REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

PLENARY ASSEMBLY

JUDGMENT

IN THE APPLICATION OF AYDIN YAVUZ AND OTHERS

(Application Number: 2016/22169)

Date of Judgment: 20 June 2017

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PLENARY ASSEMBLY

JUDGMENT

President	: Zühtü ARSLAN
Vice President	: Burhan ÜSTÜN
Vice President	: Engin YILDIRIM
Justices	: Serdar ÖZGÜLDÜR
	Serruh KALELİ
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	Recep KÖMÜRCÜ
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	Kadir ÖZKAYA
	Rıdvan GÜLEÇ
	Recai AKYEL
	Yusuf Şevki HAKYEMEZ
Rapporteur	: Aydın ŞİMŞEK
Applicants	: 1. Aydın YAVUZ
Representative	: Birol TAŞ, Attorney at law
	2. Birol BAKİ
	3. Burhan GÜNEŞ
	4. Salih Mehmet DAĞKÖY
Representative	: Hasan HELVACI, Attorney at law

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicants allege that there has been a breach of their right to liberty and security on the grounds that their detention within the scope of the investigation conducted with respect to the coup-attempt of 15 July was not lawful; that length of their detention has exceeded reasonable time; that there has been a restriction on their access to investigation file; and that their detention review was conducted without holding a hearing.

II. APPLICATION PROCESS

2. The individual applications were lodged with the Constitutional Court on 20 October 2016 and 21 December 2016.

3. The applications were submitted to the Commission after examination of the application forms and annexes thereto under administrative procedure.

4. Under the preliminary examination, it was established that the applications nos. 2016/39931, 2016/39939 and 2016/39944 were of the same nature in terms of subject-matter. They were accordingly joined with the application no. 2016/22169, and it was decided that the examination be proceeded with over the case-file no. 2016/22169.

5. The Commission decided that the examination as to the admissibility of the application be conducted by the Section.

6. The Presiding Judge of the Section decided that the examination on the admissibility and merits of the application be made concurrently.

7. One copy of the application was sent to the Ministry of Justice ("the Ministry") for receiving its observations.

8. The applicants did not submit their counter-statements with respect to the Ministry's observations.

9. At the meeting held on 13 June 2017, the Second Section, decided to relinquish jurisdiction in favour of the Plenary Assembly, pursuant to Article 28 § 3 of the Internal Regulations of the Court ("Internal Regulations").

III. THE FACTS

10. As stated in the application forms and annexes thereto and in accordance with the information and documents available on the National Judiciary Informatics System ("the UYAP"), the facts of the case may be summarized as follows:

11. For a sound assessment of the applicants' detention and the declaration of a state of emergency in our country, providing general information on the backdrop of the situation is deemed necessary.

A. The Coup Attempt

12. Turkey faced with an armed coup attempt at the night of 15 July 2016.

13. It has been revealed that by the "martial law directive" prepared by those attempting to stage the coup, the Turkish Armed Forces ("the TAF") constituted a "Peace at Home Council" ("*Yurtta Sulh Konseyi"*) for taking over the administration of the state, within the chain of command; that a martial law and curfew were declared all across the country. All appointments and assignments by virtue of public power would be performed by the "Peace at Home Council" or under the power delegated by it, and actions to be performed in any other means would be deemed null and void. The current executive body was removed from power. The Grand National Assembly of Turkey ("the GNAT") was dissolved. All governors were relieved of their duty, and all governors, district governors and mayors would be appointed by the "Peace at Home Council". All activities of the political parties were terminated. The police organization were brought under the command of the martial law commanders. This directive and the enclosed appointment list of the martial law commanders were circulated to the relevant military units and the ministries by the coup-plotters.

14. The coup-plotters issued a declaration on behalf of the "Peace at Home Council" via the Turkish Radio and Television Association ("TRT") headquarters, which the coup-plotters had occupied. The issues included in the "martial law directive" were generally mentioned in this declaration.

15. In the course of the coup attempt, bombed and armed attacks were carried out by airplanes and helicopters, on many campuses including the GNAT, the Presidential Complex, the Ankara Security Directorate, the Special Operations Department of the Security General Directorate and the National Intelligence Organization ("the MIT"). Besides, the coup-plotter soldiers raided the hotel where the President was staying. However, as the President had left

the hotel just before the armed raid, the coup-plotters could not attain the aim pursued. Moreover, fire was opened on the convoy of the Prime Minister. Many high-level military officers including the Chief of the General Staff and the force commanders were taken hostage. The Bosphorus Bridges connecting Europe and Asia and the airports located in Istanbul were blocked and closed to traffic through tanks and armoured vehicles. A great number of public institutions located in various places of the country were occupied or attempted to be occupied by force of arms.

16. During the attempt, attacks were carried out on the relevant institutions and organizations including TURKSAT Satellite Communication Cable TV and Management Public Company ("the TURKSAT") in order to cease the television broadcasts and internet access throughout the country. To that end, headquarters of certain television channels were also occupied, and broadcast streams were interrupted.

17. According to the initial findings reported in the statement of the Turkish General Staff8.000 military personnel got involved in the coup attempt; 35 aircrafts including the fighter aircrafts, 3 ships, 37 helicopters, 246 armoured vehicles including 74 tanks, and about 4000 light weapons had been used during the attempt.

18. This coup attempt was denied by all constitutional organs. Upon the President's call, the people took to the streets and reacted to the coup attempt. The security forces acting in line with the orders and instructions of the legitimate state authorities resisted the coup attempt. All political parties represented in the GNAT and the non-governmental organizations denounced the coup attempt. Almost all media and press outlets delivered broadcasts against the coup attempt. The public prosecutor's offices initiated investigations against those attempting to stage the coup and ordered the security forces to arrest the coup-plotters throughout the country. Ultimately, the coup was prevented through a pervasive and strong resistance.

19. The security forces fighting against the coup attempt and the civilians taking the streets for reacting to the coup attempt were attacked by airplanes, helicopters, tanks, the other armoured vehicles and weapons. As a result of these attacks, a total of 250 persons, out of whom 4 were military officers, 63 were police officers and 183 were civilians lost their lives, and a total of 2.735 persons out of whom 23 were military officers, 154 were police officers

and 2.558 were civilians were injured. The Prime Minister announced that 36 of the coup plotters had been killed while 49 of them had been injured.

20. Following the prevention of the coup-attempt, millions of people continued keeping watch throughout the night, for about one month, at almost every city square within the country.

B. The Facts as to the Structure behind the Coup Attempt

21. The applicants have been accused of being a member of an armed terrorist organization and of attempting to overthrow the constitutional order by use of force and violence, based on the factual allegation that they had involved in the coup attempt of 15 July, and they have been detained on remand accordingly. Therefore, certain factual information regarding the structure behind the coup attempt should be provided.

22. In Turkey, there is a structure established by Fetullah Gülen, operating since 1960s. It has been defined as a religious group until recent years and called as "the Community", "the Gülen's Community", "the Fetullah Gülen's Community", "the Hizmet Movement", "the Volunteers' Movement" and "the Fellowship". Many investigations and prosecutions have been conducted into the organization and activities of this structure. In the recent investigation and prosecution documents, this structure has been called as "the Fetullahist Terrorist Organization" (the FETÖ) and/or "the Parallel State Structure" ("the PDY").

23. At its meeting of 20 July 2016, the National Security Council deliberated over the coup attempt of 15 July. In the meeting it has been indicated that the coup attempt was initiated by FETÖ members serving within the TAF; this organization ultimately aimed at taking control of the nation and the state by dominating, influencing, and infiltrating the educational institutions, non-governmental organizations, media outlets, commercial institutions and public officers.

24. In the various oral and written statements of the competent authorities, it is generally indicated that the coup attempt was initiated upon the instruction of Fetullah Gülen, and it had been put into implementation in line with the plan approved by Fetullah Gülen by the members or heads of FETÖ/PDY who have been infiltrated into TAF, the police and gendarmerie organizations, and other key state institutions.

25. In addition, a high number of indictments ─which have been issued by the chief public prosecutor's offices throughout the country upon the conclusion of the investigations on the coup attempt or against those who have been linked to FETÖ/PDY despite not being actively involved in the coup attempt─ contain determinations and assessments pointing out that the coup attempt was staged by the FETÖ/PDY members within the knowledge and under the instruction of Fetullah Gülen. The factual basis of these determinations and assessments may be summarized as follows:

1. Witnesses' Statements

i. In his statement, the Chief of the General Staff noted: "It was on the agenda of the Supreme Military Council meeting, which would be held in August 2016 within the scope of the fight against the FETÖ/PDY's structure within the TAF, to take serious decisions. Having foreseen the probable outcome thereof, the terrorist organization performed an armed insurrection." During the coup attempt, the Chief of General Staff was taken hostage by the coup-plotter soldiers and he was forced to sign a declaration, however, he resisted doing so. The Brigadier General H.E., one of the persons taking him hostage, told him *"If you desire, we would enable you to get in contact with our opinion leader Fetullah Gülen"*. Those planning and involving in the coup attempt were members of the FETÖ/PDY (the indictment of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E.2017/7327).

ii. Two anonymous witnesses (Şapka and Kuzgun) heard by the Izmir Chief Public Prosecutor's Office indicated in their statements: They had participated in some meetings held in a villa located in Ankara a short time before the coup attempt, upon the invitation of the FETÖ/PDY members who were in contact with them. At the meetings certain high-level military officers, as well as A.Ö, reportedly the civil head of the coup attempt, planned the coup attempt. Referring to the evening of 15 July, A.Ö. stated in one of his speeches *"one of the primary duties to be performed by the assigned persons is to enable the immediate release of the detained community members from prisons"* and he stated in another speech *"My fellow men, I have just talked with our senior in the next room (Fetullah Gülen). Our senior sent his compliments to all of you. I will be in Istanbul on Saturday or Sunday. I will then go abroad. If nothing goes wrong, I will meet our senior on Tuesday and will return on Wednesday or Thursday".* When he was reminded of the possibility that the armed coup attempt may fail, he answered *"Let's not call up the devil with such negative thoughts. With the help of Allah, this attempt will be successful".* The anonymous witnesses also added that

at these meetings, certain plans were made for taking hostage the President, the Prime Minister, the Minister of Internal Affairs, the Undersecretary of the MIT, the Security General Director, the Head of the Anti-Terror Department, the Head of the Intelligence Department of the Security Directorate and the Head of the Special Operations Department (the investigation of the Izmir Chief Public Prosecutor's Office no. 2016/61972 and the indictments of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E.2017/7327 and dated 31 March 2017 and no. 2017/10698).

2. The Suspects' Statements

i. The Rear Admiral H.I.Y., who was the Amphibious Naval Infantry Brigade Commander, noted in his statement: During the Ramadan Feast before the coup attempt, they held a meeting with certain soldiers in Ankara with respect to the coup planning, and the FETÖ/PDY imam named A.Ö. attended this meeting. During this meeting, A.Ö. told them *"I will go to America and present these studies to Fetullah Gülen hodja"*. At this meeting, he was assigned with the duty of taking hostage some of the generals who were not supporting the coup, and he accordingly took hostage two of these generals during the coup attempt (the indictment of the Ankara Chief Public Prosecutor's Office dated 2 January 2017 and no. E. 2017/26).

ii. In his statement, the Lieutenant Colonel L.T., who was the aide-de-camp of the Chief of the General Staff, indicated: He had voluntarily served for the FETÖ/PDY for years. One member of this organization had delivered the questions of the military school admission exam to him before the exam. Upon the instruction of his superiors within the FETÖ/PDY, he placed a bugging device in the office of the former Chief of the General Staff and he submitted the tape recordings to his superior within the FETÖ/PDY (the community brother *"abi"*). He had learnt the coup attempt from the Colonel L.T., who was the principal consultant of the Chief of the General Staff and whom was known by the suspect as a member of the FETÖ/PDY, at the morning hours one day before the coup attempt. According to the plan, the President, the Prime Minister, the Ministers, the Chief of the General Staff and the Force Commanders would be taken hostage one by one and they would be killed quietly. His duty was to neutralize the Chief of the General Staff and he accepted to do so without hesitation. As planned, they entered into the office of the Chief of the General Staff and took him hostage (the indictment of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E.2017/7327).

iii. In his statement, the Squadron Leader H.H. serving in the Gendarmerie General Command note that he involved in the coup attempt activities by getting influenced by the statements of a person in a meeting arranged by the FETÖ/PDY members he was in contact, one day before the coup attempt. His statements are as follows: *"this process has reached to unbearable levels; those having relation with the community have been identified; all of these persons would be dismissed from their office and would be caused to stay in prison for years; there is nothing to do in respect thereof; and Fetullah Gülen inspired this idea"* (investigation of the Ankara Chief Public Prosecutor's Office no. 2016/105585 and the indictment of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E.2017/7327).

iv. In his statement, the Lieutenant Colonel F.E. serving in the Special Command of Public Security of the Gendarmerie Commando Unit said: He had a link with the FETÖ/PDY since his secondary-school years. In the period during which he was working in the appointment unit, a teacher codenamed "Osman" who was, according to the suspect, "the community imam within the military" gave a list of personnel to be appointed. He appointed the appropriate persons in the list. He became aware of the coup attempt on 12 July 2016 when he met with Osman and another person codenamed "Hakan", who was superior of Osman, at an office. During this meeting, the head of the FETÖ/PDY codenamed "Hakan" told: *"a large-scale operation would be performed against the community members within the military in the near future. In case of such an operation, the community would completely come to an end. In order to prevent this, the military would seize control of the state administration at around 03:00 a.m. on 15 July 2016, the night between Friday and Saturday. This instruction was received from Fetullah Gülen. The first step of the operation is to seize the headquarters of the General Staff. Then all military headquarters would be seized and subsequently, martial law commands would be established in every province. This coup would not occur within the chain of command, and the army corps and brigades would support the coup".* F.E. also stated that he was assigned with a duty within this scope (investigation no. 2016/105585 conducted by the Ankara Chief Public Prosecutor's Office and the indictment of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E.2017/7327).

v. The captain F.T.Ç. noted in his statement: He was serving as a pilot in the TAF. He had been in connection with the FETÖ/PDY since he was a child. He and certain commission officers organized a meeting at a home in Ankara two days before the coup attempt. He shot at various military and civilian targets [during the coup attempt] in Ankara

by a helicopter operated by him (investigation no. 2016/108299 conducted by the Ankara Chief Public Prosecutor's Office and the indictment of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E.2017/7327).

vi. The Gendarmerie Lt. Col. A.K. serving in the Joint Intelligence Coordination Centre noted in his statement: He had been in contact with the FETÖ/PDY since his secondary-school years: A few days before the coup attempt, one of his friends, who was a lieutenant colonel, took the suspect near a person introduced as "his *abi*" (his superior in the FETÖ/PDY). The *abi* noted *"about 3.000 military officers will be dismissed after the Supreme Military Council meeting to be held in August. It is the time to stop this conduct. It is necessary to prevent the Government from organizing this meeting. A coup will be staged within a short time, and a martial law will be declared. This coup is ordered to be staged by Fetullah Gülen".* The suspect also added that he was assigned with a duty in this scope (investigation no. 2016/105585 conducted by the Ankara Chief Public Prosecutor's Office and the indictment of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E.2017/7327).

vii. The Squadron Leader M.T. serving in the Gendarmerie Intelligence School Command noted in his statement: He had been in relation with the FETÖ/PDY since his earlier ages. At noon on 15 July, one of his friends who was a lieutenant colonel took him to a home where there were other military officers he was acquainted with. A civilian at that home stated *"everyone in connection with the community will be dismissed from the military by virtue of the decision of the Supreme Military Council of this year. Those who are in contact with the community are not given a chance to live. Therefore, they are going to seize the administration at night".* He was assigned with a duty in this scope (investigation no. 2016/105585 conducted by the Ankara Chief Public Prosecutor's Office and the indictment of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E.2017/7327).

viii. The Brigadier General G.Ş.S., who was a Chair of the Joint Target Analysis Management at the Air Forces Command, noted in his statement: The coup attempt had been planned a while ago at the command of generals providing support for the FETÖ/PDY within the TAF. The military officers and generals at the lower level, who were known to support the FETÖ/PDY, had been informed of their role in the coup attempt before 15 July 2016. These instructions were conveyed to those officers and generals, in a confidential manner, through

the secure lines internally used within the TAF (the indictment of the Ankara Chief Public Prosecutor's Office dated 2 January 2017 and no. E.2017/26).

ix. The Captain A.P., who was serving at the Joint Target Analysis Management at the Air Forces Command, noted in his statement that he had been in connection with the FETÖ/PDY since his studentship. During this period, at every time his place of duty changed, the *"brother"* being in contact with him was changed. At the time when he was the platoon commander at the Turkish Military Academy, he had been ordered to ill-treat certain left-oriented students. When he questioned this order, his *brother* within the FETÖ/PDY replied "*Ill-treating these students does not amount to rightful share. That is because, dismissing them from the TAF is a service rendered for the country, nation and the Islam, and it is for avoiding, in advance, the damage to be caused by these persons"*. On 10 July 2016, the Brigadier General G.Ş.S., the commander of the troop where he was serving, ordered him to take map images of the Undersecretariat of the MIT, the training field of the Police Special Operations Team, the Ministry of Internal Affairs, the Prime Ministry, the Special Operations Department located in Gölbaşı, a building located in the Dikmen Valley, the building of the Telecommunication Communication Presidency ("the TIB") located in Ahlatlıbel, the Turk Telekom's building in Ümitköy, a building on which there were small dish antennas (aerials), the TURKSAT's building in Gölbaşı, and the Presidential Palace, the Kalander Military Guest House, the Fenerbahçe Military Guest House and the Samandıra Military Quarters which were located in Istanbul and to indicate coordinate information of these locations under each image. He had performed this duty. He had also did the same with respect to about 80-90 crossroads located in Ankara and marked on a map provided by G.Ş.S. a few days later. At the night of 15 July when the coup-related actions were being performed, G.Ş.S. called him by phone at around 11:00 pm and asked him the coordinates of the Presidential building located on the Okluk Bay in Marmaris. He conveyed these coordinates to G.Ş.S. through a lieutenant colonel (the indictment of the Ankara Chief Public Prosecutor's Office dated 31 March 2017 and no. E.2017/10698).

x. The Lieutenant Colonel İ.A. indicated in his statement that he was serving as a pilot in the TAF. He had a link with the FETÖ/PDY since his earlier ages. He and certain military officers serving as a pilot like him had held a meeting in Ankara before the coup attempt. He had shot at various civilian targets [during the coup attempt in Ankara by a helicopter

operated by him (the indictment of the Ankara Chief Public Prosecutor's Office dated 2 January 2017 and no. E.2017/26).

xi. In his statement, the Lieutenant M.M. who was serving as a pilot in the Akıncı 4th Main Jet Base Command noted: He had a link with the FETÖ/PDY since his high-school years. At a meeting held at the base in the evening hours of the day when the attempt took place, a Lieutenant Colonel told *"they have a list containing our names. All of our names are at their hands. We are all in this list. Some of the generals have been suspended from office. Then, it our turn will follow. We have to get this done today. We have to take action before them"*. He had been assigned with a duty in this respect and he had bombed the parking area and bridge crossing next to the Presidential Complex by an airplane operated by him [during the coup attempt]. He and his fellows, in other words "the community", were attempting to stage the coup (the indictment of the Ankara Chief Public Prosecutor's Office dated 31 March 2017 and no. E.2017/10698).

xii. H.H.B., who was a squadron commander in the Akıncı 4th Main Jet Base Command, indicated in his statement that he bombed the GNAT according to the duty assigned to him at the night of coup attempt. He did not have a link with the FETÖ/PDY, however, the coup attempt had been performed by the members of the structure led by Fetullah Gülen (the indictment of the Ankara Chief Public Prosecutor's Office dated 31 March 2017 and no. E.2017/10698).

xiii. M.M.K., a pilot serving in the Akıncı 4th Main Jet Base Command, noted in his statement that he had a link with the FETÖ/PDY, and at the night when the coup attempt was taking place, he had taken the commanders to the rooms of the base (those taken hostage) previously notified to him. He then realized that he was doing wrong (the indictment of the Ankara Chief Public Prosecutor's Office dated 31 March 2017 and no. E.2017/10698).

xiv. A.K., a pilot serving in the Akıncı 4th Main Jet Base Command, noted in his statement that he had been in connect with the FETÖ/PDY since the final year of the high school. The coup attempt had been performed by this structure. They had been exploited during this attempt (the indictment of the Ankara Chief Public Prosecutor's Office dated 31 March 2017 and no. E.2017/10698).

xv. T.F.D., who was a non-commissioned officer at the Department for Appointment in the Land Forces Command, indicated in his statement indicated in his statement he had a

link with the FETÖ/PDY. He had convened with certain military officers upon the instruction of a member of the FETÖ/PDY who had got in contact with him one day before the coup attempt. He had acted in line with their instructions. In this scope, they had taken a hostage from the lodging buildings allocated for the generals (the Commander of the Turkish Gendarmerie Forces) to the Akıncılar base. He had been exploited by the FETÖ/PDY in this incident (the indictment of the Ankara Chief Public Prosecutor's Office dated 31 March 2017 and no. E.2017/10698).

xvi. A great number of military officers accused of having involved in the coup attempt, apart from the persons noted above, indicated in their statements that they had been in relation with the structure in question for many long years, without expressing that the coup attempt had been performed by the FETÖ/PDY (the indictments of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E. 2017/7327 and dated 31 March 2017 and no. E.2017/10698).

xvii. M.U., who was serving at the Office of the Private Secretary of the Prime Ministry, noted in his statement: He was responsible for submitting the invitations, which are addressed to the Prime Minister, to the Private Secretary. He was a member of the FETÖ/PDY and acting as an *"abi"* within the structure. He had provided organizational trainings for his subordinates in the structure who were civil and military persons at various places and positions. On 14 July 2016, certain persons had held a meeting concerning the coup at his home in his absence. The coup attempt had been planned and performed by the FETÖ/PDY members (the indictment of the Ankara Chief Public Prosecutor's Office dated 2 January 2017 and no. E.2017/26).

3. Facts as to the Civilian Heads of the Coup Attempt

i. It was found established by the investigation authorities through video footages and records of statements that five persons specified to be civilian heads of the coup attempt (A.Ö., K.B., H.Ç., N.O. and H.B.) had been at the Akıncılar Air Base ─the headquarters where the coup attempt was directed─ during the coup attempt; and that A.Ö. had, in person, directed this process at this headquarters. It was further revealed that during this process, K.B. had been talking to the military officers at the base and had gone in and out of the offices together with these officers; and that N.O. and H.B. had been walking along the corridor (the

indictments of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E. 2017/7327 and dated 31 March 2017 and no. E.2017/10698).

ii. These persons, as well as the military officers attempting to stage the coup, were arrested within and/or nearby Akıncılar Air Base. In their statements, A.Ö., K.B. and H.B. maintained that they had been at that place during the night when the attempt took place, as "they were looking for a land/farm". H.Ç. indicated that he had gone to the Akıncılar Air Base upon the invitation of a colonel who was the parent of a student receiving education at the school owned by him. On the other hand, N.O. noted that he had gone there for making an interview and agreement for a documentary he would make on livestock raising; and that he was not familiar to that region (the indictments of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E. 2017/7327 and dated 31 March 2017 and no. E.2017/10698).

iii. According to the findings reached by the investigation authorities, A.Ö. was a lecturer (assistant professor) at the faculty of theology of a university and charged by Fetullah Gülen as a high level head (the imam responsible for the Air Forces Command) within the FETÖ/PDY (for the statement of the witness Ç.A in support of this finding, *see* the indictment of the Ankara Chief Public Prosecutor's Office dated 2 January 2017 and no. E.2017/26). It is specified therein that A.Ö. had been in a close relationship with Fetullah Gülen for a long time, and his photos taken with Fetullah Gülen are submitted in support thereof. Moreover, it is also indicated that K.B. was a director general in a company operating under a holding company, which is in relation with the FETÖ/PDY, and that H.Ç. was the owner of a private school that is in connection with that structure (the indictments of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E. 2017/7327 and dated 31 March 2017 and no. E.2017/10698).

iv. The records pertaining to domestic and foreign travels of these persons who are specified to be the civilian heads of the coup attempt were examined. Accordingly, it was observed that they had recently visited Ankara at the same dates; and that they had gone abroad and returned to the country at the same or close dates. In this sense, it was revealed that A.Ö., N.O. and H.B. had all together arrived in Ankara by a car on 27 December 2015, 9 January, 16 January, 30 January, 20 February, 29 February, 14 March, 30 March, 5 May, 27 May, 4 June and 15 June 2016 and held meetings with certain military officers in Ankara for planning the coup. Moreover, the findings of the investigation authorities indicate that

following the meeting held in Ankara on 14 March 2016, A.Ö. went to the USA on 17 March 2016 and returned to Turkey on 21 March 2016. It was also revealed that K.B., H.Ç. and N.O. were in the USA in the same period. It was indicated that A.Ö. had arrived in Ankara on 15 June 2016 to hold a preparatory meeting for the coup, then gone to the USA together with N.O. on 20 June 2016 and returned to Turkey on 25 June 2016 with H.Ç. (on the same day). It was also established that K.B. had also been in the USA during the same period; and that these persons had made an assessment of the situation with Fetullah Gülen. Finally, it was specified that A.Ö. had organized meetings in Ankara several days before the coup attempt, namely on 6 July and 9 July 2016, and gone to the USA together with K.B. on 11 July 2016; and that after receiving Fetullah Gülen's approval for the coup plan, he returned to Turkey, once again together with K.B., on 13 July 2016. The video footage revealed that A.Ö. and K.B., who denied being acquainted with each other, returned to Turkey by the same plane on 13 July 2016 and walked along and had a conversation for a while at the terminal building of the Istanbul Atatürk Airport (the indictments of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E. 2017/7327 and dated 31 March 2017 and no. E.2017/10698).

4. The Other Facts

i. M.A., a former Security Director, against whom an arrest warrant had been issued for being a member of the FETÖ/PDY was arrested in military clothes within an armoured vehicle attacking on the Istanbul Security Directorate (the indictment of the Ankara Chief Public Prosecutor's Office dated 2 January 2017 and no. E. 2017/26).

ii. It was further found established that certain members of the security directorate and the officials of civil administration against whom a legal action was taken for being a member of the FETÖ/PDY had paid visits to the public institutions where they would have been appointed if a martial law had been declared following the coup attempt (the indictment of the Ankara Chief Public Prosecutor's Office dated 2 January 2017 and no. E. 2017/26).

iii. The "Peace at Home Council" established by 38 persons who had involved in the coup attempt consists of the military officers taking office at the Land, Air, Naval Forces Commands and the Gendarmerie General Command. Out of these 38 persons, one was a full general, one was a lieutenant general, three were major-generals, thirteen were brigadier generals/rear admirals, fourteen were colonels and six were lieutenant colonels. Moreover, there was an appointment list enclosed with the martial law directive which had been drawn

up by the "Peace At Home Council". According to this list, 84 military officers were assigned as "the commander of martial law", and 413 persons were planned to be appointed to the "courts of martial law". It was also found that a list had been drawn up for the appointment of 450 persons to the military and civilian positions of critical importance. It is considered by the investigation authorities that a great number of these persons, who were a member of the "Peace at Home Council", charged as the "commander of martial law", and appointed to the "courts of martial law" and "military and civilian positions of critical importance" were members of the FETÖ/PDY; and that in this appointment process, the hierarchy within this structure had been taken into consideration (the indictment of the Ankara Chief Public Prosecutor's Office dated 3 March 2017 and no. E. 2017/7327).

iv. The following message, which had been sent at the night of the coup attempt, was found in the mobile phones of certain security officers who are the suspects of one of the investigations conducted into the coup attempt: *"My fellow brothers, now the military officers are interfering with the State administration. So quit everything right now and direct the fellows to assist in the military officers' interference. Tell them not to resist and stand against the security forces who are resisting the coup attempt. Let's obtain information about the interference from each province and region. Act in line with this strategy and provide us with information from every point. Write proper notes. Tell the fellows not to resist the military officers and stand against those showing resistance. Especially those serving at the special operations department and the anti-riot police must surrender themselves to the military forces so that resistance shown by those not supporting this struggle could be broken. Let's get in contact with everybody"; "the brothers ("abiler") are to fulfil the orders received from the security directorate"; "everyone must go to the headquarters of the General Staff and establish contact with their fellows and one another; tell them to form a chain and ensure that everyone including the retired ones be aware thereof"; "tell everyone to go to the Headquarters of the General Staff with their arms"; "tell every officer who is on active duty or was retired and who is now in Ankara to go to the Headquarters of the General Staff, the Security General Directorate, the Ankara Security Directorate, the Anti-Smuggling and Organized Crimes Department, the Anti-Terror Branch and the Yıldız neighbourhood and to neutralize those who are resisting there; tell them to assist the military officers in this respect and not to stay at home, as anyone who stays at home would be committing a sin… Ensure that this message be disseminated to everyone"* (the indictment of the Istanbul Chief Public Prosecutor's Office dated 10 October 2016 and no. E. 2016/3799).

v. According to the information included in the indictments with respect to the coup attempt, the FETÖ/PDY took the decision to stage a coup towards the end of 2015, and the preparatory actions and the meetings on this matter were initiated on 27 December 2015. In the coup plan which was approved by Fetullah Gülen in the USA between 11 July and 13 July 2016 through A.Ö. and K.B., who are among the civilian heads of the coup attempt, the coup was indeed set for 16 July 2016 03:00 a.m. However, as a military officer serving at the Army Aviation Command went to the MIT and reported that there would be an attack by the military officers, who were members of the FETÖ/PDY, for taking hostage the Undersecretary of the MIT, and as the Undersecretary thereupon informed the Turkish General Staff of this fact, the Chief of the General Staff took certain measures and gave certain orders. In this scope, the Land Forces Commander carried out investigations at the Army Aviation Command in company with a committee also involving a military prosecutor. Accordingly, it was ordered that vehicles of the TAF on the air (such as aircraft, helicopter, and drones) would return to their bases and the armoured vehicles would not be allowed to go outside the troop. Thereupon, the coup-plotters got into panic and decided to stage the coup at an earlier hour worrying that they and the other members of the FETÖ/PDY who were making preparations for the coup would be detained. Therefore, the operational actions of the coup were initiated at around 08:30 p.m. on 15 July 2016.

C. Characteristics of the FETÖ/PDY

26. The competent authorities and the investigation authorities have reached many findings and assessments in the course of the investigations and prosecutions against the FETÖ/PDY that this organization was the perpetrator of the coup attempt of 15 July. These findings and assessments may be summarized as follows:

i. The FETÖ/PDY initially performed activities especially in the fields of religion and education, with a view to gaining legitimacy among the society.

ii. The FETÖ/PDY has raised the youth under its influence in line with its targets through the light (students') houses, schools, dormitories and private teaching institutions operating for the structure, and these persons have constituted the human resource for the structure. A certain part of incomes earned by the members of the structure has been collected as "benevolence", and those who want to leave the structure have been exposed to pressure and certain sanctions.

iii. The FETÖ/PDY has expanded the field of its activities in progress of time and extended its activities in over one hundred and fifty countries, as well as in Turkey. As a matter of fact, this structure has many institutions operating at home and abroad in various sectors such as education, health, media, finance, commerce and civil society.

iv. The FETÖ/PDY's legitimate activities in the social, cultural and economic fields relate to the civilian and private spheres such as operating private teaching institutions, schools, universities, associations, foundations, trade unions, professional chambers, economic foundations, financial institutions, newspapers, journals, TV channels, radio channels, web-sites and hospitals. Besides, there is an illegal structure either hidden behind these legal institutions or organized and operated separately and independently from the legal structure, especially for carrying out activities in public sphere.

v. The organization attributes holiness to itself. As a result, it has an understanding that everything including even the motherland, state, nation, ethics, law, fundamental rights and freedoms is, in value, subordinate to itself.

vi. The FETÖ/PDY has a vertical hierarchy based on obedience and submission in which Fetullah Gülen is on the top as "the universe imam" and which consists of continental, country, state, provincial, district, neighbourhood, settlement and house imams and a cell-type structure which is affiliated to imams but which is independent from one another. There is also a separate structure which monitors the internal functioning of the organization and reports the process to the leader through persons who are appointed by and only known to Fetullah Gülen. On the other hand, there is a responsible person who is appointed by the structure to each institution and organization the structure has infiltrated. Such persons are called as "*abi"* or *"imam"* and appointed to the institutions deemed important for the State administration, from among outsiders of these institutions.

vii. The heads and members of the FETÖ/PDY are conducting their activities on the basis of confidentiality and using covert communication methods. A great number of the members have "codenames". In this sense, it may be mentioned that the most important characteristic of the structure is confidentiality. The sense of confidentiality is attributed a very high degree of significance within the FETÖ/PDY members infiltrated the TAF, judiciary, security directorate and civil authority that are deemed important for the State administration. To that end, members of this structure occasionally endeavoured to even show

themselves as an "opponent to Fetullah Gülen and the community". As a matter of fact, certain messages were found on the mobile phone of E.G., the deputy inspector, who is among the suspects against whom an investigation has been carried out following the coup attempt of 15 July. These messages, addressed to regional imams and sent on 16 July 2016 between 05:20 and 05:29 a., read as follows: *"important and bad situation. It is an urgent notification. Convey this message to all provincial and district imams, abi, abla ("sisters") and to imams of the institutions. Tell all members of the community to post shares strongly condemning the coup, to pour into streets and camouflage themselves, to take photos and post them through social media and to say 'democracy, elected will'. However, warn them not to mention of the Hodja Effendi. We may be all together arrested and taken into custody. Everyone must say they were not aware of the coup and they heard of it through TV. Never share an unfavourable post against the Government and Tayyip. I remove this group right away* (the indictment of the Istanbul Chief Public Prosecutor's Office dated 10 October 2016 and no. E. 2016/3799).

viii. Real aim of the FETÖ/PDY is to take over the State. To that end, the organization placed its members in all public institutions and organizations, notably the TAF, the security organization, the MIT, the judicial bodies, the civil administration units and educational institutions. In this respect, Fetullah Gülen, the founder and leader of structure, delivered instructions in his speeches and statements at various dates: *"Be everywhere. If you are not everywhere, you are nowhere"; "Be flexible. Move through their vital points without coming into prominence!"; "Progress towards the vital points of the system until reaching to all power centres, without making anyone to notice you!"; "Each step until you would take along the power and strengthen in all constitutional institutions is deemed an early one, according to the state structure in Turkey"; "Existence of our fellows in courthouses, civil service or other critical institutions and organizations must not be considered and assessed as an individual existence. In other words, they are our guarantees in these units for the future. To some extent, they are assurance of our existence."* The FETÖ/PDY was organized within the political parties, trade unions, foundations and associations and non-governmental organizations such as business companies and attained a significant power in these fields.

ix. Loyalty of the public officers who are members of this structure is directed to the structure rather than the State. Therefore, these persons are preferring the interests of the structure over the interests of the State and act in line with the aims of the structure. The

structure encouraged its members to work in the public institutions and organizations and especially to take office in strategic units (personnel, intelligence, private secretariat, informatics, accounting departments and etc.). The FETÖ/PDY's members taking office in the public institutions saved the information about the persons who did not take part in the structure and obtained and archived the confidential information and documents belonging to the State.

x. A basic characteristic of the FETÖ/PDY's activities in the public institutions and organizations is that a public activity is apparently performed by a public officer competent to carry out this duty; however, this activity has been indeed performed not with the relevant public officer's own will but with the will of his hierarchical superior ("*abi"*) to whom he is affiliated, apart from the hierarchy in the public institution.

xi. This structure has limited number of members in the society. However, the ratio of its members within the public institutions and organizations is considerably high in comparison to the number of its members within the society.

xii. The FETÖ/PDY has been organized in parallel to the current administrative system with a view to take over the constitutional institutions of the State for re-shaping the State, society and citizens in accordance with its ideology and for managing the economy and social and political life through an oligarchic group. To this end, the structure engaged in political and economic alliances at international level, and it has become an "organization of tutelage" over the State and the nation.

D. Characteristics the Coup-Attempt Period

1. As to the FETÖ/PDY

27. The structure and activities of the FETÖ/PDY have been, for a long time, a matter of controversy among the society. However, there have been so concrete investigations and prosecutions conducted, during the recent years, into this structure and its activities for the offences of destroying evidence, wiretapping the phones of public institutions and high-level State officials, disclosing State's intelligence activities, obtaining questions in advance of the exams held for employment or promotion in public institutions and the offence of distributing these questions to its members and so on.

28. In the investigations and prosecutions within the scope of which hundreds of persons were detained on remand before the coup attempt of 15 July, it is indicated that the FETÖ/PDY is a terrorist organization, and it is claimed that the persons against whom legal action was taken would be sentenced for the offences of "establishing, managing or being a member of an armed terrorist organization" and "attempting to overthrow the Government of the Republic of Turkey or to prevent it from performing its duties", as well as some other offences.

29. On the other hand, it is asserted that many cases leading to intense public debates such as "*Şemdinli*", "*Ergenekon*", "*Balyoz (Sledgehammer)",* "*Askeri Casusluk (Military Spying)",* "*Devrimci Karargah (Revolutionist Military Headquarters)", "Oda TV"* and *"Şike (Match-fixing)"* cases were directed at discharging certain public officers who were taking office in several public institutions and organizations, notably the TAF. They also aimed at officers who were not members of this structure and at repressing persons considered to act against the interests of the organization in different civil platforms. Such kinds of improper actions in these cases are also dealt with in the Constitutional Court's judgments finding a violation (see *Sencer Başat and Others* [Plenary], application no. 2013/7800, 18 June 2014; *Yavuz Pehlivan and Others* [Plenary], no. 2013/2312, 4 June 2015; *Yankı Bağcıoğlu and Others* [Plenary], no. 2014/253, 9 January 2015).

30. The facts that an investigation was initiated, by prosecutors and judges in connection with the FETÖ/PDY, against certain politicians, their relatives and certain business men known to public, at the end of 2013, with the allegation that they had involved in corruption (investigations of 17-25 December) and that the trucks which contained materials belonging to the MIT were stopped and subject to search, with the allegation that they were carrying weapons, in the beginning of 2014, have formed the basic foundation for the investigations conducted against FETÖ/PDY's on the basis that the structure's activities were directed at overthrowing the Government. The detention measure applied in respect of certain judicial members and security officers taking part in the "17-25 December" and "MIT Trucks" investigations was also brought to the Constitutional Court's attention through individual application procedure. However, the Constitutional Court declared these individual applications inadmissible for being manifestly ill-founded (see *Hikmet Kopar and Others* [Plenary], no. 2014/14061, 8 April 2015, §§ 74-87¸ *Mustafa Başer and Metin Özçelik* [Plenary], no. 2015/7908, 20 January 2016, §§ 134-161; *Süleyman Bağrıyanık and Others*

[Plenary], no. 2015/9756, 16 November 2016, 198-244; and see the judgment no. E.2015/3 K. 2017/3 and dated 24 April 2017 of the 16th Criminal Chamber of the Court of Cassation where the judges, who had previously ordering the release of the police officers detained on remand within the scope of the FETÖ/PDY, were convicted of being a member of an armed terrorist organization).

31. With its indictment of 6 June 2016 that was issued shortly before the coup attempt, the Ankara Chief Public Prosecutor's Office filed a criminal action against 73 heads of the organization including Fetullah Gülen, alleging that they had established an armed organization and attempted to prevent the Government of the Republic of Turkey from performing its duties. In this indictment, it is specified that the FETÖ/PDY has formed its own staff structure especially within the TAF and the security organization; that it has dedicatedly trained its members to be appointed as commission and non-commissioned officers; and that it has become a dominant power in the military jurisdiction, and, therefore, the investigations conducted into this structure have not yielded to any result. As stated in the indictment, this structure within the TAF has reached to a level that would disturb the discipline of the army and cause vulnerability in the self-defence of the country. The public prosecutor has considered that this armed structure, which consists of tens of thousands of members within the force commands, gendarmerie and security organizations ─and having its own hierarchy independent from the State─ is the largest, the most dangerous and organized terrorist organization that has emerged within the Republic of Turkey throughout its history. Accordingly, the threat posed by the FETÖ/PDY, which has obtained the armed power to change or eliminate the constitutional order and which is the single organized power that could stage a military coup, is explicit and imminent given the structure's efficiency within the TAF. Making reference to the facts that in case of materialization of this threat it would amount to a real destruction for the State, that the country may drift into a civil war, that millions of people may die and millions of refugees may emerge, and that it may not be possible to revive the State, the public prosecutor indicated in the indictment that the dissolution of the FETÖ/PDY has become a matter of existence/non-existence for the State (the indictment of the Ankara Chief Public Prosecutor's Office no. E. 2016/24769).

32. One of the many actions brought against the FETÖ/PDY throughout the country was concluded by the Erzincan Assize Court on 16 June 2016 (decision no. E. 2016/74). In the decision, it is stated that the FETÖ/PDY has been organized especially in the judiciary, the

security units, and the TAF and has formed a structure independent from the hierarchal structure of the State, and it has been accordingly acknowledged that this structure is an armed terrorist organization.

33. On the other hand, the threat posed by the FETÖ/PDY at national level was also discussed in the decisions, statements and practices of the public administrative bodies. In this sense, the State officials explained that the structure in question had been posing a threat to the security of the country. Such assessments were also included in the resolutions of the National Security Council ("the MGK"). Since the beginning of 2014, the MGK has been defined this structure as "the structure threatening public peace and national security", "the illegal structure within the State", "the parallel structure disturbing public peace and conducting illegal activities at home and abroad through its structure appearing to be legal", "the parallel state structure", "the parallel state structure acting in collaboration with terrorist organizations" and as "a terrorist organization". Each of the MGK's resolutions in question were announced to the public through press release. Besides, in 2014, the FETÖ/PDY was mentioned in the National Security Policy Document as "the Parallel State Structure" under the heading of "Illegal Structures Appearing to Be Legal". On 8 January 2016, the Gendarmerie General Command included the FETÖ/PDY in the current list of terrorist organizations.

34. Moreover, disciplinary proceedings were conducted against a great number of public officers involved with the structure, notably judicial members and police officers, and various disciplinary sanctions including dismissing from public office or administrative sanctions were imposed in respect of many public officers.

35. Furthermore, certain administrative measures were also applied in respect of certain business organizations, financial institutions and media outlets considered to be in connection with the FETÖ/PDY. In this respect, trustees were appointed to Bugün Daily, Millet Daily, and Zaman Daily on 26 October 2015, 28 October 2015 and on 4 March 2016, respectively. On 15 October 2015, 13 television channels including Samanyolu TV, Samanyolu Haber TV, Mehtap TV and Dünya TV and radio channels incorporated in "the Samanyolu Broadcasting Group" were removed from the TURKSAT platform. The Savings Deposit Insurance Fund ("the TMSF") took control of the Bank Asya on 3 February 2015, and the Banking Regulation and Supervision Agency ("the BDDK") handed over the bank in

question to the TMSF on 29 May 2015. Besides, trustees were appointed to a great number of business organizations specified to have a link with the FETÖ/PDY.

36. In the indictments drawn up following the coup attempt, it is stated that the measures taken recently for the prevention of this structure's influence over the State and the society have played an important role in the FETÖ/PDY's decision to stage a coup. Further, as some information leaked following Supreme Military Council Meeting of 2016 that the personnel acting in unity with the FETÖ/PDY would be dismissed from the TAF, the attempt was decided to be materialized in July 2016.

2. As to the Terrorist Incidents

37. The coup attempt of 15 July took place in a period when the country was exposed to several terrorist attacks. For a better understanding of the gravity of threat and danger posed by this attempt to national security ─also considering that terror acts have a bearing on the declaration of the state of emergency and the prolongation thereof─ certain information about the terrorist attacks which Turkey was exposed to is provided below:

38. Turkey has been experiencing a terror problem for long years. Within this period, the country has fought against the separatist terrorist organization, namely the PKK. The country has been also exposed to terrorist attacks from other terrorist organizations such as the DHKP/C, the Al-Qaeda, and the DAESH and therefore has also fought against them. In the recent years, there has been a considerable increase in terrorist attacks and in the other security problems due to the civil war taking place in Syria and some other reasons.

39. The civil war taking place in Syria has direct and indirect bearings on the safety of Turkey. In the first place, over three million Syrian people, who had to leave their country, took refuge in Turkey. The clashes in Syria near the border has influenced Turkey. An armed assault was conducted by the DAESH militants towards the Consulate General of Turkey in Mosul, and on 11 June 2014, 49 persons including the Consul General of Turkey in Mosul were taken hostage. They were then rescued on 20 September 2014. Moreover, in October 2014 certain places located in Suruç (Şanlıurfa) were evacuated for being targeted at by mortar projectiles. With a view to avoiding the attacks from Syria, primarily armed elements such as artillery fire was employed from the Turkish territories. However, as these interventions remained insufficient, a land control operation was initiated in August 2016, and it continued for several months.

40. As of 6 October 2014, groups asserting that they were reacting to the clashes taking place in Syria engaged in violent acts in several parts of Turkey for days, as known "the 6-7 October incidents". They attacked on the public buildings, branch offices of the banks, workplaces, vehicles, security forces and civilians with stones, sticks, Molotov cocktails and guns. In the press statement of 10 October 2014 released by the Minister of Internal Affairs, it was noted that 35 provinces got affected from these incidents; 2 police officers and 31 civilians lost their lives, and hundreds of civilians and security officers were injured; hundreds of public or private buildings were set on fire or destroyed; and over a thousand of vehicles have become unusable.

41. Turkey has been exposed to intense terrorist attacks since June 2015. In this scope, a bombed attack was carried out in the course of the election meeting held by the People's Democratic Party ("the HDP" – *Halkların Demokratik Partisi*) in Diyarbakır on 5 June 2015. According to the announcement of the chief public prosecutor's office, 2 persons lost their lives and over 100 persons were injured. On 20 July 2015, 34 persons died and 73 persons were injured as a result of the suicide bombing ─claimed by the DAESH─ during a press statement issued with respect to the conflict in Syria. Two days after this attack, two police officers were found dead, shot in the head, at their home in the Ceylanpınar district (Şanlıurfa), and this attack was undertaken by the PKK.

42. In wake of these incidents, ditches were dug and barricades were established on streets and avenues in the districts of Cizre, Silopi and İdil (Şırnak), the district of Yüksekova (Hakkari); the districts of Silvan, Sur and Bağlar (Diyarbakır); the districts of Dargeçit, Nusaybin and Derik (Mardin) and the district of Varto (Muş), and bombs and explosives were placed in these barricades and thereby some of these cities were tried to be occupied. A large number of terrorists trying to occupy these places under the name of "self-governance" imposed restriction on the people's entry into or exit from these places. The security forces conducted operations for a long time, with a view to ensuring normalization of the life by means of filling in these ditches and removing the barriers, and clashed with the terrorists. In the course of these operations and clashes continuing for several months, over 2.000 terrorists were killed, and 200 security forces lost their lives, as well as tons of bombs and explosives were disposed (for decisions of this Court rejecting the requests for lifting, as a measure, of the curfew ban declared in the regions where clashes were intense, see *Mehmet Girasun and Ömer Elçi* [Interim Decision], no. 2015/15266, 11 September 2015; *Meral Danış Beştaş*

[Interim Decision], no. 2015/19545, 22 September 2015; *Mehmet Yavuzel and Others* [Interim Decision], no. 2016/1652, 29 January 2016; for the ECtHR's decisions, see *Elçi v. Turkey*, no. 63129/15, 12 January 2016; *Çağlı and Others v. Turkey*, no. 63130/15, 12 January 2016; *Vesek v. Turkey*, no. 63138/15, 12 January 2016; *Eroğlu v. Turkey*, no. 478/16, 12 January 2016; *Görgöz v. Turkey*, no. 480/16, 12 January 2016; *Sultan and Süleyman Düzgün v. Turkey*, no. 891/16, 12 January 2016; and *Bedri and Halime Düzgün v. Turkey*, no. 901/16, 12 January 2016).

43. During this period in which the terrorist attacks increasingly became intense and spread over several regions of the country, both the security forces and the civilians were targeted. In this respect, during the period of about one year before the coup attempt of 15 July, the following incidents took place, and over 340 persons lost their lives, and about 1730 persons were injured. A great majority of those who died or were injured were civilians (about 250 persons of the deceased and about 1380 of the injured persons were civilians).

i. In 2015, in Sultanbeyli (Istanbul), Pervari (Siirt), Yüksekova, and Sur, Ankara Railway Station and Istanbul Sabiha Gökçen Airport;

ii. In January and February 2016, in Çınar (Diyarbakır), at Istanbul Sultanahmet Square and Ankara Kızılay Square;

iii. In March and April 2016, in Nusaybin, Sur, Bağlar, Hani (Diyarbakır), Şırnak, Mazıdağı (Mardin) and Bursa; at Ankara Kızılay Square and on Istanbul Istiklal Street;

iv. In May 2016, Gaziantep, Dicle (Diyarbakır), Derik, Bağlar, Istanbul, Sur, Çaldıran (Van), Midyat (Mardin), Kulp (Diyarbakır) and Silopi.

v. In June and July 2016, Vezneciler (Istanbul), Midyat, Ovacık (Tunceli), Ömerli (Mardin), Dicle, Artuklu (Mardin) and Erciş (Van); at Istanbul Atatürk Airport.

44. Terrorist attacks continued taking place following the coup attempt of 15 July. In this sense, bombings and armed terrorist attacks through which civilians and security forces were targeted took place. As a result of these attacks, about 240 persons lost their lives and over 1340 persons were injured. More than half of those dying (135 persons) and many of those injured (about 1090) were civilians.

i. In August 2016, in Bingöl, Kızıltepe (Mardin), Sur, Bismil (Diyarbakır), Van, Elazığ, Gaziantep and Cizre;

ii. In September and October 2016, in Van, Istanbul, Şemdinli (Hâkkari), Gaziantep and Antalya;

iii. In November and December 2016, in Bağlar, Derik, Adana, Beşiktaş (Istanbul), Kayseri and Ankara;

iv. In January 2017, at a night club located in Istanbul, in Izmir and Diyarbakır.

45. Apart from the above-mentioned incidents, a great number of security officers lost their lives or was injured during the armed clashes engaged in with terrorists within the scope of the counter-terrorism activities and as a result of the attacks by terrorists.

46. On the other hand, during his speech delivered on 3 January 2017 at the GNAT, the Minister of Internal Affairs announced that a total of 339 severe terrorist incidents, 313 of which were planned to be performed by the PKK, 22 by the DAESH and 4 by the extreme-left terrorist organizations, were prevented in 2016; and that 247 explosives and 61 bomb vehicles were seized, and 23 suspected suicide bombers and 42 terror group members preparing for attacks were arrested.

E. Declaration of the State of Emergency

47. At its meeting held on 20 July 2016 in wake of the suppression of the coup attempt, the MGK decided to recommend the Government to declare a state of emergency *"with a view to effectively implementing the measures taken for the protection of democracy, the principle of state of law, rights and freedoms of citizens"*.

48. The Council of Ministers convening under the chairmanship of the President decided on 20 July 2016 that a state of emergency for 90 days effective from 21 July 2016, Thursday, 01:00 a.m. be declared throughout the country. This decision was published in the Official Gazette of 21 July 2016 and accordingly took effect. The decision concerning the declaration of state of emergency was ratified by the GNAT on the same day. The Minister of Justice taking floor in the course of the negotiations held at the General Assembly of the GNAT explained the reason of declaring a state of emergency as follows: *"...The recommendation for declaring a state of emergency ─with a view to swiftly eliminating all elements of the terrorist organization attempting to stage a coup, to ensuring that it would no longer pose a threat and danger to our democracy and state of law, our nation, the national will and our country, to prevent re-occurrence of the coup attempt and to ensuring that*

measures required to be taken to that end would be taken and implemented in a rapid and decisive manner─ was submitted to the Council of Ministers. The Council of Ministers convening, in accordance with the Turkish Constitution, under the chairmanship of our President, in line with this recommendation, declared a state of emergency in Turkey for a period of three months… Such a decision has been taken in order to maintain free democratic order, to protect fundamental rights and freedoms, to protect public safety, public peace and order, to prevent occurrence of violent acts, to prevent re-occurrence of the failed coup attempt and new attempts to stage a coup in Turkey, to remove the Fetullahist terrorist organization ─which has done the greatest evil to our nation, disturbed public order, damaged our country, attempted to overthrow our democracy, state of law, the Parliament where our national will appears, the elected President and Government through a coup attempt and which has encompassed our State like a cancer cell─ and all of its extensions from the public institutions, notably from the Turkish Armed Forces, the judiciary, the Security Organizations and universities, and from the public sector; and to secure our democracy, the State, the nation and the state of law; and to prevent this organization and its units from posing a further threat and danger to our country, democracy and state of law."

49. The state of emergency was prolonged, at each time, for a further period of three months, by the decisions taken by the Council of Ministers convening under the chairmanship of the President on 5 October 2016, 3 January 2017 and 17 April 2017.

50. On 21 July 2016, the Government of Turkey notified the Secretary General of the Council of Europe and the Secretary General of the United Nations of its derogation from the European Convention on Human Rights ("the ECHR") and the International Covenant on Civil and Political Rights ("the ICCPR"), respectively. The decisions issued for the prolongation of the state of emergency were also submitted to the Secretary General of the Council of Europe and the Secretary General of the United Nations.

F. Measures Implemented during the State of Emergency

1. Criminal Investigations

51. In the aftermath of the coup attempt of 15 July, an investigation was initiated by the chief public prosecutor's offices, throughout the country, against many persons who had involved in the coup attempt or who were considered, even if not having directly involved in the attempt, to have a link with the FETÖ/PDY. Within the scope of these investigations,

many public officers, notably those serving in the TAF, the security organization, and the judiciary and civilians were arrested and taken into custody, and a large number of these persons were detained on remand, by virtue of court decisions.

52. According to the information provided by the Ministry of Justice, as of 13 June 2017, investigations have been launched against 161.875 persons in connection with FETÖ/PDY. Out of these persons, 47.136 were released subject to conditional bail, whereas 13.497 were released without being subject to any measure. Besides, any legal action, in the form of arrest or custody, was not taken in respect of 30.597 persons against whom an investigation has been conducted. 50.436 persons detained on remand include 2 members of the Constitutional Court, 104 members of the Court of Cassation, 41 members of the Supreme Administrative Court, 3 members of the High Council of Judges and Prosecutors ("the HCJP"), 2.492 judges and prosecutors, 7.143 military officers (169 generals/admirals), 8.849 police officers, 24 governors, 73 deputy governors, and 115 district governors. On the other hand, 8.359 persons (including 8 members of the Court of Cassation, one member of the Supreme Administration Court, 2 members of the HCJP, 208 judges and prosecutors, 1.332 military officers, 1.336 police officers, 3 governors, 9 deputy governors, and 4 district governors) were released after having been detained on remand. 7.969 persons, out of those who were released, were subject to conditional bail. On the other hand, there are 7.605 fugitives in respect of whom an arrest warrant was issued by the investigation/prosecution authorities. Out of these fugitives, 26 are members of the Court of Cassation, 6 are members of the Supreme Administration Court, 218 are judges and prosecutors, 147 are military officers, 386 are police officers, 3 are deputy governors and 9 are district governors. It appears that 790 persons are still held in custody.

53. A significant part of the investigations conducted in this respect has been concluded, and hundreds of indictments have been issued against thousands of suspects across the country. In these indictments, the FETÖ/PDY is defined as a terrorist organization, and it is claimed that those considered to have involved in the coup attempt be sentenced for the offences of "attempting to overthrow the constitutional order, attempting to overthrow the GNAT or to prevent it from performing its duties, attempting to overthrow the Government of the Republic of Turkey or prevent it from performing its duties" and those who have no relation with the coup attempt but considered to have a link with the FETÖ/PDY be sentenced

for the offences of "being a member of an armed terrorist organization, making terror propaganda and financing a terrorist organization".

54. A great part of the actions brought is still pending. However, in certain actions, first instance courts rendered conviction decisions. For instance, on 5 January 2017, the 2nd Chamber of the Erzurum Assize Court rendered a conviction decision (E.2016/216) in which two accused were sentenced to aggravated life imprisonment for the offence of "attempting to overthrow the constitutional order" for being involved in the coup attempt. In this decision, it is indicated that the FETÖ/PDY members holding public authority to use firearms and force have been trained in a manner to use these authorities in line with the instructions received from its hierarchical superior within the FETÖ/PDY, and that this fact was proven also by the coup attempt and the way it took place. On the basis of this assessment, it is concluded in this decision that the FETÖ/PDY is an armed terrorist organization.

2. Measures Taken by virtue of the Decree Laws

55. Within the state of emergency period, the Council of Minister convening under the chairmanship of the President has so far issued 24 Decree Laws (numbered 667 to 690) "on the matters necessitated by the state of emergency". By virtue of these Decree Laws, general and abstract rules have been issued, actions having direct bearings on the individuals have been taken, and other measures were have been introduced. They may be summarized as follows:

a. Measure of Dismissing From Public Office

56. The Decree Law no. 667 envisages that among judiciary members ─and those deemed to perform this profession as specified in Article 3─ and those among public officers (including workers) ─as specified in Article 4─ "those who are considered to be a member, be in relation or in connection with "terrorist organizations or structures, formations and groups that have been determined, by the National Security Council, to perform activities against the national security of the State" will be dismissed from profession or public office. It is also specified in these articles that those who have been dismissed cannot be employed again directly or indirectly in the public sector.

57. A limited number of public institutions and organizations, notably the Constitutional Court and the HCJP, dismissed those taking office in these institutions and

organizations from profession or public office through administrative decisions. In this respect, over 4.000 members of the judiciary including members of the supreme courts were dismissed from profession.

58. Moreover, about 98.500 public officers were dismissed from public office by Decree Laws no. 668, 669, 670, 672, 675, 677, 679, 683, 686 and 689. Accordingly, it has been observed that about a half of the total number of generals and admirals serving in the TAF were dismissed from public office. Besides, a great number of personnel in the TAF, civil administration, security organizations, universities and the other public institutions were dismissed from public office. In numbers, teachers rank first among those dismissed from public office.

59. It appears that the officers dismissed from the public office were in charge in public institutions and organizations operating in various fields, namely the GNAT, the Court of Cassation, the Supreme Administrative Court, the Supreme Court of Public Accounts, the Supreme Election Committee, appeal courts and inferior courts, the Prime Ministry and other ministries, municipalities, higher education boards, the Turkish Directorate of Religious Affairs, the Ataturk Supreme Council for Culture, Language and History, the Directorate General of Foundations, the Undersecretariat of Treasury, the BDDK, the Capital Market Board ("the SPK"), the TMSF, the Energy Market Regulation Board ("the EPDK"), the Competition Authority, the Revenue Administration, the Public Procurement Authority, public banks, the Directorate General of Press and Information, the Radio and Television Supreme Council ("the RTÜK"), the TRT, the TURKSAT, the Directorate General of Turkish Post ("the PTT"), the Scientific and Technological Research Council of Turkey ("the TUBITAK"), the Directorate General of Mineral Research and Exploration ("the MTA"), the Turkish Atomic Energy Authority, the Mechanical and Chemical Industry Corporation ("the MKE"), the Turkish Statistical Institution ("the TUIK"), the Turkish Standards Institute ("the TSE"), the Turkish Patent Institute, the Information Technologies and Communications Authority ("the BTK"), the Social Security Institution ("the SGK"), the Turkish Employment Agency, the Department of Sports Services, the Higher Education Loan and Dormitory Authority ("the YURTKUR"), the Student Selection and Placement Centre ("the OSYM"), the Directorate General of Land Registry and Cadastre, the Directorate General of State Airports Authority, the Directorate General for Highways, the Directorate General of Turkish State Railways ("TCDD"), the (Land, Air and Naval) Forces Command, the Gendarmerie and

Coast Guard Commands, the Security General Directorate, the Undersecretariat for Defence Industries, Directorate General of Coastal Safety, and the Secretariat General of the National Security Council.

60. The measure of dismissing from public office, which was introduced by virtue of the Decree Laws, has been generally applied for having a link with the FETÖ/PDY. However, this measure was applied in respect of over 2.000 persons for having a link with other terrorist organizations, or with structures, formations and groups that have been determined, by the National Security Council, to perform activities against the national security of the State.

61. In this period, about 1.400 persons who had been previously dismissed from public office by the Decree Laws were reinstated.

b. Other Measures

62. By virtue of the Decree Laws, ranks of many security officers ─who retired voluntarily or *ex officio*, who were dismissed from profession or who were deemed resigned─ were withdrawn. Besides, about 275 persons who were assigned to study abroad were discharged. Measures against some of these persons were discontinued within this period.

63. Moreover, certain news agencies, television and radio corporations, newspapers, journals, publishing firms, and distribution channels; private health-care organizations (pre-school, primary and secondary education), private schools, private students' dormitories and hostels, private universities; foundations and associations and commercial enterprises of these foundations and associations, and the trade unions were closed. Within this period, such measures applied in respect of some of the above-mentioned institutions and organizations were abolished. On the other hand, the Decree Laws also include provisions envisaging that assets of the private institutions and organizations, which have been closed, shall be deemed to have been transferred, free of charge, to the Treasury.

64. Besides, a trustee was appointed to a great number of companies found established, within the scope of the investigations conducted by the public prosecutor's offices, to have a link with the FETÖ/PDY. By the Decree Law no. 674, it is envisaged that powers entrusted to trustees previously appointed to the companies shall be transferred to the TMSF, that in the procedures to be followed subsequent to the issuance of this Decree Law the TMSF shall be appointed as a trustee to the companies, and that, accordingly, the TMSF

has been entitled to sell and dissolve such companies. By the Decree Law no. 675, the TMSF shall act in the companies ─50% of which are owned by real and legal persons who are members of, in relation or in connection with the FETÖ/PDY─ as a trustee for the management and representation of the shares.

65. The Decree Law no. 674 sets out that in the event that a mayor or acting mayor or councillor is suspended from office, detained on remand, disqualified to hold public office or his capacity as a mayor or councillorship has expired, for the offences of aiding and abetting terror or terrorist organizations, the Minister of Internal Affairs or the governors may assign another person to these positions. In this respect, new persons were appointed to the relevant positions after over 80 mayors had been suspended from office or detained on remand or disqualified to hold public office with the allegation that they had aided and abetted terror and terrorist organizations. It was indicated that a great number of these mayors was in connection with the PKK.

66. Finally, working licenses of many teachers serving in private educational institutions were revoked by the Ministry of National Education.

c. Establishment of the Commission for the Examination of the State of Emergency Procedures

67. By the Decree Law numbered 685, it was envisaged within the scope of the state of emergency declared by virtue of Article 120 of the Constitution and ratified by the decision of the GNAT dated 21 July 2016 that "the Commission for the Examination of the State of Emergency Procedures" be established for assessing and concluding the applications lodged due to the actions which were directly taken by virtue of the provisions of the Decree Laws ─without a further administrative action─ against persons being a member of, in relation with or in connection with any structure, formation or groups decided, by the National Security Council, to be carrying out activities against national security of the State. Members to take office in this Commission were appointed on 16 May 2017.

68. Consisting of seven members, the Commission shall assess and adjudicate on the applications lodged with respect to the following actions that were directly carried out by virtue of the Decree Laws within the scope of the state of emergency: dismissal or discharge from public office, profession or an organization; dismissal from studentship; the closure of associations, foundations, trade unions, federations and confederations, private health-care

institutions, private educational institutions, private higher education institutions, private radio and television institutions, newspapers and journals, news agencies, publishing firms and distribution agencies; revoking of ranks of retired personnel. The mandate of the Commission relates to acts that are directly taken with respect to the legal status of natural or legal persons by the Emergency Decree Laws. The decisions of the Commission may be challenged before the administrative courts.

G. Period during which the Applicants were Detained

69. The investigation authorities found established that during the coup attempt of 15 July 2016, two military teams consisting of 34 and 32 persons ─from among the troops preparing at the Polatlı 58th Artillery Brigade Command– were charged to take over the TURKSAT and the TIB. These troops took action, however, they could not reach these locations as the roads were blocked by the people. Therefore, these troops could not seize these institutions having a significant role in maintaining mass media and communication at the national level (see the indictment of the Ankara Chief Public Prosecutor's Office dated 18 December 2016 and no. E.2016/2856 and the case-file of the 13th Chamber of the Ankara Assize Court no. E.2017/1).

70. On the other hand, a team of 13 persons including certain military officers serving at the Special Forces Command and those who were serving as non-commissioned officers at this Command and receiving training at the Turkish Military Academy as they had passed exam for becoming a commissioned officer primarily arrived in the Guard Regiment Command located within the Prime Ministry's campus in Çankaya, with a view to ceasing and controlling the national broadcasts by means of taking over the satellite facilities of the TURKSAT within the scope of the coup attempt. These coup-plotting soldiers were unconditionally provided with firearms (infantry rifles) and ammunition at this campus. These military officers left the campus by two different helicopters and subsequently arrived in the TURKSAT's campus located on the 40th km of the Gölbaşı-Konya highway at around 00:47 a.m.. While the helicopters were still on the sky, the military soldiers in the helicopters opened fire on the main entrance of the TURKSAT. As a result, some of the TURKSAT's officers got wounded.

71. These helicopters landed at the helipad located within the TURKSAT campus, and subsequently the military officers took action to take the TURKSAT facilities under

control. To that end, they neutralized the security officers serving at the TURKSAT by means of seizing their weapons and mobile phones and tried to gather the personnel who would cease television broadcasts. Moreover, 3 out of the TURKSAT workers who had left the campus with a view to checking around were exposed to armed assault by the coup-plotting military officers while returning to the campus. As a result of these armed assault, two of them lost their lives and the remaining one was wounded.

72. The military officers ordered the TURKSAT officials to cease the satellite broadcasts and to that end, tried to ensure the cease of broadcasts by force of arms. However, it appears that the TURKSAT officials told that they did not know how to cease the broadcasts and distracted the military officers by acting as if they had been ceasing the broadcasts. After it had been revealed that the satellite broadcasts could not be ceased, the military officers at the campus were informed by their superiors that some civilians would be sent there in order to assist them in ceasing the broadcasts.

73. According to their own statements, the applicant Aydın Yavuz is an electronic engineer; the applicants Birol Baki and Burhan Güneş are electrical and electronic engineers, and other applicant Salih Mehmet Dağköy is a computer engineer. As is specified in the application forms, the applicants are residing outside Ankara.

74. Stating that they arrived in Ankara at the evening hours on 15 July 2016, the applicants arrived in the TURKSAT campus by a car driven by one of the applicants, Burhan Güneş, at around 02:00 a.m. on 16 July.

75. The police officers serving at the Gölbaşı District Security Directorate went to the TURKSAT campus and took control of access to this campus for maintaining environmental safety. The applicants were stopped by the police officers when driving up to the main entrance of the TURKSAT campus. According to the statements of the police officers, the applicants told the police officers that “they had been called by those who were inside the campus” and asked the police officers to let them enter inside. After the police officers had become suspicious of the applicants’ identities, the applicant Burhan Güneş tried to delete his mobile phone records and wished to reset his mobile phone to factory settings. Thereupon, the applicants were arrested and handcuffed by the police officers. The applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy were made to wait in separate cars belonging to the

security directorate, and the applicant Aydın Yavuz was kept in the car which they drove, due to lack of adequate number of cars.

76. On the other hand, as the military officers failed to cease the satellite broadcasts, their superiors with whom they had been in contact decided that the TURKSAT campus be bombed by fighter aircraft for the cease of broadcasts. Thereupon, the military officers went outside the campus by cars belonging to the TURKSAT and to the TURKSAT personnel that were seized by these military officers as the helicopters by which they arrived therein had left the campus. It has been revealed that the military officers also took along the firearms and mobile phones they had seized at the TURKSAT campus. The military officers, who were running away towards the Konya highway from the TURKSAT campus at around 02:50 a.m., opened fire on the security officers who were taking security measures on the road and who had stopped and arrested the applicants. One of the police officers were wounded due to the fire opened on them. Travelling towards the direction of Konya, the military officers were taken by helicopters landing at the open terrain where the military officers were. The wounded military officers were taken to the Gülhane Military Medical Academy ("the GATA"), whereas the remaining ones were taken to the Akıncılar Air Base known to be the centre of the coup attempt. The TURKSAT campus was bombed for four times by the fighter aircrafts between 03:10 a.m. and 03:20 a.m., following the departure of the military officers.

77. Upon being informed that the TURKSAT campus would be bombed while the applicants were made to wait at the incident scene, the officers and civilians who were at the TURKSAT campus tried to leave the campus by their cars. An uproar erupted on the road, and the police officers retreated towards the Konya highway upon bombing of the campus; and that in the meantime, the applicant Aydın Yavuz, who was kept handcuffed within the car escaped and sheltered himself at the open terrain. He was then arrested by the gendarmerie officers when he arrived in a petrol station at noon.

78. Upon the order of the Gölbaşı Chief Public Prosecutor's Office, on 16 July 2016 the Gölbaşı Magistrate Judge's Office ordered "*restriction of the defence counsel's access to the investigation file*" in the investigation conducted against the applicants, pursuant to Article 153 of the Code of Criminal Procedure dated 4 December 2004 and no. 5271, on the ground that the examination of the case-file content or taking copies of the documents included therein by the defence counsel might imperil the purpose of the investigation.

79. On 18 July 2016, the applicants taken into custody were questioned by the law-enforcement officers. In the course of their questioning, the applicants' defence counsels were also present. The applicants denied the accusations against them. According to the applicants' statements, the applicant Salih Mehmet Dağköy residing in the province of Izmir arrived in Istanbul by plane and met with the other two applicants Birol Baki and Burhan Güneş residing in Istanbul. Then these applicants arrived in Ankara by coach. The other applicant Aydın Yavuz arrived in Ankara by coach from Gebze where he was residing. The applicants noted that they had arrived in Ankara due to a job interview; and that they met at the Ankara Bus Terminal ("the ASTI") on 15 July 2016 in the evening hours (at around 08:00 p.m.). They also maintained that they toured around the city by a car rented by the applicant Burhan Güneş, that upon the calls for "pouring into the streets against the coup attempt" they heard from the radio in the car, the applicants got involved in convoys on the road, that they then lost their way, after they had learned from the radio that there was an attack on the TURKSAT, they once again travelled towards the TURKSAT campus with a view to involving in the convoys, and that they were stopped by the police at the TURKSAT campus. Burhan GÜNEŞ, who was driving the car, noted that he did not know the person renting out his car, and that when he was stopped by the police officers, he told the officers that "they had been called by those within the campus" because of momentary panic.

80. On 18 July 2016, the Gölbaşı Chief Public Prosecutor's Office referred the applicants to the Gölbaşı Magistrate Judge's Office with the request that they be detained on remand. The applicants heard before the Magistrate Judge's Office gave statements along the same lines as their previous statements. In the course of their statement-taking process, their defence-counsels accompanied them. In this process, the investigation documents and the information included in the investigation file were read to the applicants.

81. On 18 July 2016, the Gölbaşı Magistrate Judge's Office ordered the applicants to be detained for committing the imputed offence of attempting to overthrow the constitutional order. Magistrate Judge's Office based its detention order on *the concrete facts under the incident scene investigation report, the suspects' statements, and content of whole documents and took into consideration the risk of tampering with evidence as the gathering of evidence had not been completed yet. The Magistrate Judge's Office accordingly considered that conditional bail was not appropriate under the circumstances, given especially the type and length of the penalty prescribed in the law and that the detention was proportionate.*

82. The applicants objected to the detention order. Their objection was dismissed by the decisions of the Ankara 7th Magistrate Judge's Office dated 1 August 2016 and the Ankara 8th Magistrate Judge's Office dated 4 August 2016. In rendering the dismissal decisions, these courts reached the conclusion that the decision of the Gölbaşı Magistrate Judge's Office of 18 July 2016 ordering the applicant's detention was *"in compliance with procedure and law"*.

83. By the decision of the Gölbaşı Magistrate Judge's Office of 20 September 2016, the continuation of the applicants' detention was ordered. On 22 September 2016, the applicants Aydın Yavuz, Birol Baki, Burhan Güneş and Salih Mehmet Dağköy appealed this decision through their defence counsels. By the decisions of the Ankara 8th Magistrate Judge's Office dated 23 September 2016 (miscellaneous no. 2016/3116 and 2016/3117), their appeal was dismissed with no right to appeal. In these decisions, it was noted that *"there is strong suspicion, on the part of the applicants, of having committed the imputed offence. As the imputed offence is one of the catalogue offences, there is the risk of the suspects' fleeing, taking cover and tampering with evidence. Given the amount of penalty prescribed in the law and identities of the suspects, the provisions of conditional bail would remain insufficient and the measure of detention was proportionate. There is no change in the existing evidence"*.

84. On 20 October 2016, the applicant Aydın Yavuz lodged an individual application.

85. As the act imputed to the applicants fell into the jurisdiction of assize court, the investigation file issued against the applicants was transferred to the Ankara Chief Public Prosecutor's Office with the motion of 5 October 2016 drawn up by the Gölbaşı Chief Public Prosecutor's Office.

86. On 18 October 2016, the Ankara 9th Magistrate Judge's Office *ex officio* examined the detention status of the suspects including the applicants and ordered the continuation of the applicants' detention *"having regard to the facts indicating the existence of strong suspicion of having committed the offence and to the existence of the grounds for their detention, to characteristics and nature of the imputed offence, to the evidence available, and to the maximum limit of the sentence prescribed in the law for the imputed offence"*. On 7 November 2016, the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy appealed this decision. In the meantime, the applicants' appeal was adjudicated by the Gölbaşı Magistrate Judge's Office as their investigation file was submitted to the Gölbaşı Chief Public Prosecutor's Office, by virtue of the decision for lack of jurisdiction taken by the Ankara

Chief Public Prosecutor's Office on 1 November 2016. Their appeal was dismissed by the decision of the Gölbaşı Magistrate Judge's Office dated 7 November 2016. In rendering this decision, the Magistrate Judge's Office took into account *"the characteristics and nature of the offence in question, the available evidence, the risk of tampering with evidence and the risk of the applicants' fleeing"*.

87. The applicants noted that they had become aware of this decision on 18 December 2016.

88. The applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy lodged an individual application on 21 December 2016.

89. The investigation file of the applicants was once again submitted to the Ankara Chief Public Prosecutor's Office, by the motion of 21 December 2016 drawn up by the Gölbaşı Chief Public Prosecutor's Office.

90. On 14 December 2016, the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy submitted a petition to the Gölbaşı Chief Public Prosecutor's Office through their defence counsels and requested to be released. In their petitions, the applicants requested that the examination be carried out by holding a hearing and that the restriction imposed on the investigation file be lifted.

91. Besides, on 22 December 2012, the Ankara Chief Public Prosecutor's Office requested the Ankara 4th Magistrate Judge's Office to examine the detention status of the suspects including the applicants.

92. On 26 December 2016, the Ankara 4th Magistrate Judge's Office reviewed the applicants' detention over the file and dismissed their requests for their release on the ground that *"nothing has occurred in favour of the suspects following the date of detention; the nature of the imputed offence; the evidence available; the fact that the investigation was not concluded yet; the existence of the risk of tampering with evidence, the continuation of the grounds for their detention; and the strong suspicion of having committed the offence"*. The Magistrate Judge's Office therefore ordered the continuation of (all) suspects' detention on the basis that *"detention was proportionate"* and that *"conditional bail would remain insufficient under the circumstances."* This decision does not include any assessment with

respect to the applicants' request for a review with holding a hearing or lift of the restriction imposed on the investigation file.

H. Criminal Case Filed against the Applicants

93. With the indictments of the Ankara Chief Public Prosecutor's Office (the Investigation Bureau for the Offences Committed against the Constitutional Order) dated 2 January 2017 and no. E.2017/26, the applicants were charged for "attempting to overthrow the constitutional order, to overthrow the GNAT or to prevent it from performing its duties, to overthrow the Government of the Republic of Turkey or to prevent it from performing its duties and being a member of an armed terrorist organization".

94. This criminal case concerns, in general, the assault, as a part of the coup attempt, for the suspension of satellite and television broadcasts by means of taking over the TURKSAT. By this indictment, it is sought that, in addition to applicants, 12 accused persons, including the military officers allegedly occupied the TURKSAT at the incident date (one of these military officers was found death in the car by which they had run away) and another accused, who was the owner of the car by which the applicants had gone to the TURKSAT) be convicted. Besides, two TURKSAT personnel having lost their lives due to the armed attack by the military officers, four complainants who were their relatives and 54 complainants who were real persons, as well as the TURKSAT as a legal entity were indicated in this indictment.

95. Emphasizing nature and characteristics of terrorist organizations (using force and violence, acting through the methods of oppression, intimidation, terrorization, suppression or threat, acting with political motive, being armed, being convenient for committing the targeted offences given number of its members and the tools and equipment at their disposal, consisting of at least three persons; and so on), the indictment indicates that the FETÖ/PDY is a terrorist organization that staged the coup attempt of 15 July.

96. In the indictment, a reference is made to the following definition and phrases in a book written by Fetullah Gülen, with respect to the conducts of the members of the FETÖ/PDY and the organization's expectation from these members: *"A person affiliated to the community must be determined/decisive; must be obedient to the service; must take over responsibility of all things; must not disturb his determination in case of receiving a blow; must prioritize the rank of the service, not his own rank, when appointed to a higher position;*

must be aware of the fact that the tasks to be undertaken by him within the service may be challenging and must be ready to sacrifice his fortune/life/beloved ones for the service". "Whoever you are, be not overwhelmed with your position or reputation. Be "ZERO/NEUTRAL" so that you could deal with big figures and appointed to high positions".

97. The following statements are included in the indictment with respect to the applicants.

> *"In the course of the incidents during which the broadcasts were attempted to be ceased at the TURKSAT campus, the suspects Birol Baki, Burhan Güneş, Salih Mehmet Dağköy, Aydın Yavuz, who arrived in the campus for entering inside by a car ... owned by the suspect named U.Ö. on 16 July 2016 at around 02:00 a.m., arrived there in order to cease the TURKSAT broadcasts. Thereupon, the suspects were stopped by the law-enforcement officers and maintained that 'they had been called by those inside the campus.' After the law enforcement officers got suspicious of the suspects' identities, Burhan Güneş tried to delete some records from his mobile phone and to reset it to its factory settings. Thereupon, the suspects were arrested.*
>
> *The materials and mobile phones in the possession of the applicants were seized, and their names were indicated in the statements given by the Lieutenant Colonel E.U. ─the leader of the persons wearing military uniform and trying to occupy the campus─ as civilians to assist in the cease of the broadcasts'.*
>
> *As a result of the inquiry subsequently made with respect to the suspects, Aydın Yavuz, Birol Baki, Burhan Güneş and Salih Mehmet Dağköy attempting to enter inside the TURKSAT, it has been revealed that the suspects were experts in the fields of computer and communication; and that Salih Mehmet Dağköy was graduated from the Yamanlar High School linked to the FETÖ/PDY and has been working in Samanyolu TV as an information technologies director. Also, Aydın Yavuz was previously deputy head of the corporate development department at the TUBITAK Marmara Research Centre, Burhan Güneş is a computer engineering graduate and previously took office in the TUBITAK as the deputy head responsible for administrative affairs, and Birol Baki is the owner of a company "... Electronik" and served in the Samanyolu TV for a while. It has been further revealed that while Burhan Güneş's wife was working in the TUBITAK, a legal action was taken in respect of her within the scope of this coup-*

related events, and she was accordingly subject to a probation. It has been therefore found established that the suspects were at the TURKSAT campus on the incident day in order to cease satellite broadcasts.

As a matter of fact, the suspect U.Ö., who is the title holder of the car by which the suspects arrived in the TURKSAT, indicated in his statements: Upon a message sent by his friend M.Y. through WhatsApp at noon on 15 July 2016, they met at their common friend S.K.'s home ... where there were also M.Y. and O.D. After they had been called by phone, M.Y., O.D. and S.K. left by his car, and he stayed alone at S.K.'s home. It has been accordingly revealed that the media made news ─with photographs ─ that M.Y., S.K. and O.D., whose names were indicated in the suspect U.Ö.'s statement, went to the TRT building together with the military officers raiding the building, with a view to interrupting the TRT broadcasts, within the scope of the coup-attempt activities. These persons are still fugitive and all of them are expert in the fields of computer and communication; and that, according to the suspect U.Ö.'s statement, they took office in significant public institutions such as *the HAVELSAN* [Avionics Industry] *and TAI* [Turkish Aviation Industry] (…).

During the period in which the suspects Aydın Yavuz, Birol Baki, Salih Mehmet Dağköy and Burhan Güneş were made to wait at the incident scene following their arrest, there was an intense flow of officers and civilians trying to leave the campus by their cars on the ground that the TURKSAT campus would be bombed. Therefore, there was an uproar on the road for a while. The security forces tried to check those leaving the campus. Upon the dropping of bombs on the campus, the security officers retreated towards the Konya Road. In the meantime, one of the suspects Aydın Yavuz was waiting handcuffed in the car (...). Aydın Yavuz taking out of the situation and getting out of the car run away towards the surrounding wastelands where he took cover until 02:00 p.m. When he arrived, being handcuffed, in a petrol station located in close proximity to the incident scene, he was arrested by the gendarmerie officers and then surrendered to the officers of the district security directorate.

... As the TURKSAT campus was bombed by a military aircraft after the car [owned by the suspect U.Ö. and driven by the applicants at the time of incident] *had been left at the incident scene and as there was an armed clash between the military officers who were the suspects running away from the campus at that time and the*

security officers, necessary steps could not be taken with respect to this car. In the meantime, the suspect U.Ö. arrived therein by a car of his friend M.Y. living in Ankara, run the car by its duplicate key he had previously taken from his home and drove away at around 10:40 a.m. on 16 July 2016. For a while, location of the car could not be determined. However, it was revealed from the license that owner of this car was the suspect U.Ö. Accordingly, upon the inquiries, the car was found driven by the suspect U.Ö. in the Çınarcık district of Yalova province on 30 August 2016.

98. With respect to the applicants' link with the FETÖ/PDY, the indictment also includes information concerning the applicants' accounts at the Bank Asya linked to this structure. As noted in the indictment, all of the applicants are clients of this bank. The accounts of the applicant Burhan Güneş were opened on 3 June 1999, and there were records of transactions performed through these accounts between 18 December 2013 and 14 February 2014. Aydın Yavuz's accounts were opened on 13 October 2000, and there are many transactions made by him at various branch offices. His accounts was active until the date of offence. Birol Baki's account was opened on 23 October 2000, and there are account activities made at various branch offices. His account was active until the date of offence. Salih Mehmet Dağköy's account was opened on 21 July 2005, and his account was active until the date of offence. Moreover, according to the first findings of the investigation authorities, the applicant Aydın Yavuz is among the persons downloading and using the "ByLock" app. on his mobile phone, through which the FETÖ/PDY members maintain confidential communication among themselves.

99. A great number of police officers heard as complainants noted that on 15 July 2016, while they were at the main entrance of the TURKSAT, a car with four persons approached them, that the persons in the car told *"they had been called by phone by those inside the campus and they had to enter inside"*, that thereupon, they made these persons get out of the car and carried out a search on their bodies, and that upon observing that the driver was trying to reset his mobile phone to the factory settings, they arrested and took these four persons (the applicants) into custody.

100. Besides, the Lieutenant Colonel E.U. ─the leader of the military officers raiding the TURKSAT─ was questioned by the investigation authorities. The part of his statement related to the applicants reads as follows:

"As I had no technical information about the cease of broadcasts, I tried to learn out whether there was any person in charge. I was then told that there was nobody knowing how to do so. When I learned the building where the broadcasts would be ceased, we went there… The person to assist in ceasing of the broadcasts was at the broadcasting building. In the meantime, I was receiving calls and was constantly told that the broadcasts were still going on and must be immediately ceased. The TURKSAT personnel present there showed me different places to do so. They even told me that there were containers outside where such actions could be performed. We then visited these containers. I am unable to exactly know whether the broadcasts were ceased. However, I was continuously told on the phone that the broadcasts had not been ceased.

Telling me that they were in different departments, the TURKSAT personnel did not assist me. I was told on the phone that civilian technicians, who were not from the TURKSAT, would arrive therein for the cease of the broadcasts. However, I never saw these technicians. Besides, I am not sure whether they had been sent to the campus. I was not provided with any name or information about their identities. Nor was I informed of name of any TURKSAT personnel who could help us. We tried to figure out how to cease the broadcasts only through our own means… However, in the end, upon our failure to do so, we received an instruction to evacuate everyone from the buildings within the campus as another method would be applied…"

101.The indictment drawn up with respect to the applicants was accepted by the 14th Chamber of the Ankara Assize Court on 13 January 2017. Thereupon, the proceedings were initiated (case file no. E. 2017/3).

102. At the end of the preliminary proceedings examination, the court ordered the continuation of the applicants' detention on the grounds of *"nature of the imputed offence, the evidence collected, existence of strong suspicion of having committed the imputed offence on the basis of the defence submissions and witnesses' statements during the investigation, the probability of the accused persons' fleeing and tampering with evidence, and the fact that conditional bail would remain insufficient at this stage"*. Furthermore, on 9 March 2017, the court *ex officio* examined the applicants' detention over the case-file and accordingly ordered the continuation of their detention on the grounds of *"existence of concrete evidence indicating the strong suspicion of having committed the imputed offence, the fact that*

membership of a terrorist organization was one of the catalogue offences listed in Article 100 of the CCP, the lower and upper limits prescribed for the imputed offences, and the fact that the detention measure was proportionate, given the period of their detention".

103. The applicants' trial has started with the hearing on 4 April 2017. The court ordered video-recording of the hearing through the SEGBIS (the Audio- Visual Information System). The hearing continued on 5 April and 6 April 2017. During these hearings, the applicants' identifications were established, they were reminded of the imputed offences and legal rights, the indictment, annexes thereto and legal characterization of the imputed offences were read out. Accordingly, their defence were heard, and then the complainants were heard. The applicants' defence submissions before the court were similar with their statement at the investigation stage, and they denied the accusations. The applicants, Birol Baki and Mehmet Salih Dağköy, indicated that they had worked in the Samanyolu TV for a while. The applicants, Aydın Yavuz and Burhan Güneş, who had "ByLock" app. on their mobile phones, argued that they were not aware of this program and had not used it. All applicants whose mobile phones were found to be turned off as from the evening hours of 15 July asserted, in this respect, that their phones had run out of battery. At the hearing of 6 April 2017, the applicants and their defence counsels informed the court of their verbal requests to be released. At the same hearing, the court dismissed the applicants' requests and ordered the continuation of their detention due to *"type and nature of the imputed offence; the existence of concrete facts indicating the existence of strong suspicion of having committed the offence; continuation of the procedure for the collection of evidence; and the facts that the practice of conditional bail would remain insufficient at this stage and that the measure of detention was proportionate"*.

104. At the hearing of 8 May 2017 held by the court, the public prosecutor submitted his written opinion as to the merits and requested that the applicants be sentenced on the counts of all charges. During the hearings of 8 May and 29 May 2017, the court once again ordered the continuation of the applicants' detention due to *"type and nature of the imputed offence, the existence of concrete facts indicating the existence of strong suspicion of having committed the offence, and the facts that the practice of conditional bail would remain insufficient at this stage and that the measure of detention was proportionate"*.

105. As of the date the individual application examined by this Court, the case-file is still pending before the first instance court, and the applicants are still detained on remand.

I. Information regarding the ByLock App

106. It would be useful to mention of the findings and assessments of the judicial authorities about the general features of this program, as applicants Aydın Yavuz and Burhan Güneş were users of the "ByLock" communication application (app.) and were communicating through it, which was considered by the investigation and prosecution authorities as an important element indicating their link with the FETÖ/PDY. As notably indicated in the decision of 24 April 2017 (E.2015/3, K.2017/3) rendered by the 16th Criminal Chamber of the Court of Cassation –in the capacity of the first instance court– and the decision of 19 January 2017 (E. 2016/401, K. 2017/4) rendered by the 2nd Chamber of the Kayseri Assize Court, these findings and assessments may be summarized as follows:

i. "ByLock" is an application used by approximately 215.000 persons for communication over internet.

ii. There are thousands of groups of friends in the "ByLock" app. thorough which millions of messages and electronic mails are exchanged.

iii. This app. has a strong encryption system. It is designed in a way that would enable encryption of each message sent through this app. with a different crypto key.

iv. Payments of transactions (such as leasing server and IP) for the operation of this app. made anonymously by way of leasing a server in another country. Moreover, the person developing and availing the app. has no reference about his previous works. Nor was any action taken for the promotion of this app. Therefore, the aim is not to increase the number of its users and not to make it have commercial value. In conclusion, this app. does not have any institutional and commercial nature.

v. Source code of the app. includes certain Turkish phrases. Besides, a large part of the user names, group names and passwords broken and almost all of the deciphered contents of the app. are in Turkish.

vi. In Turkey, access to the "ByLock", through Turkish IP addresses, has been denied. Therefore, users accessing to the app. from Turkey have been forced to access to it via VPN for the concealment of their identities and communication.

vii. Almost all searches made, with respect to the "ByLock", over search engines were performed by the users residing in Turkey. There was a substantial increase in

searches carried out through search engines, by the date when access to the app. through Turkish IP addresses was blocked.

viii. Web-based posts concerning the "ByLock" app. were mainly shared through fake accounts, and these posts are in favour of the FETÖ/PDY.

ix. The app., which has been used by a large group of users, was not known to Turkish public or known outside Turkey before the coup attempt of 15 July.

x. For running the app. after downloading it to smartphones, it is requisite to create a user name/user code and a password and also to create a dedicated, strong cryptographic password. Then, all of this information is to be cryptically transmitted to the app. server. Thus, it is aimed at protecting the user information and communication security to the maximum extent.

xi. Any personal information (phone number, identity number, e-mail address and etc.) is not requested while creating a user account in the "ByLock". Furthermore, as opposed to global and commercial applications of similar nature, there is no process for verification of the user account (SMS password authentication, e-mail authentication and etc.). These are the measures taken for hampering the identification of users.

xii. Signing up is not a sufficient step for making contact with the users registered in the system. Parties may get in contact with each other only after adding the other party's user names/codes obtained through a face-to-face meeting or through an intermediary (e.g. a courier, a "ByLock" user already signed up). Messaging may be initiated only after both users add each other. The application is therefore considered to have been designed to allow communication suitable to "the cell structure".

xiii. It is possible to make a voice call, send or receive written messages, e-mails and make file transfers through the app. It has been thereby ensured that the users establish organizational communications without needing any other communication means. Ensuring all communication of the users through the "ByLock" app. also enables the application administrator to supervise and control the groups and message contents in the system.

xiv. Messages sent/received through the “ByLock” are automatically deleted from the device after a certain period of time without manual intervention. Even if the users forget to delete any data that must be deleted for communication security, the “ByLock” system has been designed to take the necessary precautions. Thereby, even in case of seizure of the device within the cop of an investigation, access to the other users in the user list of the application and to previous messages in the application is blocked.

xv. Server-related and communication data are cryptically saved in the application database, which is another measure taken for the prevention of identification of the user and for communication security.

xvi. “ByLock” users have also taken certain measures to conceal their identities. To that end, the users have used “code names” instead of their real names in the messages and in their contact lists, they also created long passwords.

xvii. It was initially possible for everyone to download this application for a certain period of time in the beginnings of 2014. After that time, however, its use became possible only after its manual download to the users’ devices.

xviii. Almost all deciphered content of the messages sent/received through “the ByLock” are concerning the organizational contacts and activities of the FETÖ/PDY members. In this scope, it has been understood that organizational messages such as the following were sent through this app.: “change of meeting addresses; informing beforehand of operation to be carried out, hiding places for its members, organization of fleeing abroad; benevolence organizations, providing money for the organization members suspended or dismissed from their office, dissemination of Fetullah Gülen’s instructions and thoughts, sharing of certain web-site addresses carrying out activities for creating an influence that Turkey is supporting terrorism and encouraging the organization members to take part in surveys available in these web-sites, ensuring release of the suspects and those accused by judges and prosecutors in the course of the investigations and prosecutions conducted into the FETÖ/PDY, retaining defence counsel for its members, dissemination of information about its members against whom an investigation was conducted and whose names were disclosed, advising to avoid homes or probable places easy to be arrested considering the possible

investigations, erasing the digital data that is of importance for the structure by those who are designated for this task, blacklisting of those expressing opinions against the FETÖ/PDY or fighting against the structure, instructing that in case of disclosure of the "ByLock" app. alternative applications to be used (Eagle, Dingdong, Tango and etc.), and preparation legal defence of its members".

xix. Names of the group (*"Bölge Bayan", "Etütcüler", "Ev abileri", "Imamlarım", "Okulcular", "8 abiler", "8 birimciler", "8 büyük bölge", "Bölgeciler", "II Mezuncular", "Talebeciler", "Üniversiteciler", "Zaman Gönüllüler", "Mesul", "Mesuller", "İzdivaç")* in the app., through which a group communication is possible, are consistent with the specific literature of the organization frequently used and its cell-type hierarchical structure.

xx. Certain suspects whose statements were taken following the coup-attempt of 15 July, indicated that the "ByLock" had been used as an organizational communication means by the FETÖ/PDY members since the beginning of 2014.

xxi. Although the "Bylock" seems to be a global application, it is indeed a communication means made available exclusively for the FETÖ/PDY members.

IV. RELEVANT LAW

A. Domestic Law

(The relevant provisions of the Constitution, which are mentioned or to which a reference is made in this judgment, are cited from the text which was in force at the relevant time when the incidents took place.)

1. Relevant Provisions of the Constitution

107. Article 120 of the Constitution, which embodies the *"declaration of a state of emergency because of widespread acts of violence and serious deterioration of public order",* which is one of the *"extraordinary administration procedures"*, reads as follows:

"In the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers convening under the chairpersonship of the

President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months."

108. Article 121 of the Constitution, titled *"Rules regarding the state of emergency"* reads as follows:

"In the event of declaration of a state of emergency under the provisions of Articles 119 and 120 of the Constitution, this decision shall be published in the Official Gazette and shall be immediately submitted to the Grand National Assembly of Turkey for approval. If the Grand National Assembly of Turkey is in recess, it shall be immediately assembled. The Assembly may alter the duration of the state of emergency, may extend the period for a maximum of four months each time upon the request of the Council of Ministers, or may lift the state of emergency.

The financial, material and labour obligations which are to be imposed on citizens in the event of the declaration of a state of emergency under Article 119 and the manner how fundamental rights and freedoms shall be restricted or suspended in line with the principles of Article 15, how and by what means the measures necessitated by the situation shall be taken, what sorts of powers shall be conferred on public servants, what kinds of changes shall be made in the status of officials as long as they are applicable to each kinds of states of emergency separately, and the extraordinary administration procedures, shall be regulated by the Act on State of Emergency.

During the state of emergency, the Council of Ministers convening under the chairpersonship of the President of the Republic may issue Decree Laws on matters necessitated by the state of emergency. These Decree Laws shall be published in the Official Gazette, and shall be submitted to the Grand National Assembly of Turkey on the same day for approval; the time limit and procedure for their approval by the Assembly shall be indicated in the Rules of Procedure."

2. Provisions of the Relevant Laws

109. Article 1, titled "*Objective"*, of the State of Emergency Law dated 25 October 1983 and no. 2935 ("Law no. 2935") is as follows:

"*The objective of this Law, in cases of*

...

(b) appearance of serious indications resulting from widespread acts of violence targeted to eliminate the free democratic order established by the Constitution or fundamental rights and freedoms, or serious deterioration of public order due to acts of violence,

is to determine the declaration of a state of emergency and the procedures to be applied in states of emergency."

110. Article 2 of Law no. 2935, titled "*Scope*", is as follows:

"*This Law lays out the provisions (...) on declaration of state of emergency and procedures to be applied in each type of state of emergencies, concerning how fundamental rights and freedoms shall be limited or suspended, how and in which way necessary measures shall be taken, what sort of powers shall be given to public authorities; changes concerning public officials, and extraordinary administration procedures."*

111. Article 3 of Law no. 2935, titled "*Declaration of a State of Emergency*", is as follows:

"The Council of Ministers convening under the chairmanship of the President shall declare a state of emergency, after consultation with the National Security Council:

(...)

(b) whenever there appears serious indications resulting from widespread acts of violence which are aimed at destroying the free democratic order or fundamental rights and freedoms, or serious deterioration of public order due acts of violence in one or more regions or throughout the country for a period not exceeding six months.

The state of emergency decision shall be published in the Official Gazette and immediately submitted for the approval of the Grand National Assembly of Turkey. If the Grand National Assembly of Turkey is in recess, it shall be summoned to convene

immediately. The Assembly may amend the duration of the state of emergency. Upon the request from the Council of Ministers, the Assembly may prolong the duration each time for a period not exceeding four months, or it may terminate the state of emergency.

The Council of Ministers, after declaring a state of emergency in accordance with paragraph 1/ (b) of this provision, shall also consult the National Security Council before taking a decision on the issues as to the prolongation of the duration, alteration of the scope, or termination of the state of emergency.

The reasons for the decision to declare a state of emergency, its duration and scope shall be broadcasted via Turkish radio and television and, if the Council of Ministers deems it necessary, be also disseminated through other media."

112. Article 4 of Law no. 2935, titled *"Decree Laws"*, provides as follows:

"During a state of emergency, the Council of Ministers convening under the chairmanship of the President of the Republic may issue decree laws on matters necessitated by the state of emergency, without being bound by the restrictions and procedures laid down in Article 91 of the Constitution. Decree laws shall be published in the Official Gazette and submitted to the Grand National Assembly of Turkey for approval on the same date."

113. Relevant part of Article 100, titled *"Grounds for Arrest"*, of the Code of Criminal Procedure no. 5271 ("Law no. 5271") is as follows:

"(1) If there are concrete evidence indicating the existence of a strong suspicion of having committed an offence and a ground for arrest, an arrest warrant may be issued in respect of the suspect or the accused. In case of not being proportionate with the gravity of offence, the penalty likely to be imposed or the security measure likely to be taken, no arrest warrant can be issued."

(2) At the below mentioned instances, a "ground for arrest" may be deemed to exist:

a) In the event that the suspect or the accused had fled, taken cover or if there are specific facts causing the suspicion of fleeing.

b) If the conduct of the suspect or the accused indicates strong suspicion of attempt;

1. To destroy, conceal or alter the evidence,

2. To apply unlawful pressure on witnesses, the victims or other individuals.

(3) If there are grounds for strong suspicion of having committed the below-cited offences, then "the ground for arrest" may be deemed to exist:

a) Offences as defined in the Turkish Criminal Code dated 26 September 2004 and no. 5237:

(...)

10. Offences against the security of the state (Arts. 302, 303, 304,307, 308),

11. Offences against the Constitutional order and against the functioning of this system (Arts. 309, 310, 311, 312, 313, 314, 315),

(...)"

114. Article 101 §§ 1, 2 and 5of Law no. 5271, titled *"detention order"*, reads as follows:

" (1) During the investigation phase, upon the motion of the public prosecutor, the Justice of the Peace in Criminal Matters shall issue an arrest warrant for the suspect, and during the prosecution phase the trial court shall issue an arrest warrant for the accused upon the motion of the public prosecutor, or by its own motion. The afore mentioned motions must contain statement of reasons and must contain an explanation for why the application of judicial control would not be sufficient in a given case, based on legal and factual grounds.

(2) In detention orders, orders for the continuation of detention or orders dismissing the request for release, evidence indicating
(a) Strong suspicion of having committed an offence,
(b) Existence of any ground for detention,
(c) that measure of detention is proportionate
shall be explicitly indicated by being justified with concrete facts. Content of the order shall be verbally notified to the suspect or the accused and one copy of the order shall be delivered to them, and that will be specified in the order.

(...)

(5) Orders given pursuant to this Article and Article 100 may be appealed."

115. Articles 104 §§ 1 and 2 of Law no. 5271, titled *"request of release by the suspect or the accused"*, reads as follows:

"(1) The suspect or the accused is entitled to request to be released at any stage of the investigation and prosecution phases.

(2) The judge or trial court shall decide on whether the detention period should continue, or the suspect or the accused should be released. The decision dismissing the request may be appealed."

116. Article 105 of Law no. 5271, titled *"the procedure",* reads as follows:

"Upon the request made according to the provisions of Articles 103 and 104, the decision approving the request, dismissing it or ordering judicial control shall be rendered by the competent authority within three days, after the opinions of the Public Prosecutor and the defence counsel and statements of the suspect and the accused have been obtained. (Additional Sentence: On 24 November 2016 - by Article 23 of the Law no. 6763) Except for the requests made pursuant to the first sentence of Article 103 § 1, this period shall be seven days in respect of organized offences. In rendering such a decision without of a hearing, opinion of the public prosecutor, the suspect, the accused or the defence counsel shall not be sought. These decisions may be appealed."

117. Article 108 of Law no. 5271 , titled *"review of detention"* reads as follows:

"(1) During the investigation phase, while the suspect is in prison and within periods not exceeding 30 days each, the Magistrate Judge shall decide as to whether the continuation of detention is necessary, upon the request of the public prosecutor, after hearing the suspect or his defence counsel. The provisions set out in Article 100 shall apply to this review.

(2) Within the period mentioned in the foregoing paragraph, the suspect may also request the judicial review of his detention.

(3) The judge or the court ex officio shall decide on whether the continuation of the detention of the accused, who is in prison, would be required at each session or on any day between two sessions if necessitated by the conditions or within the period specified above in the first paragraph."

118. Articles 109 §§ 1 and 3 of Law no. 5271, titled *"conditional bail"*, reads as follows:

"(1) In the course of an investigation conducted into an offence, in case of existence of the grounds for detention specified in Article 100, it may be ordered that the suspect be subject to conditional bail, instead of being detained on remand.

...

(3) Conditional bail includes one or more obligations to be imposed on the suspect as stated below:

a) To not to be allowed to travel abroad,

b) To regularly report to authorities that will be specified by the judge within certain time periods,

c) To obey the calls of authorities or persons specified by the judge and, when necessary, fulfilling the measures of conditional bail applied with respect to their professional activities or issues of continuing education.

d) Not to be allowed to drive any or some of the vehicles and, when necessary, leaving his driving license to the office of registry in return for a receipt,

e) To obey and accept the measures of medical treatment or examination, including being hospitalized, especially in order to quit narcotics, stimulating or evaporating substances and alcohol,

f) To deposit an amount of money as a safeguard. The amount of payment, whether it shall be paid at once or in instalments shall be determined by the judge upon the request of the public prosecutor, after taking into account the financial conditions of the suspect.

g) Not to be allowed to have or to carry weapons and, if necessary, to leave the guns to the judicial depositary in return for a receipt,

h) To provide real or personal guarantee for the money ─amount and payment period of which shall be specified by the judge─ upon the request of the public prosecutor to assure the rights of the injured party,

i) To assure the fulfilment of the obligations towards his/her family and the payment of alimony regularly, pursuant to the judicial decisions.

j) Not to leave his dwelling house,

k) Not to leave a certain residential area,

l) Not to visit places or regions that have been designated."

119. Relevant part of paragraph 2, and paragraphs 3 and 4 of Article 153 of Law no. 5271, titled *"the defence counsel's authority to examine the file",* are as follows:

"(2) The defence counsel's authority to examine the file content or take copies of documents included therein may be restricted by judge, upon the request of the public prosecutor, if it may imperil the purpose of the investigation. Such a decision may be rendered only in investigations conducted into the below-mentioned offences:

a) Those listed in the Turkish Criminal Code dated 26 September 2004 and no. 5237,

...

6) Offences committed against the security of the State (Articles 302, 303, 304, 307 and 308)

7) Offences committed against the constitutional order and functioning of this order (Articles 309, 310, 311, 312, 313, 314, 315 and 316),

...

(3) The records of statements given by an individual or by an arrested suspect, as well as the expert reports and the records of other judicial proceedings, during which

the above mentioned individuals are entitled to be present, are exempted from the provisions of the second paragraph.

(4) The defence counsel may review the full contents of the court files and all secured pieces of evidence, as from the date when the indictment is accepted by the court and take copies of all the records and documents without any fee."

120. Article 267 of Law no. 5271, titled *"Decisions that may be appealed"*, reads as follows:

"An appeal may be raised against decisions rendered by judge, or against court decisions in cases specified by the law."

121. Paragraph 1 of Article 271 of Law no. 5271, titled *"Decision",* reads as follows:

"(1) Except for cases laid down in Law, a decision over the appeal be rendered without holding a hearing. However, if deemed necessary, the public prosecutor, and subsequently the defence counsel or the representative shall be heard."

122. Paragraph 1 of Article 309, titled *"Violation of the Constitution"*, of the Turkish Criminal Code dated 26 September 2004 and no. 5237 ("Law no. 5237") reads as follows:

"Any person who attempts to abolish, replace or prevent the implementation of, through force and violence, the constitutional order of the Republic of Turkey shall be sentenced to a penalty of aggravated life imprisonment."

123. Paragraph 1 of Article 311 of Law no. 5237, titled *"Offence against a legislative body"*, reads as follows:

"Any person who attempts, by use of force and violence, to abolish the Turkish Grand National Assembly or to prevent it, in part or in full, from fulfilling its duties shall be sentenced to a penalty of aggravated life imprisonment."

124. Paragraph 1 of Article 312 of Law no. 5237, titled *"Offence against the Government"*, reads as follows:

"Any person who attempts, by use of force and violence, to abolish the Government of the Republic of Turkey or to prevent it, in part or in full, from fulfilling its duties shall be sentenced to a penalty of aggravated life imprisonment."

125. Paragraphs 1 and 2 of Article 314 of Law no. 5237, titled *"Armed Organization"*, reads as follows:

"(1) Any person who establishes or commands an armed organisation with the purpose of committing the offences listed in parts four and five of this chapter shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years.

(2) Any person who becomes a member of the organisation defined above in paragraph one shall be sentenced to a penalty of imprisonment for a term of five to ten years."

126. Article 1, titled *"Definition of Terrorism"*, of the Anti-Terror Law dated 12 April 1991 and no. 3713 ("Law no. 3713") reads as follows:

"Terrorism is any kind of act committed by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of using force and violence and by one of the methods of pressure, intimidation, discouragement or threat".

127. Article 2 of Law no. 3713, titled *"Terrorist Offender"*, reads as follows:

"*Any member of an organization ─founded to attain the aims defined in Article 1─ who commits an offence in line with these aims, individually or in concert with others, or any member of such an organization, even if he does not commit such an offence, is a terrorist offender.*

Persons, who are not members of a terrorist organization but have committed an offence on behalf of the organization, are also deemed to be terrorist offenders."

128. Article 3 of the Law no. 3713, titled *"Terrorist Offences"*, reads as follows:

"Terrorist offences are the ones defined in Articles 302, 307, 309, 311, 312, 313, 314, 315 and 320 and in the first paragraph of 310 of the Turkish Criminal Code dated 26 September 2004 and no. 5237."

3. Steps taken by virtue of the Decree Laws Issued under the State of Emergency

129. Relevant part of Article 6, titled *"Investigation and prosecution procedures"*, of the Decree Law dated 22 July 2016 and no. 667, entered into force after being promulgated in the Official Gazette of 23 July 2016 (the Law amending the Provisions of the Law on Adoption of the Decree Law concerning the Measures taken within scope of the State of Emergency) reads as follows:

"During the period of state of emergency, with regard to the offences enumerated under the Fourth, Fifth, Sixth and Seventh Sections of the Fourth Chapter of the Second Volume of the Turkish Criminal Code no. 5237 and dated 26 September 2004, the offences falling under the Anti-Terror Law no. 3713 and dated 12 April 1991 and the collective offences;

...

ı) Review of detention, objection to detention and requests for release may be concluded over the case file.

..."

130. Relevant part of Article 3, titled *"Investigation and prosecution procedures"*, of the Decree Law dated 25 July 2016 and no. 668, entered into force after being promulgated in the Official Gazette of 27 July 2016 (the Law amending the Provisions of the Law dated 8 November 2016 and no. 6755 on the Adoption of the Decree Law on the Measures to be taken within the Scope of the State of Emergency and on Making Arrangements with respect to Certain Institutions and Organizations) reads as follows:

"During the period of state of emergency, with regard to the offences enumerated under the Fourth, Fifth, Sixth and Seventh Sections of the Fourth Chapter of the Second Volume of the Turkish Criminal Code no. 5237 and dated 26 September 2004, the offences falling under the Anti-Terror Law no. 3713 and dated 12 April 1991 and the collective offences;

...

c) The Magistrate Judge's office or the court, whose detention order has been objected to, shall revise its order if it deems necessary; otherwise, it shall refer, within ten days, the objection to the authority competent to examine the objection.

ç) Requests for release shall be concluded over the case file within a maximum period of thirty days, along with a review of the detention.

...

l) The defence counsel's right to examine the contents of the case-file or take copies of the documents may be restricted by the decision of the public prosecutor, provided that the purpose of the investigation may be imperilled.

..."

B. International Law

1. Law of the United Nations

a. Declaration and Conventions

131. Article 9 of the Universal Declaration of Human Rights ("the Declaration") is as follows:

"No one shall be subjected to arbitrary arrest, detention or exile."

132. Article 4 of the International Covenant on Civil and Political Rights ("the ICCPR") is as follows:

"1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

133. Article 9 § 1 of the ICCPR is as follows:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

b. General Comments of the United Nations Human Rights Committee

i. General Comment no. 29 on Article 4 of the ICCPR adopted at the 72nd Session of the Human Rights Committee held in 2001

134. The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant or departing from the obligations stemming from the Covenant. Moreover, measures derogating from the provisions of the Covenant or practices directed at taking measures departing from these obligations must be of an exceptional and temporary nature.

135. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers.

136. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. A fundamental requirement for any measures derogating from the

Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.

137. According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, this provision requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law.

138. State parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

139. It is inherent in the protection of rights explicitly recognized as non-derogable in Article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees.

140. In paragraph 3 of Article 4, State parties, when they resort to their power of derogation under Article 4, commit themselves to a regime of international notification.

ii. General Comment no. 35 on Article 9 of the ICCPR adopted at the 112nd Session of the Human Rights Committee held in 2014

141. Article 9 recognizes and protects both liberty of person and security of person. However, the right to liberty of person is not absolute. Article 9 § 1 of the Covenant requires that deprivation of liberty must not be arbitrary, and must be carried out with respect for the rule of law.

142. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the

burden of proof lies on State parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. State parties derogating from normal procedures required under Article 9 in circumstances of armed conflict or other public emergency must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.

143. Derogating measures must also be consistent with a State Party's other obligations under international law, including provisions of international humanitarian law relating to deprivation of liberty, and non-discriminatory.

144. The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances. The existence and nature of a public emergency which threatens the life of the nation may, however, be relevant to a determination of whether a particular arrest or detention is arbitrary. Similarly, valid derogations from other derogable rights may also be relevant when a deprivation of liberty is characterized as arbitrary because of its interference with another right protected by the Covenant.

145. The procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. While reservations to certain clauses of article 9 may be acceptable, it would be incompatible with the object and purpose of the Covenant for a State party to reserve the right to engage in arbitrary arrest and detention of persons.

2. The European Law

a. Conventions

146. Relevant part of Article 5 § 1of the ECHR, titled *"right to liberty and security"*, reads as follows:

> *"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;

...”

147. Article 15 of the ECHR, which is entitled *“derogation in time of emergency”*, reads as follows:

“*1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

b. The Case-Law of the European Court of Human Rights

148. Article 15 of the ECHR enables the State Parties, through unilateral notification, to contravene certain rights and freedoms enshrined in the ECHR, in other words, to reduce the obligations with respect to these rights and freedoms, under certain limited circumstances. Many State Parties to the ECHR (Turkey, the United Kingdom, France, Ireland, Greece, Ukraine, Albania, Georgia and Armenia) have so far notified derogation from their obligations enshrined in the ECHR. The European Court of Human Rights (“the ECtHR”) adjudicated the applications arising from the practices in conjunction with these notified derogations. Some of these judgments in which Article 15 of the ECHR is interpreted are explained below.

149.Although Article 15 of the ECHR embodies state of war as one of the grounds enabling reduce of the obligations, no application has been lodged with the ECtHR for reduce of the obligations due to the existence of war. According to the ECHR, apart from state of war, the obligations may be derogated only in case of other public emergencies threatening the life of the nation. The ECtHR indicates that it is its duty to construe each elements of Article 15 of the ECHR including what would constitute a state of emergency. In this scope, the ECtHR defines public emergency threatening the life of the nation as an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed (see *Lawless v. Ireland (3)*, no. 332/57, 1 July 1961, section of the Law, § 28).

150. The ECtHR carries out a supervision, in spite of being limited in nature, as to the existence of "public emergency threatening the life of nation", in respect of the states notifying derogation. In determining the standard of this supervision, it has been notably emphasized that national authorities have a wide margin of appreciation. The ECtHR recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in trying to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than international judges to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the ECtHR to rule on whether inter alia the States have gone beyond the "extent strictly required by the exigencies" of the crisis. At the same time, in exercising its supervision, the ECtHR must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation *(Brannigan and McBride v. the United Kingdom*, no. 14553/89-14554/89, 26 May 1993, § 43).

151. It appears that in any of the judgments rendered by the ECtHR on the merits of the applications, it did not rule against the presence of an emergency case that is notified by States for derogation.

In the judgments of *Lawless v. Ireland (3), Ireland v. the United Kingdom* (no. 5310/71, 18 January 1978), *Brannigan and McBride v. the United Kingdom*, *Aksoy v. Turkey* (no. 21987/93, 18 December 1996), *A v. the United Kingdom* [GC] (no. 3455/05, 19 February 2009), the existence of a public emergency threatening the life of nation was acknowledged. The ECtHR considers, in light of all material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a "public emergency threatening the life of the nation" *(see Aksoy*, cited-above, § 70).

152. However, the European Commission of Human Rights ("the Commission") made different assessments, in the applications lodged by the Governments of Denmark, Norway, Sweden and the Netherlands versus the Government of Greece (nos. 3321/67, 3322/67, 3323/67 and 3344/67), concerning the derogation notification by the military government known as the Regime of Colonels and taking over the government following the coup taking place in Greece in 1967. Although otherwise was asserted by Greece, the Commission has concluded that it is its task to examine whether there existed any circumstance posing a threat to the life of the Greek nation within the scope of Article 15 of the ECHR. The Commission is of the opinion that such a threat must be real and imminent and must also have influence over all nation. Furthermore, there must be a threat towards the proper maintenance of the life of the nation. Finally, such a crisis and threat must be of extraordinary nature which would render ordinary measures and restrictions permitted by the ECHR for the protection of the public safety, health and order ineffective. The Commission has reached the conclusion that it did not find such evidence in its assessments as to the applications in question.

153.The ECtHR is of the opinion that even in time of emergency cases necessitating derogation, States may take measures contravening the obligations set out in the ECHR, only to the extent strictly required by the circumstance in question. It is primarily indicated in Article 15 § 2 of the ECHR that no derogation shall be made from certain rights. The ECtHR has noted that, pursuant to Article 15 of the ECHR, even in the event of emergency cases threatening the existence of the nation, no measure contrary to the following articles enshrined in the ECHR may be taken: Article 2 of the ECHR protecting the right to life (*Mc Cann and Others v. the United Kingdom* [GC], no. 18984/91, 27 September 1995, § 147; *Makaratzis v. Greece* [GC], no. 50385/99, 20 December 2004, § 56; *Isayeva v. Russia*, no. 57950/00, 24 February 2005, § 172; *Isayeva and Others v. Russia*, no. 57947/00-57948/00-57949/00, 24 February 2005, § 168; *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, 24

March 2011, § 174); Article 3 of the ECHR setting out the prohibition of torture and ill-treatment (see *Aksoy*, cited-above, § 62; *Ireland v. the United Kingdom*, cited-above, § 163; *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, § 88; *Chahal v. the United Kingdom* [GC], no. 22414/93, 15 November 1996, § 79; *Saadi v. Italy* [GC], no. 37201/06, 28 February 2008, § 127; *El-Masri v. the Former Yugoslav Republic of Macedonia* [GC], no. 39630/09, 13 December 2012, § 195; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014, § 507); *Öcalan v. Turkey* (2), no. 24069/03 - 197/04 - 6201/06 - 10464/07, 18 March 2014, §§ 97-98); paragraph 1 of Article 4 of the ECHR setting out the prohibition of slavery and forced labour (see *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, § 283; *Siliadin v. France*, no. 73316/01, 26 July 2005, § 112; *C.N. v. the United Kingdom*, no. 4239/08, 13 November 2012, § 65; *Stummer v. Austria* [GC], no. 37452/02, 7 July 2011, § 116); Article 7 enshrining the principle of no punishment without law (see *Del Rio Prada v. Spain* [GC], no. 42750/09, 21 October 2013, § 77; *Ecer and Zeyrek v. Turkey*, no. 29295/95-29363/95, 27 February 2001, § 29; *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, § 137; *M v. Germany*, no: 19359/04, 17 December 2009, § 117); and Additional Protocol no. 6 to the ECHR concerning the abolition of the death penalty and Additional Protocol no. 13 to the ECHR concerning the abolition of the death penalty in all circumstances (see *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 2 March 2010, § 118).

154. As regards the derogable rights, the ECtHR examines whether the restriction to be imposed by virtue of the measures to be taken in emergency cases is proportional to the degree of the existing threat. Accordingly, any measure which would lead to the violation of the ECHR in case of being applied under ordinary conditions must be proportional to the emergency case with which the national authorities have faced. In its examination, the ECtHR acknowledges that states have a certain margin of appreciation. It is stated that the ECtHR is not to replace its own opinion with those of the national authorities while deciding which measure would be appropriate and beneficial, in such a period, for overcoming the existing threat. It is within the national authorities' margin of appreciation to decide as to the type of the measures to be taken in emergency cases, as to whether such measures would be changed over time and whether the measures would remain in force, on condition of being in accordance with Article 15 of the ECHR (see *Ireland v. the United Kingdom*, cited-above, § 213; *Brannigan and McBride*, cited-above, § 43; *Marshall v. the United Kingdom*, no. 41571/98, 10 July 2011).

155. In determining whether a measure taken in an emergency case is to the extent certainly required by the situation, the ECtHR deals with the question why the means permitted in the ordinary periods and in compliance with the ECHR are not sufficient to avert the existing threat and why emergency measures have been applied. It also assesses the necessity of the measure taken in its entirety. In examinations carried out in this respect, the ECtHR has concluded in its judgments of *Lawless v. Ireland (3)*, *Ireland v. the United Kingdom*, *Brannigan and McBride v. the United Kingdom* that the measures taken are proportionate. The measures taken in respect of these applications are generally for the extension of the custody periods and for depriving persons of their liberty for a certain period of time without a judge's decision (seven days in the judgments of *Brannigan and McBride v. the United Kingdom*).

156. However, in its judgment of *Aksoy v. Turkey*, the ECtHR did not agree that, in the existence of a legal arrangement enabling a person to be held in custody for up to 30 days without seeing a judge, placing a person in custody for 14 days due to his involvement in terrorist offences was a proportionate interference and accordingly held that there was a breach of Article 5 § 3 of the ECHR. It is also specified therein that the Government did not adduce any detailed reasons before the ECtHR as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable (see *Aksoy*, cited-above, § 78). In its subsequent judgments of *Demir and Others v. Turkey* (no. 71/1997/855/1062-1064, 23 September 1998), *Nuray Şen v. Turkey* (no. 41478/98, 17 June 2003) and *Bilen v. Turkey* (no. 34482/97, 21 February 2006), the ECtHR has held that the custody periods of 16 and 23 days, 11 days, and 18 days respectively were not also proportionate in spite of the fact that the measure of detention was applied in the period during which the notification of derogation was in force.

157. In its judgment of *A v. the United Kingdom*, the ECtHR considered that detention of the foreigners, on suspicion of being a terrorist, by the British Government following the terrorist attacks of 11 September 2001, without concrete evidence indicating that they had committed the imputed offence, was disproportionate for constituting a discrimination between the British citizens and the foreigners. The ECtHR has accordingly held that there was a breach of Article 5 § 1 of the ECHR.

158. Moreover, the measures that may be contrary to the obligations enshrined in the ECHR must not conflict other obligations stemming from the international law. In its

judgment of *Brannigan and McBride v. the United Kingdom*, the ECtHR examined the complaints raised by the applicants that the obligation of "official proclamation" of the emergency case, which is set out in Article 4 of the ICCPR, was not fulfilled. However, the ECtHR deemed the speech delivered by the Secretary of State for the Home Department in the House of Commons as an official notification.

159. Finally, Article 15 of the ECHR cannot apply in case of failure to officially notify the Secretary General of the Council of Europe of the derogation from the obligations set out in the ECHR. In its judgment of *Sakık and others v. Turkey* (no. 87/1996/706/898-903, 26 November 1997), the ECtHR did not accept the Turkish Government's assertion that Article 15 of the ECHR must apply in the application lodged by six parliamentarians arrested and detained on remand in Ankara, indicating that the derogation notification did not extend to the city of Ankara (for comparison, see *Aksoy*, cited above).

160. On the other hand, the ECtHR has considered in its judgment of *Lawless v. Ireland (3)* that submission of the relevant documents to the Secretary General 12 days after the acceptance of the measure derogating from the ECHR constituted no violation. In the same vein, in its judgment of *Ireland v. the United Kingdom*, the ECtHR has concluded that notifying the Secretary General of the measure 11 days later, for the purpose of preventing the persons to be taken into custody from being aware thereof and fleeing, raised no violation.

c. Reports drawn up by the Council of Europe concerning the State of Emergency in Turkey

i. Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey by the Council of Europe Commissioner for Human Rights, Strasbourg, 7 October 2016 (CommDH(2016)35)

161. The Commissioner for Human Rights indicates that the coup attempt of 15 July is of nature which would have marked the end of democracy in Turkey in case of attaining its purpose and would have defeated all the values underlying the Council of Europe. There is wide agreement in Turkish society that the Fethullah Gülen's movement was responsible for this coup attempt; and that the movement had infiltrated into numerous state institutions including the army and the judiciary. As noted in the memorandum, shocking and terrifying incidents taking place at the night of 15 July caused trauma in Turkish society. It is also emphasized that this trauma is all the more profound given the history of military coups and

massive violations of human rights they engendered in Turkey's recent history. It is underlined therein that given the seriousness of the crimes committed by those who were behind the coup attempt and the obvious threat to Turkish democracy and the Turkish state, a swift and decisive reaction to that threat was both natural and necessary. It is further noted that the Commissioner does not in any way question the decision of the Turkish authorities to declare a state of emergency and to derogate from the European Convention on Human Rights (ECHR) in such a context.

ii. Opinion of the European Commission for Democracy through Law (the Venice Commission) on Emergency Decree Laws nos. 667-676 adopted following the failed coup of 15 July 2016, Opinion no. 865/2016, Strasburg 12 December 2016, (CDL-AD(2016)037)

162. In its report, the Venice Commission strongly and resolutely condemns, once again, the ruthlessness of conspirators, indicates that a military coup against a democratic government, by definition, denies the values of democracy and the rule of law. The Venice Commission recognises, without any reservation, that the coup attempt of the 15 July 2016 constituted "a public emergency threatening the life of the nation", as it posed an existential threat to Turkish democracy. Furthermore, it is clearly emphasized that the coup was exactly the sort of situation described in Article 120 of the Turkish Constitution as a pre-condition for the declaration of the state of emergency. The Venice Commission considers that, following the coup, Turkey was entitled to defend its democratic institutions and population, as they were under violent attacks, killing more than 200 persons and leaving thousands injured. The Venice Commission acknowledges, together with the Commissioner for Human Rights of the Council of Europe, that "given the seriousness of the crimes committed by those who were behind the coup attempt and the obvious threat to Turkish democracy and the Turkish state, a swift and decisive reaction to that threat was both natural and necessary".

V. EXAMINATION AND GROUNDS

163. At its session of 20 June 2017, the Constitutional Court examined the application and decided as follows.

A. Overview of the Emergency Administration Procedures

1. Definition and Characteristics

164. The emergency procedures are the administration regimes of temporary and exceptional nature which are applied in the case where a severe threat or danger to the existence of the state or the nation or to the public order cannot be avoided by use of the powers of ordinary period and which grant the public authorities broader powers in comparison with those of ordinary period, with a view to averting such threat or danger. In such administration procedures, there may be changes both in the distribution of authority among the legislative, executive and judicial organs and there may be departure from the ordinary legal system. The most significant reflection of such departure is the narrowing of the safeguards with respect to fundamental rights and freedoms.

165.The emergency administration procedures may be applied only in the event of severe threat or danger to the existence of the state or the nation or to the public order, such as state of war, outbreak of war threat, rebellion, domestic disturbance, increase in violent acts, terrorist attacks, natural disaster, epidemic, and severe economic crisis. It may be unavoidable to take certain emergency measures, with a view to averting such threat or danger. In this regard, such a necessity may require, on one hand, enlarging of the powers vested in the executive powers in order to avert the existing threat or danger immediately and, on the other hand, restricting of fundamental rights and freedoms to the extent which cannot be justified in the ordinary period. Therefore, the emergency administration procedures arise from an exigency.

166. Besides, the emergency administration procedures are exceptional and temporary in nature. These procedures may be resorted to only when there is a severe threat or danger to the existence of the state or nation or to the public order and as long as such threat or danger continues to exist. In this sense, aim of the emergency administration procedures is to eliminate the reasons necessitating the implementation of these regimes and to revert to ordinary legal order. Therefore, temporariness and exceptionality are underlies the legitimacy of the emergency administration procedures.

167. The emergency administration procedures are legal regimes. Incidents posing a threat or danger to the existence of the state or the society or to the public order constitute factual basis for transition to the emergency administration regime. However, whatever the scope, gravity and effects of such incidents, measures directed at the elimination of the existing threats must comply with the law.

168. In order to ensure compliance with the law in emergency periods, it is necessary to determine under which circumstances the emergency administration procedures may be applied and the procedure to be followed, as well as to set the limits of the likely measures in such periods in a way that would ensure legal certainty. Thereby, before the emergency administration procedures are applied, the individuals may foresee what kind of measures may be taken and to what extent fundamental rights may be restricted by state organs during such a period.

2. Emergency Administration Procedures in the International Texts

169. In certain international instruments regarding the human rights, states are allowed to depart from legal regime of the ordinary period and to resort to measures contrary to the international obligations of the ordinary period, in the event of a war or emergency cases threatening the existence or life of the nation.

170. Within this framework, it is set out in Articles 4 and 15 of the ICCPR and the ECHR, respectively, that measures contrary to the obligations set forth in these instruments may be taken under certain circumstances during such periods (see, §§ 132, 147 above).

3. Emergency Administration Procedures in the Turkish Law

171. In the Turkish law, the first legal arrangement with respect to the emergency administration procedures was made in the Ottoman Basic Law in 1876. In Article 113 of the Basic Law, the proclamation of martial law was set out, whereas Article 36 thereof vested the administration with the authority to make certain legal arrangements with respect to emergency periods, under the name of the "Provisional Law". By virtue of the Law on Treason and Fugitives introduced in 1920, certain legal arrangements were made with respect to emergency periods. Besides, in the period when the Constitution of 1921 was in force, the executive body had to resort to certain emergency measures during the Independence War. Articles 74, 78 and 86 of the Constitution of 1924 embodied the provisions as to emergency administration regimes. The Law on the Maintenance of Order enacted in 1925 and the National Security Law enacted in 1940 vested the government with certain powers specific to emergency periods. Article 123 of the Constitution of 1961 included provisions setting out the states of emergency, whereas Article 124 thereof related to the martial law and states of war. According to this provisions, martial law may be proclaimed in case of state of war, outbreak

of any incident requiring a war, rebellion or existence of certain evidence indicating a serious insurrection against the Republic.

172. The emergency administration procedures are embodied in the current Constitution (currently in force) introduced in 1982. Arrangements with respect to these procedures are provided in the Chapter Two ─relating to executive power─ of the Part Three setting out the fundamental organs of the Republic. In this scope, Articles 119, 120 and 121 of the Constitution set out "the states of emergency", and Article 122 sets out "martial law, mobilization and state of war".

173. Two forms of emergency administration procedure are envisaged in the Constitution depending on the reason of proclamation. Accordingly, a state of emergency ─as set out in Article 119 of the Constitution─ may be resorted to in cases of "natural disasters, dangerous epidemic diseases or a serious economic crisis", whereas a state of emergency ─as set out in Article 120─ may be resorted to in cases of "serious indications of widespread acts of violence or serious deterioration of public order due to acts of violence". Martial law set out in Article 122 of the Constitution is an emergency administration procedure which may be applied in cases of "widespread acts of violence which are more dangerous than the cases necessitating a state of emergency, war, occurrence of a situation necessitating war, an uprising, or the spread of violent and strong rebellious actions against the motherland and the Republic, or widespread acts of violence of internal or external origin threatening the indivisibility of the country and the nation".

4. Its Relation with Fundamental Rights and Freedoms

174. The duties upon the state, in democracies, are to protect and improve fundamental rights and freedoms and to take measures which would ensure effective enjoyment of these rights and freedoms by everyone. Therefore, assurance of fundamental rights and freedoms is an indivisible element of a democratic society.

175. However, fundamental rights and freedoms are not unlimited. Even during ordinary periods in democratic social orders, it is allowed to impose restrictions on these rights and freedoms due to various reasons such as national security, public order, prevention of offences and the protection of the other individuals' rights. Besides, in periods where emergency administration procedures are in force as the existence of the state or society, or the public order is under serious threat or danger, it may be required to take measures

resulting in wider restriction of fundamental rights and freedoms in comparison to ordinary periods or even suspension of these rights and freedoms, in order to avert the existing threat or danger.

176. However, the aim of resorting to an emergency administration regime is not to prevent enjoyment of fundamental rights and freedoms but to re-establish the disturbed public order and to reinstate the ordinary administration procedure as immediate as possible, by means of averting threats or dangers towards the state and the society and thereby to ensure the re-enjoyment of denied rights and freedoms in a safe environment.

B. Examination of Individual Applications during the Periods when Emergency Administration Procedures are in Force

1. Authority to Examine Individual Applications

177. Article 148 § 1 and the first sentence of Article 148 § 3, which set out the "*functions and powers* of the Constitutional Court" of the Constitution provide as follows:

> *"The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decree laws and the Rules of Procedure of the Grand National Assembly of Turkey, and adjudicate on individual applications. Constitutional amendments shall be examined and verified only with regard to their form. However, decree laws issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court, alleging their unconstitutionality as to form or substance.*
>
> *(...)*
>
> *Everyone may apply to the Constitutional Court on the grounds that one of fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities."*

178. Article 45 § 1, titled *"the right to individual application"*, of the Code on the Establishment and Rules of Procedures of the Constitutional Court dated 30 March 2011 and no. 6216 ("Law no. 6216") reads as follows:

"Everyone may apply to the Constitutional Court based on the claim that any of fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto ─to which Turkey is a party─ which are guaranteed by the Constitution has been violated by public force."

179. By Article 148 § 1 of the Constitution, the Constitutional Court is invested with the duty and power to conclude individual applications. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 1 of Law no. 6216, everyone is entitled to lodge an application with the Constitutional Court with the allegation that any of the fundamental rights and freedoms safeguarded in the Constitution and falling into the scope of the ECHR and the additional protocols thereto –to which Turkey is a party– has been violated by public force.

180. On the other hand, whereas it is set out in Article 148 of the Constitution that decree laws issued during a state of emergency, martial law and state of war cannot be brought before the Constitutional Court for their alleged unconstitutionality as to form or substance (for interpretation and implementation of this provision, see the Court's judgment no. E.2016/166 and K.2016/159 and dated 12 October 2016, §§ 12-23), there is no provision prescribing that an individual application cannot be lodged due to an interference with fundamental rights and freedoms during such emergency periods. Nor do other articles of the Constitution or the relevant laws include any provision envisaging that an individual application cannot be lodged with the Constitutional Court during a period when emergency administration procedures are in effect, by alleging that any of the fundamental rights and freedoms falling into the scope of the individual application has been violated.

181. Accordingly, in period of times when emergency administration procedures are in effect, the Constitutional Court has the authority to examine the applications lodged with the allegation that out of the fundamental rights and freedoms safeguarded in the Constitution, any of those falling into the scope of the ECHR or its additional protocols to which Turkey is a party has been violated by public force.

2. Examination Process of Individual Applications

a. In General

182. Article 13 of the Constitution, titled "*Restriction of fundamental rights and freedoms*", reads as follows:

"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

183. Article 15 of the Constitution entitled "*Suspension of the exercise of fundamental rights and freedoms*" reads as follows:

"In times of war, mobilization, martial law or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures which are contrary to the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.

Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling."

184. The criteria to be taken into consideration in imposing a restriction on fundamental rights and freedoms during an ordinary period are set out in Article 13 of the Constitution. According to this, the interference with fundamental rights and freedoms must be in compliance with the criteria of "lawfulness", "legitimate aim", "compliance with the letter and spirit of the Constitution", "not infringing the essence", "being in conformity with the requirements of the democratic order", "being in conformity with the requirements of the secular republic" and "the principle of proportionality".

185. The restriction of fundamental rights and freedoms in ordinary times are laid out in Article 13 of the Constitution, whereas the restriction or suspension of the exercise of the rights and freedoms in times of "war", "mobilization", "martial law" and "a state of emergency" are set out in Article 15 of the Constitution.

186. According to the relevant article, in times of war, mobilization, martial law or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended or measures which are contrary to the guarantees embodied in the

Constitution may be taken. However, Article 15 of the Constitution does not entrust the public authorities with an unlimited power in this respect. The measures which are contrary to the guarantees embodied in other provisions of the Constitution must not infringe upon the rights and freedoms provided in Article 15 § 2 of the Constitution, must not be contrary to the obligations stemming from the international law and must be within the extent required by the exigencies of the situation.

187. Accordingly, in examining the individual applications against emergency measures, the Constitutional Court is to take into account the protection regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms.

b. Conditions as to the Applicability of Article 15 of the Constitution

i. Existence and Declaration of Emergency Case

188. For the application of Article 15 of the Constitution, there must exist "war", "mobilization", "martial law" or "state of emergency" and subsequently, the proper legal institution must be proclaimed by the state authorities empowered by the Constitution. Pursuant to Article 119 of the Constitution, in the event of "natural disaster, dangerous epidemic diseases or a serious economic crisis" and pursuant to Article 120 of the Constitution, in the event of "serious indications of widespread acts of violence or serious deterioration of public order because of acts of violence", the Council of Ministers, meeting under the chairmanship of the President of the Republic, may proclaim a state of emergency; and pursuant to Article 122 of the Constitution, in the event of "widespread acts of violence which are more dangerous than the cases necessitating a state of emergency; or in the event of war, the emergence of a situation necessitating war, an uprising, the spread of violent and strong rebellious actions against the motherland and the Republic or widespread acts of violence of internal or external origin threatening the indivisibility of the country and the nation", the Council of Ministers, meeting under the chairmanship of the President of the Republic, may declare martial law.

189. The Constitution-maker vested the Council of Ministers, meeting under the chairmanship of the President of the Republic, with the discretion of assessing whether there exists an emergency situation that is a precondition for the applicability of Article 15 and other relevant articles. The Constitution does not contain any provision empowering the Constitutional Court to review this discretionary power. However, the nature of the facts leading to proclamation of an emergency case will be taken into consideration in assessing

whether the measures taken in the presence of such cases are within the extent required by the exigencies of the situation.

ii. The Measure must be related to Emergency Case

190. The main objective in applying emergency procedures is to eliminate the existing threat or danger which requires the application of these administrative regimes. For this reason, for the application of Article 15, it does not suffice that an impugned measure is taken during an emergency period but this measure must also be related to the elimination of the threat or danger leading to the declaration of the emergency case.

191. In case of failure to establish such a relation, Article 13, not Article 15, is to be applied in reviewing impugned measures even if it is taken in the emergency period. There is no doubt that the public authorities have a wide margin of appreciation as to which measure is related to the elimination of the threat or danger leading to the declaration of the emergency case. However, the final evaluation of whether this discretionary power has been exceeded or not will be made by the Constitutional Court.

c. Examination pursuant to Article 15 of the Constitution

i. Whether the Measure is in breach of the Safeguards Enshrined in the Constitution

192. The use of emergency administration procedures in emergency cases where there is a serious threat or danger to the existence of the state, community or public order does not necessarily require that any measure taken at this time be beyond the criteria allowed in the ordinary period. Public authorities may also take measures to prevent the existing danger or threat by using the means provided by the ordinary legal order in emergency cases. Therefore, an interference with fundamental rights and freedoms during emergency periods may be compatible with the guarantees set out in the Constitution for ordinary times.

193. Accordingly, in the individual applications against a measure interfering with fundamental rights and freedoms during an emergency period, the first examination under Article 15 of the Constitution will be made for determining whether the relevant measure complies with the guarantees set out in the Constitution according to the criteria of the ordinary period. This is also required by Article 15 of the Constitution which reads as "*…measures which are contrary to the guarantees embodied in the Constitution may be taken.*"

194. In such review, other provisions of the Constitution, being in the first place the provision where the interfered right is set forth, and of course, Article 13 of the Constitution which is of main importance in restricting rights and freedoms during the ordinary period, will be relevant. If this review result in a finding that the measure is in compliance with the guarantees set out in provisions of the Constitution other than Article 15, naturally no further examination will be made with respect to the criteria set out in Article 15 of the Constitution, and it will be concluded that the interference has not led to a violation of any fundamental right or freedom.

195. If the relevant interference is found to be in breach of the safeguards prescribed in the Constitution with respect to fundamental rights and freedoms, then a further examination will be made for determining whether it is justified by Article 15 of the Constitution, in which the restriction or suspension of the exercise of fundamental rights and freedoms in times of "war", "mobilization", "martial law" and "a state of emergency" are set out. Where it is determined that the interference is in compliance with the criteria set out in the relevant Article, it will be concluded that the right or freedom raised in the individual application has not been violated. Otherwise, in the case that the interference is found to be contrary to one or more criteria set out in Article 15 of the Constitution, it will be concluded that the right or freedom raised in the individual application has been violated.

ii. Whether a Measure in Breach of the Non-emergency Safeguards is Legitimate in time of Emergency Period

(1) Whether the Measure has a bearing on the Core Rights

196. In order to accept that the measure, which constitutes an interference with fundamental rights and freedoms during the emergency administration procedures and is contrary to the safeguards provided in the Constitution, is legitimate, in the first place it must not infringe upon the rights and freedoms provided in Article 15 § 2 of the Constitution. Accordingly, even in emergency cases, the individual's right to life and the integrity of his/her corporeal and spiritual existence shall be inviolable except in cases of death that occurs through acts in conformity with the law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling.

197. If the measure which is contrary to the safeguards set out in the Constitution is related to the enlisted core rights, it cannot be regarded as legitimate within the meaning of Article 15 of the Constitution, and it will be concluded, without any further examination, that the relevant right or freedom has been violated.

(2) Whether the Measure is in breach of the Obligations Stemming from the International Law

198. The second examination to be made under Article 15 of the Constitution aims at determining whether the measure is in breach of the obligations stemming from the international law. The primary obligations among these obligations are those stemming from the international conventions on human rights to which Turkey is a party.

199. The main conventions on human rights to which Turkey is a party are the ICCPR and the ECHR. According to Article 4 of the ICCPR and Article 15 of the ECHR, in time of public emergency which threatens the life of the nation, the States may take measures derogating from their obligations under these conventions. However, the rights and freedoms that cannot be suspended are set out in Article 4 § 2 of the ICCPR, Article 15 § 2 of the ECHR, Article 4 of the Protocol No. 7 to the ECHR, Article 3 of the Protocol No. 6 of the ECHR and Article 2 of the Protocol No. 13 to the ECHR. A substantial portion of these rights and freedoms are embodied in Article 15 § 2 of the Constitution. Accordingly, within the scope of the second examination, no separate assessment is required with respect to the common rights and freedoms set out in the Constitution, the ICCPR and the ECHR, which cannot be suspended.

200. However, it is regulated in Article 4 § 2 of the ICCPR, Article 15 § 2 of the ECHR and Article 4 of the Protocol No. 7 to the ECHR that certain rights and freedoms that are not enlisted in Article 15 of the Constitution cannot be suspended. In this respect, even in emergency cases, no one shall be held in slavery or servitude, no one shall be imprisoned for not fulfilling their obligations stemming from the convention, and no one shall be tried or punished again for an offence for which he/she has already been finally acquitted or convicted. Furthermore, even during this period everyone shall have the right to recognition everywhere as a person before the law. Lastly, the measures to be taken during an emergency period must not involve discrimination on the ground of race, colour, sex, language, religion or social origin.

201. Accordingly, the measures interfering with the above-mentioned rights and freedoms ─though they are not among the core rights provided in Article 15 of the

Constitution─ cannot be considered as legitimate due to non-compliance with the obligations stemming from the international law.

(3) Whether the Measure is within the extent required by the Emergency Case

202. The last examination to be made for establishing whether the measure constituting an interference with fundamental rights and freedoms during a period when emergency administration regimes are in force is legitimate or not pursuant to Article 15 of the Constitution is directed at determining whether it is "within the extent required by the emergency case".

203. The principle of proportionality is also set forth in Article 13 of the Constitution where the criteria set for restricting fundamental rights and freedoms during the ordinary period are regulated. However, the proportionality pointed out in Article 15 of the Constitution refers to the proportionality in a situation leading to the implementation of emergency administration procedures. In this respect, the proportionality set forth in Article 15 of the Constitution allows for much more interference with fundamental rights and freedoms when compared to the proportionality criteria provided in Article 13 of the Constitution. This point is also supported by the very fact that the criterion set forth in Article 15 of the Constitution can only be applied in cases where a measure derogating from the safeguards regarding fundamental rights and freedoms for ordinary times is in consideration (see also §§ 192─195 above).

204. The principle of proportionality set out in Article 15 of the Constitution represents that the means used for restricting or suspending the use of fundamental rights and freedoms are appropriate and necessary for achieving the aim, and that the means and the aim are proportionate to each other (see the TCC, E.1990/25, K.1991/1, 10 January 1991). According to this, the measure must be appropriate for achieving the aim of eliminating the threat or danger causing the emergency case and must be necessary for achieving this aim; furthermore, there must be no disproportionality between the public interest in the aim to be achieved and the negative effect of the measure restricting fundamental rights and freedoms on the individual (see, among many other authorities, the TCC, E.2013/57, K.2013/162, 26 December 2013).

205. In determination of the elements of the proportionality, all conditions of the emergency period in which the measure is taken must be assessed together. In this scope, the nature of the threat or danger leading to the adoption of emergency administration procedures

must primarily be taken into consideration in the assessment of the elements concerning the proportionality of the emergency measure constituting an interference with fundamental rights and freedoms.

206. The nature of the interfered right or freedom is also important in determination of the proportionality. For example, depriving an individual of his/her liberty and restricting his/her freedom of organization or right to property will not have the same adverse effect. As a matter of fact, restriction of an individual's liberty makes the exercise of many rights and freedoms considerably difficult in itself and makes it even impossible in some occasions.

207. The period of the time when the measure is taken must also be taken into account in determination of the proportionality. In this respect, measures taken during a time when the events constituting the emergency case has occurred or when the concrete danger is obvious and measures taken during a period when the danger or the threat has considerably been eliminated must be assessed in different ways. Here, especially the conditions of the period of the time when the measure was implemented must be taken into account. In this regard, the fact that the public authorities impose certain measures in a less strict manner in progress of time during the state of emergency cannot be construed to mean that the relevant measures were disproportionate at the time when they were employed initially. The gradual implementation of measures based on the emergency administration regime is within the discretion of the public authorities.

208. On the other hand, the duration, scope and weight of the measure which interferes with fundamental rights and freedoms should be taken into consideration in determining the proportionality. As a matter of fact, as the duration of the interference prolongs, the burden on individual increases. However, a short term measure may also affect fundamental rights and freedoms very seriously due to its scope or weight. Thus, the weight of the measure can cause individual to bear an excessive burden independently of its duration.

209. On the other hand, it is necessary to provide individuals with procedural safeguards to challenge disproportionate or arbitrary interferences with fundamental rights and freedoms. Accordingly, individuals' being deprived of these safeguards considerably will be incompatible with the principle of proportionality.

210. There is, of course, a wide margin of appreciation for the public authorities, who are primarily responsible for combating it, in the issues as to whether a measure is appropriate to eliminate the threat or danger that constitutes the emergency case and whether

the measure is proportionate to the aim to be achieved. However, it is within the scope of the duties of the Constitutional Court to examine whether the measure that is subject to an individual application goes beyond this margin of appreciation.

211. Lastly, in addition to taking measures which are contrary to the guarantees embodied in the Constitution in terms of fundamental rights and freedoms in emergency cases, it is also set out in Article 15 of the Constitution that the exercise of fundamental rights and freedoms may be suspended partially or entirely. However, the notion of "suspension" here does not mean that the relevant right become completely unusable, it rather means that it is suspended temporarily. The measures in the form of suspending the exercise of fundamental rights and freedoms must be in compliance with the abovementioned aspects of the principle of proportionality.

C. Assessment as to the Current Emergency Case in Turkey

212. The incident led to the emergency case in Turkey is the coup attempt that took place on 15 July 2016. Those behind the coup attempt attacked the nation, the legitimate government, the media outlets and the security forces. During the attack, they used war arms such as fighter jets, helicopters, vessels and tanks and heavy weapons, which were entrusted to them for protecting the very people they attacked. This barbaric attempt left behind more than 250 deaths and thousands of injured. The coup attempt aimed at overthrowing the constitutional order was prevented by the decisive resistance of all legitimate elements of the democratic society (see §§ 15-19 above).

213. In assessing the magnitude of the threat posed by the coup attempt against the democratic constitutional order, it is not sufficient to take into consideration the damage caused by this prevented attempt alone. In addition to this, the risks that might have occurred if the coup attempt had not been prevented in a short time or if the coup had occurred must also be assessed. If the nation that is the owner of the sovereignty and all elements of the democratic constitutional order had not prevented the coup attempt in a short time by their decisive resistance, they would either have accepted the absolute sovereignty of a group of rebels and surrendered to their will which is not subject to a democratic supervision or they would have continued their resistance. The first possibility would have resulted in the death of a nation democratically. The latter would have led to the prolongation of the clashes as well as their becoming widespread, thereby leading to, as an imminent, serious and explicit threat, the emergence of the risk of overthrowing the state authority and even the state completely.

214. On the other hand, the fact that this coup attempt took place at a time when Turkey was under fierce attack of many terrorist organizations made the country even more vulnerable to such attacks and therefore considerably increased the gravity of threat it posed against the existence of the nation (see §§ 42-43, 46 above).

215. Given all these assessments, there is no doubt that the coup attempt of 15 July has posed an existing and severe threat not only to the democratic constitutional order but also to the "individuals' fundamental rights and freedoms" and "national security", both of which are indeed closely associated with one another. This is the most severe attack in the history of the country, targeting the national security and the lives of the people and even existence of the whole nation.

216. The investigations initiated by the authorities following the coup attempt, the statements of suspects and witnesses, the material facts (see §§ 27-35 above), and pre-coup attempt investigations on the FETÖ/PDY (the Fetullahist Terrorist Organization/Parallel State Structure) (see § 25 above), when considered as a whole, indicate that the public authorities' assessment as to the FETÖ/PDY being the plotter/perpetrator of the coup attempt has sufficient factual basis. As a matter of fact, as stated in the reports of international organizations, these findings of the relevant authorities are accepted by a vast majority of Turkish society (see § 161 above).

217. On the other hand, Turkey has faced many coups or coup attempts since the date on which the multi-party system was adopted in the country. The following characteristics of the FETÖ/PDY increase the gravity of the threat it has posed to the democratic social order even more: the FETÖ/PDY has been organized in all public institutions and organizations, notably the Turkish Armed Forces, security directorates, the judiciary, public institutions of education and religion, the political parties, trade and labour unions, non-governmental organizations and business companies; it has national and international alliances; it has been operating in over 150 countries in many fields; it adopts a mentality attributing holiness to the organization and to its actions without questioning; its members act in full obedience and devotion to the organizational will, and it is made up of hierarchical and cell-type structure; it has been using confidential/covert means of communication; it ultimately aims at taking control of the constitutional institutions of the state, re-designing the society and the individuals in line with its own ideology, and governing the country through an oligarchic rule (see § 26 above).

218. Considering the principles set forth in the Preamble of the Constitution, the characteristics of the State ─set out in Article 2─, the sovereignty and the manner it is exercised ─set out in Article 6─, and the systematic of the Constitution as a whole, it is understood that there is an indissoluble link between "sovereignty", "the manner the sovereignty is exercised, "the will of the nation", "democracy", "state of law" and "human rights".

219. Accordingly, the source of sovereignty will be the nation, as in all civilized societies, the sovereignty will be exercised ─directly or indirectly─ by the organs authorized by the nation's will, the nation's will shall be exercised within a democratic order, and the sovereignty will be exercised by the authorities in compliance with the principles of democracy, being in the first place the principle of the state of law and respect for human rights.

220. Coup attempt is an attempt by a group, which is not authorized to exercise the nation's sovereignty, to overthrow or change the democratic constitutional order by use of coercion and violent means. Where the coup occurs, the democratic constitutional order and the superiority of the will of the nation will cease to exist, and the sovereignty belonging to the nation ─thus to each individual─ in the democratic order will be overtaken by a group. In this case, there can be no mention of democracy and the state of law. Naturally, in such an order, there will not be a mechanism that will safeguard fundamental rights and freedoms of individuals. As a matter of fact, fundamental rights and freedoms can in the real sense be protected in the presence of an effective democracy.

221. In view of the reasons explained above, it is beyond dispute that the coup attempt constitutes an open and serious attack on the principles of "sovereignty belong to the nation", "sovereignty shall be exercised through the authorized organs", "the exercise of sovereignty shall not be delegated by any means to any individual, group or class", "democracy", "state of law", and "respect for human rights" which are the indispensable principles of the democratic social order set forth in the Constitution. In this respect it can be said that one of the most serious threats that a democratic society may face, and maybe the severest one, is coup attempts.

222. In Article 5 of the Constitution, "protecting the Republic and democracy", "ensuring the welfare, peace and happiness of the individual and society", "striving for the removal of obstacles which restrict fundamental rights and freedoms of the individuals" and

"providing the conditions required for the development of the individual's material and spiritual existence" are set out among the fundamental aims and duties of the State. Preventing the coup attempts, which are the most serious attacks on the democratic constitutional order, fundamental rights and freedoms and national security, or completely eliminating the danger posed by the coup attempt that took place and the threat leading to the coup attempt is not only an issue within the authority of the State, but also a responsibility and duty of the State which cannot be disregarded pursuant to Article 5 of the Constitution.

223. According to Article 120 of the Constitution, "In the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairmanship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months." The Constitution restricted the declaration of a state of emergency and its extension to certain periods, in accordance with the temporary and exceptional nature of the emergency administration procedures. The state of emergency which might be declared for a period not exceeding six months under Article 120 of the Constitution might be extended for a maximum of four months each time under Article 121 of the Constitution.

224. As a matter of fact, following de facto prevention of the coup attempt, the Council of Ministers, meeting under the chairmanship of the President of the Republic in accordance with Articles 120 and 121 of the Constitution, after consultation with the National Security Council (see § 47 above), declared a state of emergency throughout the country for a period of ninety days starting from 21 July 2016 01.00 a.m. At the end of this period, the state of emergency was extended three times for three months respectively (see §§ 48-49 above). Within state of emergency, various measures were taken against the relevant persons, such as launching criminal investigations and applying preventive measures in this respect, dismissal from the public service, closing private education institutions and appointing trustees for companies (see §§ 51-66 above).

225. The state of emergency which was declared after the coup attempt has been discussed in international reports and documents as well. The Council of Europe Commissioner for Human Rights indicated in his Memorandum that if the coup attempt of 15 July had reached its goal, the democracy in Turkey would have been overthrown, as well as,

all underlying values of the Council of Europe would have been eliminated. The report of the Venice Commission clearly states that as the coup attempt has posed a threat to the existence of the Turkish democracy, it constitutes a general danger threatening the life of the nation and that following the coup attempt, Turkey has had the right to defend its democratic institutions and its people. The Venice Commission and the Commissioner for Human Rights have acknowledged that it is both natural and necessary to give an immediate and decisive response to the open threat posed by the coup attempt against the Turkish democracy and the Turkish State (see §§ 161-162 above).

226. The coup attempt made on 15 July 2016 lies behind the declaration of state of emergency on 21 July 2016. This was noted in the recommendation of the National Security Council and was also underlined by the Minister of Justice who took the floor on behalf of the Government during a meeting held at the General Assembly of the GNAT on the approval of the declaration of state of emergency (see §§ 23, 48 above).

227. On the other hand, it was pointed out in the general preamble of the Decree Law no. 667, which was issued immediately after the declaration of state of emergency, that for "*protecting the constitutional order, national order, rule of law, democracy and fundamental rights and freedoms, terminating the last coup attempt in our country completely, and avoiding the reoccurrence of such a coup attempt*", as well as for "maintaining the *fight against terrorism in a more effective manner"*, it became necessary to take some urgent measures during the state of emergency. The aim of the Decree Law in question was stated in Article 1 of the Decree Law as *"to establish measures that must necessarily be taken within the scope of attempted coup and fight against terrorism under the state of emergency and to determine procedures and principles relating to these measures."* Accordingly, in addition to the fact that the coup attempt made on 15 July 2016 lies behind the declaration of the state of emergency, the intense terror attacks against Turkey also have a bearing in this regard. In addition to the coup attempt, "other terrorist attacks" were also referred to in the declarations of derogation submitted by Turkey to the Secretary General of the Council of Europe.

228. As a matter of fact, after the coup attempt was defeated and the state of emergency was declared, Turkey continued to face intense terrorist attacks. In this context, bombed and armed terrorist attacks occurred in many cities including Ankara, İstanbul, İzmir, Kayseri, Diyarbakır, Mardin, Gaziantep, Elazığ, Van, Bingöl, Antalya, Hakkâri and Şırnak; and many security officers and civilians lost their lives or got injured during these attacks.

Given those terrorist attacks, it is understood that the threat of terrorism in Turkey is not limited to a specific region of the country and that it is of a size and intensity which severely affects the whole population (see § 44 above).

229. It is understood that the measures implemented during the state of emergency, considered in parallel with the public authorities' above mentioned assessments on the facts leading to the declaration of state of emergency, aims at eliminating the threats and dangers arising from terrorism and the FETÖ/PDY that is revealed to be the perpetrator of the coup attempt of 15 July.

230. However, it appears that the public authorities imposed the measures in a less strict manner during the period following the declaration of state of emergency. Within this framework, some of the detainees were released, the measures pertaining to the dismissal of the judicial members and public officials from office and pertaining to the dismissal of some students and the closure of some institutions have been partially revoked. Furthermore, "Commission on Examination of the State of Emergency Procedures" was decided to be established with a view to examining and adjudicating the applications concerning the actions directly instituted by emergency decree laws. In this sense, the opportunity to bring an annulment action against the decisions of the relevant Commission has also been introduced. Lastly, it was stated in the Decree Law no. 685 that the judicial members and those who deemed as such may file an action with the Supreme Administrative Court as the first-instance court within sixty days as from the date the decision become final (see *Murat Hikmet Çakmakcı*, no. 2016/35094, 15 February 2017, §§ 27-28; and *Hacı Osman Kaya,* no. 2016/41934, 16 February 2017, §§ 28-29).

D. Examination of the Applicants' Allegations

1. Alleged Unlawfulness of the Applicants' Detention

a. The Applicants' Allegations and the Observations of the Ministry

231. The applicants maintained that on the date of incident they acted together with the convoys formed by the groups resisting the coup attempt and went to the campus where TURKSAT was located, that their act was not associated with any activity related to the coup attempt, that they did not have any connection with the imputed offences; and that they nevertheless were detained. In this respect, the applicants alleged that their right to fair trial, right to an effective remedy, right to personal liberty and security, as well as, the principle of equality had been violated. They requested their release and sought compensation in this connection.

232. In its observations, the Ministry reiterated the similar judgments of the Constitutional Court and the ECtHR on detention and pointed out that for a detention to be lawful, it must comply with the requirements of the national legislation and that the national legislation must be in compliance with the ECHR and must not be arbitrary. Accordingly, for a person to be deprived of his liberty, there must be reasonable suspicion or convincing reasons indicating that he has committed the imputed offence. For the existence of reasonable suspicion ─regard also being had to the evidence obtained and to the circumstances of the case─, there must be sufficient evidence to convince an objective observer. On the other hand, it is not necessary to have sufficient evidence to charge a person with an offence at the time of taking the person into custody or during the custody.

233. The Ministry considers that as a criminal case was initiated against the applicants, there has been sufficient suspicion, beyond reasonable doubt, of their having committed the offence, which justified their being taken into custody. Besides, the applicants' statements are incompatible with each other. In addition, the applicant Aydın Yavuz was the user of "ByLock" which is the cryptographic communication application through which the members of the FETÖ/PDY members communicated with each other for organizational communication.

234. The Ministry pointed out that the charges against the applicants were based on concrete evidence and that, given the emergency case following the coup attempt during which the applicants were arrested, taken into custody and detained, those measured cannot be considered as arbitrary. Accordingly, given the incidents that occurred on the night of 15 July, the applicants' statements, the incident scene investigation report and all other relevant information and documents, there is no reason to depart from the judicial authorities' conclusions (detention). Therefore, the applicants' complaints in this respect are manifestly ill-founded.

b. The Constitutional Court's Assessment

235. Article 19 § 1 and the first sentence of Article 19 § 3 of the Constitution reads as follows:

"Everyone has the right to personal liberty and security.

...

Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing

escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention."

236. The Constitutional Court is not bound with the legal characterization of the facts by the applicants, but the Court makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). As the gist of the applicants' allegations are related to the fact that they have not been involved in the offence they are charged with and therefore their detention was unlawful, this part of the application must be examined within the scope of the right to personal liberty and security within the meaning of Article 19 of the Constitution.

i. Enforceability

237. The accusations on basis of which the applicants were detained was their having gone to the TURKSAT campus which was occupied by the coup plotters in order to cease the broadcasting as part of the coup attempt on 15 July 2016. The applicants were detained on 18 July 2016 within the scope of the investigation conducted on the basis of this accusation. On the date when the applicants were detained, a state of emergency had not been declared yet in Turkey. The state of emergency was declared three days after the applicants' detention (see § 48 above).

238. However, the charges against the applicants were related to an action within the scope of the coup attempt of 15 July which led to the declaration of a state of emergency in Turkey. The applicants were arrested on the night of the coup attempt on the basis of the allegation that they were involved in an activity within the scope of the coup attempt, and they were detained two days after their arrest. In this case, it appears that the charges on the basis of which the applicants were arrested were directly related to the incidents leading to declaration of the state of emergency.

239. Emergency administration procedures are exceptional administration regimes that are applied in cases where the State, the community life or the public order is under a serious threat or danger. This administration regime can be adopted after the fulfilment of certain procedural requirements. According to Articles 120 and 121 of the Constitution and Article 3 of Law no. 2935, in the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, firstly the National Security Council must meet and submit an opinion to the Government in this respect; then, the Council of Ministers must meet under the chairmanship

of the President of the Republic and proclaim a state of emergency in one or more regions or throughout the country, and lastly the proclamation must be published in the Official Gazette. Furthermore, after the proclamation of a state of emergency, this must immediately be submitted to the GNAT for approval (see §§ 107-108, 111).

240. The measures applied by public authorities against the incidents leading to state of emergency before its proclamation may be reviewed under Article 15 of the Constitution. In this regard, when a severe incident affecting the whole country such as the coup attempt is experienced, it is not possible to immediately take above-mentioned procedural steps for declaring a state of emergency. Considering the incidents occurred during the coup attempt of 15 July, such as the armed raid carried out at the hotel where the President was staying, the armed harassment conducted against the Prime Minister's convoy, and taking hostage of the Chief of the General Staff and the Commanders-in-chief of Armed Forces, the meeting of the National Security Council ─consisting of the President, the Prime Minister, the Chief of the General Staff, the Deputy Prime Ministers, the Minister of Justice, the Minister of National Defence, the Minister of Interior, the Minister of Foreign Affairs, the Commanders of the Turkish Land, Naval and Air Forces and the Commander of the Turkish Gendarmerie Forces─ and subsequently the meeting the Council of Ministers under the chairmanship of the President, and the publication of proclamation of state of emergency took some days (until 21 July 2016).

241. At the time when the incidents leading to the declaration of a state of emergency occurs, which poses a threat against the national security and the public order, the public authorities cannot be expected to remain inactive to eliminate this threat until the declaration of a state of emergency. For this reason, the effect of the measures taken by the public authorities until the completion of the procedural processes concerning the declaration of a state of emergency in the event of an unexpected situation having severe effects, such as coup attempt necessitating the declaration of a state of emergency, on fundamental rights and freedoms must be examined under Article 15 of the Constitution (for the ECtHR's similar judgments on the practices prior to the notification of derogation, see § 160).

242. In this respect, the lawfulness of the applicants' detention will be reviewed under Article 15 of the Constitution. Prior to such review, whether the applicants' detention violated the guarantees set forth in Articles 13, 19 and in other Articles of the Constitution must be determined.

ii. General Principles

243. The Constitutional Court examined the alleged unlawfulness of detention in many judgments and set out the principles concerning the examination methods (see *Mustafa Ali Balbay*, no. 2012/1272, 4/12/2013, §§ 71-75; *Hanefi Avcı*, no. 2013/2814, 18/6/2014, §§ 45-49; *Hikmet Kopar and Others*, §§ 77-84; *Günay Dağ and Others* [the Plenary], no. 2013/1631, 17/12/2015, §§ 154-163; *Erdem Gül and Can Dündar* [the Plenary], no. 2015/18567, 25/2/2016, §§ 62-69; and *Süleyman Bağrıyanık and Others*, cited above, §§ 203-215).

244. It is set forth in Article 19 § 1 of the Constitution that everyone has the right to personal liberty and security. In addition to this, the circumstances in which individuals may deprived of liberty with due process of law laid out in Article 19 §§ 2 and 3 of the Constitution. Accordingly, the right to personal liberty and security may be restricted only in cases where one of the situations laid out in this Article exists (see *Murat Narman,* no. 2012/1137, 2 July 2013, § 42).

245. Similar to the rules provided in the Constitution, it is set out in Article 5 § 1 of the ECHR that everyone has the right to liberty and security and that no one shall be deprived of his liberty save in the cases stated in Article 5 § 1 (a)-(f) (see *Mehmet İlker Başbuğ,* no. 2014/912, 6 March 2014, § 42).

246. The interference with the right to personal liberty and security will lead to a violation of Article 19 of the Constitution in the event that it does not comply with the conditions prescribed in Article 13 of the Constitution where the criteria for restricting fundamental rights and freedoms are provided. For this reason, it must be determined whether the restriction complies with the conditions set out in Article 13 of the Constitution, i.e., being prescribed by law, relying on one or more of the justified reasons provided in Article 19 § 3 of the Constitution, and not being in breach of the principle of proportionality (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53-54).

247. Article 13 of the Constitution provides that fundamental rights and freedoms may be restricted only by law. On the other hand, it is set out in Article 19 of the Constitution that the procedures and conditions under which the right to personal liberty and security may be restricted must be prescribed by law. Accordingly, the requirement of "lawfulness" as regards the restriction of all fundamental rights and freedoms, which is provided in Article 13 of the Constitution, is also set out in Article 19 in terms of the right to personal liberty and security. In this respect, it is necessary in accordance with Articles 13 and 19 of the Constitution, which are compatible with each other, that the measure of arrest as an

interference with personal liberty must have a legal basis (see *Murat Narman*, cited above, § 43; and *Halas Aslan*, cited above, § 55).

248. On the other hand, it is provided in Article 13 of the Constitution that fundamental rights and freedoms may be restricted only in conformity with the reasons mentioned in the relevant articles of the Constitution. The individuals who may be detained as a restriction to their personal liberty and security, the cases in which a detention order may be given, and the authorities who may give a detention order are explained in Article 19 § 3 of the Constitution. According to the Article, individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge for the purposes of preventing escape or preventing tampering with evidence, as well as in other circumstances prescribed by law and necessitating detention (see *Halas Aslan*, cited above, § 57).

249. Accordingly, detention of a person primarily depends on the presence of a strong indication of having committed a crime. This is a *sine qua non* sought for detention. For this, it is necessary to support an allegation with plausible evidence which can be considered as strong. The nature of the cases and information which can be considered as convincing evidence is to a large extent based on the peculiar conditions of the concrete case (see *Mustafa Ali Balbay*, cited above, § 72).

250. For an initial detention, it may not always be possible to present all evidence indicating that there is a strong suspicion of having committed offence. Another purpose of detention is to take the criminal investigation or prosecution forward by means of verifying or refuting the suspicions against the relevant person (see *Dursun Çiçek*, no. 2012/1108, 16 July 2014, § 87). Therefore, it is not absolutely necessary to require that the sufficient evidence have been collected in the course of arrest or detention. The facts which will form a basis for criminal charge must not be assessed at the same level with the facts that will be discussed at the subsequent stages of the criminal proceedings and constitute a basis for conviction (see *Mustafa Ali Balbay*, cited above, § 73).

251. It is also provided in Article 19 of the Constitution that an individual may be detained for the purpose of preventing "escape" or "tampering with evidence". However, the Constitution-maker, by using the expression of "*…as well as in other circumstances prescribed by law and necessitating detention*", points out that the grounds for detention are not limited to those set forth in the Constitution and sets forth that the grounds for detention other than those provided in the relevant Article can only be prescribed by law. Accordingly,

the Constitution grants discretion to the legislator to determine the legal grounds for detention (see *Halas Aslan*, cited above, § 58).

252. Article 100 of Law no. 5271, where the grounds for detention are regulated, provides that individuals may only be detained if there are facts indicating that there is a strong suspicion of having committed an offence and there is a ground for detention. The grounds for detention are also set out in the same Article. According to this, detention may be ordered in cases where the suspect or accused escapes or hides or there are concrete facts which raises the suspicion of escape or where the behaviours of the suspect or accused tend to show the existence of a strong suspicion of tampering with evidence or attempting to put an unlawful pressure on witnesses, victims or other individuals. In the relevant Article, the offences regarding which the ground for arrest may be deemed to exist *ipso facto* are enlisted, provided that there exists a strong suspicion of having committed those offenses (see *Ramazan Aras*, no. 2012/239, 2 July 2013, § 46; and *Halas Aslan*, cited above, § 59).

253. It is also set out in Article 13 of the Constitution that the restrictions on fundamental rights and freedoms cannot be contrary to the "principle of proportionality". The expression of "*requiring detention*" set out in Article 19 § 3 of the Constitution points out that detention must be proportionate. In parallel with the constitutional provisions, it is provided in Article 100 of Law no. 5371 that no detention shall be ordered if the detention is not proportionate to the significance of the case, expected punishment or security measure (see *Halas Aslan*, cited above, § 72).

254. The aim of the principle of proportionality is to prevent the unnecessary restriction of fundamental rights and freedoms. In accordance with the judgments of the Constitutional Court, the principle of proportionality, which requires that there must be a reasonable relation between the aim and the means, in other words, a fair balance must be struck between the restriction and the interest it provides, has three sub-principles in the examination of the relation between the restrictive measure and the purpose of the restriction: "appropriateness" that is to determine whether the measure is appropriate for reaching the purpose of the restriction, "necessity" that seeks to determine whether the restrictive measure is necessary for reaching the purpose of the restriction and for the democratic social order; and "proportionality" that determines whether the purpose and the means are proportionate to each other and in this respect whether they impose a disproportionate obligation or not (see E.2013/57, K.2013/162, 26 December 2013).

255. It is primarily the duty of the judicial authorities, which implements the detention measure, to respect the "principle of proportionality" set forth in Article 13 of the Constitution. Therefore, whether a detention measure implemented within the scope of a criminal investigation or prosecution is proportionate or not can primarily be determined on the basis of the grounds of the detention order (see *Murat Narman*, cited above, § 62). The detention of a person through a court order which is completely devoid of statement of reasoning is unacceptable. A suspect or accused may be detained by showing justifications which legitimize detention, however, giving a detention order through extremely short justifications and without relying on legal provisions cannot be considered as such (see *Hanefi Avcı*, cited above, § 70).

256. In the justifications of the decisions on detention, the prerequisite of the detention which is "existence of a strong indication that the person committed the imputed offence", as well as, "the grounds for detention" must be set forth. This is also set out in Article 101 § 2 of Law no. 5271 where detention orders are regulated. Accordingly, the evidence showing that there is a strong suspicion of having committed an offence, that there are grounds for detention, and that the detention measure is proportionate will be justified with concrete facts and must be expressly stated in detention orders (see *Halas Aslan*, cited above, § 75).

257. For an initial detention, it may be sufficient, by the very nature of the case, to present abstract grounds for detention set forth in the Constitution and the Law (see *Halas Aslan*, cited above, § 77). On the other hand, it must be examined whether the preventive measures alternative to detention are sufficient in accordance with the principle of proportionality, in the most general sense, for ensuring the legitimate purpose of the proper administration of justice. The obligations imposed by virtue of conditional bail, which are set forth in Article 109 of Law no. 5271, are the preventive measures that have less effects on fundamental rights and freedoms compared to detention. Accordingly, for a detention to be proportionate, it must be set forth in detention orders why the measures of conditional bail are not sufficient in terms of the legitimate aim to be achieved by detention. This issue is set forth in Article 101 § 1 of Law no. 5271 concerning the detention measures (see *Halas Aslan*, cited above, § 79).

iii. Application of the Principles to the Case

258. Within the scope of an investigation conducted on the basis of the allegation that the applicants took part in an activity as part of the coup attempt, they were detained for the offence of attempting to overthrow the constitutional order under Article 100 of Law no. 5271. In this respect, the applicants' detention that amounts to an interference with their right to personal liberty and security has a legal basis.

259. When the detention orders in respect of the applicants are examined (see 81 above), it is understood that detention of the applicants ─an interference with their right to personal liberty and security─ ordered by the Judge's Office on the basis of the strong suspicion of having committed an offence and on the grounds for detention has a legitimate aim as set forth in the Constitution and the Law.

260. Within the scope of the right to personal liberty and security of person, the most significant element of the judicial review of the first detention is the existence of "strong indication" of having committed an offence, which is specified as one of the requisite conditions of having recourse to detention measure in Article 19 § 3 of the Constitution. In that regard, the existence of serious indication of having committed an offence suffices for the first detention of a person (see *Hikmet Kopar and Others*, cited above, § 84).

261. When the coups and coup attempts against Turkey are examined, it appears that the places mass media and communications platforms are among the first places seized or wanted to be seized by the coup plotters. That is because, taking under control the mass media and the communication is of vital importance for a successful coup attempt.

262. As a matter of fact, on 15 July 2016 many attacks were carried out by the coup plotters for the purpose of seizing the places which provided mass media and communication services. In this respect, the coup plotters occupied the TRT and issued a coup declaration on behalf of the "Peace at Home Council", as well as, they occupied or attempted to occupy some of the private television channels, and they also carried out attacks against the places from where television broadcasts and internet access were provided. As a matter of fact, the coup plotters who were assigned with the duty of seizing the TURKSAT and the TIB could not reach those places as they were prevented by the people (see § 69 above). The coup plotters occupied the TURKSAT through the military officers whom were dispatched by helicopters and they forced the staff working there to cease the satellite broadcastings, and as they could not succeed, they bombed the TURKSAT campus by fighter aircrafts (see §§ 70-72, 76 above).

263. The fact that the television broadcasting or internet access could not be cut off by the coup plotters during the coup attempt carries a great importance in the failure of the coup. Almost all TV channels made anti-coup broadcastings. Through these broadcastings, many segments of society realized that a coup attempt was being carried out by the members of the FETÖ/PDY that infiltrated into the TAF and that the legitimate State authorities made efforts to suppress this coup attempt. The President invited people, connecting through a videophone system to a number of private TV channels, to take to the streets to prevent the coup, one of the private TV channels broadcasting this speech of the President live was occupied by the coup plotters in the late hours of the night while the live broadcasting was still continuing, and the broadcasting was ceased, and the Turkish people watched this attempt of occupation live. In addition, the statements, images or videos of state and security officials resisting the coup attempt and the images and videos of brutal attacks of coup plotters were disseminated among the people through social media, and the resistance of people against the coup attempt in an organized manner via communicating social media accounts/groups became significantly effective in the failure of the coup.

264. As regards the existence of suspicion of having committed an offence in the present case, the detention order referred to the incident scene, the investigation report, and the applicants' statements (see 81 above). According to the determinations of the investigation authorities, the applicants wanted to enter the campus of TURKSAT occupied by coup plotters, and they were stopped by the police officers at the entrance of the campus. They were arrested after the applicant Burhan Güneş, who had been driving the car, had stated that "they had been called by those inside the campus" and had tried to delete the records on his mobile phone in rush (see § 75 above). The authorities considered "being called by those who were inside the campus" to be a call by the military officers occupying TURKSAT.

265. In addition to that, the applicants stated that they had been residing in various regions outside Ankara and had met at the bus station in Ankara at the evening hours on 15 July and that they had borrowed the car they were driving from a person whose name they did not want to disclose. Although they also stated that they had been moving to join the convoys fighting against the coup, they in fact went to the campus of TURKSAT (located in the Gölbaşı district) which was tens of kilometres away from the provincial centre where anti-coup demonstrations took place (see §§ 73-74 above).

266. Moreover, the suspect U.O. (owner of the car by which the applicants went to TURKSAT) stated to the investigation authorities that *"he met with the applicants at a home*

on the incident day, the applicants left the home by his vehicle, and later on, the applicants were reported in the news that they raided TRT ("the Turkish Radio and Television Corporation") building together with the coup-plotter military officers for interrupting its broadcasting at the night of the coup attempt." One of the military officers occupying TURKSAT, E.U., said in his statement that "*as the TURKSAT personnel did not assist us to stop broadcasting, we were told by our superiors that civilian technicians would arrive from outside to assist us to stop broadcasting"* (see §§ 97, 100). Accordingly, there are strong reasons substantiating the investigation authorities' suspicion that the applicants committed the imputed offences.

267. In addition, it has been established that the applicants, Burhan Güneş and Aydın Yavuz, were users of the "ByLock" application (app), which is the digital platform through which the FETÖ/PDY members maintained secure communication among themselves. Taking into account the technical features of this app, it is comprehensible that the fact that the applicants have and use this app is considered by authorities as a strong indication for their connection with the FETÖ/PDY. As a matter of course, the degree of this indication may vary by concrete incidents, depending on the factors such as whether this app has been actually used by the individual concerned, the manner and frequency of its use, the position of and importance attached to the contacts within the FETÖ/PDY, and the content of messages communicated via this app. Moreover, the competent authorities' assessment that the use of ByLock or having it in electronic/mobile devices constitutes a strong indication of having committed an offence cannot be considered as unfounded or arbitrary. Therefore, it must be concluded that there is, also in this respect, a strong suspicion that the applicants Burhan Güneş and Aydın Yavuz, who are users of this app, had committed the imputed offences.

268. On the other hand, although the pre-requisite of strong suspicion of having committed an offence for detention may exist, it must also be determined whether the impugned detention measure is proportionate or not. The constitutional review on this matter must be made with regard to the detention process and the grounds thereof (see *Erdem Gül and Can Dündar*, cited above, § 79; *Mehmet Baransu (2)*, no. 2015/7231, 17 May 2016, § 136; and *Süleyman Bağrıyanık and Others*, cited above, § 226). At this stage, the Constitutional Court's duty is not to find out the most appropriate measure or means best serving the establishment of justice but to review the constitutionality of the impugned interference (the detention measure in the present case). In this connection, in determining

whether the detention measure implemented during the investigations was proportionate or not within the meaning of Articles 13 and 19 of the Constitution, all circumstances of the case including the general conditions when the detention order was given must be taken into account.

269. In the first place, investigation of the terror offences exposes the public authorities to serious difficulties. Therefore, the right to personal liberty and security must not be interpreted as to make it excessively difficult for the judicial and investigation authorities to deal effectively with crimes ─particularly organized ones─ and the criminals (see *Süleyman Bağrıyanık and Others,* cited above, § 214).

270. Thousands of military officers were involved in the coup attempt during which extremely brutal attacks were carried out, such as armoured attacks against the GNAT and the Presidential Complex by fighter aircrafts and helicopters, armoured attack against the hotel where the President was staying, the firing against the convoy which the Prime Minister's vehicle was in, the hostage of the many senior military officers among whom there was also the Chief of the General Staff, the occupation of many public institutions by force of arms, the recital of the coup declaration on the TRT, the attacks carried out to cut off the television broadcasting or internet access across the country, and the killing or injuring of the persons who took to the streets to resist the coup attempt. In this respect, it can be said that a strong wave of violence and fear spread throughout the country.

271. Considering the fear atmosphere created by the severe incidents that occurred during the coup attempt, the complexity of the structure of the FETÖ/PDY that is regarded as the perpetrator of the coup attempt and the danger posed by this organization, orchestrated criminal or violent acts committed by thousands of FETO/PDY members in an organized manner, the necessity to immediately launch investigations against thousands of people including public officials although they might not be directly involved in the coup attempt, the preventive measures other than detention may not be sufficient for ensuring the gathering of evidence properly and for conducting the investigations in an effective manner.

272. The possibility of escape of the persons who are involved in the coup attempt or who are in connection with FETÖ/PDY─ the terror organization behind the coup attempt─ by taking advantage of the turmoil in its aftermath, and the possibility of tampering with evidence are more likely when compared to the crimes committed during the ordinary times. Besides, the fact that the FETÖ/PDY has organized in almost all public institutions and

organizations within the country, that it has been carrying out activities in more than one hundred and fifty countries, and that it has many important international alliances will greatly facilitate the escape and residence abroad of the persons who are subject to investigation with respect to this organization (for similar assessments, see *Yıldırım Ataş*, no. 2014/4459, 26 October 2016, § 60). As a matter of fact, many suspects who are subject to investigation in this respect have escaped abroad in the course of the investigation process.

273. It is clear that this situation concerning the general conditions after the coup attempt of 15 July does not require automatic detention of all the suspects investigated with respect to the said events. Moreover, the investigating authorities did not resort to the detention measure with respect to all suspects against whom they conducted investigations in relation to the FETÖ/PDY regardless of their involvement in the coup attempt. In this scope, a significant proportion of the suspects (about 2/3) have been released by conditional bail or without any preventive measures or they have not been subjected to any procedures restricting liberty. Similarly, thousands of suspects have been released after their detention (see § 52 above).

274. In the present case, while giving a detention order, the Judge's Office relied on the existence of the suspicion of tampering with evidence, the severity of the sanction set forth in the Law for the offence, the fact that the measure of conditional bail might be insufficient and that detention is proportionate.

275. According to their statements, the applicants residing in İzmir, İstanbul and Gebze arrived at Ankara on 15 July in the evening, one or two hours before the time when the activities within the scope of the coup attempt were started, and they were arrested while trying to enter the TURKSAT campus, which was occupied by the coup plotters, during the time when the clashes had just occurred. The car the applicants used on the night of the incident did not belong to them, and they were unable to provide a reasonable explanation about the person from whom they borrowed the car and the way they received it. It is understood that in the morning after the coup attempt, the accused U.Ö. who was the owner of the car took it from the incident scene by using the spare key of the car without informing the investigating authorities and without taking permission, and that the car was later found by through registry information. In addition to these, "the offence of attempting to overthrow the constitutional order" on the basis of which the applicants were detained requires "aggravated life imprisonment" which is the heaviest punishment set forth in the Turkish legal system. The gravity of the punishment set forth in the Law with respect to the imputed offence constitutes

one of the cases where the suspicion of fleeing arises (see *Hüseyin Burçak*, no. 2014/474, 3 February 2016, § 61). Furthermore, it was understood that on the night of the incident the applicant Aydın Yavuz escaped from the car, where he was being held handcuffed, by taking advantage of the turmoil occurred due to the bombing of the TURKSAT by the fighter aircrafts and that the next day he was arrested by the gendarmerie at a petrol station and handed over to the police.

276. Considering the general circumstances in which the applicants were detained and the particular circumstances of the present case together, it is understood that the legal grounds for the applicants' detention, the risk of tampering with evidence and suspicion of fleeing have sufficient factual basis. Regard being had to the fact that the applicants were arrested while they were trying to enter the TURKSAT campus on the night when the coup attempt occurred and that they were held in custody for two days and then the Judge's Office ordered their detention, there is no reason to conclude that their detention during the investigation process was not "necessary" as an element of the principle of proportionality.

277. For the reasons explained above, as it is clear that there is no violation as regards the alleged unlawfulness of the applicants' detention, this part of the application must be declared inadmissible for being manifestly ill-founded.

278. Accordingly, as it is concluded that the interference with the applicants' right to personal liberty and security by means of detention does not constitute a violation of the guarantees set forth in the Constitution (Articles 13 and 19), no further examination is required with respect to the criteria provided in Article 15 of the Constitution.

2. Alleged Unreasonable Length of Detention

a. The Applicants' Allegations and the Observations of the Ministry

279. The applicants maintained that the extension of their detentions lacked justification and that in this respect they continued to be deprived of their liberty arbitrarily. In this connection, the applicants alleged that their right to a fair trial, right to an effective remedy, right to personal liberty and security, and the principle of equality had been violated, and they requested their release and sought compensation in this respect.

232. In its observations, the Ministry did not make any explanations as to the applicants' allegations under this heading.

b. The Constitutional Court's Assessment

281. Article 19 § 7 of the Constitution reads as follows:

"Persons under detention shall have the right to request trial within a reasonable time and to be released during investigation or prosecution. Release may be conditioned by a guarantee as to ensure the presence of the person at the trial proceedings or the execution of the court sentence."

282. The Constitutional Court is not bound by the legal characterization of the facts by the applicants, but the Court makes such assessment itself (see *Tahir Canan*, § 16). The applicants' allegations that the extension of their detention lacked justification and, in this respect, the alleged length of their detention must be examined within the scope of the right to personal liberty and security safeguarded in Article 19 of the Constitution.

i. Enforceability

283. The suspected offence resulting in the applicants' detention concerned an act relating to the coup attempt of 15 July, which was the primary incident that led to the declaration of the state of emergency in Turkey. The state of emergency was in force during the period when the applicants were detained on remand. In this respect, whether the length of the applicants' detention exceeded the reasonable period is to be examined under Article 15 of the Constitution. During this examination, it will be first determined whether the length of the applicants' detention was in breach of the safeguards enshrined in Articles 13 and 19 and the other Articles of the Constitution.

ii. General Principles

284. The Constitutional Court examined the alleged unreasonable length of detention in many judgments and set out the principles concerning the examination methods (see *Murat Narman*, cited above, §§ 60-66; *Mustafa Ali Balbay*, cited above, §§ 102-106; *Hanefi Avcı*, cited above, §§ 64-73; *Hüseyin Burçak*, cited above, §§ 42-61; and *Halas Aslan*, cited above, §§ 51-91).

285. According to Article 19 § 7 of the Constitution, persons detained within the scope of a criminal investigation shall have the right to request trial within a reasonable time and to the right to be released during investigation or prosecution process. "The right to request trial within a reasonable time" and "the right to request to be released" safeguarded in the same paragraph must not be regarded as an alternative to each other but complementary. (see *Murat Narman*, cited above, § 60; and *Halas Aslan*, cited above, § 66).

286. In accordance with "the right to request to be released" safeguarded in Article 19 of the Constitution, persons detained within the scope of a criminal investigation or prosecution shall have the right to request from the relevant judicial authorities to be released. As a reflection of this right, it is provided in Article 104 § 1 of Law no. 5271 that the suspect or the accused is entitled to request to be released at any stage of the investigation and the prosecution proceedings. It is also set forth in Article 108 of the same Law that detention must be examined *ex officio* during the investigation and prosecution proceedings within certaim time intervals. It is also a requirement of Article 19 § 7 of the Constitution that the judicial authorities must explain the legal grounds of detention during the examinations carried out either *ex officio* or upon the request of the person to be released at any stage of detention (see *Halas Aslan*, cited above, § 67).

287. It is also stated in the Article that detained persons are entitled to request a "trial within a reasonable time". In general, not concluding a trial within a reasonable time falls under the scope of the right to a fair trial safeguarded in Article 36 of the Constitution. According to Article 19 of the Constitution in which the guarantees as to the restriction of the individuals' physical liberty are set out (see *Galip Öğüt* [the Plenary], no. 2014/5863, 1 March 2017, § 35), it is required in the first place that the length of detention must not exceed the reasonable time. The relevant Article also points out that detention pending trial must be concluded within a reasonable time. A person who is detained pending trial has much more interest, by its very nature, in the reasonable length of the proceedings when compared to others. In this connection, the "right to be tried within a reasonable time" of a detained person, which is set forth in Article 19 § 7 of the Constitution, provides a greater protection than the right to be tried within a reasonable time within the scope of the right to a fair trial guaranteed in Article 36 of the Constitution. Accordingly, the investigation and prosecution proceedings carried out while the suspect/accused is being held in detention must be concluded swiftly. In this respect, all public authorities, being in the first place the public prosecutors' offices and the courts, must act in due diligence to conclude swiftly the investigation/prosecution proceedings carried out while the suspect/accused is being held in detention, in compliance with the guarantees arising from the right to a fair trial. The obligation to act in due diligence is also necessary for not being arbitrary of the continuation of a person's detention pending trial, and thereby maintaining the legitimate aim in the interference with the personal liberty. In this respect, the required due care concerning the investigation/prosecution proceedings in

respect of detained persons is guaranteed by Article 19 § 7 of the Constitution (see *Halas Aslan*, §§ 68-71).

288. On the other hand, whether a detention measure is proportionate or not may be determined firstly on the basis of the grounds of the detention orders. The existence of "a strong indication of having committed the crime" as a prerequisite for detention and "the grounds for detention" must be set forth in the justifications of detention orders. As a matter of fact, according to Article 101 of Law no. 5271, the evidence showing that there is a strong suspicion of having committed an offence, that there are grounds for detention and that the detention measure is proportionate shall be justified with concrete facts and shall be explicitly indicated in the decisions on detention, continuation of detention, and rejection of a request to be released (see *Halas Aslan*, §§ 74-75).

289. The strong suspicion of having committed an offence is a prerequisite for detention and must exist at all stages of detention. Although for an initial detention it is not always possible to put forward the existence of a strong suspicion of having committed an offence, the evidence that will justify or eliminate the suspicion of having committed an offence will be accessed in the later stages of investigation/prosecution. For this reason, in the decisions on the continuation of detention after the passage of a certain period of time, the existence of a strong suspicion of having committed an offence must be explained with concrete facts. Where the facts showing that there is a strong suspicion of the suspects' having committed the imputed offence have disappeared at any stage of detention, the detention cannot be said to have a legitimate aim (see *Halas Aslan*, cited above, § 76).

290. Although for an initial detention, it may be sufficient, by the very nature of the case, to indicate abstractly the grounds for detention set forth in the Constitution and the Law, as the evidence is collected during investigation/prosecution proceedings, the possibility to tamper with evidence disappears or gets difficult. Furthermore, it can also be said that the risk of absconding of the suspect or accused diminishes since the detention term shall be deducted from the sentence to be imposed at the end of the proceedings. For these reasons, in the decisions on the continuation of detention exceeding a certain period, it is not sufficient to indicate the abstract grounds for detention (see *Hanefi Avcı*, cited above, § 70).

291. In such decisions, the grounds for detention must be explained on the basis of concrete facts, and it must also be explained why these reasons are necessary in the circumstances of the case. As the detention continues, the burden imposed on the individual

increases whereas the legitimate aim of the detention weakens. Therefore, the general circumstances of the case as well as the particular situation of the detainee must be taken into account in the decisions on the continuation of the detention, and, in this sense, the grounds for detention must be personalized (see *Hanefi Avcı*, cited above, § 84). It is also necessary in the detention decisions to explain why the measures of conditional bail ─having less effect on fundamental rights and freedoms when compared to detention─ are insufficient. Despite the "presumption of innocence" which is one of the basic principles of the law and safeguarded in Article 38 § 4 of the Constitution as "*No one shall be considered guilty until proven guilty in a court of law*", the continuation of detention may only be justified in cases where it is demonstrated with evidence that the detention of the person for the purpose of proper administration of justice prevails the right to liberty and security (see *Halas Aslan*, cited above, § 78).

292. Thus, the question whether the length of detention is reasonable or not cannot be addressed under general principles. This examination must be made according to the particular circumstances of each case (see *Murat Narman*, cited above, § 61).

293. In the evaluation of the reasonable period, the beginning of the period is the date on which the applicant was arrested and taken into custody for the first time; however, in cases where the applicant was directly detained, the date of detention in question is the beginning of the period. The end of the period is, as a rule, the date on which the person is released or the date on which the judgment is rendered by the first instance court (see *Murat Narman*, cited above, § 66).

294. In the individual applications lodged on the basis of the complaints that the detention has been prolonged or exceeded a reasonable period, it is the duty of the Constitutional Court to examine the grounds explained in the decisions of detention and the decisions on the continuation of the detention rendered by the inferior courts and to examine whether these grounds are relevant and sufficient in the particular circumstances of the case, also considering if the required due diligence ─explained above─ is respected or not. If such review leads to conclusion that the grounds for detention are not relevant and sufficient to justify the legal grounds for the restriction of the applicants' liberty or that investigation/prosecution proceedings are prolonged due to the lack of due care on the part of public authorities, it shall be found that length of detention has exceeded the reasonable period (see *Halas Aslan*, cited above, §§ 82-83).

iii. Application of the Principles to the Case

295. On 16 July 2016 the applicants were taken into custody, and they were detained by the decision of the Gölbaşı Magistrate Judge's Office, dated 18 July 2016. As of the date of examination of the individual application, the applicants' detention on remand has been ongoing. Accordingly, the applicants have been detained for approximately 11 months.

296. The applicants, who have been accused of entering the TURKSAT campus that was occupied by the coup plotters within the scope of the coup attempt of 15 July in order to cease the satellite broadcasting, have been detained in this respect for the offence of "attempting to overthrow the constitutional order". It was clearly pointed out by the Magistrate Judges' Offices during the investigation and by the 14th Chamber of the Ankara Assize Court during the prosecution proceedings that there was a strong suspicion of the applicants' having committed the imputed offence. In the examination of the alleged unlawfulness of the applicants' detention, the Constitutional Court has concluded that there are strong indications that the applicants have committed the offence (see §§ 264-267). Considering the content of the evidence referred to in the decisions on detention and continuation of detention with respect to the applicants, it is concluded that court decisions are explanatory and sufficient in terms of the existence of the strong suspicion of having committed offence, which is a prerequisite for detention.

297. Upon examination of those court decisions, it is concluded that these decisions were based on the factual and legal grounds such as the risk of absconding, the risk of tampering with evidence, the gravity of the sanction arising from the imputed offence, that the imputed offence is among the offences regarding which the ground for arrest may be deemed to exist *ipso facto* under Article 100 § 3 of Law no. 5271, that the measure of conditional bail will not be sufficient and that the detention measure is proportionate (see §§ 83, 86, 92; 102-104 above). Considering the nature of the charges and the circumstances of the facts examined during the investigation/prosecution proceedings as a whole, it has been also concluded that the reasons provided for the continuation of detention sufficiently demonstrates that it is based on legal grounds and legitimate aims at this stage of the proceedings.

298. On the other hand, in the investigation carried out into the attack aimed at ceasing the television broadcasting by seizing the TURKSAT, the investigation authorities took actions against 12 military officers who had allegedly occupied the TURKSAT, against

the applicants, and against a suspect who was the owner of the car used by the applicants on the date of the incident. In this scope, besides the applicants, the defence of some other suspects who had not escaped were taken, the professional positions and the backgrounds of the suspects were investigated, evidence with respect to the bank records of the applicants and their use of secret communication programs were collected, and the statements of many complainants were taken. Furthermore, autopsy reports of those who had lost their lives during the incident and medical reports of those injured (indicating the type of injuries) were requested from the Forensic Medicine Institute, expert reports pertaining to the criminal examinations carried out on the evidence collected from the incident scene were obtained, a footage was examined, suspects were identified, the signals received from the GSM lines used by the suspects were determined and examined, and the incident scene investigation reports were drawn up. Accordingly, the whole investigation process was concluded within approximately 5 months and 15 days after the coup attempt, the applicants were prosecuted by the indictment issued by the Ankara Chief Public Prosecutor's Office on 2 January 2017. Within the scope of the proceedings, the first hearing was held on 4 April 2017 and the applicants' defence were taken. Evidence were collected during the hearings held until 8 May 2017, and on this date the public prosecutor submitted to the Court his written opinion as to merits (see §§ 103-104 above). In this respect, it has been concluded that the investigation and prosecution proceedings are conducted with due diligence.

299. Regard being had to the fact that the reasoning of the decisions on the continuation of the applicants' detention are relevant and sufficient to substantiate the legal grounds for the applicants' being deprived of their liberties and that the investigation and prosecution proceedings did not lack due diligence, it has been concluded that the detention period of approximately 11 months is reasonable.

300. In view of the reasons explained above, as it is clear that there has been no violation with respect to the alleged unreasonable length of the applicants' detention, this part of the application must be declared inadmissible *for being manifestly ill-founded*.

301. Accordingly, as it is concluded that the interference with the applicants' right to personal liberty and security by ordering the continuation of their detention is not contrary to the safeguards provided in Articles 13 and 19 of the Constitution, no further examination is required under Article 15 of the Constitution.

3. Alleged Restriction of the Access to the Investigation File

a. The Applicants' Allegations and the Observations of the Ministry

302. The applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy maintained that their right to defence was interfered due to the restriction order given on account of the confidentiality of the investigation file. In this respect the applicants alleged that their right to a fair trial was violated.

303. In its observations, the Ministry submitted the judgments of the ECtHR and pointed out that the suspect or the accused or defence lawyers must have access to the main information and documents relied on for detention order. According to the Ministry, in the present case the Magistrate Judge's Office read out to the applicants the information and the documents in the case file on the basis of which they were detained, as well as, the investigation document. The Ministry also drew attention to the fact that the applicants gave detailed statements concerning the offences they were charged with at the police station. Accordingly, as the applicants had information about the evidence on the basis of which they were charged, they could object to these evidence effectively.

b. The Constitutional Court's Assessment

304. Article 19 § 8 of the Constitution reads as follows:

"Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful."

305. The Constitutional Court is not bound by the legal characterization of the facts by the applicants, but the Court makes such assessment itself (see *Tahir Canan*, § 16). In this respect, the applicants' allegations in this part must be examined within the scope of the right to personal liberty and security safeguarded in Article 19 of the Constitution.

i. Enforceability

306. As the restriction order against which the applicants complained was issued within the scope of an investigation conducted on the basis of their alleged participation in an activity as part of the coup attempt leading to the declaration of the state of emergency, the lawfulness of this order, in other words, its effect on the right to personal liberty and security will be examined under Article 15 of the Constitution. Within this scope, it will be first

established whether the restriction order and its enforcement are contrary to the guarantees provided in Article 19 of the Constitution.

ii. General Principles

307. The Constitutional Court examined in many judgments the effect of the restriction orders issued in accordance with Article 153 of Law no. 5271 on the right to personal liberty and security and, in particular, the right of objection of the detainees to their detention, and the Court determined in this judgments the general principles concerning the examination methods (see *Hikmet Kopar and Others*, cited above, §§ 121-122; *Günay Dağ and Others*, cited above, §§ 168-176; *Hidayet Karaca* [the Plenary], no. 2015/144, 14 July 2015, §§ 105-107; *Erdem Gül and Can Dündar*, cited above, §§ 46-48; *Süleyman Bağrıyanık and Others*, cited above, §§ 248-257).

308. It is provided in Article 19 § 4 of the Constitution that individuals arrested or detained shall be promptly notified in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them; in cases of offences committed collectively this notification shall be made, at the latest, before the individual is brought before a judge (*Günay Dağ and Others,* cited above, § 168).

309. Furthermore, pursuant to Article 19 § 8 of the Constitution, persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of the proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful. Under this procedure, although it is not possible to provide all safeguards of the right to a fair trial, the concrete safeguards complying with the conditions of the alleged detention must be set forth in a judicial decision (see *Mehmet Haberal*, no. 2012/849, 4 December 2013, §§ 122-123).

310. At the investigation phase, access to certain evidence may be restricted for the reasons such as, in particular, protecting the fundamental rights of the third parties, protecting the public interest or securing the investigation methods. Therefore, restriction of the lawyer's right to examine the case file for securing the effectiveness of the investigation proceedings cannot be considered necessary for the democratic social order. However, the restriction to be imposed on the right to access to the case file must be proportionate to the aim pursued and must not prevent the use of the right to defence adequately (see the Court, E.2014/195, K.2015/116, 23 December 2015, § 107).

311. Arrested persons must be told the legal and factual grounds for the arrest in a simple and nontechnical language that they can understand so that, if they deem necessary, they can to apply to the court to challenge its lawfulness in accordance with Article 19 § 8 of the Constitution. Article 19 § 4 of the Constitution does not require that the information provided during arrest or detention contains a full list of the offences the arrested or detained person is charged with. In other words, it does not necessitate that all evidence on the basis of which he is accused be notified or explained (see *Günay Dağ and Others,* § 175).

312. In the event that the applicant is questioned about the content of the restricted documents or that the applicant referred to the content of such documents within the scope of the objection to detention order, it must be accepted that the applicant had access to the documents on the basis of which the detention was ordered, that the applicant had sufficient information about the content of the documents and therefore could adequately challenge the the grounds for detention. In such a case, the detainee has sufficient information about the content of the documents that the detention is based on (see *Hidayet Karaca*, § 107).

iii. Application of the Principles to the Case

313. Pursuant to Article 153 § 2 of Law no. 5271, Gölbaşı Magistrate Judge's Office ordered on 16 July 2016 the restriction of the applicants' lawyers' access to the investigation file on the ground that his review of the file or taking copies of the documents would endanger the purpose of the investigation.

314. By a petition dated 14 December 2016, the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy requested to be released and that the restriction order in question be lifted. However, while the applicants' request to be released was dismissed with the decision of the Ankara 4th Magistrate Judge's Office, dated 26 December 2016, no decision was rendered with respect to their request for lifting the restriction order (see §§ 90-92 above). Although there is no document or information as to whether the restriction order was later lifted or not, on 13 January 2017 when the 14th Chamber of the Ankara Assize Court accepted the indictment, the restriction automatically ended in accordance with Article 153 § 4 of Law no. 5271.

315. The charges against the applicants are based on the fact that they went to the TURKSAT campus, which was occupied by the coup plotters during the coup attempt of 15 July, to cease satellite broadcasts. In the examination of the applicants' statements taken by the police, it was seen that the applicants were given information on the offences they were charged with and they were asked questions about the acts on account of which they were

accused, that they submitted their defence against the imputed offences together with their lawyers, that the applicants denied the accusations against them and that they denied that they went to the TURKSAT to help cease the satellite broadcasting.

316. It was also understood that during the statement taking process before the Gölbaşı Magistrate Judge's Office, the investigation documents and the other information in the investigation file were read out to the applicants in the presence of their lawyers. After being informed about the information and documents pertaining to the charges against them, they made verbal defence before the judge in the presence of their lawyers. In their defence submissions, they denied the accusations once again.

317. Furthermore, it was understood that in their petitions to object to their detention, the applicants submitted their arguments in detail. Besides, the applicants did not complain about the restriction of their access to their records of statement, expert reports, and the records of other judicial proceedings during which they were entitled to be present and in this respect about the violation of Article 153 § 3 of Law no. 5271. Accordingly, it is understood that the applicants and their lawyers had access to the information on the basis of which they the detention is ordered.

318. In this respect, considering the fact that the main elements forming a basis for the accusations and the information on the basis of which the lawfulness of detention was assessed were notified to the applicants or to their lawyers and that the applicants were provided with the opportunity to make their defence accordingly, it could not be accepted that the applicants could not effectively object to their detention due to the restriction order imposed during the investigation process that lasted a few months (for a similar assessment, see *Deniz Özfirat*, no. 2013/7929, 1 December 2015, § 91).

319. For the reasons explained above, as it is clear that there is no violation in terms of the alleged restriction of the right to defence of the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy in the context of the objection to their detention due to the restriction order, this part of the application must be declared inadmissible *for being manifestly ill-founded.*

320. Accordingly, as it is seen that the interference with the applicants' right to personal liberty and security by the restriction order within the investigation file is not contrary to the safeguards provided in the Constitution (in particular, Article 19), no further examination is required under Article 15 of the Constitution.

4. Alleged Review of Detention without Hearing

a. The Applicants' Allegations and the Observations of the Ministry

321. The applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy maintained that the review of their detention and of their objection to detention was carried out without holding a hearing, which was in breach of their right to fair trial.

322. In its observations, the Ministry pointed out that in accordance with the Decree Laws nos. 667 and 668, decisions concerning the review of detention, the objection to detention and the request for release may be given without holding a hearing. The Ministry notes that given the notification of derogation made under Article 15 of the Constitution and Article 15 of the ECHR, the number of persons taken into custody after the coup attempt and against whom judicial action was taken, the high number of the investigations conducted and the fact that many members of the judiciary were suspended from their duties due to their links with the FETÖ/PDY and/or that they were dismissed, these arrangements have been in compliance with the international obligations and within the extent required by the exigencies of the situation.

b. The Constitutional Court's Assessment

323. The Constitutional Court is not bound by the legal characterization of the facts by the applicants, but the Court makes such assessment itself (see *Tahir Canan*, § 16). In this respect, the applicants' allegations in this part must be examined within the scope of Article 19 § 8 of the Constitution.

i. Enforceability

324. The accusation on the basis of which the applicants were detained is related to an act carried out within the scope of the coup attempt of 15 July that was the main incident leading to the declaration of the state of emergency in Turkey. During the applicants' detention period, the state of emergency was in force. In this respect, the effect of the review of the applicants' detention without holding a hearing on the right to personal liberty and security will be examined under Article 15 of the Constitution. In the course of this examination, it will be first established whether the manner in which the review of detention was carried out was in breach of the safeguards provided in Article 19 of the Constitution.

ii. Admissibility

325. This part of the application must be declared admissible for not being manifestly ill-founded and for lack of other grounds for inadmissibility.

iii. Merits

(1) General Principles

326. The Constitutional Court examined the allegations regarding the procedure to be applied in the review of detention and objections to detention in many judgments, and it indicated in these judgments the principles concerning the method of review (see *Firas Aslan and Hebat Aslan*, no. 2012/1158, 21 November 2013, §§ 64-78; *Mehmet Haberal*, cited above, §§ 122-132; *Mehmet Halim Oral*, no. 2012/1221, 16 October 2014, §§ 50-54; *Ferit Çelik*, no. 2012/1220, 10 December 2014, §§ 51-52; *Hikmet Yaygın*, no. 2013/1279, 30 December 2014, §§ 29-36; *Emrah Oğuz*, no. 2013/1755, 25 March 2015, §§ 43-54; *Ulaş Kaya and Adnan Ataman*, no. 2013/4128, 18 November 2015, §§ 53-73; and *Süleyman Bağrıyanık and Others*, cited above, §§ 265-270).

327. Pursuant to Article 19 § 8 of the Constitution, persons whose liberties are restricted are entitled to apply to the competent judicial authority for speedy conclusion of the proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful (see § 309 above). As no distinction was set forth in the relevant provision with respect to the grounds of restriction of liberty, the right to apply to the competent judicial authority naturally covers the deprivation of liberty by means of detention on account of the suspicion of having committed offence (see *Mustafa Başer ve Metin Özçelik*, cited above, § 165).

328. As an application for release must be lodged with the competent judicial authority, this right can only be enjoyed upon a request. Accordingly, the right to apply to the competent judicial authority is a guarantee for those deprived of their liberty due to criminal charge, and this guarantee must be afforded not only in terms of the request for release but it must also be afforded during the examination of the objections against detention, the continuation of detention and dismissal of the request for release (see *Mehmet Haberal*, cited above, § 123).

329. However, during an *ex officio* review of detention of the suspect or the accused without a request under Article 108 of Law no. 5271, no assessment shall be made within the scope of these persons' right to apply to the competent judicial authority. Therefore, such reviews do not fall into the scope of Article 19 § 8 of the Constitution (see *Firas Aslan and Hebat Aslan*, cited above, § 32; *Faik Özgür Erol and Others*, no. 2013/6160, 2 December 2015 § 24).

330. As it is set forth in Article 19 § 8 of the Constitution that the requests for release must be lodged with a judicial authority, it is, by its very nature, a judicial review. In this judicial review, safeguards of the right to a fair trial that is compatible with the nature and conditions of detention must be available. In this respect, the principles of "equality of arms" and "adversarial proceedings" must be respected in reviewing the continuation of detention or the request to be released (see *Hikmet Yaygın*, cited above, §§ 29-30).

331. The principle of equality of arms means that parties of a legal action shall be subject to the same conditions in terms of procedural rights and that both parties shall be afforded equal opportunities to submit allegations and arguments without any favour to any. Even if an advantage afforded to one of the parties does not result in an unfavourable outcome against the other party, the principle of equality of arms is deemed to have been breached in such case (see *Bülent Karataş,* no. 2013/6428, 26 June 2014, § 70).

332. The principle of adversarial proceedings entails affording of the opportunity to the parties to have information about the case-file and to comment in respect thereof and therefore active involvement of the parties in the proceedings in its entirety. This principle is highly correlated with the principle of equality of arms, and these two rights are complementary in nature. This is because in case of breach of the principle of adversarial proceedings, the balance between the parties for defending their case shall be impaired (*Bülent Karataş,* cited-above, § 71).

333. One of the fundamental safeguards deriving from Article 19 § 8 is the right to request for an effective review of detention before a judge. Indeed, a very high importance must be attached to this safeguard considering that this is the primary legal tool for a person deprived of his liberty to effectively challenge his or her detention. In this way, a detained person is given the opportunity to discuss the reasons led to his/her detention and the assessment of the investigation authorities in person before a judge or a court. Therefore, a detained person should be able to exercise this right by being heard before a judge at certain reasonable intervals (see *Firas Aslan and Hebat Aslan,* cited-above, § 66¸and *Süleyman Bağrıyanık and others,* § 267).

334. As a reflection of this safeguard, Article 105 of Law no. 5271 sets out that while deciding on the suspect's or the accused's request for release at a hearing during the investigation or prosecution phases, the suspect, the accused or the defence counsel and the

public prosecutor shall be heard. Article 108 thereof also envisages that in the assessment of the question of continuation of the detention, the suspect or his defence counsel is to be heard. Moreover, decisions on detention that is rendered either e*x officio* or upon request within the scope of Article 101 § 5 or Article 267 may be challenged before a court (see *Süleyman Bağrıyanık and others,* § 269). As regards the review of detention orders, Article 271 sets forth that the challenge shall be in principle concluded without a hearing; however, if deemed necessary, the public prosecutor and subsequently the defence counsel may be heard. Accordingly, in case that a review of detention or objection to detention is made through a hearing, the suspect, the accused or the defence counsel must be heard.

335. However, holding a hearing for reviewing objections to detention orders or assessing every request for release may lead to congestion of the criminal justice system. Therefore, safeguards enshrined in the Constitution as to the review procedure do not necessitate a hearing for review of every single objection to detention unless the special circumstances require otherwise.

(2) Implementation of the Principles in the Concrete Case

336. On 18 July 2016, the applicants were heard by the Gölbaşı Magistrate Judge's Office. At this stage, the applicants and their defence counsels orally submitted their defence arguments with respect to the accusations brought against them and to the detention request of the prosecutor's office.

337. It appears that at the investigation stage the reviews of the applicants' detention ─*ex officio* and upon the applicants' request─ were conducted without a hearing. The applicants' objections to detention orders and to continuation of detention were concluded by the competent authorities over the case-file. Nor does the observation submitted by the Ministry include any information indicating that reviews of detention were carried out, at the investigation stage, by holding a hearing.

338. In this respect, at the investigation stage, the applicants' detention was reviewed and their objections to detention were assessed without holding a hearing.

339. The indictment of 21 January 2017 issued by the Ankara Chief Public Prosecutor's Office in respect of the applicants was admitted by the 14th Chamber of the Ankara Assize Court on 13 January 2017. The court then *ex officio* reviewed the applicant's

detention status in the preliminary examination carried out at the same date. This examination was also made over the case-file. Moreover, it appears that the court *ex officio* reviewed the applicants' detention status over the case-file on 9 February and 9 March 2017 and ordered the continuation of their detention.

340. Within the scope of the proceedings conducted against the applicants, the first hearing was held on 4 April 2017. The applicants and their defence counsels orally submitted their request for release during the hearing held on 6 April 2017. The court dismissed the applicants' request for release and ordered the continuation of their detention in the same hearing.

341. From 18 July 2016 when the applicants' detention was ordered to 6 April 2017, the applicants' detention status was ordered to continue by virtue of the decisions rendered upon the reviews carried out over the case-file without holding a hearing. The applicants did not have the opportunity to orally submit their objections to detention, their allegations with respect to the content and legal qualification of the evidence forming the basis for their detention, their counter-statements with respect to the considerations and assessments in their favour or to their detriment, and their requests for release before a judge or court. Accordingly, review of the applicants' detention within the scope of the imputed offences without holding a hearing between the above-mentioned dates and their deprivation of liberty for 8 months and 18 days under such a procedure do not comply with the principles of "equality of arms" and "adversarial proceedings".

342. In its previous judgment, the Constitutional Court held that review of the applicant's objection to detention without a hearing 1 month and 28 days later (*Mehmet Haberal,* § 128) did not constitute a breach of Article 19 § 8 of the Constitution, whereas the it concluded that the continuation of the applicants' detention for 7 months and 2 days (*Mehmet Halim Oral,* § 53; *Ferit Çelik*, § 53) and for 3 months and 17 days (*Ulaş Kaya and Adnan Ataman,* § 61) as a result of the examinations carried out over the case-file without holding a hearing was in breach of Article 19 § 8 of the Constitution.

343. As explained above, ordering the continuation of the applicants' detention for 8 months and 18 days through examinations carried out over the case-file is in breach of the safeguards set out in Article 19 § 8 of the Constitution. It is therefore necessary to examine whether this situation is legitimate within the scope of Article 15 of the Constitution which

entails the suspension and the restriction of exercise of the fundamental rights and freedoms in time of emergency cases.

iv. Article 15 of the Constitution

344. The examination to be made pursuant to Article 15 of the Constitution is limited to determine whether the impugned interference infringes upon the very essence of the rights and freedoms set out in paragraph 2 of the same article, whether it is in breach of the obligations stemming from the international law, and whether it is within the extent required by the emergency case (see § 186 above).

345. The right to liberty and security is not one of the core rights provided in Article 15 § 2 of the Constitution as inviolable even when emergency administration procedures such as war, mobilization, martial law or a state of emergency are in force (see § 196). It is therefore possible in times of emergency to impose measures with respect to this right contrary to the safeguards enshrined in the Constitution in time of emergency cases.

346. Nor is this right among the non-derogable rights in the international conventions to which Turkey is a party, notably Article 4 § 2 of ICCPR and Article 15 § 2 of the ECHR, as well as the additional protocols thereto. Furthermore, it has not been found established that the interference with the applicants' right to liberty and security is in breach of any obligation (any safeguard continued to be under protection in time of an emergency case) stemming from the international law (see §§ 199-200 above).

347. However, the right to liberty and security is a fundamental right which precludes the State to arbitrarily interfere with the individuals' freedom (see *Erdem Gül and Can Dündar,* cited-above, § 62). Not arbitrarily depriving individuals of their liberty is among the most significant underlying safeguards of all political systems bound by the principle of rule of law. Procedural safeguards afforded for the prevention of the arbitrary deprivation of liberty must also be assessed in this scope.

348. The requirement that an interference with individuals' freedoms must not be arbitrary is a fundamental safeguard that must be also applied when emergency administration procedures are in force. Even in time of emergencies, an individual's deprivation of liberty in arbitrary manner or suspension of basic procedural safeguards prscribed for the prevention of

arbitrary detention is contrary to the obligations stemming from international law (see §§ 138-145 above).

349. In order to conclude that the interference with the applicants' right to liberty and security resulting from the review of the applicant's detention status without holding a hearing is "within the extent required by the emergency case" under Article 15 of the Constitution, this interference must not be arbitrary at the outset. On the other hand, in assessing whether the interference in question is "proportionate" or not, the period during which the applicants are deprived of liberty without being brought before a judge, as well as the characteristics of the case leading to the declaration of the state of emergency in our country, and the circumstances emerging upon the declaration of the state of emergency must also be taken into consideration.

350. In the course and aftermath of coup attempt of 15 July, upon the instructions of the chief public prosecutor's office, investigations were launched throughout the country against 162.000 persons who involved in the coup attempt or who were considered to be in connection with the FETÖ/PDY even if not directly involved in the coup attempt. In this scope, over 50.000 persons were detained on remand whereas over 47.000 persons were released subject to conditional bail (see § 52 above). The investigation authorities faced with the necessity to immediately initiate and conduct investigations against tens of thousands of suspects upon such an unexpected situation, namely the coup attempt. Given also the characteristics of the FETÖ/PDY considered to be the perpetrator of this attempt (confidentiality, cell-type structuring, infiltrating public institutions and organizations, attributing holiness to itself, and acting on the basis of obedience and devotion), it is clear that these investigations are far more difficult and complex than other criminal investigations. In this respect, especially courts and the investigation authorities are to manage an unforeseeable heavy workload. Furthermore, on 16 July just after the suppression of the coup attempt, the HCJP decided, at the first stage, suspension of 2.745 judges and prosecutors from their office for having connection with the FETÖ/PDY, and at the subsequent stages, over 4.000 members of the judiciary were dismissed from office (see § 57 above).

351. Certain measures were employed following the coup-attempt, especially in order to overcome the serious situation encountered by the investigation authorities and judicial bodies and to maintain proper functioning of the investigation and/or prosecution proceedings. Therefore, internship periods of candidate judges and prosecutors were

shortened and they were promoted for office immediately, in order to back up number of judges and prosecutors on duty. Moreover, necessary administrative actions were taken for the recruitment of candidate judges and prosecutors, and the judges and prosecutors who were previously retired or resigned were enabled to be reinstated.

352. Furthermore, certain amendments have been made to procedural rules with respect to the investigations and prosecutions for certain offences (especially offences associated with the coup-attempt, the FETÖ/PDY, and terrorism), effective throughout the state of emergency. Accordingly, Article 6 of the Decree Law no. 667 issued under the state of emergency enables that during the state of emergency, the detention reviews, examinations of objections to detention and requests for release shall be assessed and concluded over the case-file with respect to the offences defined in Parts 4, 5, 6 and 7 of the Chapter 4 of the Volume 2 of Law no. 5237, the offences falling into the scope of Law no. 3713, and the collective offences. Besides, Article 3 of the Decree Law no. 668 sets out that if the magistrate judge's office or the court shall revise its decision if it accepts the objection, otherwise, it shall refer the objection within a maximum period of ten days to the competent court to examine the objection. It is also set forth that, detention reviews and requests for release shall be assessed and concluded over the case-file within time intervals of maximum 30 days (see § 129-130 above).

353. Accordingly, the detainees' right to recourse to a judicial authority for ensuring their release has been maintained in time of emergency case. In this respect, pursuant to Article 104 § 1 of Law no. 5271, all detainees including those who have been detained on remand within the scope of the investigations conducted into the incidents leading to declaration of the state of emergency may request to be released at any stage of the investigation and prosecution. However, pursuant to Article 3 of the Decree Law no. 668, requests for release made by those detained on remand due to certain offences shall be concluded over the case-file within periods of maximum thirty days, along with detention reviews.

354. Moreover, during this period, detention reviews have continued to be examined *ex officio* in respect of all suspects or accused persons including those detained on remand within the scope of the investigations conducted into the incidents leading to the declaration of the state of emergency, within a period of maximum 30 days, pursuant to Article 108 of Law no. 5271. Such reviews are conducted by magistrate judge at the investigation phase by

and the competent court at the investigation phase. Further, it is possible to object to the decisions on detention, to dismissals of the request for release, and to continuation of detention during the state of emergency. Besides, during the state of emergency, review of detention or objection to the detention may be concluded over the case-file pursuant to Article 6 of the Decree Law no. 667.

355. The offence of "attempting to overthrow the constitutional order" on the basis of which the applicants have been detained and other offences maintained to be committed by the applicants in the indictment (attempting to overthrow the GNAT or to prevent it from performing its duties, attempting to overthrow the Government of the Republic of Turkey or to prevent it from performing its duties, being a member of an armed terrorist organization) are set out in the Volume II, Chapter IV, Part V of Law no. 5237 and also among the offences enumerated in Articles 6 and 3 of the Decree Laws no. 667 and 668. Accordingly, the continuation of the applicants' detention over the case-file without holding a hearing has been ordered in line with the legal arrangements introduced by the above-mentioned Decree Laws.

356. Having regard to the severe workload of unforeseeable nature to which the investigation authorities and judicial organs have been exposed after the coup attempt, the suspension and dismissal of a significant part of the judges and prosecutors who would tackle with this workload and ensure proper functioning of the legal system within the country (about 1/3 of all members of the judiciary) by the HCJP for being in relation and connection with the FETÖ/PDY, and the dismissal of a significant part of the assistant courthouse personnel and law enforcement officers from public office who would take part in the investigations and prosecutions including those concerning the coup attempt or the FETÖ/PDY, it must be acknowledged that carrying out detention reviews of those detained for having committed certain offences over the case-file without holding a hearing is a proportionate measure which is required by the exigency of the state of emergency.

357. Finally, a certain part of the guardians and gendarmerie personnel in charge for ensuring safety and protection of the detainees and a significant part of the security officers who may be assigned, when necessary, to ensure safety of detainees were dismissed or suspended from public office for having a link with the FETÖ/PDY. It is also obvious that the penitentiary institutions are operating beyond capacity as tens of thousands of suspects have been detained as a result of the investigations conducted into the coup attempt and the FETÖ/PDY. As a matter of fact, many inmates have been released in progress of time upon

changes made in the time periods for transfer to an open penitentiary institution and for entitlement of conditional release and probation, and, thereby, the number of inmates staying in the closed penitentiary institutions has been decreased. Given all of these facts, it must not be ignored that if thousands of persons who are detained due to offences especially those concerning the coup attempt, the FETÖ/PDY and terrorism and a great majority of whom are held in penitentiary institutions located in provincial centres are periodically taken to courthouses or places where they could be heard via the SEGBIS (the Audio and Video Information System) for their detention reviews, there may occur extremely serious security problems. In this respect, conducting detention reviews in respect of the offences in question without holding a hearing may be considered as a genuine necessity for maintaining public security in time of the state of emergency declared following the coup attempt of 15 July, which constituted a severe attack to the existence of the state and the society and to the national security.

358. Accordingly, it has been concluded that continuation of the detention of the applicants, who have been detained on remand with the allegation of having committed an offence within the scope of the coup attempt, by virtue of decisions rendered over detention reviews made over the case-file without holding a hearing during a period of 8 months and 18 days amounts to a measure "proportionate to the extent required by the emergency case".

359. For these reasons, the interference, which is contrary to the safeguards set out in Article 19 § 8 of the Constitution for the individual's right to liberty and security, complies with the criteria set in Article 15 of the Constitution which provides that fundamental rights and freedoms may be suspended or restricted in time of "state of emergency".

IV. JUDGMENT

The Constitutional Court unanimously held on 20 June 2017 that

A. 1. The alleged violation of the right to liberty and security due to unlawful detention be DECLARED INADMISSIBLE, in respect of all applicants, for *being manifestly ill-founded.*

2. The alleged violation of the right to liberty and security due to unreasonable length of detention be DECLARED INADMISSIBLE, in respect of all applicants, for *being manifestly ill-founded.*

3. The alleged violation of the right to liberty and security due to the restriction on access to case-file by the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy, be DECLARED INADMISSIBLE for *being manifestly ill-founded.*

4. The alleged violation of the right to liberty and security due to conducting the review of the detention without holding a hearing be DECLARED ADMISSIBLE, in respect of the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy.

B. There has been no breach of the right to liberty and security of the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy, considered in conjunction with Article 15 of the Constitution,

C. The court expenses be COVERED by the applicants.

D. A copy of this judgment be SUBMITTED to the Ministry of Justice.