to eight years, one month and fifteen days' imprisonment, the applicant Bülent Utku to four years and six months' imprisonment, the applicant Ahmet Kadri Gürsel to two years and six months' imprisonment, and the applicants Güray Tekin Öz, Önder Çelik, Hacı Musa Kart, Hakan Karasinir and Mustafa Kemal Güngör to three years and nine months' imprisonment each.

52. The Assize Court acquitted the applicant Turhan Günay of the above-mentioned charges.

53. The Assize Court also acquitted the applicants Turhan Günay, Akın Atalay, Bülent Utku, Güray Tekin Öz, Önder Çelik, Hacı Musa Kart,

Hakan Karasinir and Mustafa Kemal Güngör of the charges of misappropriation under Article 155 § 2 of the CC.

54. The applicants and the prosecutor's office each appealed against the judgment of 25 April 2018.

55. In a judgment of 18 February 2019 the Istanbul Court of Appeal (Third Criminal Division) dismissed the appeals after examination on the merits. It found as follows:

> "... the impugned judgment did not contain any substantive or procedural irregularities. There were no deficiencies in the evidence taken or the other investigative steps carried out by the first-instance court. The impugned acts were correctly characterised in accordance with the types of offences provided for by law. The sentences were fixed in accordance with the convictions and the law. Accordingly, the grounds of appeal advanced by the prosecutor's office and by the convicted persons are unfounded. ..."

E. The appeals to the Court of Cassation

1. The observations of the chief public prosecutor

56. The parties appealed on points of law.

57. On 16 July 2019 the chief public prosecutor attached to the Court of Cassation, in his submissions, sought the quashing of the judgment convicting the applicants. He relied on a series of grounds of appeal.

58. The chief public prosecutor pointed out in particular that the crime of assisting criminal organisations or armed terrorist organisations required direct intent. In that regard he observed that the finding that a criminal offence had been committed could not be grounded purely on a hypothetical aim pursued by the accused in expressing their political opinions, merely on the basis that their assessment of the situation was at variance with that of the public authorities and the majority of the public. A finding that the alleged offence had been committed had to be based first and foremost on concrete facts. The evidence adduced in support of the allegations should make it possible to establish the facts so as to demonstrate that the accused had acted with the aim of helping to achieve the illegal objectives of the terrorist organisations. In other words, articles published in newspapers or items shared on social media could not constitute the offence of assisting terrorist organisations purely because they contained remarks criticising the actions of the public authorities.

59. As to the charges against the three accused who had occupied managerial positions within *Cumhuriyet*, including the applicants Mehmet Murat Sabuncu and Akın Atalay, the chief public prosecutor considered that the individuals concerned could not be held responsible for the impugned articles as there was no evidence or information indicating that they had been involved in the writing of the articles. The chief public prosecutor noted, moreover, that the prosecution and the defence had agreed on this

point. He stated that the individual responsibility of the authors of the articles, who had been known and identified, could be engaged, but that the criminal responsibility of the management of *Cumhuriyet* could not.

60. With regard to the charges relating to the applicants' alleged assistance to terrorist organisations, the chief public prosecutor made the following points.

(i) The telephone conversations between the accused and persons who had subsequently been the subject of a criminal investigation for membership of FETÖ could not constitute evidence of the offence of assisting an armed terrorist organisation.

(ii) The accusation that the changes to the board of management of the Cumhuriyet Foundation following discussions and elections between 2013 and 2016 had altered the editorial stance of the newspaper *Cumhuriyet* in order to provide assistance to terrorist organisations was not based on any factual evidence.

(iii) Participation in the "Abant meetings" could not by itself amount to evidence that the accused had committed the offence of assisting a terrorist organisation, since the memoranda submitted by the accused at those meetings had not contained any of the constituent elements of a crime.

(iv) Participation in a breakfast organised by the Journalists' and Writers' Foundation, a body against which no suspicion or accusation of assisting terrorist organisations existed, and the fact of being photographed on that occasion with suspected members of FETÖ, could not by themselves constitute evidence of the offence of assisting a terrorist organisation.

(v) Exchanges between third parties (suspected in other criminal proceedings of belonging to the organisation FETÖ) via the messaging application ByLock on the question of who would be invited to the Abant meetings could not be regarded as evidence of the offence of assisting a terrorist organisation, provided that they did not refer to facts concerning assistance to such an organisation.

(vi) The alleged facts concerning the activities routinely organised by the members of the PKK and of FETÖ were in no way connected to the accused in the present case.

(vii) Material shared on social media that did not contain any criminal element but simply constituted comments or criticism of a political nature could not be regarded as evidence of the offence of assisting armed terrorist organisations.

61. By way of conclusion, the chief public prosecutor requested the Court of Cassation to quash the judgment convicting the accused. He took the view that the applicants should be acquitted of the charges against them, given that, in view of the principles, standards and restrictions laid down by the Constitution, and the case-law of the Strasbourg Court and the Constitutional Court, the articles and other written material complained of had simply conveyed information, criticism or comments and did not

warrant the application of any restriction necessary in a democratic society for the purpose of preventing disorder or crime.

2. The Court of Cassation judgment

62. In a judgment of 12 September 2019 the Court of Cassation quashed the appeal judgment convicting the applicants, basing its decision on the grounds advanced by the chief public prosecutor. In its reasoned judgment delivered on 27 September 2019 it observed at the outset that the press and investigative journalism, by subjecting political decisions and actions, and possible negligence on the government's part, to close scrutiny and facilitating participation by citizens in the decision-making process, ensured the proper functioning of democracy. The court stressed the fact that the press constituted one of the most appropriate means by which citizens could form a view on the opinions and attitudes of political leaders.

63. The Court of Cassation pointed out that activities relating to the exercise of public rights and freedoms should be presumed to be in accordance with the law and that press freedom, when exercised within the limits laid down by law, was no exception to that principle. It stressed that, according to the Press Act, the press was free and that this freedom encompassed the right to receive and disseminate information, the right to criticise, the right to interpret facts and opinions and the creation of works of all kinds.

64. The Court of Cassation also referred to the case-law of the Strasbourg Court, describing the role of the press as a "public watchdog" as vital to the functioning of a democratic society.

65. The Court of Cassation went on to point out the particular features of the offence of assisting a terrorist organisation, emphasising that persons committing that offence, in addition to a general intentional fault, namely intent to carry out acts punishable under criminal law, had to have committed a specific intentional fault consisting in pursuing a particular objective. The Court of Cassation held that, for the offence of assisting a terrorist organisation to be established, the perpetrator had to have deliberately assisted such an organisation while being aware that the latter pursued the aim of committing criminal offences. The court specified that the expression "while being aware" also required direct intent on the part of the perpetrator. Hence, in the court's view, it was also necessary to ascertain whether the person concerned had acted with the intention of helping to achieve the illegal aims of the organisation in question.

66. The Court of Cassation added that if the assistance had been provided not directly to the illegal organisation itself, but to the individuals who were members of it, the person providing the assistance could not be held responsible for that criminal offence unless it was established that he or she had been aware that the individuals concerned were acting as members

of an organisation created for the purpose of committing the said offences or crimes.

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

68. The Court of Cassation therefore concluded that the lower courts had erroneously characterised the offences in issue as "assisting a terrorist organisation". The case was sent back to the Istanbul Assize Court.

3. Follow-up to the Court of Cassation judgment

69. In a judgment of 21 November 2019 the Istanbul 27th Assize Court acquitted the applicant Ahmet Kadri Gürsel, finding that he had not been a member of any board of management within *Cumhuriyet* and that his own written pieces could be characterised as criticism coming within the exercise of freedom of expression. With regard to the other applicants, the Assize Court departed from the Court of Cassation judgment of 18 September 2019 and confirmed its own judgment of 18 February 2019 convicting the applicants. It sentenced the applicant Mehmet Murat Sabuncu to seven years and six months' imprisonment, the applicant Akın Atalay to eight years, one month and fifteen days' imprisonment, the applicant Bülent Utku to four years and six months' imprisonment, the applicant Önder Çelik to three years and nine months' imprisonment, the applicant Haci Musa Kart to three years and nine months' imprisonment, the applicant Hakan Karasinir to three years and nine months' imprisonment, the applicant Mustafa Kemal Güngör to three years and nine months' imprisonment, and the applicant Güray Tekin Öz to three years and nine months' imprisonment.

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

F. The individual applications to the Constitutional Court

1. As regards all the applicants

70. On 26 December 2016 the applicants each lodged an individual application with the Constitutional Court. They alleged a breach of their right to liberty and security and their right to freedom of expression and freedom of the press. They also maintained that they had been arrested and detained on grounds other than those provided for by the Turkish Constitution and the Convention.

71. The Constitutional Court delivered its judgments on the applicants' applications on 11 January 2018 (with regard to Turhan Günay) and on 2 and 3 May 2019 (with regard to the remaining applicants). In the case of the applicants Mehmet Murat Sabuncu, Akın Atalay, Önder Çelik, Mustafa Kemal Güngör, Hakan Karasinir, Hacı Musa Kart, Güray Tekin Öz and Bülent Utku, it found, by a majority, that there had been no violation of the provisions of the Constitution relied on by the applicants, namely Article 19 (right to liberty and security of person) and Articles 26 and 28 (freedom of expression and freedom of the press respectively).

72. In the case of the applicants Turhan Günay and Ahmet Kadri Gürsel the Constitutional Court held, unanimously in the first case and by a majority in the second, that there had been a breach of the aforementioned provisions.

2. As regards the applicants Önder Çelik, Mustafa Kemal Güngör, Hakan Karasinir, Hacı Musa Kart, Güray Tekin Öz and Bülent Utku

73. In a judgment of 2 May 2019 the Constitutional Court observed that in issuing the detention orders in respect of these six applicants, the authorities had found that, following their appointment to the board of management of the Cumhuriyet Foundation, the daily newspaper *Cumhuriyet* had criticised the actions of various State bodies and had published several articles that could be regarded as propaganda in favour of terrorist organisations, in that they had been liable to create a favourable perception of those organisations among members of the public. It also noted that the authorities that had ordered the applicants' detention had found that the individuals concerned, in view of the senior positions which they occupied and their length of service, had influenced the newspaper's editorial policy and should be held criminally responsible for the articles published in the newspaper. On this point the Constitutional Court observed as follows:

> "It is beyond doubt that the board of management of the Cumhuriyet Foundation appoints the publication director of the daily newspaper and that the latter chooses the editor-in-chief and other persons. In this context, some of the applicants and [the applicant] Akın Atalay stated that the board of management could replace the publication director at any time if his performance was unsatisfactory. Likewise, the vice-president of the foundation's board of management, Akın Atalay, stated that a review meeting concerning the newspaper was held every two months. In particular, in reply to a question, he stated that prior to the publication of the articles concerning the 'MİT lorries', the newspaper's lawyers, including himself, had met and assessed the articles and had then published them. Some witnesses, including journalists and former editors of the newspaper, stated that the newspaper's publishing policy was determined by the board of management of the Cumhuriyet Foundation, that Akın Atalay, who was the vice-president of the management board and the chairman of the executive committee, was the most senior authority in that regard, and that he had proposed to the foundation's board of management that it appoint C.D. as publication director. The court notes that the investigating authorities, taking into account all these

> facts and the applicants' positions within the foundation and the media company, and their long-standing positions within the newspaper, concluded that the applicants could indeed be held responsible for the publication of the news items and articles published in the newspaper and for the direction taken by the newspaper's publishing policy."

74. The Constitutional Court considered that it had been neither arbitrary nor unfounded for the investigating authorities to consider that there was a strong indication of the applicants' guilt, in view of the language used in the articles and in the social media posts and of the impact that these documents had had on public opinion at the time of their publication.

75. The Constitutional Court referred in particular to the alleged acts as set out in the orders for the applicants' detention (see the summary of these facts at paragraph 23 above) and in the bill of indictment concerning them (see the summary of these facts at paragraph 49 above).

76. On the basis of those accusations the Constitutional Court considered that all the applicants had posed a flight risk, given the severity of the statutory penalties for their alleged offences. Like the criminal courts, it rejected the applicants' claim that they had been investigated and placed in pre-trial detention solely on account of acts coming within the scope of their freedom of expression and freedom of the press.

77. A minority of six judges of the Constitutional Court (six out of fifteen, including the President) expressed separate dissenting opinions. They considered that there had been no reasonable or strong suspicion capable of justifying the applicants' arrest and detention. In their view, the suspicions advanced by the public prosecutor's office and cited by the competent authorities as grounds for the applicants' initial and continued detention, to the effect that the applicants, in their capacity as members of the board of management of the Cumhuriyet Foundation, had influenced the content of the articles referred to in the judgment, had not been supported by any specific evidence. The dissenting judges considered that there was likewise no indication that the applicants had acted with the intention of assisting the criminal organisations referred to in the judgment. In the judges' view, the prosecution of the members of the board of management on account of articles written by other journalists and published under the responsibility of the newspaper's publication director had been contrary to the principle of the individual nature of criminal responsibility. Furthermore, no evidence had been adduced casting doubt on the applicants' defence in reply to those accusations, as it had been consistent with the normal course of life. Noting that the suspicions against the applicants had been based on newspaper articles that were covered by freedom of expression and freedom of the press, the dissenting judges considered that the authorities in question should have taken particular care in applying measures entailing a deprivation of liberty. The change in the newspaper's editorial stance could not by itself constitute the subject of a

criminal offence. The judges pointed out that the senior management of the newspaper could not be prosecuted unless the newspaper's editorial stance systematically promoted the use of violence and terrorist methods and sought to legitimise terrorist organisations. As a general rule, accusations could not be made against journalists in a sweeping manner by listing the headings, articles and opinions published by the newspaper over a particular period. A blanket approach of this kind, omitting to specify how each article had infringed the Criminal Code, would narrow the sphere of journalistic activity and have a chilling effect on freedom of the press. The dissenting judges considered that even if some articles apt to support the activities of a terrorist organisation were published from time to time in a newspaper, they could merely engage the criminal responsibility of their authors but did not suffice to demonstrate a shift in the editorial stance of the newspaper as a whole.

78. The dissenting judges pointed out that the Constitutional Court had set aside the provisions of the Prevention of Terrorism Act providing for the proprietors of newspapers to be held responsible for articles published in their newspapers, basing its ruling on the individual nature of criminal responsibility. In their view, the criminal investigation authorities had in no way demonstrated in the present case how the responsibility of the applicants, whose situation could be likened to that of the proprietors of a newspaper, could have been engaged.

79. The judges also pointed to the case-law of the Constitutional Court according to which the requirement of strong suspicion, which under Article 19 of the Constitution was a prerequisite for detention, continued to apply even during the state of emergency.

80. Moreover, a newspaper's editorial stance was protected by freedom of expression and freedom of the press. These freedoms, which enabled the public to be informed of different versions of events and to read critical opinions on current affairs and governance issues, had a vital role to play in the functioning of a democratic, pluralist regime. The freedoms in question also applied to minority views within society. According to the dissenting judges, while some published items or editorial stances might present certain similarities with the supposed objectives of terrorist organisations, such similarities could not in themselves be regarded as assistance to a terrorist organisation.

3. As regards the applicant Mehmet Murat Sabuncu

81. In its judgment of 2 May 2019 the Constitutional Court observed that the applicant Mehmet Murat Sabuncu had been appointed as editor-in-chief of the newspaper *Cumhuriyet* on 1 September 2016, in other words, after the attempted coup; that he had subsequently been accused of being responsible for the articles published in the newspaper; and that he had also been accused of opposing the operations conducted by the security

forces against the media outlets controlled by the organisation FETÖ/PDY, of having given the impression, via material posted on social media, that the members of that organisation were victims, of allowing the newspaper *Cumhuriyet* to disseminate propaganda in favour of the PKK by conveying the messages of that organisation, and of thereby aiding these two terrorist organisations.

In that connection the Constitutional Court found as follows:

> "53. It was noted in the detention order that the media company (Yenigün) was the company responsible for publishing the daily newspaper and that the (Cumhuriyet) Foundation, which held the trademark and publishing rights in relation to the newspaper, ranked above the newspaper and the media company in the institutional hierarchy, with the result that an organic link existed between the foundation, the media company and the newspaper; that following the election ... to the foundation's board of management of individuals with links to FETÖ/PDY, the newspaper had altered its statist, secular and nationalist stance and begun targeting the State; that a large number of headings, news items and articles liable to create a favourable impression of the organisations FETÖ/PDY and the PKK had been published in the newspaper; and that the newspaper had obscured (manipulated) the facts to the benefit of the terrorist organisations, thus attempting to render the country ungovernable. It was found that the applicant was also responsible for these materials in his capacity as publication director and that there was a strong suspicion that he was guilty. In the above-mentioned order, items published by the newspaper after 2013 were referred to in support of the charges. The indictment mentioned the changes to the foundation's board of management in 2013 and subsequently, and the news items and articles published in the newspaper during the same period and to which the charges related.
>
> 54. Accordingly, the applicant was not charged for having written a news item or an article published in the newspaper. It was found that the charge against the applicant in account of the news items and articles published in the newspaper was based on the fact that he had been responsible for the headings, news items and articles published in the newspaper because he was its publication director. It was also alleged that the applicant had opposed the operations carried out by the judicial authorities against FETÖ/PDY's media outlets and had attempted, through his social media posts, to portray the members of FETÖ/PDY as victims and had also, through his social media posts, supported the publication of PKK propaganda, thereby assisting the above-mentioned terrorist organisations.
>
> 55. It was further alleged in the indictment that the applicant had been in telephone contact with persons who were under investigation for offences linked to FETÖ/PDY or who were users of ByLock. The above-mentioned aspects were not the subject of a separate charge but were mentioned in connection with the main charge against the applicant, referred to above."

82. The Constitutional Court referred to the newspaper articles mentioned by the judicial authorities in ordering the detention of Mehmet Murat Sabuncu (see paragraph 25 with reference to paragraph 23 above) and, in particular (citing them specifically), those mentioned in the bill of indictment of 3 April 2017 (see paragraphs 45-47 above). The court concluded that it could not be said that there had been no reasonable suspicion that the applicant had committed a criminal offence necessitating his placement in pre-trial detention. It considered, on the basis of those

accusations, that the applicant had posed a flight risk at the time of the events, given the severity of the statutory penalty for the offences in question. Like the criminal courts, it also rejected the applicant's argument that the investigation concerning him and his pre-trial detention had been designed to punish acts that were covered by freedom of expression and freedom of the press.

83. The Constitutional Court held, by a majority, that the orders for Mehmet Murat Sabuncu's initial and continued detention had been well founded and had not been arbitrary.

84. A minority of the members of the Constitutional Court (six judges out of fifteen, including the President) expressed separate dissenting opinions in the case of Mehmet Murat Sabuncu. They pointed to their opinions concerning freedom of expression set out in the case of *Önder Çelik and Others*, to the effect that a newspaper's editorial stance was protected by freedom of expression and freedom of the press. These freedoms, which enabled the public to be informed of different versions of events and to read critical opinions on current affairs and governance issues, had a vital role to play in the functioning of a democratic, pluralist regime and also applied to minority views within society. According to the dissenting judges, while some published items or editorial stances might present certain similarities with the supposed objectives of terrorist organisations, such similarities could not in themselves be regarded as assistance to a terrorist organisation.

85. As to the existence of suspicions that the offence of assisting terrorist organisations had been committed, the dissenting judges stressed that none of the articles referred to by the prosecution had actually been written by the applicant Mehmet Murat Sabuncu himself. The prosecution had not even attempted to demonstrate how the individual articles referred to had infringed the Criminal Code, but had simply listed the articles one by one before alleging that the newspaper's editorial stance had changed, becoming aligned with the stated aims of the terrorist organisations in question. In the judges' view, freedom of expression, and especially freedom of the press, protected the dissemination to the public of all dissenting views and the public's right to be informed of them.

86. Some of the dissenting judges also observed that the impugned articles referred to in the detention orders had not been published during the period when Mehmet Murat Sabuncu was the publication director, but had in fact been published prior to September 2016, when he had been appointed to that position. In the view of other judges, the remarks shared by Mehmet Murat Sabuncu on social media, criticising the proceedings brought against the media outlets accused of having close ties to the organisation FETÖ and expressing concern at the likelihood of civilians close to the government being armed, were protected by freedom of expression.

4. As regards the applicant Akın Atalay

87. With regard to the responsibility of the applicant Akın Atalay on account of news items and articles published in the newspaper *Cumhuriyet* and referred to by the magistrate and the prosecuting authorities in the present case, the Constitutional Court made findings similar to those made in relation to the other applicants. It held as follows:

> "... 52. It was noted in the detention order that the media company (Yenigün) was the company responsible for publishing the daily newspaper, that the (Cumhuriyet) Foundation, which held the trademark and publishing rights in relation to the newspaper, ranked above the newspaper and the media company in the institutional hierarchy, with the result that an organic link existed between the foundation, the media company and the newspaper; that following the election ... to the board of management of the foundation of individuals with links to FETÖ/PDY, the newspaper had altered its statist, secular and nationalist stance and begun targeting the State; that a large number of headings, news items and articles liable to create a favourable impression of the organisations FETÖ/PDY and the PKK had been published in the newspaper; and that the newspaper had obscured (manipulated) the facts to the benefit of the terrorist organisations, thus attempting to render the country ungovernable. It was found that the members of the foundation's board of management, including the applicant, were responsible for these materials and that there was a strong suspicion that they were guilty. In the above-mentioned order, items published by the newspaper after 2013 were referred to in support of the charges. The indictment mentioned the changes to the foundation's board of management in 2013 and subsequently, and news items and articles published in the newspaper during the same period and to which the charges related.
>
> 53. Accordingly, the applicant was not charged for having written a news item or an article published in the newspaper. It was found that the charge against the applicant on account of the news items and articles published in the newspaper was based on the fact that he had been a member of the board of management of the foundation and the board of the media company, that he had been chairman of the executive committee (of the foundation's board of management) and that he had thus had an active role in the newspaper. It was also alleged that the applicant had opposed the operations carried out by the judicial authorities against FETÖ/PDY's media outlets and had attempted, through his social media posts, to portray the members of FETÖ/PDY as victims, thereby assisting that terrorist organisation.
>
> 54. It was further alleged in the indictment that financial transactions had taken place between, on the one hand, persons and companies with links to FETÖ/PDY and, on the other hand, the newspaper and the media company, connected to the foundation on whose board of management the applicant sat as vice-president, and that the applicant had been in telephone contact with persons under investigation for offences linked to FETÖ/PDY or who were users of ByLock. The above-mentioned aspects were not the subject of a separate charge but were mentioned in connection with the main charge against the applicant, referred to above."

88. The Constitutional Court, after reiterating the allegations made by the authorities against Akın Atalay in the orders for his initial and continued pre-trial detention (see paragraph 26 with reference to paragraph 23 above), and by the prosecutor's office in the indictment of 3 April 2017 (see paragraph 48 above), went on to find that it could not be said that there had

been no reasonable suspicion that the applicant had assisted the terrorist organisation in question by opposing the operations conducted against the media outlets controlled by the organisation FETÖ/PDY and by attempting to cast doubt on the legitimacy of those operations via the items he had posted on social media, which had given the impression that the members of that terrorist organisation were in fact victims.

89. Lastly, the Constitutional Court found that it had been neither arbitrary nor unfounded for the criminal investigation authorities to consider that there was a strong indication of the applicant's guilt, in view of the language used in the articles published in *Cumhuriyet* and in the items posted on social media, and of the impact that these had had on public opinion at the time of their publication.

90. In the light of these considerations regarding the complaints concerning the right to liberty and security, the Constitutional Court dismissed Akın Atalay's remaining complaints, including those relating to freedom of expression and freedom of the press.

91. A minority of the judges of the Constitutional Court (six judges out of fifteen) expressed separate dissenting opinions in Akın Atalay's case. In their view, the observations they had made in the case of *Önder Çelik and Others* concerning the prosecution and detention of the senior managers of the Cumhuriyet Foundation for their alleged influence over the editorial stance of the newspaper *Cumhuriyet* applied equally to the case of Akın Atalay. According to the dissenting judges, Akın Atalay had also been prosecuted not because of any articles that he himself had written, but first and foremost because he had allegedly influenced articles written by other *Cumhuriyet* journalists, on account of his managerial positions within the Cumhuriyet Foundation and the publishing company *Yenigün*. In the judges' view, it was not possible to arrive at the conclusion that suspicions had existed simply by listing the allegations against the applicant; each of the items of evidence should have been examined in turn on the basis of the facts and the documents in the case file. Neither the prosecuting authorities nor the majority of the Constitutional Court had conducted such an examination.

92. The dissenting judges also observed that in the few items he had shared on social media, the applicant had not just expressed the view that the measures taken against the organisations deemed to be close to FETÖ/PDY had been in breach of the law; he had also referred to that organisation's past illegal activities and had criticised the government, and even the Constitutional Court, for not preventing those activities. The judges concluded that the investigating authorities had failed to give any reasons for their finding that the sharing of these items on social media was not protected by freedom of expression.

5. As regards the applicants Turhan Günay and Ahmet Kadri Gürsel

93. In its judgment of 11 January 2018 concerning the applicant Turhan Günay, the Constitutional Court found a violation of the applicant's right to liberty, taking the view that there had been no strong suspicions that he had committed the alleged criminal offences capable of justifying his pre-trial detention. It noted in that connection that the applicant had not been charged on account of an article that he himself had written, but that the allegations had been based on his membership of the board of management of the foundation, which allegedly rendered him responsible, together with his fellow board members, for the change in editorial stance and the manipulative articles published in the newspaper championing the cause of terrorist organisations. However, the court noted that the applicant had ceased to be a member of the newspaper's senior management in 2013 and that his name did not feature among the members of the board of management, and that the alleged acts had taken place after 2013. It therefore considered it unnecessary to examine the complaints of a breach of freedom of expression, since no facts had been disclosed concerning possible influence by the applicant over the material published in the newspaper. The Constitutional Court also made an award to the applicant for costs and expenses. Since the applicant had not claimed any compensation, submitting that the finding of a violation would constitute redress for the alleged damage, and since he had already been released pending trial, the Constitutional Court ruled that there was no need to take any additional action in his case.

94. In its judgment of 2 May 2019 concerning the applicant Ahmet Kadri Gürsel, the Constitutional Court considered that there had been no strong suspicions that the applicant had committed the alleged criminal offences. It noted in that regard that although the investigating authorities had argued that the applicant, in his capacity as editorial adviser, had been responsible for the news items and articles published in the newspaper *Cumhuriyet*, those authorities had not specified how his role – which had been confined to giving editorial advice – had had an impact on the newspaper's editorial policy. The court found that, while the style of the article written by the applicant had been harshly critical, his remarks had not expressly incited others to commit violence or terrorist acts. The Constitutional Court further considered that the fact that the applicant had met with persons who had been investigated in connection with an offence linked to a terrorist organisation could not in itself constitute a ground for bringing charges. In that connection it pointed out that it would have had to be proven that the meetings had taken place in the context of an organisational activity. In the instant case it noted that the investigating authorities had not indicated for what purpose the applicant had met with the persons concerned. The Constitutional Court concluded by finding a violation of the right to liberty and the right to freedom of expression. It also

made an award to the applicant for costs and expenses. Since the applicant had not claimed any compensation, submitting that the finding of a violation would constitute redress for the alleged damage, and since he had already been released pending trial, the Constitutional Court ruled that there was no need to take any additional action in his case.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Constitution

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

> "Everyone has the right to personal liberty and security.
>
> ...
>
> Individuals against whom there are strong presumptions of guilt may be detained only by order of a judge and for the purposes of preventing their absconding or the destruction or alteration of evidence, or in any other circumstances provided for by law that also necessitate their detention. No one shall be arrested without an order by a judge except when caught *in flagrante delicto* or where a delay would have a harmful effect; the conditions for such action shall be determined by law.
>
> ...
>
> A person who has been arrested or detained shall be brought before a judge within forty-eight hours at the latest or, in the case of offences committed jointly with others, within four days, not including the time required to convey the person to the court nearest to the place of detention. No one shall be deprived of his or her liberty after the expiry of the aforementioned periods except by order of a judge. These periods may be extended during a state of emergency or a state of siege or in time of war.
>
> ...
>
> Anyone who has been detained shall be entitled to request a trial within a reasonable time and to apply for release during the course of the investigation or criminal proceedings. Release may be conditioned by a guarantee to ensure the person's appearance throughout the trial, or the execution of the court sentence.
>
> Everyone who is deprived of his or her liberty for any reason whatsoever shall be entitled to apply to a competent judicial authority for a speedy decision on his or her case and for his or her immediate release if the detention is not lawful.
>
> ..."

B. Relevant provisions of the Criminal Code

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

> "...
>
> (6) Anyone who commits an offence on behalf of an [illegal] organisation shall also be sentenced for belonging to that organisation, even if he or she is not a member of

it. The sentence to be imposed for membership may be reduced by up to half. This paragraph shall apply only to armed organisations.

(7) Anyone who assists an [illegal] organisation knowingly and intentionally (*bilerek ve isteyerek*), even if he or she does not belong to the hierarchical structure of the organisation, shall be sentenced for membership of that organisation. The sentence to be imposed for membership may be reduced by up to two-thirds, depending on the nature of the assistance.

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

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

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

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

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

C. Relevant provisions of the Code of Criminal Procedure

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

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

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

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

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

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

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

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

D. The case-law of the Constitutional Court

104. In its decision of 4 August 2016 (no. 2016/12) concerning the dismissal of two members of the Constitutional Court and its decision of 20 June 2017 (*Aydın Yavuz and Others*, no. 2016/22169) concerning a person's pre-trial detention, the Constitutional Court provided information and assessments on the attempted military coup and its consequences. It carried out a detailed examination, from a constitutional perspective, of the facts leading to the declaration of the state of emergency. As a result of this examination, it found that the attempted military coup of 15 July 2016 had been a clear and serious attack both on the constitutional principles that sovereignty was unconditionally and unreservedly vested in the people, who exercised it through authorised organs, and that no individual or body could exercise any State authority not emanating from the Constitution, and also on the principles of democracy, the rule of law and human rights. According to the Constitutional Court, the attempted military coup had been a practical illustration of the severity of the threats posed to the democratic constitutional order and human rights. After summarising the attacks carried out during the night of 15 to 16 July 2016, it emphasised that in order to assess the severity of the threat posed by a military coup, it was also necessary to consider the risks that might have arisen had the coup attempt not been thwarted. It found that the fact that the attempted coup had taken place at a time when Turkey had been under violent attack from numerous terrorist organisations had made the country even more vulnerable and

considerably increased the severity of the threat to the life and existence of the nation. The Constitutional Court noted that in some cases, it might not be possible for a State to eliminate threats to its democratic constitutional order, fundamental rights and national security through ordinary administrative procedures. It might therefore be necessary to impose extraordinary administrative procedures, such as a state of emergency, until such threats were eliminated. Bearing in mind the threats resulting from the attempted military coup of 15 July 2016, the Constitutional Court accepted the power of the Council of Ministers, chaired by the President, to issue legislative decrees on matters necessitating the state of emergency. In that context, it also emphasised that the state of emergency was a temporary legal regime, in which any interference with fundamental rights had to be foreseeable and the aim of which was to restore the normal regime in order to safeguard fundamental rights.

E. Council of Europe materials

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

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

III. NOTICE OF DEROGATION BY TURKEY

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

> "I communicate the following notice of the Government of the Republic of Turkey.
>
> On 15 July 2016, a large-scale coup attempt was staged in the Republic of Turkey to overthrow the democratically-elected government and the constitutional order. This despicable attempt was foiled by the Turkish state and people acting in unity and solidarity. The coup attempt and its aftermath together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms.
>
> The Republic of Turkey is taking the required measures as prescribed by law, in line with the national legislation and its international obligations. In this context, on 20 July 2016, the Government of the Republic of Turkey declared a State of

Emergency for a duration of three months, in accordance with the Constitution (Article 120) and the Law No. 2935 on State of Emergency (Article 3/1b). ...

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

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

..."

THE LAW

I. PRELIMINARY QUESTION CONCERNING THE DEROGATION BY TURKEY

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

107. The applicants contested the Government's argument. In their submission, the application of Article 15 of the Convention could not result in the removal of all the safeguards under Article 5. They submitted that there had been no reasonable suspicion that they had committed an offence, that they had gone to the police station to give statements of their own accord, and that the applicant Akın Atalay had even returned from abroad for that purpose.

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

109. At this stage the Court observes that in its judgment in the case of *Mehmet Hasan Altan v. Turkey* (no. 13237/17, § 93, 20 March 2018) it held that the attempted military coup had disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention. As to whether the measures taken in the present case were strictly required by the exigencies of the situation and consistent with the

other obligations under international law, the Court considers it necessary to examine the applicants' complaints on the merits, and will do so below.

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

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

110. The Government argued that the applicants had submitted their 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"). In their submission, although a non-governmental organisation had been named as the applicant before the WGAD, it could not have provided certain details without receiving input from the applicants. Furthermore, the applicants had not informed the Court that they had previously submitted their case to another international body; this amounted to an abuse of the right of application to the Court. The relevant parts of Article 35 of the Convention provide:

> "... 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.
>
> 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> (a) the application is ... an abuse of the right of individual application ..."

111. The applicants contested the Government's argument. They submitted that the complaint to the WGAD had been submitted by a third party, Mr Srinivas, on behalf of the Right Livelihood Award Foundation, a foundation based in Sweden, and that the applicants themselves had not submitted any individual applications to an international body. The only link between the newspaper *Cumhuriyet* and the above-mentioned foundation lay in the fact that the newspaper had received the Right Livelihood Award a year previously. Both the applicants and the subject matter of the present applications were different from those in the procedure before the WGAD.

112. 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 v. France* (dec.), no. 2096/05, 7 April 2009).

113. In the instant case the Court observes that it has not been established that the applicants or their close relatives submitted any

application to the United Nations bodies (see, conversely, *Peraldi*, cited above), or that they 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, and *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, no. 20641/05, §§ 37, ECHR 2012 (extracts)), the application to the Court cannot be considered as being "substantially the same as a matter that has ... been submitted ...".

114. The Court also considers that given the nature of the case, which related to the detention of journalists and managers of a newspaper on account of the newspaper's editorial stance, it is consistent with the normal course of life for non-governmental organisations working in the sphere of press freedom to feel concerned by the events and themselves take the initiative to put an end to interference which they consider to be unjustified.

115. As to the Government's argument that there had been an abuse of the right of individual application because the applicants had not informed the Court of the procedure before the WGAD, the Court refers in the first place to its finding that the procedure in question was initiated and conducted without the participation of the applicants. It also notes that the judicial authorities involved in the present case took no account of the WGAD's findings, nor did they include them in the proceedings before them. Those findings, although they concluded that the applicants' detention had been unlawful, remained a "dead letter" for the applicants at domestic level. In the Court's view, therefore, it cannot be said that the applicants abused the right of application by not first informing the Court of the procedure before the WGAD.

B. Objections concerning the individual applications to the Constitutional Court

116. The Government, referring mainly to the Court's findings in its decisions in *Uzun v. Turkey* ((dec.), no. 10755/13, 30 April 2013) and *Mercan v. Turkey* ((dec.), no. 56511/16, 8 November 2016), alleged that the applicants had not exercised the remedy of an individual application before the Constitutional Court.

117. The applicants contested the Government's argument.

118. The Court reiterates that an applicant's compliance with the requirement to exhaust domestic remedies is normally assessed with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). Nevertheless, the Court accepts that the last stage of a particular remedy may be reached after the application has been lodged but before its admissibility has been determined (see *Karoussiotis v. Portugal*, no. 23205/08, § 57, ECHR 2011 (extracts); *Stanka Mirković and Others*

v. Montenegro, nos. 33781/15 and 3 others, § 48, 7 March 2017; and *Azzolina and Others v. Italy*, nos. 28923/09 and 67599/10, § 105, 26 October 2017).

119. The Court observes that on 26 December 2016 the applicants lodged individual applications with the Constitutional Court, which gave its judgments on the merits on 11 January 2018 and on 2 and 3 May 2019.

120. Accordingly, the Court also dismisses this objection raised by the Government with regard to the applicants other than Turhan Günay and Ahmet Kadri Gürsel.

121. In the case of those two applicants (Turhan Günay and Ahmet Kadri Gürsel), the Court considers that as the Constitutional Court, in its judgments of 11 January 2018 and 2 May 2019 respectively, found a violation of Article 19 of the Constitution (right to liberty and security of person) and also, in the case of Ahmet Kadri Gürsel alone, a violation of Articles 26 and 28 of the Constitution (concerning, respectively, freedom of expression and freedom of the press), these two applicants – who, moreover, had not claimed pecuniary compensation – can no longer claim victim status in the present case in respect of the facts examined by the Constitutional Court.

The application must therefore be declared inadmissible as regards these two applicants (Turhan Günay and Ahmet Kadri Gürsel), except in relation to their complaints concerning the time taken to examine their applications to the Constitutional Court challenging the lawfulness of their pre-trial detention (Article 5 § 4 of the Convention).

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

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

123. The applicants contested the Government's argument. They asserted, in particular, that a compensation claim had not offered any reasonable prospect of success in terms of remedying the unlawfulness of their detention or securing their release.

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

125. As to the period during which the applicants were released pending trial, the Court notes that they had already submitted their complaints under Article 5 of the Convention in the context of their applications to the Constitutional Court. That court examined their complaints on the merits and dismissed them in its judgments of 2 and 3 May 2019.

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

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

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

128. The applicants (except for Turhan Günay and Ahmet Kadri Gürsel) complained that their initial and continued pre-trial detention had been arbitrary. They alleged, in particular, that the judicial decisions ordering and extending their pre-trial detention had not been based on any concrete evidence grounding a reasonable suspicion that they had committed a criminal offence. In their submission, the facts on which the suspicions against them had been based related solely to acts coming within the scope of their activity as journalists and, hence, of their freedom of expression.

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

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

A. Admissibility

130. The Court notes that these complaints, with the exception of those of the applicants Turhan Günay and Ahmet Kadri Gürsel that have been declared inadmissible, are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

131. The applicants maintained that there were no facts or information that could satisfy an objective observer that they had committed the offences of which they were accused. The facts on which the suspicions against them had been based related in principle to acts coming within the journalistic activity of the newspaper *Cumhuriyet* for which they worked. The remaining allegations made by the prosecutor's office had no basis in reality. This was true, for instance, of the allegation that companies with close ties to the organisation FETÖ had provided funding to *Cumhuriyet* by purchasing advertising space, as these transactions had not amounted to more than one per cent of those companies' advertising expenditure.

132. The applicants also pointed to the aspects of their initial and continued detention which they considered to be in breach of the provisions of domestic law and hence unlawful. Firstly, although they had been arrested on suspicion of carrying out activities on behalf of terrorist organisations without being members of those organisations, the reasons given in the orders for their pre-trial detention had referred to propaganda in favour of terrorist organisations (the offence provided for in Article 220 § 8 of the CC), and in no way justified the main suspicions against them. Secondly, the suspicions against them had not been individualised, in breach of the CCP. Although a separate detention order had been drawn up in the name of each individual applicant, they had all been accused in blanket fashion of responsibility for the newspaper's editorial stance on account of their managerial positions. Thirdly, according to the Press Act, the proprietors and editors-in-chief of newspapers were not liable for articles constituting a criminal offence unless the authors of the articles had not been identified. Hence, their criminal responsibility should not be engaged in relation to the articles referred to in the detention orders and the indictment. The applicants added that the applicant Mehmet Murat Sabuncu had been appointed as the newspaper's publication director on 1 September 2016 and that the applicant Kadri Gürsel had been the editorial adviser as of

20 September 2016, and that the articles complained of had been written before those dates.

The applicants also contested the reasons given by the judicial authorities for their continued pre-trial detention.

(b) The Government

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

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

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

136. In the Government's submission, the ultimate aim of the terrorist organisation the PKK had been established by Abdullah Öcalan and his friends in 1978, when they had founded the organisation. That aim was to establish an independent State of Kurdistan based on Marxist-Leninist principles and covering east and south-east Turkey and parts of Syria, Iran and Iraq. The KCK was a political model for reconstructing Kurdish society through administrative and judicial structures, in accordance with the PKK's ultimate goal. According to the Government, the PKK and its sub-groups had carried out terrorist activities that had infringed the right to life (tens of thousands had been killed and wounded, including civilians and members of the security forces, in the period preceding the attempted coup), the right to liberty and security, the right to respect for one's home and the right to property, in several regions of Turkey. In particular, these organisations had

stepped up the number of terrorist attacks in a bid to declare the supposed autonomy of certain provinces in south-east Turkey and to bring pressure to bear on the population of that region by preventing free movement (digging trenches, installing barricades and planting bombs at the exit and entry points of the towns and cities), and by using military weapons.

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

2. The third-party interveners

(a) The Commissioner for Human Rights

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

(b) The Special Rapporteur

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

140. In the Special Rapporteur's submission, the combination of facts surrounding the prosecution of journalists suggested that, under the pretext of combating terrorism, the national authorities were interpreting the criminal legislation and investigation files in a broad and unforeseeable manner, thereby arbitrarily suppressing freedom of expression through prosecutions and detention. For instance, the journalists in question had been charged, among other offences, with conducting telephone

conversations with persons who had allegedly used the ByLock application, with no account being taken of the fact that the journalists themselves had never used the application.

(c) The intervening non-governmental organisations

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

3. The Court's assessment

(a) Relevant principles

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

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

144. Article 5 § 1 (c) of the Convention does not presuppose that the investigating authorities should have obtained sufficient evidence to bring charges at the point of arrest or while the applicants were in custody. The purpose of questioning during detention under Article 5 § 1 (c) is to further the criminal investigation by confirming or dispelling the concrete suspicion grounding the arrest (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 53, Series A no.145-B). Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A; *Metin v. Turkey* (dec.), no. 77479/11, § 57, 3 March 2015; and *Yüksel and Others v. Turkey*, nos. 55835/09 and 2 others, § 52, 31 May 2016).

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

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

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

148. Further, it must not appear that the alleged offences themselves were related to the exercise of the applicant's rights under the Convention (see, *mutatis mutandis*, *Merabishvili*, cited above, § 187). In that regard the Court emphasises that, since the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, among many other authorities, *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 171, 13 February 2020), a suspicion cannot be regarded as reasonable if it is based on an approach consisting in "classifying as criminal conduct" the exercise of the rights and freedoms recognised by the Convention. Otherwise, the use of the notion of "reasonable suspicion" to deprive the persons concerned of their physical

liberty would risk rendering it impossible for them to exercise their rights and freedoms under the Convention.

149. In that connection the Court reiterates that any deprivation of liberty should be in keeping with the purpose of Article 5 of the Convention, namely to protect the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in 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, among other authorities, *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162-64, ECHR 2009, and *Creangă v. Romania* [GC], no. 29226/03, § 84, 23 February 2012).

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

(b) Application of these principles in the present case

151. The Court observes that the applicants were suspected of assisting organisations considered as terrorist organisations or of disseminating propaganda in their favour, mainly on account of articles published in the newspaper whose editorial stance they had allegedly influenced in their capacity as managers and, in some cases, by sharing material on social media. These are serious criminal offences which are punishable by imprisonment under Turkish law.

152. The Court's task under Article 5 of the Convention is to ascertain whether there were sufficient objective elements to satisfy an objective observer that the applicants could have committed the offences of which they were accused. In view of the seriousness of these offences and the severity of the potential sentence, the facts need to be examined with great care. In that connection it is essential that the facts grounding the suspicion should be justified by verifiable and objective evidence and that they can be reasonably considered as falling under one of the sections describing criminal behaviour in the Criminal Code.

153. The Court notes in that regard that the dispute between the parties in the present case does not concern the wording of the text or headings of

the articles and social media posts referred to in the decisions of the judicial authorities responsible for pre-trial detention. Rather it concerns the attributability of those materials to the applicants and the plausibility of other alleged acts (the factual aspect), as well as the classification of the facts as criminal conduct (aspect concerning the classification under criminal law).

(i) Factual aspect of the existence of "reasonable suspicion": attributability and plausibility

(1) Attributability to the applicants of the impugned articles allegedly indicating a change in the editorial stance of *Cumhuriyet*

154. As to whether the strikingly large number of articles referred to and listed in the detention orders can be attributed to the applicants, the Court observes that the latter were not the authors of the articles in question. It notes that the judicial authorities that ordered the applicants' pre-trial detention were unable to cite any concrete or specific fact capable of suggesting that the applicants had imposed the content of those articles on the authors, either with regard to the facts dealt with or the opinions expressed therein, with the undeclared aim of assisting illegal organisations. The authorities' accusations against the applicants were based solely on assumptions stemming from the positions which they occupied within the bodies that managed and funded the newspaper *Cumhuriyet*.

155. The Court observes in that connection that the magistrates, in ordering the applicants' pre-trial detention, and the Constitutional Court, in dealing with their individual applications, made extensive findings on this issue which can be divided into three groups. Firstly, they found that the Cumhuriyet Foundation ranked above the company Yenigün and the daily newspaper *Cumhuriyet* in the institutional hierarchy, and that its board of management was in a position to direct the newspaper's editorial stance. In this regard they took into consideration the fact that the foundation's board of management had the power to appoint or remove the publication director and could decide which journalists to recruit and which to dismiss. Secondly, the judicial authorities concerned and the Constitutional Court noted that on the day before a major "scoop", meetings were held within the newspaper *Cumhuriyet* which were attended by certain members of the board of management. Thirdly, those authorities considered that following the appointment of the applicants (with the exception of Mehmet Murat Sabuncu) to the board of management of the Cumhuriyet Foundation, the newspaper *Cumhuriyet* had published several articles that could be regarded as propaganda and assistance in favour of terrorist organisations, in that they had been liable to create a favourable impression of those organisations among the public.

The national judicial authorities found the applicant Mehmet Murat Sabuncu to be responsible for the impugned articles on the sole ground that

he had been the newspaper's publication director, rather than relying mainly on their assessment concerning the relationship between the foundation, the media company and the newspaper. In the magistrate's view, Mr Sabuncu, in his capacity as the publication director, was responsible for all the articles referred to in the pre-trial detention orders issued in respect of all the applicants (see paragraph 23 above). Meanwhile, in the Constitutional Court's view, he was responsible for the articles published during the periods when he had been involved in overseeing the material that was published (see paragraphs 43-45 above). The tweets posted by the applicants Mehmet Murat Sabuncu and Akın Atalay were taken into consideration as additional items of evidence in support of the main charge, which was based in particular on the publication of the impugned articles in the newspaper *Cumhuriyet*.

156. Even though the Court has serious doubts as to whether the articles complained of could be attributed to all the applicants, it notes that the assessment made by the national courts (including the Constitutional Court) was that the applicants were indeed responsible for those articles. In these circumstances the Court decides to ascertain whether the articles in question – even assuming them to be attributable to all the applicants – and other evidence adduced against them were capable of grounding a reasonable suspicion in relation to the applicants.

(2) Attributability to the applicants of the activities relating to the illegal organisations in question

157. The Court also notes that the authorities concerned were unable to cite any specific facts or information capable of suggesting that the above-mentioned illegal organisations had issued requests or instructions to *Cumhuriyet*'s managers or journalists for the newspaper to publish specific items or follow a particular editorial policy with the aim of helping to prepare and carry out a campaign of violence or legitimising such violence.

158. As to the witness evidence against the applicants cited by the prosecuting authorities and given by former *Cumhuriyet* journalists who had been removed from positions of responsibility, the Court notes that it merely contained very general impressions regarding the newspaper's alleged links to the illegal organisations referred to, without remedying the shortcomings which invalidated the suspicions raised by the judicial authorities.

(3) Plausibility of certain acts other than the criticisms of the government

159. The Court also notes that the acts of which the applicants were accused by the authorities responsible for their detention, leaving aside the articles published in *Cumhuriyet* and the material posted on social media, cannot be regarded as relevant in establishing the existence of a reasonable suspicion that the offence of assisting a terrorist organisation had been

committed. Given the complete absence of any incriminating content, the telephone calls made by Mehmet Murat Sabuncu and Akın Atalay to public figures against whom criminal proceedings were later brought constitute acts consistent with the normal course of journalistic activity and cannot be regarded as grounding a reasonable suspicion that the applicants had committed the criminal offences of which they were accused.

160. As to the financial transactions linked to the advertisements placed in the newspaper *Cumhuriyet* by companies with close ties to the organisation FETÖ (cited as evidence against the applicant Akın Atalay), the Court considers, in the light of the modest sums involved (around one per cent of the advertising expenditure of the companies concerned) that they do not demonstrate the existence of a privileged commercial relationship.

161. Likewise, in the Court's view, it cannot reasonably be inferred from an article entitled "Peace in the world, but what about at home?" (mainly criticising the President's political approach by alleging that his strategy of creating tensions between the different sectors of society was undermining peace within the country) that the author of the article had announced the date of the attempted coup because the instigators were controlled by a body known as the "Peace at Home Council".

162. The Court further considers that it cannot reasonably be claimed that an article published in *Cumhuriyet*, a national daily newspaper, informing the public of the location where the President, who had been absent from the media for almost a week, had been on holiday, was in fact intended to indicate to the instigators of the planned military coup where they needed to focus their actions in order to neutralise the President.

163. As regards the journalists' contribution to seminars on topical political issues, including the "Abant meetings", the Court considers that the political leanings of the organisers cannot reasonably be taken into account in determining the nature of the "reasonable suspicion", in the absence of any element in the content of the *Cumhuriyet* journalists' contributions capable of justifying restrictions on their freedom of expression.

164. The Court therefore considers that the logic applied in the present case by the authorities responsible for the applicants' pre-trial detention, equating these activities to assisting a terrorist organisation, cannot be regarded as an acceptable assessment of the facts.

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

165. The Court must also ascertain whether the materials relied on as grounds for the suspicions against the applicants could reasonably amount to an offence provided for by the CC at the time when they were written.

(1) Classification of the impugned materials according to their aim

166. The Court observes that the published material referred to by the judicial authorities in ordering and extending the applicants' pre-trial detention, as taken into consideration by the Constitutional Court in its judgments of 2 and 3 May 2019, can be divided into four groups.

167. The first group included the articles amounting to criticism of the political authorities' policies and the public conduct of their sympathisers, namely an article entitled "Danger on the streets" (see paragraphs 23, 46 and 48 above); an article entitled "No one at the rallies is talking about democracy" (see paragraphs 23, 46 and 48 above); an article about the MİT lorries (see paragraphs 23 and 48 above); an article concerning the explosives attack on the town of Reyhanlı (see paragraphs 23 and 48 above); an article under the heading "Peace in the world, but what about at home?" (see paragraphs 46 and 49 above); an article entitled "Incomplete democracy" (see paragraphs 43 and 46 above); an interview with Fethullah Gülen published on 23 May 2015 under the heading "The son-in-law called my humble home (*fakirhane*) a mansion (*malikhane*)" (see paragraph 49 above); the statement made by a *Cumhuriyet* journalist in an interview saying that he "would not describe the Gülenist community as a terrorist organisation" (see paragraph 49 above); and news items reporting information posted on the Twitter accounts *@fuatavni* and *@jeansbiri* (see paragraph 49 above).

168. The second group included articles and messages or news items reporting statements made by persons allegedly representing illegal organisations, namely an interview entitled "If they don't agree to autonomy, we'll consider separation", reporting on the views of one of the PKK's leaders, M. Karayilan (see paragraphs 23 and 48 above); an article describing the PKK's militants as "guerrilla fighters" and relaying the remarks made by the PKK's leaders on certain topical issues (see paragraphs 23 and 48 above); an article about Selahattin Demirtaş, stating that the PKK was mindful of environmental and gender equality issues (see paragraphs 23 and 48 above); tweets by the applicant Mehmet Murat Sabuncu containing excerpts from an interview with the Gülen family and from a BBC interview with Gülen himself (see paragraph 47 above); the use by the newspaper *Cumhuriyet* on two occasions of the same heading as the daily newspaper *Zaman* (see paragraph 49 above); and some articles by *Cumhuriyet*'s US correspondent reporting on some of the views of the organisation FETÖ/PDY on current affairs (see paragraph 49 above).

169. The third group included the assessments and criticisms made by *Cumhuriyet* journalists concerning the administrative and judicial authorities' actions to combat the illegal organisations, namely an article entitled "War at home, war in the world" (see paragraphs 23 and 48 above); an article entitled "The witch hunt has begun" (see paragraphs 23, 46 and 48 above); a series of news items and interviews concerning the alleged

disappearance in police custody of Hurşit Külter, a local politician of Kurdish origin (see paragraph 46 above); some tweets posted by the applicant Mehmet Murat Sabuncu expressing support for the journalists who had been dismissed or prosecuted (see paragraph 47 above); and material posted on social media by the applicant Akın Atalay criticising the allegedly unlawful measures taken against certain mass media outlets (see paragraph 48 above).

170. The fourth group included sensitive information arousing public interest, namely an article entitled "He went missing for a week ... we've discovered where Erdoğan was" (see paragraphs 23, 46 and 48 above) and articles featuring photographs of the incident in which a prosecutor was taken hostage and a telephone interview with the hostage-takers (see paragraphs 23 and 48 above).

(2) Characteristics common to the four groups

171. The Court notes that the four groups of articles or messages referred to above and cited as grounds for the suspicion against the applicants have some characteristics in common.

172. Firstly, the articles and messages constituted contributions by the journalists of *Cumhuriyet* to various public debates on matters of general interest. They contained the journalists' assessment of current political developments, their analysis and criticism of the various actions taken by the government, and their points of view on the legality and compatibility with the rule of law of the administrative and judicial measures taken against the alleged members or sympathisers of the illegal organisations. The topics addressed in these messages and articles – including the role of the Fethullahist movement in the attempted coup of 15 July 2016, the reaction of those close to the government to the coup attempt, the necessity and proportionality of the measures taken by the government against the prohibited organisations, the appropriateness or otherwise of the government's domestic and external security policy, including in relation to illegal separatist organisations, and the views expressed by the alleged members of the illegal organisations challenging the accusations made against them – had already been the subject of wide-ranging public debate in Turkey and beyond, involving political parties, the press, non-governmental organisations, groups representing civil society and public international organisations.

173. Secondly, those articles and messages did not contain any incitement to commit terrorist offences, did not condone the use of violence and did not encourage insurrection against the legitimate authorities. While some of the published material may have reported points of view voiced by members of prohibited organisations, it remained within the bounds of freedom of expression, which requires that the public has the right to be informed of the different ways of viewing a situation of conflict or tension,

including the point of view of illegal organisations (see *Nedim Şener v. Turkey*, no. 38270/11, § 115, 8 July 2014; *Şık v. Turkey*, no. 53413/11, § 104, 8 July 2014; and *Gözel and Özer v. Turkey*, nos. 43453/04 and 31098/05, § 56, 6 July 2010). As to the interview conducted by the journalist A.S. with the persons who had taken the prosecutor hostage, the Court considers it undeniable that the interview, carried out in the midst of a terrorist operation with one of the perpetrators, had news or information value and that the way in which the journalist conducted the interview – as highlighted by the antagonistic nature of the questions – had distanced him clearly from the person being interviewed. Taken overall, the interview, which amounted to the broadcasting of statements made by a third party, could not objectively have appeared to have as its purpose the propagation of the ideas of left-wing extremists, but on the contrary sought to expose the young militants and their violent attitudes (see, to similar effect, *Jersild v. Denmark*, 23 September 1994, §§ 33-35, Series A no. 298).

174. Thirdly, the stance taken by the articles and messages in question was broadly one of opposition to the policies of the government of the day. They contained points of view and positions corresponding to those expressed by the opposition political parties and by groups or individuals whose political views were at variance with those of the political authorities. The criticisms voiced in the articles and messages were in some cases accompanied by proposals for alternative policies to those pursued by the government and by suggestions that a change of government or of government policy would be better for Turkey.

175. Hence, detailed examination of the applicants' alleged acts, which at first glance were indistinguishable from the legitimate activities of political opposition, shows that those acts fell within the exercise of their freedom of expression and freedom of the press, as guaranteed by domestic law and by the Convention. There is nothing to indicate that they were part of an overall plan pursuing an aim in breach of the legitimate restrictions imposed on those freedoms. The Court therefore considers that the acts in question enjoyed a presumption of conformity with domestic law and with the Convention and were not, generally speaking, capable of grounding a "reasonable suspicion" that the applicants had committed criminal offences.

(3) Notion of "asymmetric warfare" advanced by the prosecution

176. The Court also observes that the prosecuting authorities accused the applicants of attempting, using the tactics of "asymmetric warfare", to manipulate public opinion and disguise the truth in order to slander the government and the President of the Republic, and of acting in accordance with the objectives of terrorist organisations in order to create domestic upheaval and render the country ungovernable

177. The Court notes that the use in peacetime of the notion of "asymmetric warfare", an expression denoting a method of

counter-propaganda deployed in wartime, as referred to by the prosecuting authorities and taken into consideration by the other authorities involved in this case, has the overall effect of linking expressions of opinion by political opponents, criticising the political authorities without promoting the use of violence, to the campaign of violence conducted by certain criminal organisations on the pretext of advocating similar opinions. In the Court's view, this approach is liable to result in any adversary or opponent of the political authorities being treated as a member or sympathiser of a terrorist organisation.

178. In the present case the Court notes that, in order to justify the applicants' pre-trial detention, the judicial authorities concerned created confusion between, on the one hand, criticism of the government in the context of public debate and, on the other hand, the pretexts used by the terrorist organisations to justify their violent acts. They characterised criticism levelled legitimately at the authorities in the context of public debate, in accordance with freedom of expression and press freedom, as assisting terrorist organisations and/or disseminating propaganda in favour of those organisations.

179. In the Court's view, such an interpretation of the criminal law is not only difficult to reconcile with the domestic legislation recognising public freedoms, but also posed a considerable risk to the Convention system, resulting in any person expressing a view at odds with the views advocated by the government and the official authorities being characterised as a terrorist or a person assisting terrorists. Such a situation is incapable in a pluralist democracy of satisfying an objective observer of the existence of a reasonable suspicion against journalists who are aligned with the political opposition but do not promote the use of violence.

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

180. In the light of these observations the Court considers that, even assuming that all the newspaper articles cited by the national authorities were attributable to the applicants, the latter could not be reasonably suspected, at the time of their placement in detention, of having committed the offences of disseminating propaganda on behalf of terrorist organisations or assisting those organisations. In other words, the facts of the case do not support the conclusion that a reasonable suspicion existed against the applicants. Accordingly, the suspicion against them did not reach the required minimum level of reasonableness. Although imposed under judicial supervision, the contested measures were thus based on a mere suspicion.

181. Moreover, it has likewise not been demonstrated that the evidence added to the case file after the applicants' arrest, in particular the evidence in the bill of indictment and the evidence produced while they were in detention, amounted to facts or information capable of giving rise to other

suspicions justifying their continued detention. The fact that the first-instance and appeal courts accepted the facts relied on by the prosecution as evidence of the applicants' guilt does nothing to alter this finding.

182. In particular, the Court notes that the acts for which the applicants were held criminally responsible came within the scope of public debate on facts and events that were already known, that they amounted to the exercise of Convention freedoms, and that they did not support or advocate the use of violence in the political sphere or indicate any wish on the applicants' part to contribute to the illegal objectives of terrorist organisations, namely to use violence and terror for political ends.

183. As regards Article 15 of the Convention and Turkey's derogation, the Court notes that the Turkish Council of Ministers, chaired by the President of the Republic and acting in accordance with Article 121 of the Constitution, passed several legislative decrees during the state of emergency placing significant restrictions on the procedural safeguards laid down in domestic law for anyone held in police custody or pre-trial detention. Nonetheless, in the present case, it was under Article 100 of the CCP that the applicants were placed in pre-trial detention on charges relating to the offence set out in Article 220 of the Criminal Code. It should be noted in particular that Article 100 of the CCP, which requires the presence of factual evidence giving rise to strong suspicion that the person has committed an offence, was not amended during the state of emergency. Instead, the measures complained of in the present case were taken on the basis of legislation which was in force prior to and after the declaration of the state of emergency. Consequently, the measures complained of in the present case cannot be said to have complied with the conditions laid down by Article 15 of the Convention, since, ultimately, no derogating measure was applicable to the situation. To conclude otherwise would negate the minimum requirements of Article 5 § 1 (c) of the Convention.

184. 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 applicants (except for Turhan Günay and Ahmet Kadri Gürsel) had committed a criminal offence.

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

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

186. The applicants (including Turhan Günay and Ahmet Kadri Gürsel) alleged a violation of Article 5 § 4 of the Convention on the grounds that the Constitutional Court had not complied with the requirement of "speediness" in the context of the applications they had brought before it to challenge the lawfulness of their pre-trial detention.

Article 5 § 4 of the Convention provides:

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

187. The Government contested the applicants' argument.

A. The parties' submissions

1. The Government

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

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

2. The applicants

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

B. The third-party interveners

1. The Commissioner for Human Rights

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

2. The Special Rapporteur

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

C. The Court's assessment

1. Admissibility

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

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

195. In the present case the Court observes that the applicants lodged their individual applications with the Constitutional Court on 26 December 2016 and that they were released pending trial on 9 March 2018 (in the case

of the applicant Mehmet Murat Sabuncu), on 25 April 2018 (in the case of the applicant Akın Atalay) and on 28 July 2107 (in the case of the remaining applicants). Their release pending trial put an end to the alleged breach of Article 5 § 4 of the Convention resulting from the failure by the Constitutional Court to speedily examine their complaint concerning the unlawfulness of their detention (see *Žúbor*, cited above, § 85, and the references cited therein). The Court is therefore called upon to examine in the present case the applicants' complaints of failure to comply with the speediness requirement under Article 5 § 4 in the Constitutional Court proceedings, between the dates on which the applicants' constitutional applications were lodged and the dates of their release pending trial. Accordingly, it rejects the Government's argument that these complaints are incompatible *ratione personae* with the provisions of the Convention.

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

2. Merits

197. The Court reiterates the principles arising from its case-law concerning the requirement of "speediness" within the meaning of Article 5 § 4 of the Convention, as summarised, in particular, in its judgments in *Mehmet Hasan Altan* (cited above, §§ 161-63) and *Şahin Alpay* (cited above, §§ 133-35) and in its decision in the case of *Akgün v. Turkey* ((dec.), no. 19699/18, §§ 35-44, 2 April 2019). In those cases it noted that in the Turkish legal system, anyone in pre-trial detention could apply for release at any stage of the proceedings and could lodge an objection if the application was rejected. It also observed that the question of detainees' continued detention was automatically reviewed at regular intervals of no more than thirty days. Accordingly, it held that it could tolerate longer periods of review by the Constitutional Court. However, in the case of *Mehmet Hasan Altan*, cited above, the period before the Constitutional Court to be taken into consideration was fourteen months and three days; in the case of *Şahin Alpay*, cited above, it was sixteen months and three days; and in the case of *Akgün*, cited above, it was twelve months and sixteen days. Bearing in mind the complexity of the applications and the Constitutional Court's caseload following the declaration of a state of emergency, the Court considered that this was an exceptional situation. Consequently, although periods of twelve months and sixteen days, fourteen months and three days and sixteen months and three days before the Constitutional Court could not be described as "speedy" in an ordinary context, in the specific circumstances of those cases the Court held that there had been no violation of Article 5 § 4 of the Convention.

198. In the present case, the Court notes that the periods to be taken into consideration are sixteen months in the case of the applicant Akın Atalay, fourteen months and eleven days in the case of the applicant Mehmet Murat Sabuncu, eight months and twenty-nine days in the case of the applicant Ahmet Kadri Gürsel, and seven months and two days in the case of the remaining applicants, and that these periods all fell within the period of the state of emergency, which was not lifted until 18 July 2018. It considers that the fact that the Constitutional Court did not deliver its judgment dismissing the applicants' applications until 2 May 2019, some two years and four months later, is not relevant in calculating the period of time to be taken into consideration from the standpoint of Article 5 § 4 of the Convention, since all the applicants had been released by that date.

199. The Court therefore considers that its findings in the cases of *Akgün, Mehmet Hasan Altan* and *Şahin Alpay*, all cited above, are also applicable in the context of the present application, although the situation of Akın Atalay appears to be borderline in terms of possible parallels with the cases cited above. The Court emphasises in that connection that the applicants' applications to the Constitutional Court were complex, as this was one of the first cases raising complicated issues concerning the pre-trial detention of journalists on account of their newspaper's editorial stance, and because the applicants had pleaded their case extensively before the Constitutional Court, arguing not only that their detention had not been based on any valid grounds, but also that the accusations against them were unconstitutional. Moreover, the Court considers that account must also be taken of the exceptional caseload of the Constitutional Court during the state of emergency in force from July 2016 to July 2018, and of the measures taken by the national authorities to tackle the problem of that court's backlog (see *Mehmet Hasan Altan*, cited above, § 165; *Şahin Alpay*, cited above, § 137; and *Akgün*, cited above, § 41). In that connection the Court stresses the distinction to be made between the present case and the case of *Kavala v. Turkey* in which the applicant had remained in pre-trial detention for the eleven months elapsing between the lifting of the state of emergency on 18 July 2018 and the delivery of the Constitutional Court's judgment on 28 June 2019 (see *Kavala v. Turkey*, no. 28749/18, § 195, 10 December 2019).

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

V. ALLEGED VIOLATION OFARTICLE 10 OF THE CONVENTION

201. The applicants (except for Turhan Günay and Ahmet Kadri Gürsel) alleged mainly a breach of their right to freedom of expression on account of their initial and continued pre-trial detention. In particular, they complained of the fact that the editorial stance of a newspaper criticising certain government policies had been considered as evidence in support of charges of assisting terrorist organisations or disseminating propaganda in favour of those organisations. They relied in that connection on Article 10 of the Convention, which provides:

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

202. The Government contested the applicants' argument.

A. The parties' submissions

1. The Government

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

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

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

206. As to the necessity of the interference in a democratic society, the Government submitted that the applicants had been detained and tried not for their journalistic activities but in order to answer charges of knowingly assisting organisations deemed to be criminal in nature, mainly the PKK and FETÖ/PDY. The applicants had been suspected of assisting the terrorist organisations FETÖ and the PKK by attempting to undermine public

support for the administrative and criminal proceedings instituted against the suspected members of those organisations and to exert pressure on the members of the security forces and on judges to ensure that those proceedings did not result in a process of lustration concerning the perpetrators or in the latter's conviction.

2. The applicants

207. The applicants pointed out that they had been detained for lengthy periods of time. Their placement in detention for allegedly assisting terrorist criminal organisations, on the basis of the activities of *Cumhuriyet*'s journalists reflecting the newspaper's editorial stance, constituted in itself a breach of their freedom of expression. That deprivation of liberty had prevented them from carrying on their occupation as journalists and had resulted, in their case and in the case of other journalists, in self-censorship in the exercise of their professional activity, particularly when it came to expressing their opinions in public debate concerning the conduct of the political or judicial authorities, including with regard to the proceedings taken against persons suspected of belonging to organisations deemed to be criminal.

208. Furthermore, the applicants submitted that the provisions of the CC on the basis of which they had been charged were not clear and foreseeable, in so far as there was confusion, in their view, between the individual criminal responsibility of the author of a newspaper article and the responsibility of the proprietor or editor-in-chief of the newspaper. That distinction should have been clear since a Constitutional Court judgment of 18 June 2006 on the subject, which had rejected the argument that the proprietor or editor-in-chief of a newspaper could be held responsible where the author of the article had been identified. They alleged that they had been prosecuted for articles whose authors had indeed been known, on the basis of a finding of criminal responsibility not provided for by the CC.

209. The applicants further submitted that the judicial authorities did not accuse them of having in any way actively contributed to the violent actions allegedly planned and carried out by the illegal organisations in question. Moreover, it was not necessary in a democratic society to protect the judicial authorities against criticisms made in good faith or to imprison journalists who voiced such criticism in monitoring and commenting upon the measures taken against persons suspected of being members of those organisations.

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

B. The third-party interveners

1. The Commissioner for Human Rights

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

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

2. The Special Rapporteur

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

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

3. The intervening non-governmental organisations

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

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

C. The Court's assessment

1. Admissibility

216. The Court considers that the Government's objections set out in paragraph 186 above, and contested by the applicants, raise issues that are closely linked to the examination of whether there has been an interference with the applicants' rights and freedoms under Article 10 of the Convention. It therefore decides to join them to the merits.

217. The Court further notes that these complaints, with the exception of those submitted under this provision by the applicants Turhan Günay and Ahmet Kadri Gürsel, are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

(a) Fundamental principles

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

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

220. Although the press must not overstep certain bounds, in particular in respect of the prevention of disorder and the protection of the reputation of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of

public interest, including those relating to the administration of justice (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports of Judgments and Decisions* 1997-I; The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 65, Series A no. 30; and Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216). Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204). Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick*, cited above, § 38; *Thoma v. Luxembourg*, no. 38432/97, §§ 45-46, ECHR 2001-III; and *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V).

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

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

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

(b) Whether there was interference

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

224. The Court observes in the present case that criminal proceedings were brought against the applicants for acts characterised as assisting terrorist organisations, on the basis of facts which consisted in the editorial stance adopted by the daily newspaper for which they worked in its presentation and assessment of current political developments. This characterisation of the facts also featured in the bill of indictment filed when the applicants were placed in pre-trial detention, in which the prosecuting authorities accused them of aiding and assisting a terrorist organisation, an offence carrying a heavy penalty under the Criminal Code.

225. The Court also notes that the applicants were kept in pre-trial detention for periods ranging from eight to seventeen months in the context of these criminal proceedings. It observes that the judicial authorities which ordered the applicants' initial and continued detention considered that there was serious and credible evidence that they were guilty of terrorism-related acts.

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

§ 96, and *Şık*, cited above, § 85). On the basis of this finding, the Court dismisses the Government's objection as regards the lack of victim status of the applicants other than Turhan Günay and Ahmet Kadri Yüksel.

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

(c) Whether the interference was justified

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

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

230. In the present case the applicants' arrest and detention amounted to interference with their rights under Article 10 of the Convention (see paragraph 225 above). The Court has already found that the applicants' detention was not based on reasonable suspicion that they had committed an offence for the purposes of Article 5 § 1 (c) of the Convention, and that there has therefore been a violation of their right to liberty and security under Article 5 § 1 (see paragraph 184 above). It also notes that according to Article 100 of the Turkish Code of Criminal Procedure, a person may be placed in pre-trial detention only where there is factual evidence giving rise to strong suspicion that he or she has committed an offence, and considers in this connection that the absence of reasonable suspicion should, *a fortiori*, have implied an absence of strong suspicion when the national authorities were called upon to assess the lawfulness of the applicants' detention. The Court reiterates in this regard that sub-paragraphs (a) to (f) of

Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and that no deprivation of liberty will be lawful unless it falls within one of those grounds (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 88, 15 December 2016).

The Court further observes that the requirements of lawfulness under Articles 5 and 10 of the Convention are aimed in both cases at protecting the individual from arbitrariness (see paragraphs 143, 145 and 149 above as regards Article 5, and paragraph 228 above as regards Article 10). It follows that a detention measure that is not lawful, as long as it constitutes interference with one of the freedoms guaranteed by the Convention, cannot be regarded in principle as a restriction of that freedom prescribed by national law.

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

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

VI. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

232. Lastly, the applicants (except for Turhan Günay and Ahmet Kadri Gürsel) alleged that their detention had been designed to punish them for their criticisms of the government. They contended that the purpose of their initial and continued detention had been to subject them to judicial harassment on account of their journalistic activities. They relied in that regard on Article 18 of the Convention taken together with Articles 5 and 10.

Article 18 of the Convention provides:

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

A. Admissibility

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

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

234. The applicants contested that argument.

235. The Court observes that it has found, in respect of the applicants other than Turhan Günay and Ahmet Kadri Gürsel, a violation of Article 5 § 1 of the Convention on account of the applicants' initial and continued detention in the absence of reasonable suspicion that they had committed the offences of which they were accused, and also, on the basis of the same facts, a violation of Article 10 on account of the unjustified interference with the applicants' freedom of expression. Taking the view that the complaint under Article 18 is closely linked to the complaints under those provisions, that it is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds, the Court declares it admissible.

B. Merits

1. The parties' submissions

(a) The applicants

236. In the applicants' submission, a number of features of the case demonstrated that the undeclared aim of their placement in pre-trial detention for serious offences had in fact been to punish and harass them for the critical commentaries published by the newspaper *Cumhuriyet* concerning the actions of the government and its sympathisers. They submitted that it was very common practice in Turkey to use pre-trial detention against journalists who criticised government policies. The poor situation with regard to press freedom in the country had been commented on in reports and statements by international observers including the member States and various bodies of the Council of Europe and the European Union. The Commissioner for Human Rights had also criticised the applicants' placement in detention in his memorandum of 15 February 2017.

237. The applicants alleged in particular that one of the undeclared aims of their pre-trial detention had been to punish the newspaper *Cumhuriyet* for having revealed facts which the government had sought to conceal. The facts referred to in the detention orders as the basis for the suspicions had provoked an immediate and vehement response from the members of the government. For instance, when *Cumhuriyet* had brought to light the affair concerning the lorries belonging to the intelligence services alleged to have transported weapons to armed Islamist groups in Syria, the President of the Republic had accused the newspaper of espionage and had stated: "Whoever wrote that article will pay dearly, I will not let the matter rest there". The applicants added that *Cumhuriyet's* former publication director, C.D., and

the head of the newspaper's Ankara office, E.G., had been arrested for espionage but had been released after a Constitutional Court judgment had found their detention to be unlawful in the absence of strong suspicions of guilt. They alleged that, following that judgment, the President of the Republic had stated as follows: "I will not comment on the Constitutional Court's judgment, but I am not obliged to accept it. I will not abide by this judgment, I will not comply with it".

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

239. The applicants pointed out that three of them (Bülent Utku, Mustafa Kemal Güngör and Akın Atalay) had been lawyers of the newspaper *Cumhuriyet* whose task it was to defend the newspaper in criminal and civil proceedings brought on account of the articles which it published. The applicants contended that their pre-trial detention had pursued the undeclared purpose of making it difficult for the newspaper to defend its interests in judicial proceedings.

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

(b) The Government

241. The Government contested the applicants' 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 applicants to demonstrate convincingly that the authorities' real aim had differed from the one proclaimed. In that regard they considered that a mere suspicion was not sufficient to prove that Article 18 had been breached.

242. The Government argued that the criminal investigation in question had been conducted by independent judicial authorities. The applicants 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 applicants' assertion,

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

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

2. The third-party interveners

(a) The Commissioner for Human Rights

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

(b) The intervening non-governmental organisations

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

246. According to these organisations, where restrictions on applicants' freedom of expression formed part of a wider campaign to silence and

punish anyone engaged in critical journalism, under problematic criminal laws that were increasingly restrictive of fundamental rights and freedoms, the Court should find a violation of Article 18 of the Convention. An analysis of the comments made by high-ranking State officials and pro-government media could assist in identifying the actual motivation of the State in prosecuting journalists.

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

3. The Court's assessment

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

249. The Court observes at the outset that the applicants' main complaint was that they had been specifically targeted because of their newspaper's editorial stance, which was considered to oppose the government. It notes that they also maintained that their initial and continued pre-trial detention had pursued an undeclared aim, namely to silence the newspaper's criticism of the government and its sympathisers.

250. The Court notes that the measures in question, and those taken in the context of the criminal proceedings brought against other opposition journalists in Turkey, 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, §§ 310-17), and on its own assessment of the specific relevant facts (see *Khodorkovskiy v. Russia*, no. 5829/04, § 259, 31 May 2011; *Ilgar Mammadov*, cited above, § 140; and *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 155, 17 March 2016).

251. In the present case the Court has concluded above that the charges against the applicants were not based on a "reasonable suspicion" within the meaning of Article 5 § 1 (c) of the Convention. It has found in particular that the measures taken against the applicants were not justified by reasonable suspicions based on an objective assessment of the alleged acts; instead, they were essentially based on written material which could not reasonably be considered as behaviour criminalised under domestic law but was related to the exercise of Convention rights, and in particular the right to freedom of expression.

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

253. The Court observes that the stated aim of the measures imposed on the applicants was to carry out investigations into the campaign leading to the attempted coup in 2016 and the campaigns of violence conducted by members of separatist or leftist movements, and to establish whether the applicants had indeed committed the offences of which they were accused. Given the serious disruption and the considerable loss of life resulting from these 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.

254. The Court observes that there appears to be nothing untoward in the chronological sequence of the acts of which the applicants were accused and the opening of the investigation concerning them (see, conversely, *Kavala*, cited above, §§ 225-28). The acts of which the applicants were accused in the investigation which was opened at the end of 2016 had occurred, for the most part, prior to or after the attempted coup of 15 July 2016. Those acts, most of which had occurred during 2015 and 2016, allegedly formed part of the preparations for the planned coup or of opposition to the measures taken against the alleged instigators of the coup attempt. The items reporting on the viewpoints of members of separatist or leftist organisations were published in 2015 and are thus no exception to this rule. It cannot therefore be said that an excessive length of time elapsed between the impugned acts and the opening of the criminal investigation in the course of which the applicants were placed in pre-trial detention.

255. The Court is prepared to accept that statements made in public by members of the government or the President concerning criminal proceedings against applicants could, in some circumstances, constitute evidence of an ulterior purpose behind a judicial decision (see *Kavala*, cited above, § 229; *Merabishvili*, cited above, § 324; and *Tchankotadze v. Georgia*, no. 15256/05, § 114, 21 June 2016). However, the Court notes in the present case that the statements by the President of the Republic

referred to above related to a specific affair concerning the destination of lorries belonging to the intelligence services and used to transport weapons, and were not directed against the applicants themselves but rather against the newspaper *Cumhuriyet* as a whole under the editorial direction of C.D., its publication director at the time. Moreover, it should be noted that the Constitutional Court ruled in favour of C.D. and another of *Cumhuriyet*'s managers at the time, finding that the suspicions against them were unconstitutional. It is true that the statement by the President of the Republic to the effect that he would not abide by the Constitutional Court's ruling, was not bound by it and would not comply with it, was clearly in contradiction with the basic tenets of the rule of law. However, such an expression of dissatisfaction does not in itself amount to evidence that the applicants' detention was ultimately motivated by reasons incompatible with the Convention.

256. As to the fact that a prosecutor who was himself charged with membership of the organisation FETÖ participated in the judicial investigation concerning the applicants, including the drafting of the bill of indictment, the Court considers that this fact in itself does not constitute decisive evidence of a violation of Article 18 of the Convention, as the applicants' initial and continued detention was based on orders made by a magistrate or by one or more members of the Assize Court, rather than on a decision of the public prosecutor's office. Furthermore, when this situation came to light the prosecutor in question was removed from the investigation before the bill of indictment was filed.

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

The Court further observes that the Constitutional Court subjected the applicants' complaints under Articles 5 and 10 of the Convention to thorough scrutiny and delivered its judgments in the case following in-depth discussion, as demonstrated by the large number of dissenting opinions.

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

In the light of the foregoing, the Court holds that it has not been established beyond reasonable doubt that the applicants' pre-trial detention was ordered for a purpose not prescribed by the Convention within the

meaning of Article 18. Accordingly, there has been no violation of Article 18 of the Convention in the present case.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

257. Article 41 of the Convention provides:

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

A. Damage

258. The applicants claimed 20,000 euros (EUR) each for each month spent in pre-trial detention, in respect of the non-pecuniary damage they had allegedly sustained.

259. The Government submitted that the amounts claimed by the applicants were excessive in the light of the Court's case-law on this issue, and that the claims should be dismissed.

260. With regard to non-pecuniary damage, the Court considers that the violations of the Convention have indisputably caused the applicants substantial damage. Accordingly, ruling on an equitable basis, it awards EUR 16,000 to each applicant in respect of non-pecuniary damage.

B. Costs and expenses

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

C. Default interest

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

FOR THESE REASONS, THE COURT,

1. *Declares,* unanimously, admissible the complaints submitted by Turhan Günay and Ahmet Kadri Gürsel concerning the time taken to examine their applications to the Constitutional Court challenging the lawfulness of their pre-trial detention (Article 5 § 4 of the Convention), and declares the remainder of their complaints inadmissible;

2. *Declares,* unanimously, the application admissible as regards the remaining applicants, joining the Government's objections to the merits and dismissing them;

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

4. *Holds,* unanimously, that it is unnecessary to examine the complaint under Article 5 § 3 of the Convention;

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

6. *Holds,* unanimously, that there has been a violation of Article 10 of the Convention;

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

8. *Holds,* unanimously,
   (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 16,000 (sixteen thousand euros) to each of the applicants in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses*, by six votes to one, the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 10 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Deputy Registrar

Jon Fridrik Kjølbro
President

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

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

J.F.K.
H.B.

PARTLY CONCURRING OPINION OF JUDGE YÜKSEL

1. I voted with the majority in favour of finding a violation of Articles 5 § 1 and 10 of the Convention in the present case. While I agree with the majority's position on the outcome, I respectfully dissociate myself from certain parts of the reasoning and approach adopted in the judgment, for the reasons set out below.

2. As regards the applicants' complaints under Article 5 § 1 of the Convention the main question, it seems to me, is whether the acts in issue could be attributed to the applicants, who are journalists of the national daily newspaper or directors of the related foundation. Accordingly, in the reasoning leading to the finding of a violation of that provision, it would have been sufficient, in my view, for the Court to confine its examination to the question of the attributability of the acts to the applicants, assessed in the light of the criteria relating to the reasonableness of the suspicion for the purposes of Article 5 § 1 (c) of the Convention. Thus, I am not sure about the approach consisting in examining a number of the articles, messages and interview in issue in the light of the criteria laid down in Article 10 of the Convention. In particular, I have serious reservations about the necessity of the reasoning set forth in paragraph 173 of the judgment. In addition, I respectfully disagree with the content and the conclusion of that paragraph. At this stage, I would also prefer to confine myself to pointing out that the relevant materials examined in that paragraph are the subject of another application pending before the Court.

3. As regards Article 10 of the Convention, the analysis of whether an interference was "prescribed by law" within the meaning of Article 10 requires, in my view, separate examination and should not result in the finding of a kind of automatic violation of that Article merely on the basis of the violation of Article 5, in cases where the Court finds a breach of Article 5 § 1. In this context, and referring to my concurring opinion in the case of *Ragıp Zarakolu v. Turkey* (no. 15064/12, 15 September 2020), I believe that the interference observed in the present case was prescribed by law and satisfied the requirement of lawfulness. The interference in the present case fell to be examined with reference to the criterion of necessity, notwithstanding the finding of a violation of Article 5 (see, in this connection, *Mehmet Hasan Altan v. Turkey*, no. 13237/17, §§ 202-14, 20 March 2018; *Steel and Others v. the United Kingdom*, 23 September 1998, § 110, Reports of Judgments and Decisions 1998-VII; and *Kandzhov v. Bulgaria*, no. 68294/01, § 73, 6 November 2008). In this regard, I agree with the finding of a violation of Article 10 on the grounds that the applicants' detention could not be regarded as an interference that was

proportionate and "necessary in a democratic society" within the meaning of Article 10 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE KŪRIS

I

1. I voted against point 7 of the operative part of the judgment and, consequently, against point 9.

2. There has clearly been a violation of Article 18 of the Convention. The applicants' placement in police custody, their continued pre-trial detention and the criminal charges brought against them were of a political nature, only clumsily camouflaged in legal robes, and their conviction (even if quashed) was likewise tainted with political interference. The tenets of the rule of law were disregarded. All this resulted from the authorities' policy. For how else could one assess such measures taken against the journalists, editors or managers of a newspaper critical of the authorities, primarily on the basis that, in the authorities' reading, the newspaper's editorial stance had changed (if change it was) and it had published something which, in the authorities' view, was "glaringly at odds with the world view of its readers" (see paragraph 42 of the judgment)? Most people would call this political persecution of the media. The authorities maintained that the facts were indicative of the applicants' involvement (even if only indirect) in the abortive 2016 military coup.

3. The courts are masters of the examination of the cases that come before them. They can, if they so decide, examine each fact of the case separately (which in itself is a sound method) and find that, although all or some of those facts disclose that the authorities acted in violation of the applicable law, that in itself is not sufficient for the finding that behind the violations there was an improper ulterior purpose, or "hidden agenda". These euphemisms, as a rule, refer to political motives. Even when violations of more than one legal provision are found with regard not to one but to a larger number of litigants and, moreover, there is a correlation between them, the courts sometimes conclude that this is nevertheless not indicative of the alleged improper ulterior purpose, notwithstanding that an objective observer (or virtually everyone except the court itself) would be persuaded by the abundant proof to the contrary and would therefore regard the court's finding as erroneous. When the courts' findings so markedly diverge from common knowledge, which more often than not means that they are divorced from reality, and especially when the court in question is the highest court, whose word on the matter is final, very little can be done to alleviate the feeling of the aggrieved party and that of society at large that *justice has not been served*. That feeling is even more persistent where the outcome exonerating the authorities is repeated from case to case, that is to say, the alleged ulterior purpose is not discerned by that court in a series of

cases, notwithstanding the fact that the juxtaposition of their facts would allow for the conclusion that the violations of the various victims' rights comprise a system, the constituent parts of which are united by precisely that purpose, so obvious to many.

4. Having written that "very little can be done", I must immediately qualify this statement. Something *could* be done. That "something" is in the hands of the relevant court. It consists of the most thorough and explicit analysis and balancing of all the facts and arguments both for and against the finding of a "hidden agenda" (thoroughness and explicitness being properties of equal importance), such as to demonstrate that each and every argument of the parties and the third-party interveners alleging that there were indeed ulterior motives behind the violation(s), as well as the common knowledge to that effect, have been assessed from all relevant angles and that none of them has been suppressed. Only in this way might a critical outsider be inclined to trust that, although the court, in his or her opinion, erred (for who does not?), that fallacy was sincere and did not result from the court's indulgence towards the relevant political regime or, worse, from its own "hidden agenda" – even if there was none. If that analysis and balancing require a few extra paragraphs or pages in the judgment, so be it. That would not be too high a price for demonstrating that justice was sought, even though the result turned out to be unsatisfactory to many.

5. In the present case the Chamber found violations of Article 5 § 1 and Article 10 with regard to several of the applicants. The correlation between the violations is indubitable. However, no violation of Article 18 was established. For the Chamber, it was not proven that the actions tainted by the said violations, taken either separately or in combination, resulted from the wilful – that is to say, political – persecution by the authorities of their opponents. That has something to do with the way in which the allegations were examined.

II

6. The methodology underlying the finding of no violation of Article 18 in the present case was deeply entrenched for many years in the Court's practice. It was rooted in the general assumption that the public authorities in the member States act in good faith – an assumption on which the whole structure of the Convention rests (see *Khodorkovskiy v. Russia*, no. 5829/04, § 255, 31 May 2011). A violation of Article 18 would mean that the presumed good faith gave way to a "hidden agenda", and law to force. For decades the Court required that, for a violation of Article 18 to be found, it had to be furnished with "incontrovertible and direct proof" (see *Khodorkovskiy*, cited above, § 260, and *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, § 663, 20 September 2011). That proof could not be adduced by anyone other than the applicant: if an applicant alleged that

his or her rights and freedoms had been limited for an improper reason, he or she had to "*convincingly show*" (a mere suspicion would not do) that the real aim of the authorities was not the same as that proclaimed. In brackets it was added: "or as can be reasonably inferred from the context" (see *Khodorkovskiy*, cited above, § 255, emphasis added; see also § 256), thus conceding that there remained a possibility that some contextual evidence corroborating the applicants' allegations of an improper ulterior purpose could be "reasonably" accepted. But that possibility was as slim as could be and purely hypothetical, as demonstrated by the Court's practice of avoiding any contextual analysis in Article 18 cases. To wit, such an analysis was not undertaken either in *Khodorkovskiy* or in the subsequent cases, until a breakthrough was achieved in two cases against Azerbaijan (see paragraphs 15-17 below). The standard of proof effectively applied by the Court in Article 18 cases was that the contextual evidence was *in fact* not to be taken into consideration, no matter how strongly it corroborated the allegations of a "hidden agenda". It became known as the "very exacting standard of proof" (see *Tchankotadze v. Georgia*, no. 15256/05, § 113, 21 June 2016, with further references).

7. In some cases the applicants provided the Court with copious contextual evidence in support of their claims that there was indeed an ulterior purpose behind the violations of their rights, and maintained that that evidence rendered their claims arguable, such that the burden of proof had to shift onto the Government. The Court was not moved by these considerations. It steadily steered a course whereby, even where the "appearances" spoke in favour of the applicants' claims of improper motives, the *onus* still rested with them (see, for example, *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 899-903, 25 July 2013). In some cases the Court even conceded the link between the applicants' predicaments and politics, for instance that the violations committed by the authorities against the victims were beneficial to some political players, but those "appearances", no matter how plentiful or consistent (in *Khodorkovskiy* they were present in abundance in the "resolutions of political institutions, NGOs [non-governmental organisations], statements of various public figures, etc." and "the findings of several European courts"; §§ 259 and 260), were not sufficient for the hand of politics to be discerned behind those violations, as "the political process and adjudicative process [were] fundamentally different" (ibid., § 258-59). For convenience, the latter adage can be labelled the "*Khodorkovskiy* formula". Whatever the "appearances", the Court was resolute that it ("the judge") had to base its decision on "evidence in the legal sense" (ibid.), which "appearances" were not. The proof adduced by the applicants was accepted by the Court as "evidence in the legal sense" only if it constituted "incontrovertible and direct proof". The Court's "very exacting standard of proof" thus amounted to the requirement that the

applicants present it with palpable, physical, preferably documented evidence of a "hidden agenda". That was possible only when (i) the authorities had themselves recognised or otherwise revealed that they knew (or should have known) that their actions were guided by a purpose which was not among those permitted under the Convention; and (ii) the proof of that recognition had somehow fallen into the hands of the applicants. Normally, perpetrators try not to leave traces, let alone make the footprints of their unlawful motives accessible to their victims. The few exceptions where the States did not succeed in hiding the impropriety and unlawfulness of their agenda were *Gusinskiy v. Russia* (no. 70276/01, ECHR 2004-IV); *Cebotari v. Moldova* (no. 35615/06, 13 November 2007); *Lutsenko v. Ukraine* (no. 6492/11, 3 July 2012); and *Tymoshenko v. Ukraine* (no. 49872/11, 30 April 2013). And even if there were traces of ulterior motives behind the persecution of the victims, they were neutralised – in the sense that a violation of Article 18 was not found – by a "healthy core" present in the overall set of purposes of the applicants' persecution, which allowed for, say, the raising of serious criminal accusations against them (see, for example, *Khodorkovskiy and Lebedev*, cited above, § 908).

8. As noted by several judges in their separate opinions (as well as by some academics), the specification that, in order to be accepted as "evidence in the legal sense", the proof adduced by the applicants themselves and no one else had to be "incontrovertible and direct", posed an insurmountable difficulty to most applicants (some of whom were detained at the time when their applications were lodged with the Court or even when the applications were examined). No wonder that for a long time they, one after another (with a few exceptions that could be counted on the fingers of one hand), had their Article 18 complaints rejected by the Court, regardless of what the whole world knew about the political causes of their persecution. The Court's overly restrictive approach to "evidence in the legal sense" and the findings of no violation of Article 18 based on it could not fail to contribute to a heightened feeling of impunity within the regimes concerned and a growing apprehension that the Convention was in retreat when confronted with political "bigshots" who persecuted their opponents with all the force of the State machinery. That, in its turn, could of course not leave the Court's image unimpacted.

9. In addition, the Court developed the practice of bluntly refusing even to examine Article 18 complaints, with the only simulacrum of reasoning being that, in its opinion, their examination was "not necessary", whatever that was supposed to mean (see, for instance, *Navalnyy and Yashin v. Russia*, no. 76204/11, 4 December 2014, and *Frumkin v. Russia*, no. 74568/12, 5 January 2016). At times this evasiveness took on unaccountable forms, as in *Mudayevy v. Russia* (no. 33105/05, 8 April 2010), where the Court, having found violations of Articles 2, 3, 5 and 13 and having stated that it had "already found ... that the applicants' relatives

were deprived of their liberty without any of the safeguards contained in Article 5, and not 'for the purpose of bringing [a person] before the competent legal authority on reasonable suspicion of having committed an offence' as stipulated in Article 5 § 1 (c)", decided that "since that issue [had] already been addressed by the Court, there [was] no need to examine these facts again under Article 18 in conjunction with Article 5" (§ 128). In *Kasparov and Others v. Russia (no. 2)* (no. 51988/07, 13 December 2016), where the Court stated that "the applicants' arrest and administrative detention had the effect of *preventing and discouraging them and others from participating in protest rallies and actively engaging in opposition politics*" (in violation of Articles 5 § 1, 6 § 1 and 11), it nonetheless held that "[i]n view of this" (*this*?!), the examination of the alleged violation of Article 18 was "not necessary" (§ 55; emphasis added). Similarly, in *Nemtsov v. Russia* (no. 1774/11, 31 July 2014) the Court found it established that "the applicant had been arrested, detained and convicted of an administrative offence *arbitrarily* and *unlawfully*" and that "this had had an effect of *preventing or discouraging him and others from participating in protest rallies and engaging actively in opposition politics*" (in violation of Articles 3, 5 § 1, 6 § 1, 11 and 13), yet it held that Mr Nemtsov's Article 18 complaint "*raised no separate issue* and it [was] not necessary to examine whether ... there [had] been a violation of that provision" (§§ 129 and 130; emphasis added). A similar approach was taken in the inter-State case of *Georgia v. Russia (I)* ([GC] no. 13255/07, ECHR 2014 (extracts)), in which the Court found violations of Articles 3, 5 § 1, 5 § 4, 13, 38, and Article 4 of Protocol No. 4. The Court held that "in the autumn of 2006 *a coordinated policy of arresting, detaining and expelling Georgian nationals was put in place in the Russian Federation* which amounted to an administrative practice for the purposes of Convention case-law" (point 2 of the operative part; emphasis added), but still considered it not necessary to examine "the same issues under Article 18", because it "[had] already observed the existence of [that] administrative practice in breach of [the provisions of the Convention]" (§ 224). As we see, where the violations already found directly and insistently pointed to *only one possible conclusion*, that there was a "hidden agenda" behind them, the Court *stopped at the point* where the only thing which was left to do (and of which it was seised) was to state that there had been a violation of Article 18.

10. As if that were not enough, the scope of applicability of Article 18 was further narrowed by the finding that that Article was not applicable in conjunction with Articles 6 and 7, which, in the most unexpected view of one of the Chambers, contained no limitations on rights (see *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, 23 February 2016, followed by *Navalnyye v. Russia*, no. 101/15, 17 October 2017; compare and contrast the parallel case of *Ilgar Mammadov v. Azerbaijan (no. 2)* (no. 919/15, 16 November 2017), in which a different Chamber did not

accept that stance, but left the question "open"). That new limitation on the applicability of Article 18 was in direct contradiction to the Court's well-established, decades-old case-law, including the seminal case of *Golder v. the United Kingdom* ([Plenary], no. 4451/70, 21 February 1975), in which Article 6 was interpreted as containing implicit limitations, or *Kasparov and Others (no. 2)* and *Khodorkovskiy and Lebedev (both cited above)*, in which the Court had no qualms about declaring the applicants' complaints under Article 18 read in conjunction with Articles 6 or 7 admissible (even though it then refused to examine them or found no breach).

11. The result of this resourceful "judicial self-restraint" was that the list of applicants the political nature of whose grievances the Court found undeserving of examination or unproven (no matter what was commonly known about the worrying developments in the State concerned) included the names of prominent pro-democracy and pro-human rights activists (some of them imprisoned). Had the ratiocinations that their predicaments were not related to politics not been judicial findings but, say, media reports or analysts' commentaries, they would have raised some eyebrows among those readers who were allergic to political propaganda or fake news.

12. But let us take a structural look at the "*Khodorkovskiy* formula". What does it mean, that the "political process and adjudicative process are fundamentally different"?

If the formula in question is a *normative* statement, then hardly anyone would reasonably argue against it. The nature of the two processes indeed *should be different*. So they must not be mingled – for the sake of liberty, the rule of law, and human rights.

If, however, that statement is a *descriptive* one, then, before dismissing the arguments as to the presence of a "hidden agenda" behind the violation(s), they must be subjected to the most thorough consideration, for the statement in question may not have much in common with reality. It happens in the real world – not in some "library law" – that the political and adjudicative processes coincide, go together hand in hand and *form a unit*. The very possibility of a breach of Article 18 signifies that the legal process *can be* – and, alas, in an increasing number of polities often *is* – subordinated to and subjugated by politics and made its servant. Otherwise such words as "dictatorship", "autocracy" or "political persecution" would belong not to the vocabulary of political science, but to that of dystopian fiction. The whole idea of a "hidden agenda" rests on the unattractive possibility for the legal process to be an extension or even part of its political counterpart. When the Court is seised of allegations of a "hidden agenda" behind the violations of the applicants' rights, its task and mission is to most thoroughly examine and rule on *whether that possibility has not been made a reality*. To go even further: if one takes seriously the imperative of "effective political democracy", enshrined in the Preamble to

the Convention and therefore underlying its whole fabric, that mission is constitutive of the Court's very *raison d'être*.

The "*Khodorkovskiy* formula" and its derivatives – such as "evidence in the legal sense", "incontrovertible and direct proof" and "very exacting standard of proof" – therefore must be used with particular caution. The formula in question surely *triggers the need* to examine Article 18 complaints, because the judicial assessment of the adjudicative process encompasses the comparison of what *is* with what *ought to be* (the adjudicative process *ought to be* free of political interference, but *is* it?), but it *cannot serve as an argument for the rejection* of these complaints, because what *ought to be* is not (necessarily) what *is*. Notwithstanding that, in the Court's case-law the "*Khodorkovskiy* formula" (and its derivatives) performed both functions.

13. The scope of applicability of Article 18, not broad from the very outset, gradually shrank to such an extent that that Article has been labelled the "Cinderella of the Convention"[1], referring of course to the beginning, not the happy end of that fairy tale. The answer to the eternal question "*qui bono?*" seems obvious: to that party for the benefit of which *in dubio pro reo* has been applied, and that party, as a rule, is the *stronger*, non-vulnerable party. But other questions remained: "why?", "how come?" and "for how long?"

III

14. At some point it became too obvious that enough was enough. The applicant-unfriendly "very exacting standard of proof" in its extremely restrictive interpretation had to be abandoned. The Court had to do something about it.

15. It did. The breakthrough, although overdue, was ventured in *Ilgar Mammadov v. Azerbaijan* (no. 15172/13, 22 May 2014) and *Rasul Jafarov v. Azerbaijan* (no. 69981/14, 17 March 2016). In these two groundbreaking cases the Court took a much more realistic approach to the proof required for the validation of Article 18 complaints, namely that the notion of "evidence in the legal sense" was not limited to "incontrovertible and direct proof" adduced by the applicants.

16. In *Ilgar Mammadov* (cited above) the Court referred to its practice of applying the "very exacting standard of proof" (§ 138), as well as to the "*Khodorkovskiy* formula" (§ 140), but then immediately "[took] note of the various opinions about the applicant's case which suggest[ed] that he was subjected to politically motivated prosecution" and of "the circumstances of the present case [which] suggest[ed] that the applicant's arrest and detention

1. Among recent publications see, for instance, C. Heri, "Loyalty, Subsidiarity and Article 18 ECHR: How the ECtHR Deals with *Mala Fide* Limitations of Rights", in *European Convention of Human Rights Law Review* 1 (2020).

had distinguishable features which allow[ed] the Court to analyse the situation independently of various opinions voiced in connection with this case" (ibid.). The Court stated that its prior conclusion that "the charges against the applicant were not based on a 'reasonable suspicion' within the meaning of Article 5 § 1 (c)" was "in itself ... not sufficient to assume that Article 18 was breached" and that "it remain[ed] to be seen whether there [was] proof that the authorities' actions were actually driven by improper reasons" (§ 141). It then proceeded to analyse whether such proof followed from "the combination of the relevant case-specific facts", and in particular from "all the material circumstances which it ha[d] had regard to in connection with its assessment of the complaint under Article 5 § 1 (c)", and considered it "established to a sufficient degree" that it did. In the Court's view, these circumstances indicated that "the actual purpose of the impugned measures was to silence or punish the applicant for criticising the Government and attempting to disseminate what he believed was the true information that the Government were trying to hide". The measures had thus been 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)". On that basis the Court found a violation of Article 18 read in conjunction with Article 5 (§§ 141-44). Thus, the notion of "evidence in the legal sense", formally left intact, was impregnated with *new, broader content*: it now included more than "incontrovertible and direct proof", to which its previous overly restrictive interpretation had been confined. It was demonstrated that the Court was *itself able* and *ready* to draw logical inferences from the combination of relevant facts, that is to say, *the contextual, or circumstantial, evidence*.

17. In *Rasul Jafarov* (cited above), the Court went one step further. In that case (as in *Ilgar Mammadov*, cited above) the Court referred to the "very exacting standard of proof" (§ 154) and to the "*Khodorkovskiy* formula" (§ 155), but then stated that "the applicant's arrest and prosecution, together with the cases of other human rights defenders and government critics, [had] been the subject of heavy international criticism" and (in identical wording to *Ilgar Mammadov*) that "the circumstances of the present case suggest[ed] that the applicant's arrest and detention had distinguishable features which allow[ed] the Court to analyse the situation independently of the various opinions voiced in connection with this case" (§ 155). It then proceeded to conduct its own analysis of the contextual evidence. As the Court's conclusion that "the charges against the applicant were not based on a 'reasonable suspicion' within the meaning of Article 5 § 1" was (again, using identical wording to *Ilgar Mammadov*) " in itself ... not sufficient to assume that Article 18 was breached", it held that, "depending on the circumstances of the case, improper reasons [could not] always be proven by pointing to a particularly inculpatory piece of evidence which clearly reveal[ed] an actual reason ... or a specific isolated incident",

but it could be "established to a sufficient degree that proof of improper reasons follow[ed] the combination of relevant case-specific facts", and that "the applicant's situation [could not] be viewed in isolation". The facts examined by the Court included "the general context of the increasingly harsh and restrictive legislative regulation of NGO activity and funding [which could not] be simply ignored", "the numerous statements by high-ranking officials and articles published in the pro-government media, where local NGOs and their leaders, including the applicant, were consistently accused of being a 'fifth column' for foreign interests, national traitors, foreign agents, and so on", and the fact that "[s]everal notable human rights activists who [had] cooperated with international organisations for the protection of human rights, ... [had been] similarly arrested and charged with serious criminal offences entailing heavy imprisonment sentences". Those facts were analysed in the context of the submissions of the third-party interveners, who (as in the present case) included the Council of Europe Commissioner for Human Rights. The latter testified that the case under examination "was an illustration of a serious and systemic human rights problem in Azerbaijan, which, in spite of numerous efforts by the Commissioner and other international stakeholders, to date remained unaddressed". The Court considered that the contextual facts "support[ed] the applicant's and the third parties' argument that his arrest and detention were part of a larger campaign to 'crack down on human rights defenders in Azerbaijan'", and that "[t]he totality of the above circumstances indicate[d] that the actual purpose of the impugned measures was to silence and punish the applicant for his activities in the area of human rights". On that basis it found a violation of Article 18 read in conjunction with Article 5 (§§ 156-63). Thus it was demonstrated not only that the Court was itself able and ready to draw logical inferences from the contextual evidence, but also that that evidence could include proof presented not by the applicants themselves, but *by other persons*, in particular the third-party interveners.

18. In short, in the two cases discussed above the Court's approach to what constituted "evidence in the legal sense" was substantially modified in comparison with the *Khodorkovskiy* line of judicial reasoning, in *three important respects*: (i) it accepted that the admissible evidence could be not only "direct", but also *contextual (circumstantial)*; (ii) the Court considered that it could *itself* undertake an independent analysis of that contextual evidence; and (iii) it was allowed that the proof that there was an ulterior purpose could be furnished not necessarily by the applicants, but also by *other persons*, including third-party interveners (who in such cases were often non-governmental organisations, but also officials of the Council of Europe or the United Nations), international observers, the media, and so forth.

19. The new approach to the Court's standard of proof in Article 18 cases was validated and reinforced in the Grand Chamber's landmark judgment in *Merabishvili v. Georgia* ([GC], no. 72508/13, 28 November 2017), in which the Grand Chamber reassessed and streamlined the Court's Article 18 case-law. *Merabishvili* promised a fairer approach to the grievances of the victims of political persecution and, so to say, redeemed the Court of its protracted irresolution – albeit *ex post facto* and partially, as it allowed for a finding of no violation of Article 18 if the alleged ulterior purpose, although present, did not constitute a "fundamental aspect" of the case (§ 291; *Merabishvili's* own rough edges or inconsistencies, whatever they might be – including those noted by the judges who wrote separate opinions in that case – do not undermine its overall significance, and in any case are not the subject of this opinion).

20. But not only that. The Grand Chamber made it explicit that in several of the Court's previous judgments in which the Court had been unwilling to give credence to the applicants' Article 18 complaints, the standard applied (settled as it had seemed at that time) was a flawed one. It specifically noted three judgments, all adopted in cases against Russia: *Khodorkovskiy*; *OAO Neftyanaya Kompaniya Yukos*; and *Khodorkovskiy and Lebedev (all cited above*; *however,* more judgments, not only against Russia, could be considered as candidates to join the list). *The Grand Chamber* thereby effectively *denounced* these judgments – that is, the parts of them examining the Article 18 complaint – to the extent that any court can allow itself to publicly discredit its own case-law (see *Merabishvili*, cited above, §§ 275, 276, 279 and 309), which was a fair and strong-minded undertaking.

More specifically, in contrast to the "very exacting standard of proof" which culminated in the three above-mentioned cases, the Grand Chamber made clear in *Merabishvili* that in establishing whether there was an ulterior purpose behind the violation found (and whether it was the predominant one), the Court "should adhere to its *usual approach to proof rather than special rules*" (ibid., §§ 309 and 310; emphasis added) and that "[t]here [was] ... no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18 ... or to apply a special standard of proof to such allegations" (ibid., § 316). It emphasised the need to pay due regard to "*circumstantial evidence* [which] mean[t] information about the primary facts, or contextual facts or sequences of events which [could] form the basis for inferences about the primary facts ... Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts [were] often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court" (ibid., § 317; emphasis added). This is not to say that the Grand Chamber decided that it could henceforth base its decisions on proof that was not "evidence in the legal sense". Not at all: it merely *aligned*

the Court's overly restrictive, hitherto distorted interpretation of the notion of *"legal sense"* with *common sense*.

For the "legal sense" must not only be "legal". *In the first place it must be "sense"*.

Merabishvili rehabilitated common sense in the Court's reasoning in Article 18 cases and heralded *a rapprochement of the Article 18 case-law with common knowledge*. It also *brought the Court's standard of proof in line with that applied by other "European courts"*, which in *Khodorkovskiy* the Court had irresponsibly and haughtily dismissed as inferior, or perhaps not "legal" enough (see paragraphs 21 and 22 below). Quite soon this approach was employed and further consolidated in *Navalnyy v. Russia* (nos. 29580/12 and 4 others, 15 November 2018), another Grand Chamber case, as well as in several Chamber cases against Azerbaijan.

IV

21. The present judgment abandoned *Merabishvili* (cited above), while at the same time retaining part of its facade. To be sure, some relevant paragraphs of that judgment are cited (see paragraph 250 of the judgment, where reference is made to §§ 310-17 of *Merabishvili*). This is an optical artifice. In the same paragraph 250 of the present judgment it is observed that the Court must "base its decision on 'evidence in the legal sense', in accordance with the criteria laid down by it in ... *Merabishvili* ... and on its own assessment of the specific facts". However, with regard to the Court's "own assessment of the specific facts", reference is made to three pre-*Merabishvili* cases (all cited above): not only to *Ilgar Mammadov* and *Rasul Jafarov*, in which that "own assessment" *was undertaken* and a violation of Article 18 was found, but also to *Khodorkovskiy*, in which this "own assessment" *was absent* and the "specific facts" *were not recognised* as "evidence in the legal sense", but, at best, only as "appearances" (resulting in the finding of no violation of Article 18). The paragraphs of *Ilgar Mammadov* and *Rasul Jafarov* cited in the present judgment refer to *Khodorkovskiy*, which these two judgments distinguished and distanced themselves from. *Merabishvili* upheld and reinforced that distinction and explicitly rejected *Khodorkovskiy's* equating of "evidence in the legal sense" with "direct and incontrovertible proof", rooted in the "*Khodorkovskiy* formula".

The references to *Khodorkovskiy* and *Merabishvili* provided in the present judgment are thus misleading. Contrary to what this judgment suggests, *Khodorkovskiy*, while ostensibly conceding the possibility of the "reasonable" admission of contextual evidence of a "hidden agenda", effectively did not allow for its admission and examination, in particular (and even more so) of evidence not adduced by the applicants (see paragraphs 6 and 7 above). If one judges not by mere words but by whether

they are ever made reality, *Khodorkovskiy* in fact did not allow such admission and examination, not one jot, because the "reasonable inference from the context" clause (see paragraph 6 above) was never applied, not even in circumstances where its application was the only way to lead the case to its logical end, and thus remained only theoretical and hypothetical – until *Ilgar Mammadov* broke the mould. In *Khodorkovskiy* itself the Court *refused* to make its "own assessment of the specific facts". It simply stated that it "took note" of the fact that "the combination of ... factors ... [had] caused many people to believe that the applicant's prosecution was driven by the desire to remove him from the political scene and, at the same time, to appropriate his wealth" (§ 259). Among these factors was "[t]he fact that the suspect's political opponents or business competitors might directly or indirectly benefit from him being put in jail" (§ 258). The Court admitted that "the applicant's case [might] raise a certain suspicion as to the *real intent* of the authorities, and that this state of suspicion might be sufficient for the *domestic courts* [elsewhere referred to as "several European courts"] to refuse extradition, deny legal assistance, issue injunctions against the Russian Government, make pecuniary awards, etc." (§ 260; emphasis added). It even assumed that "all courts had the same evidence and arguments before them". All that notwithstanding, the Court declared that "*its own* standard of proof applied in Article 18 cases [was] very high and [might] be different from those applied domestically". It coined (for the first time in its case-law) the "*Khodorkovskiy* formula", which posited the "fundamental difference" between the "political process and adjudicative process" (as if those other courts examined the facts not from a legal but from a political standpoint), and added that "[i]t [was] often much easier for a politician to take a stand than for a judge, since the judge [had to] base his decision only on evidence in the legal sense" (§§ 259 and 260). The Court thus sidestepped the issue and dismissed the allegations of ulterior purpose.

In other words, in *Khodorkovskiy* the Court *contradistinguished* the examination of "evidence in the legal sense", interpreted at that time as "incontrovertible and direct proof", from its "own assessment" of the relevant case-specific facts taken in combination, and rejected the very possibility of its "own assessment" by declaring that "incontrovertible and direct proof" was "absent from the case under examination". It also most forcefully *contradistinguished* its overly restrictive approach to what was "evidence in the legal sense" from that applied by other "European courts" (§§ 259 and 260). In Article 18 cases it placed itself *in opposition* not only to the legal standards as understood by other courts ("European courts"), but also to common knowledge.

Merabishvili heralded the abandonment of that opposition. The present judgment shows that it has not been abandoned.

22. The judgment in *Merabishvili* (cited above) mentions "evidence in the legal sense" only once – in § 275, where *Khodorkovskiy* (cited above) is

recapitulated. That is it. Then the approach taken in the latter, as set out in § 259 thereof, is rejected (§§ 309-17). The reference in paragraph 250 of the present judgment to § 259 of *Khodorkovskiy*, alongside §§ 309-17 of *Merabishvili*, without even a hint that the former was *denounced* by the latter and thus *disqualified*, is too indiscriminate and uncritical to be allowed to pass unnoticed.

For the sake of objectivity it must be noted that this indiscriminate referencing is not the invention of the present judgment (compare the case mentioned in paragraph 38 below). However, what matters most is that in the present case (unlike in that other one), this indiscriminate approach took on concrete form in an unconvincing outcome of the examination of the applicants' complaint under Article 18.

Be that as it may, the present judgment, while paying lip service to *Merabishvili*, effectively restored the doctrine which had been denounced and disqualified by that judgment, and implicitly granted it the status of the methodological basis for the examination of the applicants' Article 18 complaints in this case.

23. In a similar vein, the present judgment also rejected *Ilgar Mammadov* and *Rasul Jafarov* (both cited above), while at the same time citing them. These citations are no less misleading than the references to *Khodorkovskiy* and *Merabishvili* (cited above) discussed in the preceding paragraphs. For instance, paragraph 250 of the present judgment cites § 140 of *Ilgar Mammadov* and § 155 of *Rasul Jafarov*, which contain the "*Khodorkovskiy* formula", but not §§ 141-44 or §§ 156-63 respectively of those judgments, in which the Court considered that it could accept not only "direct", but also contextual evidence – which it did; that it could itself undertake an independent analysis of that contextual evidence – which it also did; and that the proof of an alleged ulterior purpose could be furnished not necessarily by the applicants, but also by other persons – which in those cases was done too.

24. One might have hoped that after *Merabishvili* (and *Navalnyy*, both cited above) the standard of "incontrovertible and direct proof" was not going to make a comeback. That hope was premature. *The comeback took place* – in the present judgment. Even though the expression "incontrovertible and direct proof" is not used verbatim in the Chamber's reasoning, the "very exacting standard of proof" in its earlier most restrictive interpretation is implicitly present there – by virtue (or rather by vice) of the reference to the "*Khodorkovskiy* formula".

By putting *Khodorkovskiy* on an equal footing with *Merabishvili* – the Grand Chamber case which discredited and disqualified the approach underlying *Khodorkovskiy* (and with *Ilgar Mammadov* and *Rasul Jafarov*, cited above, and also *Navalnyy*) – the Chamber *has blended them into one doctrinal basis* for Article 18 cases. If that blending is weaponised in future Article 18 cases (for there are no guarantees that this is not going to

happen), then the present judgment could be said to have contributed to disabling *Merabishvili* and putting it on life support.

25. The upside-down referencing discussed in paragraphs 21-23 above to *Khodorkovskiy*, and also to *Ilgar Mammadov*, *Rasul Jafarov* and, most importantly, *Merabishvili* (all cited above), and not in any contraposition or at least juxtaposition to these last three cases, reveals one more problem, which is not limited to Article 18 case-law but is of a more general nature. That problem is that perhaps there are no antidotes against citations of the Court's case-law (correct and precise as they may be in themselves) being used, in subsequent cases, contrary to their purport, meaning or significance in the specific context or the specific line of reasoning and thus reversing (not necessarily intentionally) the progress already achieved by the law of the Convention as a living instrument – to the detriment of the victims of political persecution and to the encouragement of the regimes persecuting them.

V

26. The pre- and (therefore) anti-*Merabishvili* methodology of the examination of the Article 18 complaints reverted to in the present judgment is not only overly restrictive and formalistic. It also does not recognise such things as *system, synergy and policy*. For what to an objective observer is a *system*, in which (and because) the facts, examined in combination, *reinforce each other* and allow it to be established that there was a *policy* behind the violations amounting to a "hidden agenda", is regarded by this methodology – and by the present judgment – as merely a series of coincidences, no matter how plentiful and how concerted. The conclusions reached on the basis of this outdated and (to put it mildly) dubious methodology are liable to be strikingly at odds with what everybody knows.

That is the situation in the present case concerning *Cumhuriyet*.

27. In this case, the conclusion regarding the applicants' Article 18 complaints is simply unconvincing and unreliable in view of the abundant authoritative international materials on the ongoing suppression of civil society in Turkey following the abortive 2016 military coup. A large volume of these materials was presented to the Court by the third-party interveners, among them the Council of Europe Commissioner for Human Rights, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and several NGOs. They testify to the erosion of the independence of the domestic judiciary, but especially to the crackdown on the media being consistently carried out by the Turkish authorities. They unequivocally point *to an actual policy of the State, not to random errors by the authorities*.

28. Despite the overwhelming relevance of the third-party interveners' submissions, they are presented only formally in the present judgment (see

paragraphs 244-47; see also the references in paragraph 105). They are then assessed in the most blanket, generalised form possible, with the Court "noting" that "the measures in question [taken against the applicants], and those taken in the context of the criminal proceedings brought against other opposition journalists in Turkey have been heavily criticised by the third-party interveners" (see paragraph 250), before being put aside without any apparent consideration, but with the importuning *Khodorkovskiy* reminder that, "as the political process and adjudicative process are fundamentally different, the Court must base its decision on 'evidence in the legal sense'" (ibid.), as if these submissions were not based on legal considerations (in addition to the interveners' in-depth factual knowledge of the situation).

The whole "assessment" of the third-party interveners' arguments fits *in one sentence*.

If the Court is sceptical as to the views of the third-party interveners, especially those of the Council of Europe Commissioner for Human Rights and the United Nations Special Rapporteur(s), and does not give them credence, it should not be a surprise if readers are sceptical of and do not give credence to *its* findings. *Qui bono*?

29. Even if the third-party interveners' submissions have not been duly taken into consideration (only "noted", which is not the same thing), it cannot be said that the present judgment (or the part dealing with the Article 18 complaints) does not devote any space to the analysis of whether various factual circumstances do not disclose the alleged improper ulterior purpose. It does – over almost three pages.

But let us have a closer look at *what* is analysed there – and *how*.

30. The Chamber reiterates its prior conclusion that the charges against the applicants were not based on "reasonable suspicion", but states that this "would not by itself be sufficient to conclude that Article 18 has also been violated" (paragraph 252) – as in *Ilgar Mammadov* and *Rasul Jafarov* (both cited above; compare *Merabishvili*, cited above, § 291). So far so good.

The Chamber then reasons that it was legitimate to carry out investigations into incidents that might have been related to the military coup, and that no "excessive length of time elapsed between the impugned acts and the opening of the investigation in the course of which the applicants were placed in pre-trial detention" (paragraphs 253-54). Again, no objection.

31. The reasoning then takes a peculiar turn. The Chamber attempts to justify facts which it is not so easy – in my opinion, not possible at all – to justify.

The statements of the President of the Republic, one of which is even labelled (rightly so) as being "clearly in contradiction with the basic tenets of the rule of law", are nonetheless considered justified on the basis that they "were not directed against the applicants themselves but rather against the newspaper *Cumhuriyet* as a whole under the editorial direction of C.D."

(paragraph 255). What is that supposed to mean: that the newspaper "as a whole" existed on its own, and its journalists, editors and managers were *separate from it*? Who would believe that?

It is also stated that "such an expression of dissatisfaction [with the Constitutional Court's decision] does not amount to evidence that the applicants' detention was ultimately motivated by reasons incompatible with the Convention" (ibid.). The question is: *what was it* that was capable of downgrading the clear manifestation of political pressure on the judiciary to an innocent "expression of dissatisfaction", as if it was pronounced by, say, a law professor at a constitutional-law seminar? No, the relevant public statement by the President of the Republic was *anything but innocent*, and given the whole course of events it was a declaration of intent, as *realistic* as one could be – for "you don't need a weatherman to know which way the wind blows"[2].

The Chamber even accepts that "statements made in public by members of the government or the President concerning criminal proceedings against applicants could, *in some circumstances*, constitute evidence of an ulterior purpose behind a judicial decision" (ibid.; emphasis added). It is legitimate to ask: in *what* "some" circumstances? Or rather: *what were those other circumstances* which, so to say, decontaminated the statements in question? *No explanation* to that effect is provided.

Prominence is given to the Constitutional Court's finding that the suspicions against two persons were unconstitutional (ibid.). But that is irrelevant, for that highest-ranking court *did not rule on whether there was any "hidden agenda"* behind that persecution – that, again, is *not even mentioned* in the Chamber's reasoning.

And so on.

The Chamber even accepts that the applicants' detention not only had a chilling effect on them, but was also "liable to create a *climate* of self-censorship affecting ... *all journalists* reporting and commenting on the running of the government and on various political issues of the day" (paragraph 256; emphasis added). So what? "All in all, it's just another brick in the wall"[3].

The Chamber then reasons that "the elements relied on by the applicants in support of a violation of Article 18 ..., taken separately *or in combination with each other*, do not form a sufficiently homogeneous whole for the Court to find that the applicants' detention pursued a purpose not prescribed by the Convention and representing a fundamental aspect of the case" and that "it has not been established beyond reasonable doubt that the applicants' pre-trial detention was ordered for a purpose not prescribed by the Convention within the meaning of Article 18" (ibid.; emphasis added).

2. Bob Dylan, "Subterranean Homesick Blues", from *Bringing It All Back Home*, 1965, Columbia Records.

3. Pink Floyd, "Another Brick in the Wall – Part 2", from *The Wall*, 1979, Harvest.

The Chamber concludes that "there has been no violation of Article 18 ... in the present case" (ibid.). In *Kasparov and Others (no. 2)* (cited above) the Court found that its findings of violations of various provisions of the Convention meant that there was no need to examine the applicants' Article 18 complaints (see paragraph 9 above). The finding in the present case is very similar to that one, the only difference being that the "no need to examine" formula has been replaced by what in essence could be worded as "whatever the facts, and no matter how many suspicious facts there are, all this does not amount to an improper ulterior purpose". When it comes to exonerating authority, pandering to the regime and contributing to the regime's feeling of impunity, the finding is effectively the same.

32. To sum up, a justification is given for each fact examined separately (although not all of the relevant facts are so examined; see, for example, paragraph 34 below). Although the (in my opinion, discredited) term "appearances", which played such a prominent role in *Khodorkovskiy and Lebedev* (cited above), does not feature in the Chamber's reasoning in the present judgment, all the facts that are analysed are treated as nothing but coincidental "appearances".

33. Even if one accepts the assumption (unrealistic as it is) that each of the above findings in itself is not sufficient to conclude that there has been a "hidden agenda" and, consequently, a violation of Article 18, the conclusion that they are not sufficient *in combination with each other* is far-fetched. In the part of the judgment dealing with the Article 18 complaints that conclusion is not supported by any reasoning. *Not a single sentence.*

For the third-party interveners, who are well aware not only of the facts of the present case but also of its *context*, the opposite was obvious. As mentioned, their submissions were presented – and then not duly considered.

34. The assumption hypothetically accepted in the preceding paragraph is itself as feeble as one can be. There are serious grounds to assert that some of the impugned facts are *in and of themselves sufficient* to conclude that there has been a violation of Article 18.

To take just one of them, how was it possible to conclude that there was no "hidden agenda" in view of this rogue public statement by the President of the Republic: "Whoever wrote this article will pay dearly, I will not let the matter rest there" (see paragraph 237 of the judgment)[4]? Indeed, the matter was not put to rest. The threat (for what else was it?) materialised.

4. One outspoken critic of the President commented on the lack of respect for judicial decisions, as reflected in *this very* statement by the President (and his other utterances of this kind), in the following way: "[r]espect for court decisions [is demanded by the President] only when they resulted in his opponents being imprisoned". She then concluded: "respect is [a] one-way street ...: he only accepts being on the receiving end". See E. Temelkuran, "How to Lose a Country: The Seven Steps from Democracy to Dictatorship" (London: 4th Estate, 2019), p. 35.

But in the Court's assessment of the applicants' Article 18 complaints that statement is not assessed, *or even dealt with separately*. That part of the judgment refers to the President's "statements" in the plural and then narrows their examination to virtually just one of them, in which the President, in the Chamber's opinion, merely expressed his "dissatisfaction" with the Constitutional Court's decision (see paragraph 30 above).

But what about the *direct threat* from the most powerful political actor on the national stage to the effect that whoever wrote this article would pay dearly? Also a mere "dissatisfaction"? Or (compare paragraph 31 above) was this statement also directed "against the newspaper *Cumhuriyet* as a whole" but not against the applicants, and could it "constitute evidence of an ulterior purpose behind a judicial decision" only "in some circumstances"?

35. And what about other contextual facts, likewise not assessed either separately or in combination? For instance, in *Rasul Jafarov* (cited above) the Court considered that "the general context of the increasingly harsh and restrictive legislative regulation of NGO activity and funding [could not] be simply ignored in a case like the present one" (§ 159): that regulation served as one of the contextual elements which led to the finding of a violation of Article 18. The legislation dealt with in the present case is not new for the Court – it features in numerous cases (in which violations of Convention provisions have been found). Could it – not the text of the law as such, but the practice of its interpretation and application to media players – be assessed as "harsh and restrictive"? This is only a question, by the by.

36. What is much more important is that the present case is *not an isolated one*. It is part of a series of cases (some pending, some already decided) on the same matter: the silencing, in post-military coup Turkey, of civil society in general and the media in particular. These developments have been noted and confirmed by countless (I believe objective) observers worldwide. They have been in the news on an almost daily basis – and still are[5].

The third-party interveners presented their submissions in the present case to the Court in the same document as their submissions regarding the applications in other cases. And for good reason, since they regarded all these individual cases (including the present one) as related to each other and disclosing a *pattern* of conduct on the part of the Turkish authorities *vis-à-vis* their opponents. These cases are thus seen as united by the *synergy*

5. Somewhat ironically, at just about the same time when the Chamber was deliberating in the present case, the Council of Europe published a book on the political persecution of journalists in which considerable attention is devoted to developments in Turkey. See M. Clark, W. Horsley, "A Mission to Inform: Journalists at Risk Speak Out" (Strasbourg: Council of Europe, 2020). The Court is a body of the Council of Europe, is it not?

and system in the authorities' actions against various applicants and the policy behind those actions.

The treatment of the present case as part of a broader picture stems from a realistic and objective approach to the impugned facts, of which there is common knowledge, and that common knowledge is supported by common sense. Should due credence to the common knowledge which is revealed, *inter alia*, in the third-party interveners' submissions not also constitute the basis for the Court's examination – which, of course, must be based on the "legal sense" – of the facts presented to it? In other words, should common knowledge and common sense, which both point to a *policy* on the authorities' part, not enlighten the judicial "legal sense"?

Where there is a *policy* behind the violations found, it is impermissible to conclude that there has been no ulterior purpose. Moreover, that ulterior purpose constitutes prima facie a *fundamental aspect of the case* (see *Merabishvili*, cited above, § 291). To hold otherwise, very weighty reasons would be needed. If, in the Court's analysis and balancing of the facts and arguments for and against the finding of a "hidden agenda", some arguments speaking in favour of such a finding are suppressed, that examination cannot be considered sufficiently thorough and explicit, with all the ensuing consequences for the plausibility of the finding of no violation of Article 18 (see paragraph 4 above).

37. It would have been more difficult for me to object to the Chamber's finding of no violation of Article 18 had it reasoned that although there was an improper ulterior purpose behind the violations found in the present case, that purpose nonetheless was not predominant, that is, it did not constitute a fundamental aspect of the case.

But in this case in fact *no ulterior purpose was found whatsoever*. That is strikingly *at odds with what is commonly known* (both outside and inside the Court) about developments in Turkey following the abortive 2016 military coup, and what is vividly reflected in the third-party interveners' submissions.

The closest the Chamber comes to admitting that the alleged ulterior purpose was present in – and behind – the applicants' predicaments is when it reasons that the impugned "expression of dissatisfaction [with the Constitutional Court's decision] does not ... amount to evidence that the applicants' detention was *ultimately motivated* by reasons incompatible with the Convention" (see paragraph 255 of the judgment, cited in paragraph 31 above, emphasis added; see also paragraph 252 of the judgment), but that half-admission is immediately neutralised by the finding that this purpose was not "ultimate", that is, it did not constitute a fundamental aspect of the case. There is no analysis, however, of the factual, legal or (methodo) logical basis on which it is considered not to have been "ultimate", especially in the context of the various other (so numerous) impugned acts.

Court judgments are published on paper. Paper can endure anything, for it is insensitive and irresponsive to whatever judicial truth is published on it. But it is expected that the judicial truth should resemble the actual truth.

VI

38. There are not insignificant grounds for concern as to how Article 18 has been dealt with in the Court's case-law, both prior to and (regrettably) after *Merabishvili* (cited above)[6]. Since the adoption of that judgment, there have been cases in which the Court took a principled stance on Article 18 complaints. Among those one might mention, for instance, *Kavala v. Turkey* (no. 28749/18, 10 December 2019). By the way, *Kavala* (§ 217) also makes reference to the "*Khodorkovskiy* formula" alongside the paragraphs of *Ilgar Mammadov* and *Rasul Jafarov* mentioned in paragraph 23 above (all cited above; however, in *Kavala* there are more very pertinent citations from the last two cases). But in *Kavala* the Court's treatment of the contextual evidence, including that presented by the third-party interveners, differed substantially from the treatment undertaken in the present case and (despite the succinct reference to that evidence in the relevant part of the judgment) led to a different finding.

39. Substantial progress in the treatment of Article 18 complaints is still somewhere on the horizon.

The present judgment has moved that horizon farther away.

6. On this subject, I refer to my article "Wrestling with the 'Hidden Agenda': Toward a Coherent Methodology for Article 18 Cases", in K. Lemmens, S. Parmentier, L. Reyntjens (eds.). *Human Rights with a Human Touch: Liber amicorum Paul Lemmens*. Cambridge, Antwerp, Chicago: Intersentia, 2019.