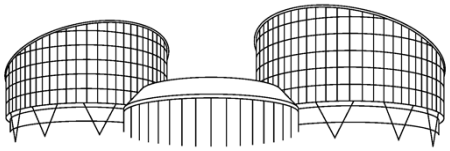

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF SELAHATTİN DEMİRTAŞ v. TURKEY (No. 2)

(Application no. 14305/17)

JUDGMENT

STRASBOURG

20 November 2018

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 Selahattin Demirtaş v. Turkey (no. 2),

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

Robert Spano, *President*,
Ledi Bianku,
Işıl Karakaş,
Paul Lemmens,
Valeriu Griţco,
Jon Fridrik Kjølbro,
Ivana Jelić, *judges*,
and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 23 October 2018,

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

PROCEDURE

1. The case originated in an application (no. 14305/17) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Selahattin Demirtaş ("the applicant"), on 20 February 2017.

2. The applicant was mainly represented by Mr M. Karaman, a lawyer practising in Diyarbakır. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that his pre-trial detention had breached Articles 5, 10 and 18 of the Convention and Article 3 of Protocol No. 1 to the Convention.

4. On 29 June 2017 notice of the application was given to the Government.

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

6. 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).

7. In addition, written comments were submitted to the Court by the Inter-Parliamentary Union ("the IPU") and jointly by the non-governmental organisations ARTICLE 19 and Human Rights Watch ("the intervening non-governmental organisations"). The Section President had granted leave to the IPU and the organisations in question to intervene under Article 36 § 2 of the Convention and Rule 44 § 3.

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

9. The Court notes that there are currently a number of applications pending before it concerning the pre-trial detention of members of parliament. Under its new prioritisation policy, effective since 22 May 2017, cases where applicants have been deprived of their liberty as a direct consequence of an alleged violation of Convention rights, as in the present case, are to be given priority. The Court observes that on 21 December 2017 the Constitutional Court gave its judgment on the individual application lodged by the applicant. The Court also considers that the applicant's application should be examined as a priority.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1973. He is currently detained in Edirne.

11. At the material time, the applicant was one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party. From 2007 onwards he was a member of the Turkish Grand National Assembly ("the National Assembly"). Following the parliamentary elections on 1 November 2015, he was re-elected as a member of the National Assembly for the HDP, and his term of office ended at the time of the parliamentary elections on 24 June 2018.

12. In the presidential election of 10 August 2014 the applicant received 9.76% of the vote. He also stood in the presidential election on 24 June 2018 and received 8.32% of the vote.

A. Events of 6-8 October 2014

13. In September and October 2014, members of the illegal armed organisation Daesh (Islamic State of Iraq and the Levant) launched an offensive on the Syrian town of Kobani (Ayn al-Arab in Arabic), some 15 km from the Turkish border town of Suruç. Armed clashes took place between Daesh forces and the People's Protection Units (YPG), an organisation founded in Syria and regarded as a terrorist organisation by Turkey on account of its links with the PKK (Workers' Party of Kurdistan, an illegal armed organisation).

14. From 2 October 2014 onwards, a large number of demonstrations were held in Turkey and several non-governmental organisations at local and international level published statements calling for international solidarity with Kobani against the siege by Daesh.

15. On 5 October 2014 a tweet was published from a Twitter account allegedly controlled by one of the PKK leaders, reading as follows:

> "We call upon all the young people, women and everyone from 7 to 70 to stand up for Kobani, to protect our honour and dignity and to occupy the metropolitan areas." ("*Gençleri kadınları 7'den 70'e herkesi Kobane'ye sahip çıkmaya onurumuzu namusumuzu korumaya metropolleri işgal etmeye çağırıyoruz*.")

16. On 6 October 2014 the following three tweets were published from the official HDP Twitter account, @HDPgenelmerkezi:

> – "Urgent call to our people! Urgent call to our people from the HDP central executive board, currently in session! The situation in Kobani is extremely dangerous. We urge our people to take to the streets and to support those protesting in the streets against Daesh attacks and the AKP [Justice and Development Party] government's embargo over Kobani" ("*Halklarımıza acil çağrı! Şuanda toplantı halinde olan HDP MYK'dan halklarımıza acil çağrı! Kobané'de duruş son derece kritiktir. IŞİD saldırılarını ve AKP iktidarının Kobané'ye ambargo tutumunu protesto etmek üzere halklarımızı sokağa çıkmaya ve sokağa çıkmış olanlara destek vermeye çağırıyoruz*");
>
> – "We call upon all our people, from 7 to 70, to [go out into] the streets, to [occupy] the streets and to take action against the attempted massacre in Kobani" ("*Kobané'de yaşanan katliam girişimine karşı 7 den 70 e bütün halklarımızı sokağa, alan tutmaya ve harekete geçmeye çağırıyoruz*");
>
> – "From now on, everywhere is Kobani. We call for permanent resistance until the end of the siege and brutal aggression in Kobani" ("*Bundan böyle her yer Kobane'dir. Kobane'deki kuşatma ve vahşi saldırganlık son bulana kadar süresiz direnişe çağırıyoruz*").

17. On the same day, the following statement from an organisation known as the KCK (*Koma Civakên Kurdistan* – "Kurdistan Communities Union", identified as the "urban wing" of the PKK by the Court of Cassation, was published on the website www.firatnews.com. The statement read as follows:

> "The wave of revolution that started in Kobani must spread throughout Kurdistan, and on that basis, we call for an uprising by the Kurdish youth ... All those among our people who can make it to Suruç must go there immediately without wasting a second, and every inch of Kurdistan must rise up for Kobani ... We call upon all our people, from 7 to 70, to make life unbearable for Daesh and their collaborators the AKP wherever they are, and to take a stand against these gangs [responsible for] massacres by fostering rebellion [*Serhildan* in Kurdish] up to the highest level." ("*Kobani ile başlayan devrim dalgası tüm Kürdistan'a yayılmalı ve Bu temelde Kürt gençliğinin ayaklanması çağrısında bulunuyoruz... Bütün halkımız Suruç'a gidebilecekler hemen bir saniye zaman kaybetmeden gitmeli ve Kürdistan'ın her karış toprağı Kobanê için ayağa kalkmalıdır... Tüm halkımızı yediden yetmişe bulunduğu her yerde yaşamı IŞİD ve işbirlikçisi AKP'ye dar etmeye ve serhıldanı en üst düzeyde geliştirerek bu katliamcı çetelere karşı durmaya çağırıyoruz*.")

18. On 7 October 2014 the following statement by the KCK Executive Council was published on the same website:

> "Our people must carry on the resistance they have started against this terrible and insidious massacre, by spreading it everywhere and at all times. Our people in the

> North [in the region of south-eastern Turkey] must give the Daesh gangs and their supporters no chance of survival. All the streets must be turned into the streets of Kobani and the strength and organisation of this historic and unique resistance must be developed further. From now on, millions of people must take to the streets and the border must turn into a flood of people. All Kurds and all honourable people, friends and groups who are sympathetic [to our cause] must take action. Now is the time to develop and amplify the act of resistance. On this basis, we call upon our people, all groups that are sympathetic [to our cause] and our friends to embrace and amplify the Kobani resistance and we call upon all young people, particularly the Kurdish youth, to join the ranks of freedom in Kobani and to intensify the resistance." ("*Halkımız bu çirkin ve sinsi katliam karşısında başlattığı mücadeleyi her yere, her zamana taşıyarak süreklileştirmelidir. Kuzey halkımız İŞİD çetelerine, uzantılarına ve destekçilerine hiçbir yerde yaşam şansı tanımamalıdır. Tüm sokaklar Kobani sokaklarına dönüştürülmeli, tarihin bu eşsiz direnişine denk bir direniş gücü ve örgütlülüğü geliştirilmelidir. Bu saatten itibaren milyonlar sokaklara akmalı, sınır insan seline dönüşmelidir. Her Kürt ve onurlu her insan, dostlar, duyarlı kesimler bu andan itibaren eyleme geçmelidir. An direniş eylemini geliştirme ve büyütme anıdır. Bu temelde tüm halkımızı, duyarlı kesimleri, dostlarımızı Kobani direnişini sahiplenerek büyümeye, başta Kürt gençleri olmak üzere tüm gençleri Kobani de özgürlük saflarına katılarak direnişi yükseltmeye çağırıyoruz*.")

19. From 6 October 2014 onwards, the demonstrations became violent. Clashes took place between different groups, and the security forces intervened forcibly. On unspecified dates, the local governors of a number of towns imposed curfews.

20. In two statements on 7 and 9 October 2014 the applicant emphasised that he was opposed to the use of violence during the demonstrations. He stated that his political party was prepared to cooperate with the government but that the latter first needed to identify those who had provoked the violence.

21. According to the Constitutional Court's judgment of 21 December 2017 (no. 2016/25189) on the applicant's subsequent individual application, fifty people died during the violence on 6 and 8 October 2014 and 772 were injured, including 331 members of the security forces. 1,881 vehicles and 2,558 buildings, including hospitals and schools, suffered damage. In the course of the subsequent criminal investigations conducted by the appropriate prosecuting authorities, 4,291 people were arrested and 1,105 were placed in pre-trial detention (see paragraph 30 of the Constitutional Court's judgment).

22. On 9 October 2014 the applicant gave a speech at the HDP offices in Diyarbakır. The relevant parts of the speech read as follows:

> "We issued the calls in question [the tweets published from the HDP Twitter account] because we had found out that Daesh had reached the border at Mürşitpınar. People went out into the streets and there was no violence anywhere. We did not tell anyone to resort to violence. We appealed for political struggle. What aggravated the violence was not the call issued by the HDP, or the demonstrations by the people. It is the government's task to find those who provoked [the demonstrations]. There should be no acts of violence. There is no need for intervention in demonstrations [held] in support of Kobani ..." ("*DAEŞ örgütünün Mürşitpınar sınır kapısına dayandığını*

öğrendiğimiz için bahsi geçen çağrıları yaptık, insanlar sokağa çıktı hiçbir yerde şiddet kullanılmadı. Şiddet kullanılsın demedik. Siyasi mücadele amaçlı bir çağrı yaptık. Şiddeti büyüten HDP'nin çağrısı değil, halkın gösterileri değil. Tahrik edenleri bulmak hükümetin görevidir. Şiddet eylemleri olmamalı. Kobane'yi sahiplenme eylemlerine müdahale edilmemeli ...")

23. In an interview published on 13 October 2014 in the daily newspaper *Evrensel*, the applicant was quoted as follows:

"It is directly linked to Kobani. It is not for us to calm down the anger. We do not have so much influence over the people, nor is it necessary. We believe that practical measures that the government could take to drive Daesh out of Kobani will end this anger. Of course, I am not talking about acts of violence. We have not encouraged acts of violence like the use of weapons, arson, destruction [and] dispossession. We have not incited or organised [such acts]. But we have called for the people's anger to turn into an ongoing protest, day and night, everywhere, on the squares, in homes, in the streets, in cars. We still stand behind that call." ("*Doğrudan Kobaniyle bağlantılıdır. Öfkeyi yatıştırabilecek olan biz değiliz. Bizim halk üzerinde ne böyle bir gücümüz vardır ne de buna gerek vardır. Yani halk IŞİD'e karşı durmasın sempati duysun diye uğraşacak değiliz. Biz hükümetin atacağı pratik adımların IŞİD'in Kobani'den püskürtülmesiyle sonuçlanmasının bu öfkeyi durduracağını düşünüyoruz. Elbette ki bundan kastettiğim şiddet olayları değil. Biz silah kullanma, yakıp yıkma, yapmalama gibi şiddet eylemlerini teşvik etmedik, tahrik etmedik, örgütlemedik ama halkın öfkesinin alanlarda, meydanlarda, gece gündüz evinde, sokakta, arabasında elindeki bütün imkanlarla bir protestoya dönüşmesinin çağrısını yaptık. O çağrının da halen arkasındayız*.")

B. End of the "solution process", and the "trench events"

24. During late 2012 and January 2013, a peace process known as the "solution process" had been initiated with a view to finding a lasting, peaceful solution to the "Kurdish question". A series of reforms aimed at improving human rights protection were implemented. A delegation of members of parliament, including the applicant, went to İmralı island, where Abdullah Öcalan – the leader of the PKK, who in 2013 called for an end to the armed struggle within his organisation – is imprisoned. On 28 February 2015 the delegation, together with the then Deputy Prime Minister, presented the "Dolmabahçe consensus", a ten-point reconciliation declaration. The then Prime Minister, Mr Ahmet Davutoğlu, stated that the consensus meant that significant steps were being taken towards halting terrorist activities in Turkey. However, shortly after the announcement, the President of Turkey, Mr Recep Tayyip Erdoğan, said that it was out of the question that the government would reach an agreement with a terrorist organisation.

25. On 7 June 2015 parliamentary elections were held. The HDP achieved 13% of the vote and passed the threshold for representation in the National Assembly. The AKP lost its majority in Parliament for the first time since 2002.

26. On 20 July 2015 a terrorist attack apparently carried out by Daesh took place in Suruç, leaving thirty-four people dead and more than 100 injured.

27. On 22 July 2015, in another terrorist attack, two police officers were killed in their homes in Ceylanpınar. The murders, allegedly committed by members of the PKK, resulted *de facto* in the end of the "solution process".

28. The day after that attack, the PKK's leaders urged the people to arm themselves and to build underground systems and tunnels that could be used during armed clashes. They also called for the proclamation of a political system of self-governance. In addition, they announced that all civil servants in the region would now be considered accomplices of the AKP and as a result would risk being targeted.

29. On 28 July 2015 the President of Turkey issued a press statement, the relevant parts of which read:

> "I do not approve of dissolving political parties. But I say that the deputies of that party [the HDP] must pay the price. Personally and individually." ("*Ben parti kapatılması olayını doğru bulmuyorum. Fakat bu partinin yöneticilerinin bu işin bedelini ödemeleri gerekir diyorum. Fert fert, birey birey*.")

30. Between 10 and 19 August 2015 self-governance was proclaimed in nineteen different towns in Turkey, the vast majority of them in the south-eastern region.

31. Members of the YDG-H (Patriotic Revolutionary Youth Movement), regarded as the PKK's youth wing, dug trenches and put up barricades in several towns in eastern and south-eastern Turkey, including Cizre, Silopi, Sur, İdil and Nusaybin, to prevent the security forces from entering. According to the security forces, members of the YDG-H had brought a large number of weapons and explosives into the region.

32. In August 2015 several curfews were imposed in various towns of south-eastern Turkey by the local governors. The stated aim of the curfews was to clear the trenches that had been dug by members of terrorist organisations, to remove any explosives planted there, and to protect civilians from violence. The security forces carried out operations in the areas where the curfew was in place, using heavy weapons.

33. Following the declaration of a curfew in Sur, the applicant gave a statement to the press in Lice on 13 September 2015, stating as follows:

> "Our people want self-governance, their own assemblies and municipalities where responsibility lies with elected officials rather than appointees. Our people have the power to resist against pressure and massacre policies everywhere. We have the power to protect ourselves against any attack. We will show that we are not despairing; we will resist together; we will achieve salvation without forgetting our motherland and history and by defending our rights." ("*Halkımız atananların değil seçilmişlerin yetkili olduğu kendi meclisleri ile belediye ile kendini yönetmek istiyor. Halkımız her yerde baskı politikalarına katliam politikalarına karşı direnebilecek güçtedir. Bütün saldırılara karşı kendimizi koruyacak gücümüz var. Çaresiz*

olmadığımızı gösteriyoruz, birlikte direneceğiz, kendi ana vatanımızı da tarihimizi de unutmadan haklarımızı da savunarak hep birlikte kurtuluşa gideceğiz.")

34. Following the failure of negotiations to form a coalition government, early elections were held on 1 November 2015, in which the HDP polled 10% of the vote. The AKP won the elections and regained its majority in the National Assembly.

35. In a press statement on 18 December 2015 the applicant stated:

"Everywhere you carry out [security] operations is filled with an atmosphere of enthusiasm rather than fear and panic. Do you know why? [Because] these people are so sure that they will triumph from the very first day. They are the defenders of an honourable, proud and dignified cause. We will not let cruelty and fascism win any more; this resistance will triumph. Those who try to downplay it by calling it [resistance of] ditches and holes should look back at history. There are tens of millions of heroes and brave people resisting against this coup. You are waging a war against the people. The people are resisting and will resist everywhere. Next week, on 26 and 27 December, we will attend the extraordinary meeting of the Democratic Society Congress in Diyarbakır. We will have intensive discussions and take important decisions concerning the processes of self-governance and autonomy and their operation in the political arena. We will implement them all." ("*Bugün operasyon yaptığınız her yerde korku ve panik havası değil coşku havası hakim. Neden biliyor musunuz ? O insanlar daha ilk günden kazandıklarından o kadar eminler ki. Onurlu, şerefli, haysiyetki bir davanın savunucularıdır. Bir kez daha zulmün, faşizmin kazanmasına izin vermeyeceğiz, bu direniş kazanacaktır. Öyle hendek, çukur diye küçümsemeye çalışanlar da dönüp tarihe baksınlar. On milyonlarca kahraman, yiğit bu darbeye karşı direnen insan var. Sen halka karşı savaş açmışsın. Halk her yerde direnir, direnecektir. Önümüzdeki haftasonu 26-27 Aralık'ta Diyarbakır'da Demokratik Toplum Kongresi'nin olağanüstü kongresine bizler de katılacağız. Öz yönetimin, özerkliğin inşası ve içinin doldurulması sürecinn siyasi zeminde daha güçlü yönetilmesi için çok yoğun tartışmalar yapacağız, önemli kararlar alacağız. Bunların hepsini hayata geçireceğiz*.")

36. On 26 December 2015 the applicant attended the extraordinary meeting of the Democratic Society Congress (DTK). He gave a speech in which he defended self-governance and the resistance. He also stated that barricades and trenches had been set up to thwart the Ankara authorities' plans for a massacre. The DTK's closing declaration included a call for the creation of autonomous regions.

37. On 29 December 2015 the President of Turkey stated to the press that the applicant's speeches amounted to "clear provocation and treason".

38. In a speech on 26 March 2016 the applicant drew a distinction between war, which he described as illegitimate, and resistance, which he said was a legitimate response to the fascist policies of the political authorities in accusing millions of people of being terrorists.

C. Constitutional amendment concerning parliamentary immunity

39. On 16 March 2016 the President of Turkey gave a speech to village and neighbourhood mayors (*muhtars*) at the presidential complex. The relevant parts of the speech read as follows:

> "We must immediately settle the issue of immunity. Parliament must move forward quickly. [We cannot discuss whether to lift the immunity of just] one or two people. We need to adopt a principle. What is this principle? Those who cause the death of fifty-two people by getting my Kurdish brothers to pour into the streets will show up in Parliament, those who say that the PKK, the PYD [Democratic Union Party] and the YPG are behind them will have clean hands, is that it? If Parliament does not take the necessary action, this nation and history will hold it accountable." ("*Dokunulmazlıklar meselesini süratle neticelendirmeliyiz. Parlamento adımını süratle atmalıdır. Bir kişi mi olsun, iki kişi mi ? Biz ortaya ilkeyi koymalıyız. Nedir bu ilke? Benim Kürt kardeşlerimi sokağa dökerek 52 kişinin ölümüne yol açan kişiler yargılanmayacak da parlamentoda boy gösterecek, arkasında PKK'nin, PYD'nin, YPG'nin olduğunu söyleyenler temiz olacak öyle mi? Parlamento gereğini yapmazsa, bu millet, tarih bu parlamentodan hesabını sorar*."

40. On 20 May 2016 the National Assembly passed a constitutional amendment by inserting a provisional Article in the 1982 Constitution. Pursuant to the amendment, parliamentary immunity was lifted in all cases where requests for the lifting of immunity had been transmitted to the National Assembly prior to the date of adoption of the amendment in question. The relevant parts of the explanatory memorandum on the constitutional amendment read as follows:

> "At a time when Turkey is waging the largest and most intensive campaign against terrorism in its history, certain members of parliament, whether before or after their election, have made speeches amounting to moral support for terrorism, have provided *de facto* support and assistance to terrorism and terrorists [and] have called for violence; [these actions] have aroused public indignation. The Turkish public is of the view that members of parliament who support terrorism and the terrorist[s] and call for violence are abusing their [parliamentary] immunity, and has urged the Turkish Grand National Assembly to allow the prosecution of anyone carrying out such activities. In the face of such a demand, it is inconceivable that the Assembly should remain silent." ("*Türkiye, tarihinin en büyük ve en kapsamlı, terörle mücadelesini yürütürken, bazı milletvekillerinin seçilmeden önce ya da seçildikten sonra yapmış oldukları teröre manevi ve moral destek manasındaki açıklamaları, bazı milletvekillerinin teröre ve teröristlere fiili manada destek ve yardımları, bazı milletvekillerinin ise şiddet çağrıları kamuoyunda büyük infial meydana getirmektedir. Türkiye kamuoyu milletvekillerinden, her şeyden önce, terörü ve teröristi destekleyen, şiddete çağrı yapan milletvekillerinin dokunulmazlığı istismar ettiğini düşünmekte, bu tür fiilleri olanların yargılanmasına Meclis tarafından izin verilmesini talep etmektedir. Böyle bir talep karşısında, Meclis'in sessiz kalması düşünülemez*.")

41. The constitutional amendment affected a total of 154 members of the National Assembly, including fifty-nine from the CHP (Republican People's Party), fifty-five from the HDP, twenty-nine from the AKP and ten

from the MHP (Nationalist Movement Party). It also concerned one independent member of parliament.

On various dates, fourteen members of parliament from the HDP, including the applicant, and one from the CHP were placed in pre-trial detention as the subject of criminal investigations.

42. On an unknown date, seventy members of parliament applied to the Constitutional Court for a review of the constitutional amendment. Their main contention was that the amendment should be treated as a "parliamentary decision" under Article 83 of the Constitution entailing the lifting of the immunity attaching to their status as members of parliament. They argued that the Constitutional Court should review the constitutionality of that "decision" in accordance with Article 85 of the Constitution.

43. In judgment no. 2016/117 delivered on 3 June 2016, the Constitutional Court unanimously rejected the application for a review of the constitutional amendment as a parliamentary decision on the lifting of the immunity of the members concerned. It observed that the case before it concerned a constitutional amendment in the formal sense of the term, which could not be treated as a parliamentary decision to lift the parliamentarians' immunity. It further noted that the amendment in question could be reviewed in accordance with the procedure laid down in Article 148 of the Constitution. However, under that procedure, only the President of Turkey or one-fifth of the 550 members of the National Assembly could apply for a review. Finding that this condition was not satisfied in the case before it, the Constitutional Court rejected the application by the members of parliament concerned.

44. The constitutional amendment was published in the Official Gazette on 8 June 2016 and came into force the same day.

D. The applicant's arrest and pre-trial detention

45. On unspecified dates while the applicant was serving as a member of parliament, thirty-one investigation reports (*fezleke*) were drawn up in respect of him by the competent public prosecutors. The prosecutors applied to the National Assembly to have the applicant's parliamentary immunity lifted in connection with the criminal investigations concerning him. A large majority of the reports concerned terrorism-related offences.

46. Following the entry into force of the constitutional amendment concerning the lifting of parliamentary immunity, the Diyarbakır public prosecutor ("the public prosecutor") decided to join all the criminal investigations in respect of the applicant under file number 2016/24950.

47. On 12 July, 15 July, 28 July, 12 August, 6 September and 11 October 2016 the competent public prosecutors issued summonses for the applicant to give evidence. However, the applicant did not appear before

the investigating authorities. In a speech at a meeting of his party's parliamentary group in April 2016, the applicant had stated that no HDP member of parliament would give evidence voluntarily.

48. On 9 September 2016 the Diyarbakır Magistrate's Court ordered restrictions on the right of the applicant's lawyers to inspect the contents of the investigation file or to obtain copies of documents in the file. On an unspecified date, the applicant lodged an objection against that decision, but the objection was dismissed on 19 November 2016.

49. On 3 November 2016, at the public prosecutor's request, the Diyarbakır Magistrate's Court ordered a search of the applicant's home.

50. On 4 November 2016 the applicant was arrested at his home and taken into police custody. Officers of the Diyarbakır police carried out a search at his home.

51. On the same day, the applicant, assisted by three lawyers, appeared before the public prosecutor. Arguing that he had been arrested and taken into police custody on account of his political activities and on the orders of the President of Turkey, the applicant stated on that occasion that he would not answer any questions relating to the accusations against him.

52. Afterwards, the public prosecutor asked the Diyarbakır 2nd Magistrate's Court to place the applicant in pre-trial detention for membership of an armed terrorist organisation (Article 314 § 1 of the Criminal Code ("the CC")) and for incitement to commit an offence (Article 214 § 1 of the CC).

53. Later on 4 November 2016, the applicant appeared before the Diyarbakır 2nd Magistrate's Court and was questioned about his alleged acts and the accusations against him. The applicant repeated the comments he had made to the public prosecutor and stated that he would not answer any questions. In the reasons for its decision, the Diyarbakır 2nd Magistrate's Court noted firstly that the constitutional amendment had lifted the applicant's parliamentary immunity in relation to the offences concerned. It then observed that, during the escalation of clashes between Daesh and the PYD in Syria in October 2014, the PKK had issued several calls for people to take to the streets. Almost simultaneously, three tweets had been published on behalf of the HDP central executive board, of which the applicant was a member and co-chair, likewise urging people to go out into the streets. The magistrate noted that during the events of 6 to 8 October 2014, PKK supporters had committed a number of offences, and in particular had caused the death of fifty people, injuries to 678 others and damage to 1,113 buildings. In his view, the tweets sent by the HDP gave rise to a strong suspicion that the applicant had committed the offence of incitement to commit an offence, in view of his position within the HDP. Next, he observed that the applicant had given several speeches in which he had described certain acts by PKK members, such as digging trenches and putting up barricades in towns, as "resistance", and had participated in

activities of the Democratic Society Congress, an organisation which, according to the magistrate, operated in accordance with the KCK Agreement. He added that the applicant was the subject of several ongoing criminal investigations by the public prosecutor's office concerning terrorism-related offences such as:

– committing offences on behalf of a terrorist organisation without being a member of it;
– disseminating propaganda in favour of a terrorist organisation;
– assisting an illegal organisation;
– public incitement to hatred and hostility;
– condoning crime and criminals;
– participating in unlawful meetings and demonstrations.

In the magistrate's view, those facts were a sufficient basis for a strong suspicion that the applicant had committed the offence of membership of a terrorist organisation. The magistrate added that the offences in question were 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. Subsequently, taking into account the severity of the sentences prescribed by law for the offences in question, he held that the measure of pre-trial detention was necessary and proportionate and that alternative measures to detention appeared insufficient.

54. On 8 November 2016 the applicant lodged an objection against the order for his pre-trial detention. In a decision of 11 November 2016 the Diyarbakır 3rd Magistrate's Court dismissed the objection.

55. On 1 December 2016 the Diyarbakır Magistrate's Court examined of its own motion the question of the applicant's continued pre-trial detention, on the basis of the case file alone. The magistrate ordered his continued detention, having regard to the existence of grounds justifying it; the nature of the alleged offences and the fact that they were among those listed in Article 100 § 3 of the CCP; the reasonable suspicion that the applicant had committed a criminal offence within the meaning of Article 5 of the Convention; the strong suspicion against the applicant for the purposes of Article 19 of the Constitution; and the factual evidence grounding a strong suspicion that he had committed an offence for the purposes of Article 100 of the Code of Criminal Procedure. Taking into account the severity of the sentences prescribed by law for the offences in question, the magistrate held that the applicant's continued pre-trial detention was proportionate and that alternative measures to detention appeared insufficient.

56. On 11 January 2017 the public prosecutor filed a bill of indictment with the Diyarbakır Assize Court in respect of the applicant, running to 501 pages (not including the appendices). He charged the applicant with forming or leading an armed terrorist organisation (Article 314 § 1 of the CC), disseminating propaganda in favour of a terrorist organisation (fifteen

counts – section 7(2) of the Prevention of Terrorism Act (Law no. 3713)), incitement to commit an offence (Article 214 § 1 of the CC), condoning crime and criminals (four counts – Article 215 § 1 of the CC), public incitement to hatred and hostility (two counts – Article 216 § 1 of the CC), incitement to disobey the law (Article 217 § 1 of the CC), organising and participating in unlawful meetings and demonstrations (three counts – section 28(1) of the Meetings and Demonstrations Act (Law no. 2911)), and not complying with orders by the security forces for the dispersal of an unlawful demonstration (section 32(1) of Law no. 2911). He sought a sentence of between forty-three and 142 years' imprisonment for the applicant.

57. The charges brought against the applicant by the public prosecutor may be summarised as follows.

(i) In a speech he had given in Batman on 27 October 2012 in the offices of the Peace and Democracy Party ("the BDP", a left-wing pro-Kurdish political party), the applicant had disseminated propaganda in favour of the PKK terrorist organisation by urging people to close their shops and not to send their children to school as a protest aimed at securing the release of the PKK leader.

(ii) On 13 November 2012 two demonstrations had been held in Nusaybin and Kızıltepe in protest against the conditions of the PKK leader's detention, and the applicant had made the following comments in Kızıltepe:

> "They said you couldn't put up the poster of Öcalan. Those who said it ... Let me speak clearly. We are going to put up a sculpture of President Apo. The Kurdish people have now risen up. With their leader, their party, their elected representatives, their children, their young and old, they are one of the greatest peoples of the Middle East." ("*Demişler ki Öcalan posteri asamazsınız. Onu diyenlere açıkça sesleniyorum... Biz başkan Apo'nun heykelini dikeceğiz heykelini. Kürt halkı artık ayağa kalkmış bir halktır. Önderiyle, partisiyle, seçilmişiyle, çocuğuyla, genciyle, yaşlısıyla Ortadoğu'nun en büyük halklarından biridir*.")

According to the bill of indictment, these comments amounted to propaganda in favour of a terrorist organisation.

(iii) In a speech he had given in the BDP offices in Diyarbakır on 21 April 2013, the applicant had made the following statements:

> "The Kurdish movement used to see the war as a war of self-defence. Nowadays, if you have enough experience to resist [and] prevail using non-violent methods, it is not morally [and] politically right to use weapons. Today, those who criticise us also say that the Kurdish people would not exist, at least in Turkish Kurdistan, without the PKK movement. You could not speak of the existence of Kurds in Turkish Kurdistan. Without the coup in 1984 [the year of the first PKK attacks], without the guerrillas, no one today could speak of the existence of the Kurdish people; the Kurds would have no other choice. ... At the time of the initial resistance in Şemdinli [and] Eruh [the first terrorist attacks by the PKK, carried out in the Şemdinli district in Hakkari and the Eruh district in Siirt on 15 August 1984], no one was aware of what was happening but the resistance has today created [the] reality of the [Kurdish] people. We have gained our identity." ("*Kürt hareketi savaşı meşru müdafaa savaşı olarak ele aldı.*

Şimdi eğer elinizde silah dışında yöntemlerle güçle, mekanizmayla direnebilecek, başarabilecek yeteri kadar birikim varsa siz buna rağmen silahı kullanırsınız birincisi bu ahlaki olmaz ikincisi de siyasi olarak da doğru bir tercih olmaz. Kürt halkı evet bugün biz sadece söylemiyoruz, bizi eleştirenler de söylüyordu, PKK hareketi olmasaydı bugün Kürt halkı diye bir şey Türkiye Kürdistan'ı için en azından olmayacaktı. Türkiye Kürdistanı'nda Kürtlerin varlığından söz edilmeyecekti. 1984 hamlesi olmasaydı, gerilla savaşı olmasıydı, kimse bugün Kürt halkının varlığından söz edemezdi, çünkü Kürtlerin başka çaresi yoktu. ... Şemdinli'de Eruh'ta ilk direniş sergilendiğinde kimse ne olduğunun farkında değildi ama o direniş bugün büyük bir halk gerçeği yarattı. Kimliğimizi kazandık.")

(iv) Following the proclamations of self-governance and the operations conducted by the security forces, the applicant had stated on several occasions that the operations in question were massacres carried out by the national authorities and had described certain acts attributed to members of the PKK as acts of resistance.

(v) The applicant had actively worked for the DTK organisation, founded according to the public prosecutor in order to raise public awareness of the PKK's views, and had given speeches at meetings organised by the DTK.

(vi) The applicant was in charge of the political wing of the KCK illegal organisation; the public prosecutor presented evidence against him including the following:

– two documents, entitled "*documento*" and "*ikram ark*", discovered on a hard drive seized from the home of a certain A.D., who had been sentenced to eighteen years' imprisonment for leading a terrorist organisation; according to those documents, the KCK leader in Turkey, S.O., had given instructions to several people, including the applicant, to visit the relatives of İ.E., who had been mistakenly assassinated by the PKK;

– the records of intercepted telephone conversations between S.O. and K.Y., a person who had been sentenced to twenty-one years' imprisonment for leading a terrorist organisation, and between K.Y. and the applicant; according to those records, S.O. had given instructions to several people, including the applicant, to take part in certain meetings abroad, including in Strasbourg.

(vii) The applicant had incited the acts of violence that had taken place between 6 and 8 October 2014 through his speeches and statements, the relevant parts of which are summarised in paragraphs 22-23 above.

58. On 2 February 2017 the Diyarbakır Assize Court accepted the bill of indictment filed by the public prosecutor. On the same day, it contacted the Ministry of Justice, asking it to take the necessary steps to transfer the venue of the applicant's trial on public safety grounds. Also on the same day, it ordered the continuation of the applicant's pre-trial detention.

59. On 1 March 2017 the Diyarbakır Assize Court examined of its own motion the question of the applicant's continued detention. Having regard to the number and nature of the charges against the applicant and the concrete

evidence grounding a strong suspicion that he had committed an offence, and bearing in mind that he had yet to provide his defence submissions, that he had refused to appear before the investigating authorities, that the alleged offences were among those listed in Article 100 § 3 of the CCP and that the grounds for keeping him in detention remained unchanged, it ordered his continued pre-trial detention. In view of the severity of the sentences provided for by law for the offences in question, the Diyarbakır Assize Court held that the application of alternative measures to detention would be insufficient.

60. On an unspecified date the applicant lodged a further objection against the decision to continue his pre-trial detention. In a decision of 14 March 2017 the Diyarbakır Assize Court dismissed the objection on the basis of the nature of the alleged offences, the state of the evidence, the period that the applicant had spent in detention, the strong suspicion that he had committed the offences in question and his refusal to appear before the investigating authorities during the investigation.

61. On 22 March 2017, at the request of the Ministry of Justice, the Court of Cassation, finding that a change of venue for the applicant's trial was appropriate in order to avoid threats to public safety, transferred the case to the Ankara Assize Court.

62. On 6 April 2017, the Diyarbakır Assize Court forwarded the file to the Ankara Assize Court.

63. On 22 June 2017 the Ankara 19th Assize Court, examining the question of its own motion, ordered the applicant's continued detention. In so doing, it took account firstly of the existence of concrete evidence grounding a strong suspicion that the applicant had committed the alleged offences and of the upper and lower limits of the sentences prescribed for those offences. Next, it found that the prevention of disorder and of further offences constituted valid grounds for pre-trial detention in the light of Article 5 of the Convention and the Court's case-law. Having regard to the period that the applicant had spent in pre-trial detention, it also held that there was a risk of his absconding and tampering with evidence. For the same reasons, it concluded that the application of alternative measures to pre-trial detention would have been insufficient.

64. On 3 October 2017, 103 days after its previous decision, the Ankara 19th Assize Court again examined the question of the applicant's continued pre-trial detention. Having regard to the number and nature of the charges against him, the existence of concrete evidence grounding a strong suspicion that he had committed the offences in question and the upper and lower limits of the sentences prescribed for those offences, and bearing in mind that he had yet to provide his defence submissions, that he had refused to appear before the investigating authorities and that the grounds for keeping him in detention remained unchanged, it ordered his continued pre-trial detention. It also noted that in view of the prospect of the applicant's

conviction for the alleged offences, the application of alternative measures to pre-trial detention would be insufficient.

65. On 7 December 2017 the Ankara 19th Assize Court held its first hearing in the case.

66. During the trial, the applicant argued that he had been detained for expressing his political opinions, and denied having committed any criminal offence. He maintained that his initial and continued pre-trial detention were unlawful. In particular, he asserted that the aim of depriving him of his liberty had been to silence members of the opposition.

67. During the investigation and the trial, the applicant lodged more than fifteen objections against his continued pre-trial detention. The national courts, in particular the Ankara 19th Assize Court, continued to extend his pre-trial detention, mainly on the same grounds as referred to in paragraphs 53, 55, 59, 60, 63 and 64 above.

68. The criminal proceedings are currently pending before the Ankara 19th Assize Court.

E. The first individual application to the Constitutional Court

69. On 17 November 2016 the applicant lodged an individual application with the Constitutional Court. He complained firstly of a violation of his right to liberty and security and his right to engage in political activities. In that connection he submitted that he had been arrested, taken into police custody and placed in pre-trial detention on account of political speeches he had made as a member of parliament and co-chair of a political party. He argued that the statements he had made should be examined from the standpoint of his right to freedom of expression. He also contended that the reasons given by the domestic courts to justify his continued detention had been insufficient. In addition, he complained that he had no access to the investigation file in order to challenge his pre-trial detention. Lastly, he maintained that in view of his status as a member of parliament, his continued pre-trial detention amounted to a violation of the right to free elections.

70. In a decision of 21 December 2017 the Constitutional Court declared the application inadmissible (decision no. 2016/25189).

71. With regard to the complaint concerning the lawfulness of the applicant's arrest and detention in police custody, it held that he should have brought an action under Article 141 § 1 (a) of the CCP but had refrained from doing so. Furthermore, it noted that he had not lodged an objection under Article 91 § 5 of the CCP against his detention in police custody. Accordingly, it declared the complaint inadmissible for failure to exhaust the appropriate remedies.

72. As regards the complaint about the lawfulness of his pre-trial detention, the applicant had argued that his initial and continued detention

were in breach of the Constitution as he enjoyed parliamentary immunity. The Constitutional Court noted in that connection that there was no constitutional rule preventing the pre-trial detention of a member of parliament whose parliamentary immunity had been lifted. It observed that the constitutional amendment of 20 May 2016 had made it possible to grant the requests for the lifting of the applicant's parliamentary immunity that had been referred to the National Assembly before the adoption of the amendment. Referring to its judgment no. 2016/117 of 3 June 2016, it dismissed the applicant's argument that his initial and continued pre-trial detention had no basis in law.

73. Next, the Constitutional Court examined whether there had been a strong presumption that the applicant had committed an offence. It noted that, at a time when the internal conflict in Syria had posed a threat to national security in Turkey, following armed clashes in Kobani and alongside appeals from the PKK, the HDP had called on the people to take to the streets. Following those calls, serious violent incidents had started to take place on 6 October 2014. Tens of thousands of people had taken part in the incidents, and many people had lost their lives, while many others had suffered injuries. The Constitutional Court noted that the applicant had not argued that the calls in question had been issued against his will; on the contrary, he had stated that he stood behind them. Having regard to the number of deaths and injuries, it found that a causal link could be established between the calls issued by the HDP central executive board, which was co-chaired by the applicant, and the acts of violence in question. Furthermore, with regard to the "trench events", it held that, bearing in mind the statements made by the applicant, the places where he had made them and his position as co-chair of the HDP, his pre-trial detention in connection with a terrorism-related offence was not unfounded. Thus, referring to the content of the speeches given by the applicant on 13 November 2012 and 21 April 2013 (see paragraph 57 (ii) and (iii) above), it observed that a finding that the speeches amounted to evidence of the commission of an offence could not be viewed as manifestly ill-founded. Lastly, having regard to the contents of the conversations between senior officials of the PKK and the applicant, it found that it had been legitimate to consider that the applicant might have acted in accordance with the instructions of the leaders of a terrorist organisation. It therefore held that these factors were sufficient grounds for a strong suspicion that the applicant had committed an offence.

74. The Constitutional Court then went on to consider whether the applicant's initial and continued pre-trial detention had been based on justifiable grounds. First of all, it examined whether the detention had pursued a legitimate aim. It noted in that connection that, having established that there was a strong suspicion that the applicant had committed the alleged offences, the Diyarbakır 2nd Magistrate's Court had ordered his pre-trial detention on the grounds that the offences in question were among

those listed in Article 100 § 3 of the CCP and were punishable by heavy sentences. The Constitutional Court noted that the severity of the potential sentence was a factor to consider when assessing the risk of absconding. It added that the applicant had refused to appear before the investigating authorities and had stated that no member of parliament from his party would give evidence voluntarily. Those aspects were sufficient in the court's view to conclude that there was a flight risk.

75. The Constitutional Court then considered whether the applicant's initial and continued pre-trial detention were proportionate to the aim pursued. In that context, the applicant had alleged that his detention had prevented him from carrying out his political activities. Referring to several Constitutional Court judgments concerning the pre-trial detention of members of parliament, he had argued that his detention was disproportionate to the aim pursued, in view of his status as a member of parliament. In relation to that point, the Constitutional Court noted firstly that, contrary to what the applicant had maintained, it had never given a judgment in which it had found that the pre-trial detention of a member of parliament whose immunity had been lifted amounted in itself to a breach of the Constitution. It noted that in the cases of *Kemal Aktaş and Selma Irmak* (no. 2014/85), *Faysal Sarıyıldız* (no. 2014/9), *İbrahim Ayhan* (no. 2013/9895) and *Gülser Yıldırım* (no. 2013/9894), no review of the lawfulness of the applicants' pre-trial detention had been carried out since they had not raised a complaint on that account. In the cases of *Mehmet Haberal* (no. 2012/849) and *Mustafa Ali Balbay* (no. 2012/1272) it had declared the complaints as to the lawfulness of the applicants' detention inadmissible as being manifestly ill-founded. In those judgments it had examined the complaints concerning the right to be elected and to carry out political activities in conjunction with the complaints about the length of the applicants' pre-trial detention. In finding a violation of the right to liberty and security of the members of parliament concerned, it had weighed the public interest inherent in the exercise of the right to be elected and to carry out political activities against the length of the applicants' detention (four years, three months and twenty-two days in the *Mehmet Haberal* judgment (no. 2012/849); four years and five months in *Mustafa Ali Balbay* (no. 2012/1272); four years, eight months and sixteen days in *Kemal Aktaş and Selma Irmak* (no. 2014/85); four years, six months and fifteen days in *Faysal Sarıyıldız* (no. 2014/9); three years, two months and twenty-six days in *İbrahim Ayhan* (no. 2013/9895); and three years, ten months and five days in *Gülser Yıldırım* (no. 2013/9894)). The Constitutional Court further noted that as the applicant had been placed in pre-trial detention a long time after the alleged offences had been committed, it had to examine whether or not his initial and continued pre-trial detention could have been regarded as necessary in the circumstances. In that context, it pointed out that, in accordance with Article 83 of the Constitution, the applicant could not have

been placed in pre-trial detention while he enjoyed parliamentary immunity. It observed that the investigation reports concerning him had been sent to the competent public prosecutors after the entry into force of the constitutional amendment introducing an exception to parliamentary immunity in his case, and that he had been placed in pre-trial detention some five months afterwards. It was therefore clear from the evidence in the case file that the investigating authorities had not remained inactive during that period. The Constitutional Court further held that it was unable to conclude that the applicant's initial and continued pre-trial detention had been disproportionate and arbitrary, notably in view of the severity of the sentences prescribed for the offences in question. For those reasons, it declared this part of the application inadmissible as being manifestly ill-founded.

76. The applicant had also argued, relying on Article 18 of the Convention, that he had been placed in pre-trial detention for a purpose other than those provided for in Article 5 of the Convention. Having regard to its conclusion concerning the lawfulness of the applicant's pre-trial detention, the Constitutional Court found that it was unnecessary to examine that complaint.

77. Concerning the applicant's complaint that he had had no access to the investigation file, the Constitutional Court held that he had had sufficient means available to prepare his defence to the charges against him and to challenge his pre-trial detention, in view of the contents of the investigation reports submitted to the National Assembly by the public prosecutors. It observed that the applicant and his representatives had had unrestricted access to those reports. Next, it examined the public prosecutor's application of 4 November 2016 for the applicant to be placed in pre-trial detention for membership of an armed terrorist organisation and incitement to commit an offence, and the order of the same day for his pre-trial detention. It found that although the applicant had not had an unlimited right of access to the evidence in the file between 9 September 2016 and 2 February 2017, he had had sufficient knowledge of the substance of the evidence forming the basis for his pre-trial detention and had thus had the opportunity to properly contest the reasons given to justify the detention. Accordingly, it declared this complaint inadmissible as being manifestly ill-founded.

78. Lastly, regarding the complaints relating to the right to freedom of expression and the right to be elected and to carry out political activities, the Constitutional Court, having regard to its conclusion in relation to the applicant's complaint as to the lawfulness of his pre-trial detention, declared them inadmissible as being manifestly ill-founded.

79. In his dissenting opinion, the judge in the minority likewise considered, on the basis of the evidence in the case file, that there was a strong suspicion that an offence had been committed by the applicant.

However, referring to the principles established in the Court's case-law, particularly in *Buzadji v. the Republic of Moldova* ([GC], no. 23755/07, 5 July 2016), he expressed the view that the applicant's detention was not proportionate in so far as it had not been shown that there were relevant and sufficient reasons to justify it. In his opinion, the judicial authorities had not explained why the application of an alternative measure to detention would have been insufficient. Turning to the risk of absconding, he observed firstly that the orders for the applicant's initial and continued pre-trial detention had given two main reasons to substantiate that risk, namely the severity of the sentences prescribed by law for the offences in question and the fact that the applicant had refused to appear before the investigating authorities. In the dissenting judge's view, however, the severity of a sentence could not *per se* justify a person's pre-trial detention. Similarly, he considered that it could not be concluded that the applicant's refusal to appear was an indication of a flight risk, since he had continued to carry out his political activities without demonstrating any intention of absconding. Furthermore, the dissenting judge noted that between the entry into force of the amendment to the Constitution lifting the applicant's parliamentary immunity and the date of his initial pre-trial detention, the applicant had travelled abroad more than ten times and had never attempted to flee. For these reasons, he was of the view that there had been a violation of Article 19 of the Constitution in the applicant's case. Noting in addition that the applicant was a member of parliament and co-chair of a political party that had obtained more than five million votes, the dissenting judge considered that his pre-trial detention without relevant and sufficient reasons also amounted to a breach of the right to be elected and to carry out political activities as safeguarded by Article 67 of the Constitution.

F. The second individual application to the Constitutional Court

80. On 20 April 2018 the National Assembly decided to bring forward to 24 June 2018 the presidential and parliamentary elections scheduled for 2019. The applicant stood as a candidate in the presidential election.

81. On 15 May 2018 the applicant lodged an objection seeking his release, on the grounds that he was a candidate in the presidential election.

82. On 21 May 2018 the Ankara 19th Assize Court, by a majority, dismissed the objection, on the following grounds:

– the existence of evidence grounding a strong suspicion that the applicant had committed the offences of which he was accused;

– the fact that the offences in question were among those listed in Article 100 § 3 of the CCP;

– the severity of the sentences prescribed by law for the offences concerned;

– the finding that alternative measures to detention appeared insufficient;

– the applicant's refusal to appear before the investigating authorities;

– the fact that the applicant's defence submissions had not yet been obtained.

In a dissenting opinion, the judge in the minority expressed the view that, since the applicant was a candidate in the presidential election, he should be released pending trial in accordance with Article 67 of the Constitution and Article 3 of Protocol No. 1 to the Convention.

83. On 22 May 2018 the applicant lodged an objection against that decision. On 23 May 2018 the objection was dismissed by the Ankara 20th Assize Court.

84. On 29 May 2018 the applicant lodged another individual application with the Constitutional Court. He alleged a violation of Articles 5 and 10 of the Convention and Article 3 of Protocol No. 1 to the Convention.

85. It appears from the case file that the proceedings concerning this application are still pending before the Constitutional Court.

G. Further development

86. On 7 September 2018, in the context of separate criminal proceedings, the Ankara Assize Court, on the basis of section 7(2) of the Prevention of Terrorism Act (Law no. 3713), sentenced the applicant to four years and eight months' imprisonment on account of a speech he had given at a rally in Istanbul on 17 March 2013. This case is still pending in the domestic courts.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Relevant provisions of the Constitution

87. 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 nearest court 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.

..."

88. The relevant passages of Article 67 of the Constitution read as follows:

"Citizens shall have the right to vote, to stand for election, to engage in political activities independently or as members of a political party and to take part in referendums in accordance with the rules laid down by law.

...

The exercise of these rights shall be regulated by law.

..."

89. Article 83 of the Constitution, concerning parliamentary immunity, reads as follows:

"Members of the Turkish Grand National Assembly shall not be liable for their votes and statements in the course of the Assembly's work, for the views they express before the Assembly or, unless the Assembly decides otherwise on the proposal of the Bureau for a particular sitting, for repeating or disseminating such views outside the Assembly.

A member who is alleged to have committed an offence before or after election shall not be arrested, questioned, detained or tried unless the Assembly decides otherwise. This provision shall not apply in cases where a member is caught in the act of committing a crime punishable by a heavy penalty and in cases falling under Article 14 of the Constitution, provided that an investigation has been initiated before the election. However, in such situations the competent authority shall notify the Turkish Grand National Assembly immediately and directly.

The execution of a criminal sentence imposed on a member of the Turkish Grand National Assembly either before or after his or her election shall be suspended until he or she ceases to be a member; the statute of limitations shall not apply during the term of office.

The investigation and prosecution of a re-elected deputy shall be subject to a fresh decision by the Assembly to lift immunity.

Political party groups in the Turkish Grand National Assembly shall not hold debates or take decisions regarding parliamentary immunity."

90. Provisional Article 20 of the Constitution, as adopted by the National Assembly on 20 May 2016, reads as follows:

"On the date when this Article is adopted by the Grand National Assembly of Turkey, the provision of the first sentence of the second paragraph of Article 83 of the Constitution shall not be applied to deputies who are the subject of requests to lift parliamentary immunity which have been submitted by the authorities with jurisdiction to investigate or grant leave for an investigation or prosecution, the public prosecutor's office or the courts to the Ministry of Justice, the Prime Minister's Office, the Office of the President of the Grand National Assembly of Turkey and the chair of the Joint Committee comprising the members of the Constitutional Committee and the Justice Committee.

Within fifteen days of the entry into force of this Article, any files with the chair of the Joint Committee comprising the members of the Constitutional Committee and the Justice Committee, the Office of the President of the Grand National Assembly of Turkey, the Prime Minister's Office and the Ministry of Justice concerning the lifting of parliamentary immunity shall be returned to the competent authority so that it can take the necessary action."

B. Relevant provisions of the Criminal Code ("the CC")

91. Article 214 § 1 of the CC is worded as follows:

"Anyone who publicly incites another to commit an offence shall be sentenced to a term of imprisonment of six months to five years."

92. Article 215 § 1 of the CC reads as follows:

"Anyone who publicly praises a crime that has been committed or a person for committing a crime shall, where a clear and present danger to public order arises on that account, be punishable by a sentence of up to two years' imprisonment."

93. Article 216 § 1 provides:

"Anyone who publicly provokes hatred or hostility in one section of the public against another section with different characteristics based on social class, race, religion, sect or regional differences, such as to create a clear and present danger to public safety, shall be sentenced to a term of imprisonment of one to three years."

94. Article 217 § 1 is worded as follows:

"Anyone who publicly incites the population to disobey the law shall be sentenced to a term of imprisonment of six months to two years or a judicial fine, provided that such incitement is capable of posing a threat to public order."

95. Article 314 § 1 reads as follows:

"Anyone who forms or leads an organisation with the purpose of committing the offences listed in the fourth and fifth parts of this chapter shall be sentenced to a term of imprisonment of ten to fifteen years."

C. The Prevention of Terrorism Act (Law no. 3713)

96. Section 7(2) of the Prevention of Terrorism Act (Law no. 3713) provides:

> "Anyone who disseminates propaganda in favour of a terrorist organisation by legitimising or condoning methods used by such organisations entailing coercion, violence or threats or incites others to use such methods shall be sentenced to a term of imprisonment of one to five years. ..."

D. The Meetings and Demonstrations Act (Law no. 2911)

97. Section 28(1) of the Meetings and Demonstrations Act (Law no. 2911) is worded as follows:

> "Anyone who organises, leads or participates in unlawful demonstrations shall be punishable by a term of imprisonment of one year and six months to three years, unless the acts in question constitute an offence punishable by a heavier sentence."

98. Section 32(1) of the same Act provides:

> "Anyone who participates in an unlawful meeting or demonstration and anyone who persists in not complying with orders by the security forces to disperse shall be sentenced to a term of imprisonment of six months to three years. If the offence is committed by the organisers of the meeting or demonstration, the sentence prescribed in this subsection shall be increased by one-half."

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

99. Article 91 § 5 of the CCP provides that an arrested person or his or her representative, partner or relatives may lodge an objection against the arrest, the order for placement in police custody or the extension of the custody period with a view to securing the person's release. The objection must be examined within twenty-four hours at the latest.

100. Pre-trial detention is governed by Articles 100 et seq. of 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.

101. For certain offences listed in Article 100 § 3 of the CCP, there is a statutory presumption of the existence of grounds for detention. The relevant passages of Article 100 § 3 of the CCP read as follows:

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

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

...

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

..."

102. 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.

103. 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.

104. Article 141 § 1 (a) of the CCP is worded as follows:

"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;

..."

105. Article 142 § 1 of the CCP 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."

106. 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).

F. Constitutional case-law

107. In a judgment delivered on 4 December 2013 (no. 2012/1272) concerning the detention of a member of parliament, the Constitutional Court examined a complaint relating to the right to be elected in conjunction with a complaint concerning the length of pre-trial detention. The case concerned the pre-trial detention of Mr Balbay, who had been elected as a member of the National Assembly following the parliamentary elections held on 12 June 2011. While his application was still pending before the

Constitutional Court, Mr Balbay had been sentenced to sixteen years' imprisonment on 5 August 2013. In its judgment, the Constitutional Court found not only a violation of the right to liberty, but also a violation of the right to be elected on account of the excessive duration of Mr Balbay's pre-trial detention following his election (four years and five months in total, including more than two years and one month after his election). It held as follows:

> "132. In the present case, the criminal investigation in respect of the applicant was initiated long before the parliamentary elections. While the applicant was in pre-trial detention, he was elected as a member of parliament in the parliamentary elections held on 12 June 2011. In that respect, neither the applicant's prosecution nor his pre-trial detention constituted an obstacle to his election as a member of parliament. ... On account of the fact that the applicant was not provisionally released after his election, he was unable to take the oath or to sit in Parliament. It is beyond doubt that the detention in question, which made it impossible to perform his parliamentary duties, constituted an interference with [the applicant's] right to be elected, because [the measure in issue] hindered all political activity and [the performance of his duties] as a member of parliament.
>
> 133. ... the applications for provisional release submitted by the applicant after his election were dismissed by the competent courts. [It should be reiterated that in the examination of the compatibility of the pre-trial detention with Article 19 of the Constitution – an equivalent provision to Article 5 of the Convention –] it was concluded that the dismissal of the applications for provisional release submitted by the applicant after his election did not strike a fair balance between his right to be elected and the interest of society in the continued pre-trial detention of a person charged with a criminal offence. The fact that the applicant was unreasonably kept in pre-trial detention prevented him from taking part in legislative activities. In view of the duration of the applicant's pre-trial detention after his election, it cannot be concluded that this severe interference with the right to carry out political activities was proportionate and compatible with the requirements of a democratic society."

G. Opinion of the European Commission for Democracy through Law (Venice Commission) on the suspension of the second paragraph of Article 83 of the Constitution

108. On 14 and 15 October 2016, at its 108th plenary session, the Venice Commission adopted its opinion on the constitutional amendment by which the principle of parliamentary inviolability was not applicable to cases against members of parliament which were pending on the date when the amendment was adopted. The relevant passages of this opinion read as follows:

> "...
>
> 80. The constitutional amendment of 12 April 2016 was an *ad hoc*, 'one shot' *ad homines* measure directed against 139 individual deputies for cases that were already pending before the Assembly. Acting as the constituent power, the Grand National Assembly maintained the regime of immunity as established in Articles 83 and 85 of the Constitution for the future but derogated from this regime for specific cases

concerning identifiable individuals while using general language. This is a misuse of the constitutional amendment procedure.

81. The argument that dealing one by one with the cases against these deputies would have taken too long and would have unduly burdened the agenda of the Grand National Assembly is not convincing. Instead of simplifying the procedure of lifting immunity, the complex system was maintained but it was derogated for 139 deputies. The heavy workload of the Grand National Assembly does not justify singling out the cases relating to these deputies from all other cases brought before it before and after the adoption of the Amendment. This violates the principle of equality. In the opinion of the Commission, the system of parliamentary immunity in Turkey should not be weakened, but reinforced, in particular in order to ensure the freedom of speech of Members of Parliament.

..."

H. Memorandum by the Council of Europe Commissioner for Human Rights following his visits to Turkey in 2016

109. On 15 February 2017 the Commissioner for Human Rights published a memorandum on freedom of expression and media freedom in Turkey. The relevant part of the memorandum reads as follows:

"Use of judicial harassment to restrict the parliamentary debate

59. While critical journalists are the most obvious victims of this situation (see below), many other sectors and groups were also directly targeted. A particularly disturbing manifestation of this situation is the lifting of the immunities of parliamentarians. In a move that the Venice Commission described as an *ad hoc*, 'one shot' and '*ad homines*' measure, as well as a misuse of the constitutional amendment procedure, the majority in the Turkish Parliament lifted the immunities of 139 of its members who were subject to pending prosecution requests submitted to the Parliament. One of the most worrying aspects of this measure was the fact that the majority of impugned acts concerned statements made by these MPs, for example for insulting the President or other public officials, terrorist propaganda or incitement to hatred. The preamble of the constitutional amendment itself stated that its purpose was to address public indignation about, *inter alia*, 'statements of certain deputies constituting emotional and moral support to terrorism'. As the Venice Commission highlighted, nearly all MPs of a particular opposition party, the HDP, were concerned by the measure. As a result of this measure, prosecutions are on-going against a large number of opposition MPs. Several members of HDP, including its co-Chairs, were arrested in November 2016. The Turkish authorities have stated that the reason of the arrests was the refusal of the MPs to comply with the order to personally appear before the prosecutor. However, even after having forcibly been made to give evidence, 11 MPs are still in prison and cannot carry out their parliamentary mandate at a crucial juncture.

60. The ECtHR made it very clear that '[w]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament ..., call for the closest scrutiny on the part of the Court.' The Commissioner also recalls the ECtHR's judgment concerning DTP, a precursor party of the HDP, which was unduly closed, mainly for statements of its members which

were protected under Article 10. The Commissioner notes, in particular, that these statements were very similar to the statements which were used as justification for the lifting of the immunities in the present case.

61. The Commissioner draws the authorities' attention particularly to the conclusion of the Court that the mere fact that there are parallels between the principles defended by the DTP and those of the PKK did not suffice to conclude that the party approved of the use of force in order to implement its policies. If a political group was considered to be supporting terrorism, merely by advocating those principles, that would reduce the possibility of dealing with related issues in the context of a democratic debate and would allow armed movements to monopolise support for the principles in question. In the current climate, the Commissioner considers that the lifting of the immunities of MPs and their subsequent arrest and detention not only disenfranchised millions of voters, but sent an extremely dangerous and chilling message to the entire Turkish population, and significantly reduced the scope of democratic debate, including on human rights."

I. Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and submitted to a national referendum on 16 April 2017, adopted by the Venice Commission

110. On 9 and 11 March 2017, at its 110th plenary session, the Venice Commission adopted its opinion on the draft legislation amending the Turkish Constitution, entailing a transition from a parliamentary to a presidential system. The relevant passage of the opinion reads as follows:

"21. First, the debates took place in the absence of a significant number of deputies from the opposition. Indeed, following a constitutional amendment enacted on 20 May 2016, published in the Official [Gazette] on 8 June 2016 and entered into force the same day, the parliamentary immunity of several MPs was lifted. On 4 November 2016, the President of the second-largest opposition party HDP (Selahattin Demirtaş) and 8 other HDP MPs were taken into detention on remand. There are currently 13 members of HDP who are still in detention, despite the Venice Commission's recommendation to restore parliamentary immunity in Turkey."

J. Decision adopted by the Governing Council of the Inter-Parliamentary Union (IPU)

111. On 18 October 2017, at its 201st session in St Petersburg, the IPU Governing Council adopted its decision concerning fifty-six HDP members of parliament, including the applicant. It stated in particular:

"...

5. *Recalls* its long-standing concerns over freedom of expression and association related to anti-terrorist legislation and the offence of membership of a criminal organization and *reiterates* its prior recommendations to the Turkish authorities to urgently address these concerns in an appropriate manner; *urges* the Turkish authorities to share the information requested on the specific facts and evidence adduced to support the charges and convictions against the concerned

parliamentarians, including relevant excerpts of all court decision; *also wishes* to be kept informed of new developments in the proceedings, particularly when verdicts are delivered;

6. *Cautions* that recent developments and the lack of progress towards resolution of the case seem to lend significant weight to fears that the ongoing proceedings may be aimed at depriving the People's Democratic Party (HDP) of effective representation in parliament, at weakening the opposition parties in parliament and in the broader political arena, and therefore at silencing the populations they represent; *reaffirms its concerns* that the limited possibility of parliamentary representation for the populations affected may contribute to further deterioration of the political and security situation prevailing in south-eastern Turkey, as well as weaken the independence of the institution of parliament as a whole;

..."

K. Amnesty International Report 2017/18: The state of the world's human rights

112. The relevant parts concerning Turkey of Amnesty International's 2017/18 annual report on the state of the world's human rights read as follows:

"**Turkey 2017/2018**

An ongoing state of emergency set a backdrop for violations of human rights. Dissent was ruthlessly suppressed, with journalists, political activists and human rights defenders among those targeted. ...

Background

...

After having been remanded in prison detention in 2016, nine parliamentarians from the Kurdish-rooted leftist Peoples' Democracy Party (HDP), including the party's two leaders, remained in prison during the whole year. Sixty elected mayors of the Democratic Regions Party, the sister party of the HDP, representing constituencies in the predominantly Kurdish east and southeast of Turkey, also remained in prison. The unelected officials who replaced them continued in office throughout 2017. ...

Freedom of expression

Civil society representatives, as well as the general population, widely practised self-censorship, deleting social media posts and refraining from making public comments for fear of dismissal from their jobs, closure of their organizations or criminal prosecution. Thousands of criminal prosecutions were brought, including under laws prohibiting defamation and on trumped-up terrorism-related charges, based on peoples' peaceful exercise of their right to freedom of expression. Arbitrary and punitive lengthy pre-trial detention was routinely imposed. Confidential details of investigations were frequently leaked to government-linked media and splashed across the front pages of newspapers, while government spokespeople made prejudicial statements regarding cases under investigation. Prosecutions of journalists and political activists continued, and prosecutions of human rights defenders sharply increased. International journalists and media were also targeted.

> Criticism of the government in the broadcast and print media largely disappeared, with dissent mainly confined to internet-based media. The government continued to use administrative blocking orders, against which there was no effective appeal, routinely, to censor internet content. ...”

THE LAW

I. THE GOVERNMENT’S PRELIMINARY OBJECTIONS

113. The Government raised three objections as to admissibility.

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

114. The Government contended that the applicant had submitted his complaints to another procedure of international investigation or settlement within the meaning of Article 35 § 2 (b) of the Convention, namely the Inter-Parliamentary Union (IPU). Article 35 § 2 (b) states:

> “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.”

115. The applicant contested the Government’s argument. He submitted that the IPU could not be regarded as a procedure of international investigation or settlement.

116. The Court reiterates that it follows from Article 35 § 2 (b) that the Convention, which seeks to avoid a plurality of international proceedings relating to the same cases, precludes the Court from dealing with an application which has already been investigated by an international body (see *Gürdeniz v. Turkey* (dec.), no. 59715/10, § 37, 18 March 2014). In this connection, it observes that a plea of inadmissibility under this provision can only be accepted on condition that the application has already been submitted to “another procedure of international investigation or settlement” (see *Peraldi v. France* (dec.), no. 2096/05, 7 April 2009).

117. In this context, the Court refers to the case-law of the European Commission of Human Rights, which found that the IPU was a non-governmental organisation bringing together parliamentarians from all over the world in order to unite them in common action and to advance international peace and cooperation. The Commission held that the term “another procedure” referred to judicial or quasi-judicial proceedings similar to those set up by the Convention, and that the term “international investigation or settlement” denoted institutions and procedures set up by

States, thus excluding non-governmental bodies (see *Lukanov v. Bulgaria*, no. 21915/93, Commission decision of 12 January 1995, Decisions and Reports 80-A, p. 108).

118. In the present case, the Court endorses the Commission's conclusion that the IPU does not constitute "another procedure of international investigation or settlement" within the meaning of Article 35 § 2 (b) of the Convention.

119. The Government's preliminary objection under this provision must therefore be dismissed.

B. Objection of failure to lodge an individual application with the Constitutional Court

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

121. The applicant maintained that he had exhausted all domestic remedies.

122. The Court reiterates that the applicant's compliance with the requirement to exhaust domestic remedies is normally assessed with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, 22 May 2001). 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, 1 February 2011; *Stanka Mirković and Others v. Montenegro*, nos. 33781/15 and 3 others, § 48, 7 March 2017; *Azzolina and Others v. Italy*, nos. 28923/09 and 67599/10, § 105, 26 October 2017; *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 107, 20 March 2018; and *Şahin Alpay v. Turkey*, no. 16538/17, § 86, 20 March 2018).

123. The Court observes that on 17 November 2016 the applicant lodged an individual application with the Constitutional Court, which gave its judgment on the merits on 21 December 2017 (see paragraphs 69-70 above).

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

C. Objection of failure to bring a compensation claim

125. Regarding the applicant's complaints under Article 5 of the Convention concerning the lawfulness of his arrest, detention in police custody and pre-trial detention, the Government stated that a compensation claim had been available to him under Article 141 § 1 (a) and (d) of the

CCP. They contended that he could and should have brought a compensation claim on the basis of those provisions.

126. The applicant contested the Government's argument. He asserted that a compensation claim did not offer reasonable prospects of success in relation to his complaints. He argued in particular that such a claim could not have resulted in his release.

1. The applicant's arrest and detention in police custody

127. Firstly, as regards the complaint concerning the lawfulness of the applicant's arrest and detention in police custody, the Court observes that the Turkish legal system provides applicants with two remedies in this respect, namely an objection aimed at securing release from custody (Article 91 § 5 of the CCP) and a compensation claim against the State (Article 141 § 1 (a) of the CCP) (see *Mustafa Avci v. Turkey*, no. 39322/12, § 63, 23 May 2017).

128. The Court reiterates that where there are doubts as to a domestic remedy's effectiveness and prospects of success – as maintained by the applicant in this case – the remedy in question must be attempted (see *Voisine v. France*, no. 27362/95, Commission decision of 14 January 1998). This is an issue that should be tested in the courts (see *Roseiro Bento v. Portugal* (dec.), no. 29288/02, ECHR 2004-XII (extracts); *Whiteside v. the United Kingdom*, no. 20357/92, Commission decision of 7 March 1994; and *Mustafa Avci*, cited above, § 65).

129. The Court notes in this connection that the Constitutional Court dismissed the applicant's complaints concerning the lawfulness of his arrest and detention in police custody, finding that anyone complaining of a violation on that account could bring a compensation claim under Article 141 § 1 (a) of the CCP. Furthermore, it noted that the applicant had not lodged an objection under Article 91 § 5 of the CCP against his detention in police custody (see paragraph 71 above).

130. In the light of the Constitutional Court's conclusion on this issue and its own findings in *Mustafa Avci* (cited above, §§ 62-65), the Court considers that, as regards his complaint concerning the lawfulness of his arrest and detention in police custody, the applicant was required to bring a claim under Article 91 § 5 or Article 141 § 1 of the CCP before the domestic courts, but did not do so. It therefore allows the Government's objection and rejects the complaint under Article 5 § 1 of the Convention concerning the applicant's arrest and detention in police custody for failure to exhaust domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

131. The Court points out, however, that this conclusion in no way prejudices any subsequent review of the question of the effectiveness of the remedy concerned, and in particular of the domestic courts' ability to develop a uniform, Convention-compliant approach to the application of

Article 141 § 1 (a) of the CCP (see *Korenjak v. Slovenia* (dec.), no. 463/03, § 73, 15 May 2007, and *Mehmet Hasan Altan*, cited above, § 102).

2. Initial and continued pre-trial detention

132. With regard to the applicant's complaints concerning his initial and continued pre-trial 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*, cited above, § 60). It notes, however, that the remedy provided for in Article 141 of the CCP is not capable of ending the applicant's pre-trial detention (see *Mehmet Hasan Altan*, cited above, § 103, and *Şahin Alpay*, cited above, § 82).

133. The Court therefore concludes that the objection raised by the Government on this account must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

134. The applicant complained that his initial pre-trial detention and its continuation were arbitrary, for two main reasons. Firstly, he argued that his initial pre-trial detention had not complied with domestic legislation in that he had been a member of the National Assembly enjoying parliamentary immunity. He further contended that there had been no evidence grounding a reasonable suspicion that he had committed a criminal offence necessitating his pre-trial detention. He complained that in those respects there had been a violation of Article 5 § 1 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;
>
> ..."

135. The Government contested that argument.

A. Compliance of the pre-trial detention with domestic legislation

1. The parties' submissions

(a) The Government

136. The Government submitted that the applicant's initial and continued pre-trial detention had complied with domestic legislation.

(b) The applicant

137. The applicant stated that, as a member of parliament, he enjoyed parliamentary immunity under Article 83 of the Constitution. He argued that the constitutional amendment resulting in the lifting of his parliamentary immunity was in breach of the principles of the rule of law, legal certainty, proportionality and protection against arbitrariness. Such an amendment in his view did not satisfy the quality-of-law requirement. Accordingly, he contended that his initial and continued pre-trial detention could not be regarded as complying with domestic legislation.

(c) The third parties

(i) The Commissioner for Human Rights

138. The Commissioner for Human Rights did not comment on whether the applicant's deprivation of liberty had had a legal basis. However, referring to the opinion of the Venice Commission on the suspension of the second paragraph of Article 83 of the Constitution, he stated that the lifting of the immunity of members of parliament against whom a prosecution had been brought was a misuse of the constitutional-amendment procedure.

(ii) The IPU

139. The IPU did not specify whether the applicant's initial and continued pre-trial detention had had a legal basis in domestic law. Nevertheless, it stated that the fundamental rights of members of parliament had to be upheld at all times, that they should be able to speak freely without fear of reprisals, and that parliamentary immunity was crucial to protect them from politically motivated allegations. It pointed out that, in accordance with Article 83 of the Constitution, Turkish parliamentarians enjoyed parliamentary inviolability and immunity and therefore could not be detained unless their immunity had been lifted.

140. In that context, the IPU criticised the constitutional-amendment procedure that had led to the lifting of parliamentary immunity for nearly all of the HDP's members of parliament. This procedure had introduced an exception to the ordinary procedure for the lifting of immunity and had authorised a blanket suspension of that principle.

(iii) The intervening non-governmental organisations

141. The intervening non-governmental organisations did not state a position on the alleged lack of a legal basis for the applicant's pre-trial detention. However, they criticised the constitutional-amendment procedure, referring in particular to the conclusions of the Venice Commission (see paragraph 110 above).

2. The Court's assessment

142. It is well established in the Court's case-law on Article 5 § 1 of the Convention that all deprivation of liberty must not only be based on one of the exceptions listed in sub-paragraphs (a) to (f) but must also be "lawful" (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 125, ECHR 2013). Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. This primarily requires any arrest or detention to have a legal basis in domestic law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. The Court must further ascertain in this connection whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein, notably the principle of legal certainty (see *Mooren v. Germany* [GC], no. 11364/03, § 72, 9 July 2009, with further references).

143. The Court observes that "quality of the law" implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness (see *Del Río Prada*, cited above, § 125). The standard of "lawfulness" set by the Convention thus requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III; *M. v. Germany*, no. 19359/04, § 90, ECHR 2009; and *Oshurko v. Ukraine*, no. 33108/05, § 98, 8 September 2011). Where deprivation of liberty is concerned, it is essential that the domestic law should clearly define the conditions for detention (see *Creangă v. Romania* [GC], no. 29226/03, § 120, 23 February 2012).

144. In examining whether the applicant's detention was "lawful" within the meaning of Article 5 § 1 and whether he was deprived of his liberty "in accordance with a procedure prescribed by law", the Court will first ascertain whether his detention complied with Turkish law.

145. The Court notes that it is not in dispute that the applicant was placed in pre-trial detention in accordance with Articles 100 et seq. of the

CCP, after his parliamentary immunity had been lifted following the constitutional amendment. The question to which the parties' arguments and differing positions relates is whether the constitutional amendment lifting parliamentary immunity in all cases where requests to that effect had been referred to the National Assembly prior to the date of adoption of the amendment in question could be considered to satisfy the "quality of the law" requirement.

146. In that context, the Court observes that the applicant's argument was raised before the Constitutional Court, which held that the Constitution did not preclude the detention of a member of parliament whose parliamentary immunity had been lifted. The Constitutional Court noted that in judgment no. 2016/117 of 3 June 2016 it had found that the case before it concerned a constitutional amendment in the formal sense of the term, entailing the lifting of immunity for members of parliament, including the applicant, in respect of whom a request to that effect had been submitted to the National Assembly prior to the date of adoption of the amendment. That being so, it concluded that the applicant's pre-trial detention could not be said to have had no basis in law or to breach the Constitution.

147. The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should review whether the domestic law has been complied with (see *Mooren*, cited above, § 73).

148. The Court considers that neither the interpretation nor the application of domestic law by the Constitutional Court in the present case appears arbitrary or manifestly unreasonable. Having regard to the foregoing, it finds, in the light of the Constitutional Court's case-law, that the applicant was placed and kept in pre-trial detention following the lifting of his parliamentary immunity and in accordance with Articles 100 et seq. of the CCP.

149. Of course, the Court must also satisfy itself that the applicant's detention, beyond its compliance with domestic law, was not arbitrary and thus contrary to the Convention. It observes in that connection that none of the parties has contended that the provisions of Articles 100 et seq. of the CCP were not themselves itself in conformity with the Convention, including the general principles expressed or implied therein.

150. Accordingly, the Court considers that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged lack of reasonable suspicion that the applicant committed a criminal offence

1. The parties' submissions

(a) The Government

151. The Government, referring to the principles established in the Court's case-law in this area (citing *Klass and Others v. Germany*, 6 September 1978, Series A no. 28; *Murray v. the United Kingdom*, 28 October 1994, Series A no. 300-A; *Sakık and Others v. Turkey*, 26 November 1997, *Reports of Judgments and Decisions* 1997-VII; *İpek and Others v. Turkey*, nos. 17019/02 and 30070/02, 3 February 2009; and *Balbay v. Turkey* (dec.), nos. 666/11 and73745/11, 3 March 2015), stated firstly that the applicant had been arrested and placed in pre-trial detention during a criminal investigation initiated in connection with the fight against terrorism, and more specifically against the PKK and the KCK.

152. They submitted that from the evidence gathered during the criminal investigation and included in the case file, it was objectively possible to conclude that there had been a reasonable suspicion that the applicant had committed the offences of which he was accused. On the strength of the evidence obtained during the investigation, criminal proceedings had been brought against the applicant and were still ongoing in the domestic courts.

(b) The applicant

153. The applicant submitted that he had been placed in pre-trial detention on account of his political opinions. He submitted that there were no facts or information that could satisfy an objective observer that he had committed the offences of which he was accused.

(c) The third parties

(i) The Commissioner for Human Rights

154. The Commissioner for Human Rights did not state a position as to whether there had been a reasonable suspicion that the applicant had committed an offence necessitating his pre-trial detention. He noted that the reason cited by the national authorities for the initial detention of the HDP members of parliament had been their refusal to appear before the investigating bodies. However, even after having been forcibly made to give evidence to the public prosecutor and a judge, a number of those members of parliament had been placed and kept in pre-trial detention.

(ii) The IPU

155. The IPU stated that it had received detailed information relating to the allegations that the evidence adduced to substantiate the charges against

the detained members of parliament concerned public statements, rallies and other peaceful political activities carried out in the course of their parliamentary duties. However, it indicated that it had not yet reached any conclusions as to whether there had been a reasonable suspicion that the individuals in question had committed a criminal offence.

(iii) The intervening non-governmental organisations

156. The intervening non-governmental organisations stated that since the attempted military coup of 15 July 2016, 1,482 members of the HDP, including several members of parliament, had been placed in pre-trial detention. They submitted that a large proportion of them had been detained for making political speeches. Emphasising the importance of public debate in a democratic society, they criticised the use of measures arbitrarily depriving HDP members of parliament of their liberty.

2. The Court's assessment

(a) Admissibility

157. The Court notes that the period to be taken into consideration in the present case began on 4 November 2016, when the applicant was placed in pre-trial detention, and that his detention is still ongoing. It observes that it has examined and dismissed the Government's objections of failure to exhaust domestic remedies in so far as they related to the applicant's pre-trial detention (see paragraphs 132-33 above).

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

(b) Merits

159. The Court first reiterates 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).

160. 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 Article 5 § 1 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, 5 July 2016).

161. The Court further reiterates that a person may be detained under Article 5 § 1 (c) of the Convention only in the context of criminal proceedings, for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence (see *Jėčius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX; *Włoch v. Poland*, no. 27785/95, § 108, ECHR 2000-XI; and *Poyraz v. Turkey* (dec.), no. 21235/11, § 53, 17 February 2015). The "reasonableness" of the suspicion on which deprivation of liberty must be based forms an essential part of the safeguard laid down in Article 5 § 1 (c). Having a 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, however, depend on all the circumstances (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182; *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X; *Korkmaz and Others v. Turkey*, no. 35979/97, § 24, 21 March 2006; *Süleyman Erdem v. Turkey*, no. 49574/99, § 37, 19 September 2006; and *Çiçek v. Turkey* (dec.), no. 72774/10, § 62, 3 March 2015).

162. The Court has also held that Article 5 § 1 (c) of the Convention does not presuppose that the investigating authorities have obtained sufficient evidence to bring charges at the time of arrest. 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. 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*, cited above, § 55; *Balbay*, cited above, § 69, *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).

163. The Court's task is to determine whether the conditions laid down in Article 5 § 1 (c) of the Convention, including the pursuit of the prescribed legitimate purpose, were fulfilled in the case brought before it. In this context it is not normally for the Court to substitute its own assessment of the facts for that of the domestic courts, which are better placed to assess the evidence adduced before them (see *Ersöz v. Turkey* (dec.), no. 45746/11, § 50, 17 February 2015, and *Mergen and Others v. Turkey*, nos. 44062/09 and 4 others, § 48, 31 May 2016).

164. The Court observes that the applicant in the present case maintained that there had been no "reasonable" suspicion at any time to justify his detention. He contended that no such suspicion had been present either during the initial period immediately after his arrest or during the subsequent periods when his pre-trial detention had been authorised and

extended by the judicial authorities. In this connection, the Court reiterates that the persistence of reasonable suspicion that the person arrested has committed an offence is a prerequisite for the lawfulness of the person's continued detention (see, among many other authorities, *Stögmüller v. Austria*, 10 November 1969, p. 40, § 4, Series A no. 9, and *McKay v. the United Kingdom* [GC], no. 543/03, § 44, ECHR 2006-X). Accordingly, while reasonable suspicion must exist at the time of the arrest and initial detention, it must also be shown, in cases of prolonged detention, that the suspicion persisted and remained "reasonable" throughout the detention (see *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, § 90, 22 May 2014).

165. In the present case, the Court notes that while the applicant was serving as a member of parliament, the competent public prosecutors submitted thirty-one investigation reports in respect of him to the National Assembly in connection with requests to have his parliamentary immunity lifted. Following the constitutional amendment, the criminal investigations in respect of the applicant were all joined together into a single investigation file, handled by the Diyarbakır public prosecutor. After the applicant had refused to give evidence to the investigating authorities, he was arrested and taken into police custody. On 4 November 2016 he was placed in pre-trial detention on suspicion of membership of an armed terrorist organisation and incitement to commit an offence (see paragraph 53 above). The Diyarbakır 2nd Magistrate's Court found that the tweets published on behalf of the HDP central executive board – of which the applicant was a member and co-chair – urging people to take to the streets were consistent with the policy espoused by the PKK and the calls it had issued. Reviewing the events of 6 to 8 October 2014, and in particular the number of deaths and injuries, the magistrate concluded that there was a strong suspicion that the applicant had committed the offence of incitement to commit an offence. He further noted that the applicant had described certain acts by members of the PKK, such as digging trenches and putting up barricades in towns, as "resistance". The applicant had also participated in activities of the Democratic Society Congress. Taking into account the fact that the applicant was the subject of several ongoing criminal investigations, the magistrate found that there was a sufficient basis for a strong suspicion that the applicant had committed the offence of membership of a terrorist organisation.

166. The Court notes in addition that in a bill of indictment filed on 11 January 2017, the public prosecutor charged the applicant with founding or leading an armed terrorist organisation, disseminating propaganda in favour of a terrorist organisation, incitement to commit an offence, condoning crime and criminals, public incitement to hatred and hostility, incitement to disobey the law, organising and participating in unlawful meetings and demonstrations, and not complying with orders by the security forces for the dispersal of an unlawful demonstration. He accordingly

sought a sentence of between forty-three and 142 years' imprisonment for the applicant.

167. The Court further notes that the Constitutional Court examined the applicant's complaint that there had been no reasonable suspicion that he had committed a criminal offence. It observes that the Constitutional Court first of all analysed the tweets published from the HDP's account and noted that, at the time of the events, national security in Turkey was threatened by the internal conflict in Syria. The Constitutional Court observed that the tweets had been published following armed clashes in Kobani and alongside calls issued by the PKK, and also that serious violent incidents had taken place after the publication of the tweets and that the applicant had stated that he stood behind the calls. Having regard to the number of deaths and injuries, the Constitutional Court found that a causal link could be established between the calls issued by the HDP central executive board, which was co-chaired by the applicant, and the acts of violence in question. Next, taking into account the applicant's statements concerning the armed clashes in the context of the "trench events", the Constitutional Court held that his pre-trial detention in connection with a terrorism-related offence was not unfounded. Furthermore, referring to the content of the speeches given by the applicant on 13 November 2012 and 21 April 2013, it found that they amounted to an indication that an offence had been committed. The Court also notes that, having regard to the contents of the conversations between leading members of the PKK and the applicant, the Constitutional Court held that it was legitimate to consider that the applicant might have acted in accordance with the instructions of the leaders of a terrorist organisation, and that as a result, it concluded that those factors were sufficient to give rise to a strong suspicion that the applicant had committed an offence.

168. The Court observes that in the present case the applicant was deprived of his liberty on suspicion of having committed several offences, some of which were terrorism-related. In that context, it notes that the public prosecutor alleged that the applicant had declared, among other things, that he intended to display a sculpture of the leader of a terrorist organisation (see paragraph 57 above). In addition, it observes that, according to the indictment, in a speech given in the BDP offices in Diyarbakır on 21 April 2013, the applicant stated that the Kurdish people in Turkey owed its existence to the armed struggle led by the PKK. In that regard, it was alleged that the applicant had referred to the first terrorist attacks by the PKK as the "coup in 1984" and the "resistance in Şemdinli [and] Eruh" (ibid.). Moreover, the public prosecutor asserted that the applicant was in charge of the political wing of the KCK, an illegal organisation. In this connection, the Court notes that evidence such as records of conversations among PKK leaders and between those leaders and the applicant had been obtained by the public prosecutor prior to the

applicant's arrest on suspicion of having committed the criminal offence of which he was accused (ibid.). It further notes that, having regard to the content of those conversations, the national authorities, in particular the first-instance courts and the Constitutional Court, found that it was possible to conclude that the applicant had been acting in accordance with the instructions of the leaders of a terrorist organisation.

169. The Court observes that a large proportion of the accusations brought against the applicant relate directly to his freedom of expression and his political opinions. However, in the context of the present application, it is not for the Court to determine whether the applicant is guilty of the offences of which he has been accused. That is the task of the national courts. The Court's function in the present case is to examine whether the applicant was deprived of his liberty on reasonable suspicion of having committed a criminal offence. In relation to that question, having regard to the requirements of Article 5 § 1 of the Convention as to the level of factual justification needed at the stage of suspicion, the Court finds that there was sufficient information in the criminal case file to satisfy an objective observer that the applicant might have committed at least some of the offences for which he had been prosecuted.

170. The Court therefore finds it appropriate to conclude that the applicant can be said to have been arrested and detained on "reasonable suspicion" of having committed a criminal offence, within the meaning of sub-paragraph (c) of Article 5 § 1 (see *Murray*, cited above, § 63; *Korkmaz and Others*, cited above, § 26; and *Süleyman Erdem*, cited above, § 37).

171. In the light of the foregoing, the Court finds that there has been no violation of Article 5 § 1 of the Convention.

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

172. The applicant complained that the duration of his pre-trial detention was excessive and that the judicial decisions ordering and extending it had contained no reasons other than mere citation of the grounds for detention provided for by law and had been worded in abstract, repetitive and formulaic terms. On that account he alleged a violation of Article 5 § 3 of the Convention, which provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

173. The Government contested that argument.

1. The parties' submissions

(a) The Government

174. The Government submitted that there had been relevant and sufficient grounds for ordering and extending the applicant's pre-trial detention. They further contended that the length of the detention had not breached Article 5 § 3 of the Convention. In that context, the applicant's detention was justified in view of the complexity and significance of the case, the nature of the alleged offences, the fact that they were linked to organised crime, the potential sentence and the risk of the applicant's absconding.

175. In relation to the last-mentioned point, the Government noted that the applicant had stated at a meeting of his party's parliamentary group that no HDP member of parliament would give evidence voluntarily. In that context, moreover, the applicant had refused to appear before the investigating authorities despite the summonses issued by the competent public prosecutors. Furthermore, certain HDP members of parliament had since fled abroad. Those factors were sufficient to show that there had been a flight risk.

(b) The applicant

176. Referring to the principles established in the Court's judgment in *Buzadji* (cited above), the applicant submitted that the Government had been unable to show that there were relevant and sufficient reasons to justify his initial and continued pre-trial detention.

177. The applicant especially disagreed with the Government that he constituted a flight risk. In that context, he submitted that the speech that the Government had cited to justify his pre-trial detention should be viewed as a political protest. He had given the speech in April 2016, long before his parliamentary immunity had been lifted. He added that his failure to give evidence to the investigating authorities could not be seen as proof of a flight risk. His pre-trial detention after his arrest and appearance before the public prosecutor had been unnecessary, since there had been no risk of his absconding or tampering with evidence. Indeed, it would have been impossible for him to tamper with the evidence, since it mainly consisted of his speeches, the contents of which were already included in the investigation file.

178. The applicant stated that it was essential for judges determining detention matters to give reasons to justify depriving a person of his or her liberty. However, the reasons given by the national courts to justify his pre-trial detention could not be regarded as acceptable. He emphasised that the Court had held in several cases, among them *Cahit Demirel v. Turkey* (no. 18623/03, 7 July 2009), that formulaic statements could not be

regarded as relevant and sufficient reasons. This lack of justification was the result of a structural problem in the Turkish legal system.

179. Lastly, noting that he had been in pre-trial detention since 4 November 2016, the applicant complained about the length of the detention.

(c) The third parties

(i) The Commissioner for Human Rights

180. The Commissioner for Human Rights noted that the initial reason cited by the Turkish authorities to justify the pre-trial detention of the HDP members of parliament had been their refusal to appear in person before the investigating authorities. Even after having forcibly been made to give evidence to the public prosecutor, a number of members of parliament, including the applicant, had been placed in detention. The reasons given by the national courts to justify the pre-trial detention of the members concerned could not be regarded as "relevant" or "sufficient".

(ii) The IPU

181. The IPU stated that, in accordance with the case-law of the Court and the Constitutional Court, a reasonable suspicion that a person had committed an offence was not sufficient to justify pre-trial detention. Further justification was also required on grounds such as the risk of the accused's absconding, tampering with evidence, exerting pressure in connection with the judicial proceedings or committing a further offence. In the case of members of parliament, the national courts should first have recourse to alternative measures to detention ensuring that the persons concerned could take part in the criminal proceedings.

(iii) The intervening non-governmental organisations

182. The intervening non-governmental organisations did not state a position as to whether there had been relevant and sufficient reasons to justify the applicant's pre-trial detention. However, they stated that under Turkish law, pre-trial detention was mandatory for persons accused of certain types of offences, in particular terrorism-related offences. In their submission, a rule of this kind was disproportionate and undermined observance of the principles deriving from Article 5 of the Convention.

2. The Court's assessment

(a) Admissibility

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

(b) Merits

184. The Court reiterates that the persistence of a reasonable suspicion that the detainee has committed an offence is a *sine qua non* for the validity of his or her continued detention. But when the national judicial authorities first examine, "promptly" after the arrest, whether to place the arrestee in pre-trial detention, the persistence of such suspicion no longer suffices, and the authorities must also give other relevant and sufficient grounds to justify the detention (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 222, 28 November 2017, with further references).

185. As the Court has previously held, those other grounds may be a risk of flight, a risk of pressure being brought to bear on witnesses or of evidence being tampered with, a risk of collusion, a risk of reoffending, or a risk of public disorder and the related need to protect the detainee (see *Buzadji*, cited above, §§ 87-88 and 101-02, with further references, and *Merabishvili*, cited above, § 222). Those risks must be duly substantiated, and the authorities' reasoning on those points cannot be abstract, general or stereotyped (see, among other authorities, *Letellier v. France*, 26 June 1991, § 51, Series A no. 207; *Clooth v. Belgium*, 12 December 1991, § 44, Series A no. 225; *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX (extracts); *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, §§ 73 and 76, 13 January 2009; and *Merabishvili*, cited above, § 222).

186. As regards the risk of flight, the Court has held that it must be assessed with reference to a number of other factors, such as the accused's character, morals, assets, links with the jurisdiction, and international contacts (see *W. v. Switzerland*, 26 January 1993, § 33 Series A no. 254-A; *Smirnova*, cited above, § 60; and *Buzadji*, cited above, § 90). Moreover, the last sentence of Article 5 § 3 of the Convention shows that when the only remaining reason for detention is the fear that the accused will flee and thus avoid appearing for trial, he or she must be released pending trial if it is possible to obtain guarantees that will ensure that appearance (see *Wemhoff v. Germany*, 27 June 1968, p. 25, § 15, Series A no. 7; *Letellier*, cited above, § 46; and, more recently, *Luković v. Serbia*, no. 43808/07, § 54, 26 March 2013).

187. It primarily falls to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of a requirement of public interest justifying a departure from the rule in Article 5 of the Convention and must set them out in their decisions on the applications for release (see *Nedim Şener v. Turkey*, no. 38270/11, § 70, 8 July 2014). It is essentially on the basis of the reasons set out in the decisions of the national judicial authorities relating to the applicant's pre-trial detention and of the arguments made by the applicant in his or her requests for release or other appeals that the Court is called upon

to decide whether or not there has been a violation of Article 5 § 3 of the Convention (see, among other authorities, *Wemhoff*, cited above, pp. 24-25, § 12; *Neumeister v. Austria*, 27 June 1968, p. 37, §§ 4-5, Series A no. 8; *Letellier*, cited above, § 35; and *Buzadji*, cited above, § 91).

188. In the present case, the Court notes firstly that the applicant was placed in pre-trial detention on 4 November 2016 and that he is still deprived of his liberty. It further observes that during the criminal investigation and trial in respect of the applicant, the domestic courts have ordered and extended his pre-trial detention on the following grounds:

– the existence of concrete evidence grounding a strong suspicion that the applicant had committed the offences of which he was accused;

– the number and nature of the alleged offences and the fact that they were among those listed in Article 100 § 3 of the CCP;

– the severity of the sentences prescribed by law for the offences concerned;

– the finding that alternative measures to detention appeared insufficient;

– the applicant's refusal to appear before the investigating authorities;

– the fact that the applicant's defence submissions had not yet been obtained;

– the state of the evidence;

– the period spent in detention;

– the risk of absconding and of tampering with evidence (see paragraphs 53, 55, 59, 60, 63, 64 and 67 above). The Court will now examine each of these grounds.

189. First of all, as regards the existence of concrete evidence grounding a strong suspicion that the applicant had committed an offence, the Court accepts, in the light of its findings under Article 5 § 1 of the Convention (see paragraphs 159-71 above), that the suspicions against the applicant may account for his initial placement in pre-trial detention. Nevertheless, it observes that as it has stated in paragraph 184 above, although this is a *sine qua non* for the lawfulness of detention, it is not sufficient justification in itself (see *Buzadji*, cited above, §§ 92-102). The Court will therefore ascertain whether there were other relevant and sufficient grounds in the present case to justify the applicant's pre-trial detention.

190. The Court observes that the judges ruling on the applicant's detention also based their decisions on the fact that he was accused of offences listed in Article 100 § 3 of the CCP. As regards these so-called "catalogue" offences, the Court notes that, in accordance with Article 100 § 3 of the CCP, Turkish law provides that for certain offences there is a statutory presumption of the existence of grounds for detention (risk of absconding, tampering with evidence or putting pressure on witnesses, victims and other persons). In this connection, the Court reaffirms that any system of mandatory detention on remand is *per se* incompatible with

Article 5 § 3 of the Convention (see *Ilijkov v. Bulgaria*, no. 33977/96, § 84, 26 July 2001). Where the law provides for a presumption concerning the grounds for pre-trial detention, it must nevertheless be convincingly demonstrated that there are concrete facts warranting a departure from the rule of respect for individual liberty (see *Contrada v. Italy*, 24 August 1998, §§ 58-65, *Reports* 1998-V). Moreover, under Turkish law, even in the case of a "catalogue" offence, the judicial authorities are under an obligation to consider alternative measures to pre-trial detention first of all (see *Agit Demir v. Turkey*, no. 36475/10, § 39, 27 February 2018). In this connection, the Court observes that it has already found that the existence of a statutory presumption of this kind does not, in the context of the review it must carry out under Article 5 § 3 of the Convention, provide any specific evidence demonstrating the need for continued pre-trial detention (see *Şık v. Turkey*, no. 53413/11, § 62, 8 July 2014). In the present case, it notes that the domestic courts' finding that alternative measures to detention appeared insufficient was not based on any analysis of the applicant's personal situation. In the Court's view, the judicial authorities made barely any mention in the reasons given for their decisions of the specific circumstances substantiating any of the risks referred to in the provision in question, and nor did they specify how such risks had been established and had persisted over such a lengthy period (see *Galip Doğru v. Turkey*, no. 36001/06, § 58, 28 April 2015).

191. The Court observes that the domestic courts also extended the applicant's pre-trial detention on the basis of the number and nature of the alleged offences. It further notes that they took into account the severity of the sentences prescribed by law for such offences. The Court takes note in this connection of the Constitutional Court's findings as to the severity of the sentences the applicant might face in the present case (see paragraph 74 above). Even assuming that the severity of the potential sentences and the nature of the charges might have justified the applicant's initial pre-trial detention, as the Constitutional Court maintained, the Court considers that they cannot in themselves form the reason for extending his detention, particularly at a late stage of the proceedings (see, *mutatis mutandis*, *Letellier*, cited above, § 51; *Ilijkov*, cited above, §§ 80-81; *Kučera v. Slovakia*, no. 48666/99, § 94, 17 July 2007; and *Idalov v. Russia* [GC], no. 5826/03, § 145, 22 May 2012). In other words, throughout the applicant's pre-trial detention the judicial authorities were required to demonstrate convincingly that his continued detention was still justified.

192. The Court further observes that the national courts also referred to the applicant's failure to give evidence to the investigating authorities as a ground for depriving him of his liberty. The Government's observations appear to interpret this as a sign that there was a risk of his absconding. The Court notes in addition that the Constitutional Court concluded that the applicant's refusal to appear before the investigating authorities and his

statement that no member of parliament from his political party would give evidence voluntarily could serve as an indication of a flight risk. However, the Court observes that the applicant made the statement in question in April 2016, before the constitutional amendment had been adopted. It accepts that the applicant did not appear before the investigating authorities to give evidence and notes in that connection that his arrest and detention were justified for the purpose of bringing him before the competent legal authority. Nevertheless, it considers that the judicial authorities did not explain how the failure of the applicant – who at the time was also the co-chair of the third largest political party represented in the National Assembly – to give evidence could have suggested that he posed a flight risk. In that context, the Court attaches considerable weight to the findings of the Constitutional Court judge in the minority, who pointed out in his dissenting opinion that the applicant had travelled abroad several times and had always come back to Turkey without demonstrating any intention to flee. The Court also notes that the applicant had long been aware of the criminal investigations of which he was the subject and of the seriousness of the charges against him, yet despite that, he had not absconded.

193. As regards the other reasons given by the national courts for keeping the applicant in pre-trial detention, the Court observes firstly that they entail a formulaic enumeration of the grounds of general scope, such as the state of the evidence, the period spent in detention and the risk of tampering with evidence. It is especially struck by the lack of a thorough analysis of the arguments in favour of releasing the applicant. In the Court's view, decisions worded in formulaic terms as in the present case can on no account be regarded as sufficient to justify a person's initial and continued pre-trial detention (see *Şık*, cited above, § 62).

194. The Court observes that it has already examined many similar cases in which it has found a violation of Article 5 § 3 of the Convention (see, among many other authorities, *Cahit Demirel*, cited above, §§ 21-28; *İbrahim Güler v. Turkey*, no. 1942/08, §§ 19-27, 15 October 2013; and *Ali Rıza Kaplan v. Turkey*, no. 24597/08, §§ 19-23, 13 November 2014). In the present case, having regard to the grounds provided by the national courts, the Court considers that the judicial authorities extended the applicant's detention on grounds that cannot be regarded as "sufficient" to justify its duration.

195. In those circumstances, it is not necessary to ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Kolomenskiy v. Russia*, no. 27297/07, § 88, 13 December 2016).

196. In the light of the foregoing, the Court concludes that there has been a violation of Article 5 § 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION ON ACCOUNT OF THE LACK OF ACCESS TO THE INVESTIGATION FILE

197. The applicant complained that his lack of access to the investigation file had prevented him from effectively challenging the order for his pre-trial detention. On that account he alleged a violation of Article 5 § 4 of the Convention, which 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."

198. The Government submitted that the applicant had been able to challenge his continued detention by lodging an objection. They noted in that connection that after he had been placed in pre-trial detention, the applicant had had no access to the investigation file for approximately three months. Furthermore, in view of the contents of the investigation reports submitted to the National Assembly and the questions put by the police officers, the public prosecutor and the magistrate, the applicant and his lawyers had had sufficient knowledge of the substance of the evidence forming the basis for his pre-trial detention, and had thus had an opportunity to properly contest the reasons given to justify the detention.

199. The applicant contested the Government's arguments. He contended that it had not been necessary to impose such a restriction.

200. The Commissioner for Human Rights stated that the restriction of access to the investigation file had an adverse effect on the procedure for reviewing pre-trial detention. The other intervening parties did not make any submissions on this complaint.

201. The Court reiterates that Article 5 § 4 of the Convention entitles arrested or detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in terms of Article 5 § 1 of the Convention, of their deprivation of liberty. Although the procedure under Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 of the Convention for civil or criminal litigation – as the two provisions pursue different aims (see *Reinprecht v. Austria*, no. 67175/01, § 39, ECHR 2005-XII) – it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question (see *D.N. v. Switzerland* [GC], no. 27154/95, § 41, ECHR 2001-III). In particular, proceedings in which an appeal against a detention order is being examined must be adversarial and must ensure equality of arms between the parties, the prosecutor and the detainee (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II). While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party is informed that observations have been filed and has a real

opportunity to comment on them (see *Lietzow v. Germany*, no. 24479/94, § 44, ECHR 2001-I). In order to determine whether proceedings falling under Article 5 § 4 of the Convention provide the necessary guarantees, regard must be had to the particular nature of the circumstances in which they take place (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A). In particular, equality of arms is not ensured if counsel is denied access to documents in the investigation file which are essential in order to effectively challenge the lawfulness of his or her client's detention (see, among other authorities, *Lamy v. Belgium*, 30 March 1989, § 29, Series A no. 151; *Nikolova*, cited above, § 58; *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I; *Lietzow*, cited above, § 44; *Mooren*, cited above, § 124; *Ceviz v. Turkey*, no. 8140/08, § 41, 17 July 2012; *Ovsjannikov v. Estonia*, no. 1346/12, §§ 72-78, 20 February 2014; and *Mustafa Avci*, cited above, § 90).

202. The Court notes that on 9 September 2016 the Diyarbakır Magistrate's Court ordered restrictions on the right of the applicant's lawyers to inspect the contents of the investigation file or to obtain copies of documents in the file. It notes that the objection filed by the applicant against that decision was dismissed on 19 November 2016 (see paragraph 48 above). It further observes that the applicant and his lawyers had no access to the investigation file until 2 February 2017, when the bill of indictment was accepted by the Diyarbakır Assize Court.

203. The Court acknowledges that the items of evidence to which the applicant claimed to have had no access were of fundamental importance in challenging the lawfulness of his detention. It observes, however, as the Constitutional Court did (see paragraph 77 above), that the applicant and his representatives had unrestricted access to the investigation reports submitted to the National Assembly. It further observes, having regard to the content and nature of the application made on 4 November 2016 by the Diyarbakır public prosecutor and the decision given on the same day by the 2nd Magistrate's Court on the applicant's pre-trial detention, that although he did not have an unlimited right of access to the evidence, the applicant had sufficient knowledge of the substance of the evidence forming the basis for his pre-trial detention and thus had the opportunity to properly contest the reasons given to justify the detention (see *Ceviz*, cited above, §§ 41-44, and *Mehmet Hasan Altan*, cited above, § 149).

204. It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

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

205. The applicant submitted that the proceedings he had brought before the Constitutional Court with a view to challenging the lawfulness of his pre-trial detention had not complied with the requirements of the Convention in that the Constitutional Court had failed to observe the requirement of "speediness". He alleged a violation of Article 5 § 4 of the Convention on that account.

206. The applicant contested the Government's argument.

A. The parties' submissions

1. The Government

207. The Government asserted that Turkish law contained adequate legal safeguards enabling detainees to effectively challenge their deprivation of liberty. In that context, pre-trial detainees could apply for release at any stage of the investigation or the trial and an objection could be lodged against a decision rejecting their application. Furthermore, the question of a suspect's continued detention was automatically reviewed at regular intervals of no more than thirty days. In that context, the Government emphasised that the Constitutional Court was not to be regarded as a court of appeal for the purposes of Article 5 § 4 of the Convention.

208. 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 of 15 July 2016, there had been a dramatic increase in the number of applications to the Constitutional Court. A total of 105,119 applications had been lodged with it between 15 July 2016 and 10 November 2017. Bearing in mind this exceptional caseload for the Constitutional Court, the Government submitted that it could not be concluded that that court had failed to comply with the requirement of "speediness".

2. The applicant

209. The applicant reiterated his assertion that the Constitutional Court had not decided "speedily" within the meaning of Article 5 § 4 of the Convention.

3. The third parties

210. The Commissioner for Human Rights submitted that the duration of proceedings before the Constitutional Court concerning applications lodged by members of parliament in pre-trial detention was unreasonably long. The other intervening parties did not make any submissions on this complaint.

B. The Court's assessment

1. Admissibility

211. The Court reiterates that it has found Article 5 § 4 of the Convention to be applicable to proceedings before national constitutional courts (see *Smatana v. the Czech Republic*, no. 18642/04, §§ 119-24, 27 September 2007; *Žúbor v. Slovakia*, no. 7711/06, §§ 71-77, 6 December 2011; *Mehmet Hasan Altan*, cited above, § 159; and *Şahin Alpay*, cited above, § 131). Accordingly, having regard to the jurisdiction of the Turkish Constitutional Court (see, for example, *Koçintar v. Turkey* ((dec.), no. 77429/12, §§ 30-46, 1 July 2014), the Court concludes that Article 5 § 4 is also applicable to proceedings before that court.

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

2. Merits

213. The Court reiterates the principles established in its case-law concerning the "speediness" requirement under Article 5 § 4 of the Convention, as set out, *inter alia*, in *Mehmet Hasan Altan* (cited above, §§ 161-63) and *Şahin Alpay* (cited above, §§ 133-35).

214. It further notes that in those cases it observed that in the Turkish legal system, anyone in pre-trial detention had the opportunity to apply for release at any stage of the proceedings and could lodge an objection if the application was rejected. It also noted that the question of a suspect's continued detention was automatically reviewed at regular intervals of no more than thirty days (see paragraph 103 above). It therefore found it acceptable that the Constitutional Court's review might take longer. However, in the *Mehmet Hasan Altan* and *Şahin Alpay* cases (both cited above), the periods to be taken into consideration before the Constitutional Court had amounted to fourteen months and three days and sixteen months and three days respectively. Bearing in mind the complexity of the applications and the Constitutional Court's caseload following the declaration of a state of emergency, the Court found that this was an exceptional situation. Accordingly, although periods of 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 found that there had been no violation of Article 5 § 4 of the Convention.

215. The Court considers that those conclusions are also valid in the context of the present case. It notes in that connection that the applicant's application to the Constitutional Court was a complex one, being one of the first of a series of cases raising complicated issues concerning the pre-trial detention of a member of parliament whose parliamentary immunity had been lifted. In addition, the Court finds it necessary to take into account the Constitutional Court's exceptional caseload following the declaration of the state of emergency in July 2016 (see *Mehmet Hasan Altan*, cited above, § 165, and *Şahin Alpay*, cited above, § 137). In the present case it observes that the applicant lodged an individual application with the Constitutional Court on 17 November 2016, and that that court's final judgment was given on 21 December 2017. It notes that the period to be taken into consideration thus amounted to thirteen months and four days.

216. In the light of the foregoing, although the duration of thirteen months and four days before the Constitutional Court could not be described as "speedy" in an ordinary context, in the specific circumstances of the case the Court considers that there has been no violation of Article 5 § 4 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION

217. The applicant complained that his pre-trial detention amounted to a violation of Article 3 of Protocol No. 1 to the Convention, which provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

218. The Government contested that argument.

A. The parties' submissions

1. The Government

219. The Government submitted that the applicant's complaint under Article 3 of Protocol No. 1 to the Convention should be dismissed as being incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto. They contended that the right to vote, to be elected and to engage in political activities as guaranteed by Article 67 of the Constitution was broader in scope than the right to free elections enshrined in Article 3 of Protocol No. 1. In that connection, they maintained that in contrast to the Constitution, Protocol No. 1 did not explicitly oblige States

to recognise the right to engage in political activities. Furthermore, the applicant had not lost his status as a member of parliament as a result of his pre-trial detention.

220. Regarding the merits of the complaint, the Government stated that the rights deriving from Article 3 of Protocol No. 1 to the Convention were not absolute and that the Contracting States had a wide margin of appreciation in this sphere. Following the constitutional amendment, the file on the criminal investigations in respect of the applicant had been sent to the competent public prosecutor's office and the proceedings had continued in accordance with the rule of law. The fact that the applicant was a member of parliament had been taken into consideration in the reasons set out in the orders for his initial and continued pre-trial detention. In that context, the national courts had found that alternative measures to detention appeared insufficient. Moreover, after noting the severity of the sentences prescribed by law for the alleged offences and having due regard to the applicant's right to carry on his political activities, they had found that his pre-trial detention was necessary and proportionate to the aim pursued.

2. The applicant

221. The applicant submitted that the Government's plea of inadmissibility under Article 3 of Protocol No. 1 to the Convention should be dismissed. He argued that acceptance of the Government's restrictive interpretation to the effect that this complaint was incompatible *ratione materiae* with the provisions of the Convention would be at odds with the principles of interpretation established in the Court's case-law, particularly since the *Wemhoff v. Germany* judgment (27 June 1968, Series A no. 7). In that regard, he contended that what was protected by the right to free elections was not only the right to be elected as a member of parliament; the Article in question also covered the right to engage in political activities as a member of parliament. The applicant had been unable to participate in the activities of the National Assembly on account of his detention. He therefore submitted that there had been a violation of Article 3 of Protocol No. 1 to the Convention.

3. The third parties

(a) The Commissioner for Human Rights

222. The Commissioner for Human Rights emphasised the key role performed by members of parliament in democratic systems. He submitted that the pre-trial detention of opposition parliamentarians had had a significant negative impact on the right to free elections safeguarded by Article 3 of Protocol No. 1 to the Convention.

(b) The IPU

223. The IPU stated that the applicant's pre-trial detention had made it impossible for him to devote himself meaningfully to his parliamentary responsibilities.

(c) The intervening non-governmental organisations

224. The intervening non-governmental organisations submitted that the pre-trial detention of opposition members of parliament for expressing critical views amounted to an unjustified interference with the rights enshrined in Article 3 of Protocol No. 1 to the Convention.

B. The Court's assessment

1. Admissibility

225. As regards the objection that the complaint concerning the right to free elections is inadmissible as being incompatible *ratione materiae* with the provisions of the Convention, the Court considers that it raises issues that are closely linked to the examination of the merits of the applicant's complaint. The Court will therefore address this question in the context of its examination on the merits.

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

2. Merits

(a) General principles

227. The Court reiterates that democracy constitutes a fundamental element of the "European public order", and that the rights guaranteed under Article 3 of Protocol No. 1 to the Convention are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 141, 17 May 2016, and *Uspaskich v. Lithuania*, no. 14737/08, § 87, 20 December 2016). It further notes that as it held in *Mathieu-Mohin and Clerfayt v. Belgium* (2 March 1987, § 47, Series A no. 113) and *Lingens v. Austria* (8 July 1986, §§ 41 and 42, Series A no. 103), free elections and freedom of expression, in particular freedom of political debate, form the bedrock of any democratic system (see *Tănase v. Moldova* [GC], no. 7/08, § 154, ECHR 2010). Thus, the Convention establishes a close nexus between an effective political democracy and the effective operation of Parliament. Accordingly, there can be no doubt that the effective functioning of Parliament is a value of key importance for a democratic society (see *Karácsony and Others*, cited above, § 141).

228. In cases concerning freedom of expression, the Court has held in particular that "[w]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament ... call for the closest scrutiny on the part of the Court" (see *Castells v. Spain*, 23 April 1992, § 42, Series A no. 236).

229. The Court reaffirms that the object and purpose of the Convention requires its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory but practical and effective (see, for example, *Grosaru v. Romania*, no. 78039/01, § 47, ECHR 2010, with further references). However, the rights guaranteed by Article 3 of Protocol No. 1, which are inherent in the concept of a truly democratic system, would be merely illusory if elected representatives or their voters could be arbitrarily deprived of them at any moment (see *Lykourezos v. Greece*, no. 33554/03, § 56, ECHR 2006-VIII). Furthermore, the Court reiterates that it has consistently held that Article 3 of Protocol No. 1 guarantees the individual's right to stand for election and, once elected, to sit as a member of parliament (see *Sadak and Others v. Turkey (no. 2)*, nos. 25144/94 and 8 others, § 33, ECHR 2002-IV; *Ilıcak v. Turkey*, no. 15394/02, § 30, 5 April 2007; *Sılay v. Turkey*, no. 8691/02, § 27, 5 April 2007; *Kavakçı v. Turkey*, no. 71907/01, § 41, 5 April 2007; *Sobacı v. Turkey*, no. 26733/02, § 27, 29 November 2007; and *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, § 141, 13 October 2015).

230. The Court further reiterates that the rights enshrined in Article 3 of Protocol No. 1 to the Convention are not absolute (see *Etxeberria and Others v. Spain*, nos. 35579/03 and 3 others, § 48, 30 June 2009). There is room for "implied limitations", and the Contracting States have a wide margin of appreciation in this sphere (see *Mathieu-Mohin and Clerfayt*, cited above, § 52; *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II; *Sadak and Others*, cited above, § 31; and *Kavakçı*, cited above, § 40). However, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with. It has to satisfy itself that the conditions governing the right to vote and to stand for election do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, cited above, § 52).

231. With regard to the initial and continued pre-trial detention of a member of parliament or a candidate in parliamentary elections, the Court observes that the Convention does not preclude the imposition of such a measure *per se* and that it does not automatically constitute a violation of Article 3 of Protocol No. 1 to the Convention, even where the detention is found to breach Article 5 § 3 of the Convention. To determine whether

deprivation of liberty was a proportionate measure for the purposes of Article 3 of Protocol No. 1, the Court has to take several aspects into account. In this context, it considers firstly that where a member of parliament or a candidate is placed in pre-trial detention, in order to discharge their positive obligation under Article 3 of Protocol No. 1 the member States must set up a remedy providing a safeguard against arbitrariness and affording applicants an effective opportunity to challenge their deprivation of liberty and to secure an assessment of their complaint under that Article. In that connection, it is essential for the domestic courts to show that they have weighed up the interests of the person concerned and of society as safeguarded by Article 3 of Protocol No. 1 against the interests of the proper administration of justice in ordering the initial pre-trial detention and/or its extension (see, *mutatis mutandis*, *Uspaskich*, cited above, § 94). In addition, the Court must take into account the duration of the detention in question and its consequences.

(b) Application of these principles

232. As a preliminary point, the Court observes that the present case is the first one in which it has had to examine a complaint under Article 3 of Protocol No. 1 to the Convention concerning the effects of the continued pre-trial detention of an elected member of parliament on the performance of his parliamentary duties. However, it considers that this is an equally crucial issue, which has a direct impact on the effective performance of the duties of a member of parliament.

233. The Court must therefore ascertain, in accordance with its case-law in this sphere (see *Paksas v. Lithuania* [GC], no. 34932/04, § 97, ECHR 2011 (extracts)), whether there has been an interference with the exercise of the applicant's rights under Article 3 of Protocol No. 1, bearing in mind that such interference will constitute a violation unless it satisfies the requirements of lawfulness, pursues a legitimate aim and is proportionate.

234. In this connection, the Court considers that it cannot support the Government's argument that the applicant's complaint under Article 3 of Protocol No. 1 to the Convention should be rejected as being incompatible *ratione materiae* with the Convention. The right to free elections is not restricted simply to the opportunity to take part in parliamentary elections. As reiterated in paragraph 229 above, the person concerned is also entitled, once elected, to sit as a member of parliament. The Court further notes that the Turkish Constitutional Court has held that the detention of a member of parliament, making it impossible for him to perform his parliamentary duties, constituted an interference with the right to be elected (see paragraph 107 above). The Court agrees with that approach.

235. In the present case, the Court observes that following the parliamentary elections on 1 November 2015, the applicant was re-elected as a member of the National Assembly and that his term of office ended at

the time of the parliamentary elections on 24 June 2018. However, it notes that on 4 November 2016, while serving as a member of parliament, the applicant was placed in pre-trial detention after his immunity had been lifted. The Court observes that it has already pointed out in paragraph 231 above that the Convention does not preclude the imposition of a measure entailing pre-trial detention *per se* and that such a measure does not automatically constitute a violation of Article 3 of Protocol No. 1 to the Convention. Nevertheless, having regard to the particular circumstances of the case, especially the length of the applicant's pre-trial detention and its potential repercussions on his right under Article 3 of Protocol No. 1, the Court considers that it must proceed with its assessment of his complaint under Article 3 of Protocol No. 1. Only in this way will it be able to examine the substance of the applicant's allegation that he was denied the opportunity to participate in the activities of the National Assembly on account of his detention.

236. The Court notes at the outset that in view of the applicant's pre-trial detention from 4 November 2016 onwards, he was unable to take part in the activities of the legislature up to the expiry of his term of office on 24 June 2018 – that is, for one year, seven months and twenty days. His deprivation of liberty made it impossible for him to perform any parliamentary duties and can be viewed, in the circumstances of the present case, as an interference with the exercise of his rights under Article 3 of Protocol No. 1 to the Convention.

237. As to whether the principle of lawfulness was complied with, the Court can accept, having regard to its conclusion concerning the compliance of the pre-trial detention with domestic legislation (see paragraph 148 above), that the interference satisfied the requirements of lawfulness.

Regarding the aim pursued, the Court reiterates that, given that Article 3 of Protocol No. 1 does not contain a list of "legitimate aims" capable of justifying restrictions on the exercise of the rights it guarantees and does not refer to those enumerated in Articles 8 to 11 of the Convention, the Contracting States are free to rely on an aim not mentioned in those Articles, provided that the aim is compatible with the principle of the rule of law and the general objectives of the Convention (see, for example, *Ždanoka v. Latvia* [GC], no. 58278/00, § 115, ECHR 2006-IV). It observes, however, the parties did not submit any specific observations on this point, and in view of its findings under Article 5 § 1 of the Convention (see paragraphs 159 and 171 above), it will proceed on the assumption that the interference in issue pursued a legitimate aim, namely public-policy imperatives, since it occurred as a consequence of the applicant's detention, the purpose of which was to ensure the proper conduct of the criminal proceedings against him.

238. Turning to the question of proportionality, the Court attaches weight to the fact that the applicant was detained while serving as a member

of parliament. However, it observes that in performing their balancing exercise, neither the courts that ruled on the extension of his pre-trial detention, nor those that refused his applications for release, nor the Constitutional Court appear to have had sufficient regard to the fact that he was not only a member of parliament but also one of the leaders of the country's political opposition, whose performance of his parliamentary duties required a high level of protection. Moreover, they did not demonstrate that there were pressing reasons justifying keeping him in pre-trial detention for such a lengthy period. The Court also observes in this connection that it has found a violation of Article 5 § 3 of the Convention on account of the extension of the applicant's pre-trial detention by the judicial authorities on grounds that could not be regarded as "sufficient" to justify detention for a duration of more than twenty-three months (see paragraph 194 above).

239. The Court further notes that it has always emphasised that pre-trial detention is a temporary measure and that its duration must be as short as possible. It has also found that the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 143, ECHR 2012). Those considerations apply *a fortiori* to the detention of a member of parliament. The Court observes that in a democracy, Parliament and comparable bodies are essential fora for political debate, of which the performance of parliamentary duties forms part (see, *mutatis mutandis*, *Cordova v. Italy (no. 1)*, no. 40877/98, § 59, ECHR 2003-I). While serving their term of office, members of parliament represent their voters, drawing attention to their concerns and defending their interests. As the minority Constitutional Court judge rightly pointed out in his dissenting opinion (see paragraph 79 above), the judicial authorities did not explain why the application of an alternative measure to detention would have been insufficient in the applicant's particular case. It does not appear from the case file that they genuinely considered the application of alternative measures to pre-trial detention, even though such measures are provided for by domestic law. Although they systematically found that measures of that kind were insufficient, they did not provide any specific reasons connected to the applicant's individual case. Yet throughout his detention, the applicant was deprived of all opportunity to devote himself to his parliamentary responsibilities.

240. Having regard to all the foregoing considerations, the Court concludes that although the applicant retained his status as a member of parliament throughout his term of office and was thus able to receive his salary in that capacity, the fact that it was impossible for him to take part in the activities of the National Assembly on account of his pre-trial detention

constitutes an unjustified interference with the free expression of the opinion of the people and with the applicant's right to be elected and to sit in Parliament. It therefore dismisses the Government's objection of incompatibility *ratione materiae* with the provisions of the Convention and concludes that the measure in question was incompatible with the very essence of the applicant's right under Article 3 of Protocol No. 1 to be elected and to sit in Parliament and infringed the sovereign power of the electorate that had elected him as a member of parliament.

241. There has therefore been a violation of Article 3 of Protocol No. 1 to the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 5 § 3

242. On the basis of the same facts and relying on Article 18 of the Convention in conjunction with Article 5, the applicant complained that he had been detained for expressing critical opinions about the political authorities. He alleged in that regard that the purpose of his pre-trial detention had been to silence him.

243. The Government contested the applicant's argument. They stated 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 so far as there had been no violation of any of the provisions of the Convention, it was not necessary to carry out a separate examination of the applicant's complaint under Article 18 of the Convention. That being so, they argued that the applicant's complaint warranted an examination under Article 5 §§ 1 and 3 of the Convention alone.

244. The Court observes that the applicant's contention in this context is that there was an ulterior purpose behind his pre-trial detention. It notes that the complaint under Article 18 relates to a fundamental aspect of the present case that has not been examined under Article 5 of the Convention or Article 3 of Protocol No. 1 to the Convention. It therefore considers that this complaint falls to be examined under Article 18 of the Convention in conjunction with Article 5 § 3. 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. The parties' submissions

1. The Government

245. The Government submitted that the system for the protection of fundamental rights and freedoms under the Convention rested on the

assumption that the authorities of the High Contracting Parties acted in good faith. It was for the applicant to demonstrate convincingly that the authorities' real aim had differed from the one proclaimed. A mere suspicion was not sufficient to prove that Article 18 had been breached.

246. The Government argued that the criminal proceedings against the applicant were being conducted by independent judicial authorities. In their submission, the applicant had not produced any evidence indicating that his pre-trial detention had pursued a hidden agenda. Moreover, he had been unable to prove his allegations.

247. The Government noted that the Court had found a violation of Article 18 of the Convention in cases where it had concluded that orders for pre-trial detention had explicitly pursued another purpose. For that reason, they submitted that in the present case, in the absence of any document capable of proving the applicant's allegation, his deprivation of liberty would need to have resulted from the arbitrary application of legislative provisions. They therefore urged the Court to reject this complaint.

2. The applicant

248. The applicant reiterated his allegation that his pre-trial detention and its extension had pursued a hidden agenda, namely the elimination of the political opposition and the restriction of political debate. He stated firstly that the government crackdown had intensified following the success of his party in the elections on 7 June 2015. In those elections, the AKP, which had been governing the country since 2002, had lost its majority in the National Assembly, above all owing to the success of the HDP, which had received 13% of the vote and had for the first time passed the threshold for representation in Parliament. Subsequently, following the failure of negotiations to form a coalition government, early elections had been held on 1 November 2015, in which the HDP had polled 10% of the vote. Both elections had been crucial as the AKP had been unable to attain a sufficient majority to amend the Constitution in order to be able to introduce a presidential system, as the President of Turkey had wished. The applicant contended that his pre-trial detention had pursued a hidden agenda, namely easing the transition to a presidential system.

249. The applicant noted that the Commissioner for Human Rights had concluded in his memorandum on freedom of expression and media freedom that the heightened level of judicial harassment targeting the government's political opponents in particular, including the applicant himself and other members of parliament from his party, as a result of measures taken by the government posed a severe threat to democracy in Turkey. In that connection he observed that between July 2015 and January 2018, 3,282 individuals linked to the HDP, including 135 co-chairs of local branches, fifteen members of parliament and 750 party officials at local level, had been arrested in the course of police operations against persons

with links to the HDP. He stated that the judicial harassment had intensified following the end of the "solution process". In his view, the real reason for his detention had been the severity of his criticism of the policies pursued by the government and the President of Turkey. In that regard, the crackdown against members of his party had become notably more visible after he had stated that he would never support a presidential system with Mr Recep Tayyip Erdoğan as president. Moreover, a series of significant reforms, such as the adoption of a presidential constitutional system in place of the parliamentary system, had been carried out while the applicant – the co-chair of the second largest opposition party represented in the National Assembly – had been in pre-trial detention for political statements he had made. In the applicant's view, his detention had also been aimed at preventing him from carrying out his political activities so that he would be unable to campaign against the new constitutional system.

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

251. The applicant stated that his detention had pursued a plurality of purposes. The success of his party in the elections had turned him into a target for the political authorities. Subsequently, the President of Turkey and leaders of the AKP had made statements accusing him of terrorism-related offences on account of his political speeches. Following those statements, his parliamentary immunity had been lifted as a result of a constitutional amendment, in other words through an *ad hoc* and *ad hominem* measure.

252. The applicant submitted that between 2007 and 24 December 2015, a total of 182 investigation reports had been produced in respect of HDP members of parliament. That figure had increased following the speech by the President calling for the lifting of parliamentary immunity, and had reached 510 files by 20 May 2016, the date of the adoption of the constitutional amendment. The fact that the total number of criminal files opened over a period of eight years had almost tripled in just six months showed that the investigation reports had been produced on the President's instructions. To find otherwise would amount to affirming that there had been a sudden wave of criminal offences by HDP members of parliament.

The applicant maintained on that account that the judicial authorities dealing with his case were not independent.

3. The third parties

(a) The Commissioner for Human Rights

253. The Commissioner for Human Rights stated that upholding the right to freedom of expression was currently all the more difficult as a result of a marked erosion of the independence and impartiality of the judiciary in Turkey. In that connection, he noted that there had been numerous instances of criminal proceedings unduly restricting freedom of expression and the right to liberty and security not only of members of parliament but also of mayors, academics, journalists and human rights defenders who had expressed criticism of official policy, notably in relation to the situation in south-eastern Turkey. In his view, laws and criminal proceedings were currently being used to silence dissenting voices.

(b) The IPU

254. The IPU did not make any submissions on this point.

(c) The intervening non-governmental organisations

255. The intervening non-governmental organisations stated that Article 18 of the Convention would be breached where an applicant could show that the real aim of the authorities was not the same as that proclaimed. A violation would be found, for example, where: there was increasingly harsh and restrictive legislation; statements by high-ranking officials and State media suggested that there was a hidden agenda; or a pattern emerged whereby individuals were targeted in similar terms. Following the attempted military coup on 15 July 2016, the Government had misused legitimate concerns in order to redouble its already significant crackdown on human rights, *inter alia* by placing dissenters in pre-trial detention. In the submission of the intervening non-governmental organisations, this amounted to a violation of Article 18 of the Convention.

B. The Court's assessment

1. Admissibility

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

2. Merits

257. The Court notes that the general principles concerning the interpretation and application of Article 18 of the Convention were recently set out by the Grand Chamber in the *Merabishvili* judgment (cited above):

> "287. In a similar way to Article 14, Article 18 of the Convention has no independent existence (see, in relation to Article 14, *Marckx v. Belgium*, 13 June 1979, § 32, Series A no. 31; *Van der Mussele v. Belgium*, 23 November 1983, § 43, Series A no. 70; *Rasmussen v. Denmark*, 28 November 1984, § 29, Series A no. 87; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 71, Series A no. 94; *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV; and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 124, ECHR 2012 (extracts)); it can only be applied in conjunction with an Article of the Convention or the Protocols thereto which sets out or qualifies the rights and freedoms that the High Contracting Parties have undertaken to secure to those under their jurisdiction (see *Kamma*, at p. 9; *Gusinskiy*, § 73; *Cebotari*, § 49; *Khodorkovskiy*, § 254; *OAO Neftyanaya Kompaniya Yukos*, § 663; *Lutsenko*, § 105; *Tymoshenko*, § 294; *Ilgar Mammadov*, § 137; *Rasul Jafarov*, § 153; and *Tchankotadze*, § 113, all cited above, all of which expressed the same idea by saying that Article 18 'does not have an autonomous role'). This rule derives both from its wording, which complements that of clauses such as, for example, the second sentence of Article 5 § 1 and the second paragraphs of Articles 8 to 11, which permit restrictions to those rights and freedoms, and from its place in the Convention at the end of Section I, which contains the Articles that define and qualify those rights and freedoms.
>
> 288. Article 18 does not, however, serve merely to clarify the scope of those restriction clauses. It also expressly prohibits the High Contracting Parties from restricting the rights and freedoms enshrined in the Convention for purposes not prescribed by the Convention itself, and to this extent it is autonomous (see, *mutatis mutandis*, in relation to Article 14, *Rasmussen*, § 29; *Abdulaziz, Cabales and Balkandali*, § 71; *Thlimmenos*, § 40; and *Konstantin Markin*, § 124, all cited above). Therefore, as is also the position in regard to Article 14, there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies (see, on that point, *Kamma*, at p. 9; *Gusinskiy*, § 73; and *Cebotari*, § 49, all cited above).
>
> 289. Lastly, being aware – as already highlighted – of a certain inconsistency in its previous judgments regarding the use of the terms 'independent' and 'autonomous' in these contexts, the Court seizes the opportunity offered by the present case to align the language used in relation to Article 18 to that used in relation to Article 14, as has been done above.
>
> 290. It further follows from the terms of Article 18 that a breach can only arise if the right or freedom at issue is subject to restrictions permitted under the Convention (see *Kamma*, at p. 10; *Gusinskiy*, § 73; *Cebotari*, § 49; and *OAO Neftyanaya Kompaniya Yukos*, § 663, all 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 (see, *mutatis mutandis*, in relation to Article 14 of the Convention, *Airey v. Ireland*, 9 October 1979, § 30, Series A no. 32; *Dudgeon v. the United Kingdom*, 22 October 1981, § 67,

Series A no. 45; *Chassagnou and Others v. France* [GC], nos. 25088/94 and 2 others, § 89, ECHR 1999-III; *Aziz v. Cyprus*, no. 69949/01, § 35, ECHR 2004-V; *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 53, ECHR 2005-XII; and *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 144, ECHR 2010)."

258. The Grand Chamber has also observed that a right or freedom is sometimes restricted solely for a purpose which is not prescribed by the Convention. But it is equally possible that a restriction is applied both for an ulterior purpose and a purpose prescribed by the Convention; in other words, that it pursues a plurality of purposes (see *Merabishvili*, cited above, § 292). That being so, a restriction may be compatible with the substantive Convention provision which authorises it because it pursues an aim permissible under that provision, but still infringe Article 18 because it was chiefly meant for another purpose that is not prescribed by the Convention; in other words, if that other purpose was predominant. Conversely, if the prescribed purpose was the main one, the restriction does not run counter to Article 18 even if it also pursues another purpose (ibid., § 305). Which purpose is predominant in a given case depends on all the circumstances. In assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, as well as its duration and effects. It will also bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law (ibid., § 307). In continuing situations, the Court cannot rule out the possibility that the assessment of which purpose was predominant may vary over time (ibid., § 308).

259. In the present case, the Court has already found that the applicant could be said to have been arrested and detained on "reasonable suspicion" of having committed a criminal offence, within the meaning of sub-paragraph (c) of Article 5 § 1 of the Convention (see paragraph 170 above). In other words, it has already concluded that the applicant was deprived of his liberty for a purpose prescribed by Article 5 § 1 (c) of the Convention. Accordingly, as in *Merabishvili* (ibid., § 318), even if it is established that the restriction of the applicant's right to liberty also pursued a purpose not prescribed by Article 5 § 1 (c), there will only be a breach of Article 18 if that other purpose was predominant. In addressing this question, the Court will ascertain whether there was a hidden agenda behind the applicant's pre-trial detention and whether the material adduced before it is sufficient to identify such an agenda as the predominant purpose.

260. The Court observes at the outset that the applicant's main complaints are that he was specifically targeted because of his opposition to the government in power in Turkey and that the purpose of keeping him in pre-trial detention was to silence him. It reiterates that the mere fact that politicians have been prosecuted or placed in pre-trial detention, even during an election campaign or a referendum, does not automatically indicate that the aim pursued was to restrict political debate (ibid., § 323). In

the Court's view, Article 18 of the Convention can only be breached after a significantly high threshold has been crossed.

261. Having regard to the applicant's complaint, the Court is called upon to examine, in the light of the principles it established in the *Merabishvili* judgment (ibid., §§ 287-91 and §§ 309-15), whether the predominant purpose of the national authorities' decisions to keep him in pre-trial detention, in breach of Article 5 § 3 of the Convention and Article 3 of Protocol No. 1 to the Convention (see paragraphs 196 and 241 above), was to remove him from the political scene in Turkey.

262. In this connection, the Court notes firstly that in *Merabishvili* (ibid., §§ 316-17), it explicitly stated its position regarding the standard of proof and the nature of the evidence that would be relevant to its examination of complaints brought under Article 18 of the Convention. It held that there was "no reason ... to restrict itself to direct proof", contrary to what the Government maintained in the present case. Indeed, the Court indicated clearly in that judgment that it could rely on circumstantial evidence, meaning "information about the primary facts, or contextual facts or sequences of events" which could "form the basis for inferences about the primary facts". It also emphasised that "[r]eports or statements by international observers, non-governmental organisations or the media" were often "taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court" (ibid., § 317).

263. On that basis, the Court would first emphasise that, as it found in paragraph 169 above, most of the accusations brought against the applicant, on the strength of which he was placed in pre-trial detention – which was subsequently extended on repeated occasions, in breach of the Convention – relate directly to his expressive political activity as leader of an opposition party on the Turkish political scene. Accordingly, a proper examination of the applicant's complaint cannot be detached from the general political and social background to the facts of the case and from the sequence of events emerging from the case file. Furthermore, in accordance with the requirement laid down in *Merabishvili* (ibid., § 314), the Court must determine whether, on the basis of a contextual analysis of that kind, sufficient proof of a predominant purpose underlying the repeated decisions to extend the applicant's pre-trial detention can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact.

264. In this context, the Court observes, in the light of the memorandum by the Commissioner for Human Rights (see paragraph 109 above), the opinions issued by the Venice Commission on the amendments to the Constitution (see paragraphs 108 and 110 above), the report published by Amnesty International (see paragraph 112 above) and the observations by the intervening third parties, that in view of the applicant's position on the Turkish political scene, the tense political climate in Turkey since 2014 and

the speeches by the applicant's political opponents, among them the President of Turkey, it is understandable that an objective observer might suspect that the extension of the pre-trial detention of the applicant – one of the leaders of the political opposition – was politically motivated, even though the offences with which he was charged were not overtly political. The Court further observes that the reports and opinions of international observers also emphasise that a number of leading figures from the applicant's political party, including members of parliament and elected mayors, have been placed in pre-trial detention, notably on account of their political speeches. In this connection, it notes that after the parliamentary immunity of 154 members of parliament, including fifty-five from the HDP, had been lifted, fifteen opposition parliamentarians, including fourteen from the party in question, were placed in pre-trial detention (see paragraph 41 above). The Court takes note of the observations of the intervening third parties, in particular the Commissioner for Human Rights, who stated that national laws were increasingly being used to silence dissenting voices. The Court therefore considers that the decisions to extend the applicant's pre-trial detention follow a certain pattern.

265. The Court further notes that the applicant and other members of parliament from his party were kept in pre-trial detention at the time of an ongoing debate among the Turkish public about what was probably the most significant amendment to the Constitution since the proclamation of the Republic of Turkey in 1923. In the context of its examination under Article 18 of the Convention, the Court has already held that it attaches considerable weight to the political context in the country concerned, although this does not constitute sufficient proof *per se* (see *Merabishvili*, cited above, § 322). It considers that, taking into account the political debates during the period of the applicant's pre-trial detention, particularly on the subject of the change to the constitutional system, it is hard to deny that the detention of the applicant, one of the opposition leaders, had a negative effect on the "no" campaign relating to the proposed Bill to amend the Constitution with a view to introducing a presidential system.

266. Moreover, the Court notes that the National Assembly decided to bring forward the presidential and parliamentary elections scheduled for 2019 by holding them on 24 June 2018, approximately a year and a half before their expected date. In the case of the presidential election, it observes that there were six candidates standing, including the applicant, who was in detention.

267. These factors enable the Court to conclude that although the applicant was placed in pre-trial detention on "reasonable suspicion" of having committed a criminal offence, there was also a political purpose behind his continued detention.

268. It remains to be determined whether the political nature of the applicant's detention can be regarded as the predominant purpose of the restriction of his right to liberty.

269. In the circumstances of the case, the Court considers that the passage of the *Merabishvili* judgment (ibid., § 308) in which it held that in continuing situations the predominant purpose could vary over time is of particular significance. It may very well transpire that the predominant purpose of the measures taken against the applicant changed during the period in question. What might initially have seemed a legitimate aim or purpose may appear less plausible as time goes on.

270. In the present case, the Court notes that several criminal investigations in respect of the applicant had been ongoing for years, but no significant steps had been taken until the end of the "solution process" to initiate a procedure for the lifting of his parliamentary immunity. In this connection, the Court observes that although the investigation in respect of the applicant was not initiated in response to the speeches by the President of Turkey, it was at least accelerated after he had given those speeches and stated that "the deputies of that party [the HDP] must pay the price" (see paragraph 29 above). On 16 March 2016 the President accused the HDP members of parliament, including the applicant, of having caused the death of fifty-two people.

271. Thus, although the Court cannot accept the applicant's argument that the whole legal machinery of the respondent State was misused *ab initio* and that from beginning to end the judicial authorities acted in bad faith and in blatant disregard of the Convention (see, *mutatis mutandis*, *Năstase v. Romania* (dec.), no. 80563/12, § 109, 18 November 2014), it appears from the reports and opinions by international observers, in particular the observations by the Commissioner for Human Rights, that the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency. In that context, concordant inferences drawn from this background support the argument that the judicial authorities reacted harshly to the applicant's conduct, bearing in mind his position as one of the leaders of the opposition, and to the conduct of other HDP members of parliament and elected mayors, as well as to dissenting voices more generally. In this regard, the Court notes that the Government have not put forward any serious argument that could satisfy it that such allegations might be unfounded.

272. In addition, the Court reiterates that in order to determine which purpose is predominant in a given case, bearing in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law, it must also take into consideration factors such as the nature and degree of reprehensibility of the alleged ulterior purpose (see *Merabishvili*, cited above, § 307). In this connection,

the Court observes that the applicant does not see himself solely as an individual victim of a violation. His contention is that he has been kept in pre-trial detention chiefly on account of his position as one of the leaders of the political opposition. The Court considers that in such an eventuality, it is not only the applicant's rights and freedoms as an individual that could be said to be under threat but the whole democratic system itself. In the Court's opinion, an ulterior purpose of that kind would undoubtedly pose a serious problem for democracy.

273. Having regard to the foregoing, and in particular the fact that the national authorities have repeatedly ordered the applicant's continued detention on insufficient grounds consisting simply of a formulaic enumeration of the grounds for detention provided for by law, the Court finds that it has been established beyond reasonable doubt that the extensions of the applicant's detention, especially during two crucial campaigns, namely the referendum and the presidential election, pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society (see, *mutatis mutandis*, *Mehmet Hasan Altan*, cited above, § 210, and *Şahin Alpay*, cited above, § 180).

274. There has therefore been a violation of Article 18 of the Convention in conjunction with Article 5 § 3.

VIII. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

275. Having regard to all its findings above, the Court considers it unnecessary to rule separately on either the admissibility or the merits of the complaint under Article 10 of the Convention (see *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 170, 17 March 2016).

IX. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

276. In addition to the other violations alleged, the applicant complained for the first time in his observations in response to those of the Government that there had been a violation of Article 34 of the Convention. He stated that in August 2017 and January 2018 his lawyer Ms R. Yalçındağ Baydemir had been summoned to the Diyarbakır public prosecutor's office, where she had been questioned in connection with a separate criminal investigation. He added that a criminal investigation had been initiated in respect of his lawyer Mr M. Karaman on account of statements he had made at a hearing in the case of another detained member of parliament. Another lawyer, Mr R. Demir, had been arrested for lodging an application with the Constitutional Court and with the Court concerning the murder of the former chairman of the Diyarbakır Bar, Mr T. Elçi. The applicant contended

that the investigations in respect of his lawyers had had an intimidating effect on them. Article 34 of the Convention provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

277. The Government contested those arguments.

278. The Court observes that there is no evidence that the investigations carried out in respect of the applicant's lawyers were designed to induce him to withdraw or modify his complaint or otherwise interfere with the effective exercise of his right of individual petition, or indeed that they had such an effect. It is clear even from the wording of the complaint that the investigations in question are unrelated to the applicant's application. The authorities of the respondent State cannot therefore be said to have hindered the applicant's exercise of his right of individual petition. Accordingly, the Court considers that the respondent State has not breached its obligations under Article 34 of the Convention.

X. ARTICLE 46 OF THE CONVENTION

279. The relevant parts of Article 46 of the Convention read as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
>
> ..."

280. By virtue of Article 46 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see, among many other authorities, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 487, ECHR 2004-VII; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC],

no. 32772/02, § 85, ECHR 2009; *Assanidze*, cited above, § 198; *Fatullayev v. Azerbaijan*, no. 40984/07, § 172, 22 April 2010; and *Del Río Prada*, cited above, § 137).

281. Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed (see *Maestri*, cited above, § 47, and *Assanidze*, cited above, § 199). Concerning the measures to be adopted by the respondent State, subject to supervision by the Committee of Ministers, to put an end to the violations found, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (see, among other authorities, *Fatullayev*, cited above, § 173, with further references).

282. Nevertheless, where the nature of the violation found is such as to leave no real choice as to the measures required to remedy it, the Court may decide to indicate only one individual measure, as it did in the cases of *Assanidze* (cited above, §§ 202-03); *Ilaşcu and Others* (cited above, § 490); *Aleksanyan v. Russia* (no. 46468/06, §§ 239-40, 22 December 2008); *Fatullayev* (cited above, §§ 176-77); *Del Río Prada* (cited above, §§ 138-39); and *Şahin Alpay* (cited above, §§ 194-95). In the light of its approach in those cases, it considers that any continuation of the applicant's pre-trial detention in the present case will entail a prolongation of the violation of Article 5 § 3 and Article 18 of the Convention and a breach of the obligations on respondent States to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention.

283. Accordingly, having regard to the particular circumstances of the case, the reasons for its finding of a violation and the urgent need to put an end to the violation of Article 5 § 3 and Article 18 of the Convention, the Court considers that the respondent State must ensure that the applicant's pre-trial detention, ordered in the criminal proceedings forming the subject of the present case, is ended at the earliest possible date, unless new grounds and evidence justifying his continued detention are put forward.

XI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

284. 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

285. The applicant claimed 59,614.04 Turkish liras (TRY – approximately 11,350 euros (EUR)) in respect of pecuniary damage, corresponding to the cost of the air tickets paid for by his wife (TRY 29,567.48), his two daughters (TRY 11,356.52 and TRY 10,324.52), his parents (TRY 1,793.82 and TRY 1,783.92) and his sister (TRY 4,787.78) to visit him in prison in Edirne. In support of his claim, he produced the invoices for the air tickets. He also claimed EUR 250,000 in respect of non-pecuniary damage.

286. The Government submitted that the amounts claimed were excessive and incompatible with the Court's case-law.

287. The Court observes that there is no direct link between the violations found and the pecuniary damage alleged. It therefore rejects this part of the claim.

288. With regard to non-pecuniary damage, the Court considers that the violation of the Convention has indisputably caused the applicant substantial damage. Accordingly, making its assessment on an equitable basis, it finds it appropriate to award the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

289. The applicant also claimed TRY 213,783.40 (approximately EUR 40,000) for costs and expenses incurred before the Court. In support of his claim, he produced a contract signed with his two lawyers, Mr M. Karaman and Ms A. Demirtaş Gökalp. He assessed the time that his representatives had spent working on the case at 120 hours, for an hourly fee of TRY 440. He also stated that two of his lawyers, both resident in Diyarbakır, had had to travel to Edirne twenty-four times to prepare his defence submissions. To that end, he sought the reimbursement of the costs associated with their air tickets and accommodation, amounting to TRY 5,730.83 for Mr M. Karaman and TRY 15,832.20 for Ms A. Demirtaş Gökalp. Lastly, he added that each visit by his lawyers had involved twelve hours' work.

290. The Government submitted that the amount claimed was excessive.

291. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as

to quantum. In the present case, having regard to the documents in its possession and to its case-law, the Court considers it reasonable to award the applicant the sum of EUR 15,000 for the proceedings before it.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Joins to the merits*, unanimously, the preliminary objection concerning the complaint under Article 3 of Protocol No. 1 and dismisses it;

2. *Declares* admissible, unanimously, the complaints concerning Article 5 §§ 1 (lack of reasonable suspicion), 3 and 4 (lack of a speedy judicial review by the Constitutional Court) and Article 18 of the Convention, and Article 3 of Protocol No. 1 to the Convention;

3. *Declares* inadmissible, by a majority, the complaint under Article 5 § 1 of the Convention concerning the lawfulness of the applicant's arrest and detention in police custody;

4. *Declares* inadmissible, by a majority, the complaint under Article 5 § 1 of the Convention concerning the compliance of the applicant's pre-trial detention with domestic law;

5. *Declares* inadmissible, by a majority, the complaint under Article 5 § 4 of the Convention concerning the lack of access to the investigation file;

6. *Holds*, unanimously, that there has been no violation of Article 5 § 1 of the Convention (alleged lack of reasonable suspicion that the applicant committed an offence);

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

8. *Holds*, unanimously, that there has been no violation of Article 5 § 4 of the Convention on account of the alleged lack of a speedy judicial review by the Constitutional Court;

9. *Holds*, unanimously, that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

10. *Holds*, by six votes to one, that there has been a violation of Article 18 of the Convention in conjunction with Article 5 § 3;

11. *Holds*, unanimously, that there is no need to examine separately the admissibility or merits of the complaint under Article 10 of the Convention;

12. *Holds*, unanimously, that the respondent State has not failed to comply with its obligations under Article 34 of the Convention;

13. *Holds*, unanimously, that the respondent State is to take all necessary measures to put an end to the applicant's pre-trial detention;

14. *Holds*, unanimously,
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in French, and notified in writing on 20 November 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President

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

R.S.
S.H.N.

PARTLY DISSENTING OPINION OF JUDGE KARAKAŞ

(Translation)

1. I agree with the findings of the judgment in the present case in so far as they concern the applicant's complaints under Article 5 §§ 1, 3 and 4, Article 10 and Article 34 of the Convention and Article 3 of Protocol No. 1 to the Convention.

2. However, I am unable to agree with the majority's conclusion that there has been a violation of Article 18 of the Convention in conjunction with Article 5 § 3. In view of all the conclusions reached by the Court under Article 5 §§ 1 and 3 of the Convention and Article 3 of Protocol No. 1, it was unnecessary in my opinion to exa-+6-mine the complaint under Article 18, which was based on the same facts. Indeed, the Court decided along those lines in two recent judgments in cases against Turkey (see *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 216, 20 March 2018, and *Şahin Alpay v. Turkey*, no. 16538/17, § 186, 20 March 2018).

3. That aside, seeing that the majority concluded that it was necessary to examine this complaint as submitted by the applicant, I consider, in the light of the approach adopted by the Court in interpreting Article 18 of the Convention in *Merabishvili v. Georgia* ([GC], no. 72508/13, 28 November 2017), that there has been no violation of Article 18 of the Convention, for the following reasons.

4. As the majority note, Article 18 of the Convention can only be breached after a significantly high threshold has been crossed (see paragraph 260 of the judgment). In the circumstances of the case, the Court found that the applicant could be said to have been deprived of his liberty on "reasonable suspicion" of having committed a criminal offence, within the meaning of sub-paragraph (c) of Article 5 § 1 of the Convention (see paragraph 170). The applicant's pre-trial detention therefore pursued an aim provided for by that Article.

5. In the context of the present case, the applicant's political activities could be taken into account as part of a contextual analysis. Nevertheless, it is clear from the Court's case-law that the status of a politician, even one with a leading role, cannot be treated as a guarantee of immunity (see, *mutatis mutandis*, *Khodorkovskiy v. Russia*, no. 5829/04, § 258, 31 May 2011). The mere fact that politicians have been prosecuted or placed in pre-trial detention, even during an election campaign, does not automatically indicate that the aim pursued by such measures was to restrict political debate (see *Merabishvili*, cited above, § 323).

6. In the present case, I note that the applicant did not produce any persuasive concrete evidence that there was any "hidden agenda" on the part of the judicial authorities. Although the applicant may have had suspicions as to the national authorities' real purpose in keeping him in pre-trial

detention, I consider that in the absence of concrete evidence, such suspicions cannot suffice from a legal perspective to warrant the conclusion that in ordering his continued pre-trial detention, the judicial authorities acted improperly and in blatant disregard of the Convention (see, *mutatis mutandis*, *Năstase v. Romania* (dec.), no. 80563/12, § 109, 18 November 2014, and *Tchankotadze v. Georgia*, no. 15256/05, § 114, 21 June 2016).

7. The same applies to the statements by the President of the Republic of Turkey concerning the criminal investigation carried out in respect of the applicant. In my view, such statements could only be seen as adequate proof of an ulterior purpose behind the judicial authorities' decisions, in line with the government authorities' own agenda, if the Court had found that the Turkish justice system was not sufficiently independent from the executive (compare *Merabishvili*, cited above, § 324). In the absence of such a conclusion (see paragraph 271 of the judgment), the majority should in my view have avoided engaging in speculation, as for example when they asserted that the applicant's continued detention had had a negative effect on the "no" campaign relating to the proposed Bill to amend the Constitution with a view to introducing a presidential system, or that the political climate in recent years had created an environment capable of influencing certain decisions by the national courts.

8. In the circumstances of the present case, therefore, I can see no indication that the judicial authorities misused their powers by extending the applicant's detention for any purpose other than the one for which it was intended. Accordingly, I consider that it has not been established beyond reasonable doubt that the main purpose of the applicant's pre-trial detention was to stifle pluralism or to limit freedom of political debate.