PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE YÜKSEL

- I -

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

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

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

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

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

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

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

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

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

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

– II –

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

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

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

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

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

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

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

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

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

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

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