PARTLY DISSENTING OPINION OF JUDGE YÜKSEL JOINED BY JUDGE PACZOLAY

I. AS REGARDS THE COMPLAINT UNDER ARTICLE 5 § 3 OF THE CONVENTION

1. I am respectfully unable to agree with the majority concerning the applicant's victim status under Article 5 § 3 of the Convention. In the present case, I am of the opinion that the applicant can no longer claim to be the victim of a violation of that provision.

2. The applicant argued before the Court that the judicial decisions ordering his initial and continued pre-trial detention had contained no reasons other than mere citation of the grounds for pre-trial detention provided for by law and had been worded in abstract, repetitive and formulaic terms. In its second judgment, on 9 June 2020, the Constitutional Court found a violation of Article 19 of the Turkish Constitution (equivalent provision to Article 5 § 3 of the Convention), holding that the national courts had failed to provide sufficient reasons in respect of their conclusion. The Constitutional Court also held that the domestic courts had failed to weigh up the competing interests involved, namely (i) the public interest in prolonging the applicant's detention in the context of the criminal proceedings and (ii) his rights as a member of parliament and the co-chair of a political party, such as his right to take part in the legislative activities of the parliament. This balancing exercise between the applicant's right to liberty and his rights as a politician formed part of the Constitutional Court's assessment of the length of the applicant's pre-trial detention.

3. One should bear in mind that the Constitutional Court had already adjudicated on the applicant's initial detention in its first judgment and found it to be in conformity with the Constitution. In this regard, I would like to reiterate that the Chamber also arrived at the same conclusion in so far as the applicant's complaint under Article 5 § 1 (c) of the Convention is concerned. In its second judgment, the Constitutional Court, which was not called upon to examine the applicant's initial detention order again, examined the decisions prolonging his detention. In my view, the Constitutional Court's second judgment, where it found a violation on the basis that the reasons given in the decisions extending the applicant's detention had not been sufficient to justify its duration, demonstrates that there has been an acknowledgment, at least in substance, of a violation of the applicant's rights under Article 5 § 3 of the Convention.

4. The Court therefore had to determine whether the Constitutional Court's judgment afforded the applicant appropriate and sufficient redress. In that connection, it follows from the Court's case-law that where the national authorities have awarded compensation to an applicant by way of redress for the violation found, the Court should examine the amount of the award (see

Hebat Aslan and Firas Aslan v. Turkey, no. 15048/09, § 44, 28 October 2014). In doing so, the Court will have regard to its own practice in similar cases and will consider, on the basis of the material in its possession, what it would have awarded in a comparable situation, although this does not mean that the two amounts must necessarily correspond. It will also take into account the circumstances of the case as a whole, including the type of remedy chosen and the speed with which the national authorities have provided the redress in question, given that it is primarily for those authorities to secure the rights and freedoms set out in the Convention (see *Vedat Doğru v. Turkey*, no. 2469/10, § 40, 5 April 2016). Nevertheless, the amount awarded at national level must not be manifestly inadequate in the circumstances of the case under examination (see *Žúbor v. Slovakia*, no. 7711/06, § 63, 6 December 2011). In the present case, the Constitutional Court held, on the basis of its findings of a violation, that the applicant was to be awarded 50,000 Turkish liras (TRY – approximately 6,500 euros (EUR) at the material time) in respect of non-pecuniary damage and TRY 4,436.30 (approximately EUR 575 at the material time) in respect of costs and expenses. I consider that those amounts cannot be regarded as inadequate and disproportionate. As such, I find it difficult to argue that the Constitutional Court's judgment of 9 June 2020 did not afford him appropriate and sufficient redress.

5. In the light of the foregoing and given the importance of the subsidiarity principle, which lies at the heart of the Convention, it is my belief that the applicant can no longer claim to be the victim of a violation of Article 5 § 3 of the Convention.

II. AS REGARDS ARTICLE 46

6. I note that the core reasoning under Article 46 of the Convention essentially amounts to an examination of both the factual and the legal grounds of the applicant's second pre-trial detention, ordered on 20 September 2019, with the conclusion that the immediate release of the applicant should be secured. I am respectfully not able to agree with the majority and voted against the application of Article 46 of the Convention, where the majority invited the respondent State to secure the immediate release of the applicant on the basis of a rather unorthodox assessment based on a legal question that (i) is pending before the domestic courts, (ii) is disputed between the parties and (iii) does not fall within the scope of the case.

7. The question of the applicant's second detention order is the subject of another individual application that is currently pending before the Constitutional Court (see paragraph 128 of the judgment). Therefore, the correct course of action would be to defer to the authority of the domestic courts in line with the principle of subsidiarity. The refusal to do so could

risk, unfortunately, not only prejudicing the proceedings pending before the Constitutional Court but also placing the Court in the position of a prosecutor in ascertaining the factual basis of the second detention order. Such an approach should have been avoided.

8. It has not been established that both the initial and the present detention orders concern the same criminal proceedings against the applicant involving the same charges stemming from the same facts (see, by contrast, *Ilgar Mammadov v. Azerbaijan* (no. 2), no. 919/15, § 203, 16 November 2017). I cannot share the view of the majority in carrying out an assessment under Article 46 of the Convention based on the assumption that the facts underlying the two detention orders, that is to say the initial detention order giving rise to the present application and the second detention order issued on 20 September 2019, were the same. As can be seen from the judgment, the offences forming the subject of the two detention orders were in fact different (see paragraphs 70 and 116 of the judgment). The fact that there might be a certain overlap in the factual grounds, namely the incidents of 6-8 October 2014 underlying the two detention orders, is not sufficient to conclude that they were issued on account of the same facts. Indeed, this issue was highly disputed between the parties.

9. Moreover, I have strong hesitations in accepting that the applicant's second detention forms part of the case before the Grand Chamber. To the best of my knowledge, this is the first Grand Chamber case in which an applicant's release has been recommended not on the basis of a complaint in respect of which the Grand Chamber finds a violation, but on the basis of a factual issue taken into consideration together with other factual issues under Article 18 of the Convention. In other words, the majority's conclusion under Article 46 of the Convention does not appear to have been aimed at putting an end to a violation that has been found to exist, given that the Grand Chamber was not called upon to examine the applicant's second detention from the point of view of Article 5 of the Convention, a question that is, I repeat, pending before the Constitutional Court. Indeed, an examination of the Grand Chamber cases in which the Court has indicated under Article 46 of the Convention that an applicant should be released shows that in all those judgments, such as *Del Río Prada v. Spain* ([GC], no. 42750/09, §§ 138-39, ECHR 2013), *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, § 490, ECHR 2004-VII) and *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 202-03, ECHR 2004-II), the indication that the applicants were to be released was based on a complaint in respect of which the Court had found a violation (see also, in respect of Chamber judgments, *Aleksanyan v. Russia*, no. 46468/06, §§ 239-40, 22 December 2008, *Fatullayev v. Azerbaijan*, no. 40984/07, §§ 176-77, 22 April 2010, and *Şahin Alpay v. Turkey*, no. 16538/17, §§ 193-95, 20 March 2018). In the instant case, the applicant's second detention ordered in September 2019 is not amongst the complaints in respect of which a violation has been found.

10. In view of the above, I voted against the application of Article 46 of the Convention in the present case.