Çelik v. Turkey

Application no. 68853/17

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENER

pursuant to the Deputy Section Registrar's notification dated 11 October 2018 that the President of the Section had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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2 November 2018

I. Introduction

In this submission, the ICJ provides the Court with observations concerning the capacity of the Turkish legal system to provide effective remedies for violations under the ECHR with regard to detention, in particular detention of Members of Parliament, in light of its Convention obligations, in particular obligations under Article 5.4. The ICJ presents its analysis of these aspects of the Turkish legal system based, in part, on information ascertained during a mission to Turkey undertaken in May 2018 (ATTM1). Specifically, the ICJ addresses the question as to whether the remedies of individual application before the Constitutional Court (CC) and under article 141.1 (a) and (d) of the Code of Criminal Procedure (CCP) may be considered as effective in light of the State's obligations under articles 5.4 and 35.1 ECHR.

II. The right to an effective remedy under international law

The right to an effective remedy for violations of Convention rights is central right to the Convention system. It is both enshrined as a substantive right in article 13 ECHR and as an admissibility criterion in article 35.1 ECHR to allow access to the European Court of Human Rights. The right to an effective remedy under article 13 largely tracks the right to remedy under other human rights instruments, including article 2.3 of the International Covenant on Civil and Political Rights, to which Turkey is a party), as well as standards of universal applicability, particularly the UN Basic Principles and Guidelines on Remedy and Reparation.[1] Taken together, these constitute principles of general international law.

It is well established in international law, including under these instruments and in the jurisprudence of this Court, that to be effective, remedies must be prompt, accessible, impartial and independent,[2] accessible and fair,[3] timely,[4] enforceable, and lead to cessation of violations and reparation for the human rights violation concerned.[5] The right to reparation for violations of human rights includes the right to restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[6]

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[1] Article 8 UDHR, Article 2.3 ICCPR, Article 8.2 CPED, Article 83 ICRMW, Article 13 ECHR. See further, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the Commission on Human Rights, Resolution E/CN.4/RES/2005/35 of 19 April 2005 and by the General Assembly Resolution A/RES/60/147 of 16 December 2005 by consensus; CESCR, *General Comment no. 9,* UN Doc. E/C.12/1998/24; CRC, *General Comment no. 5,* UN Doc. CRC/GC/2003/5. A thorough analysis of the right to a remedy is to be found in International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide*, Geneva, December 2006 (ICJ Practitioners' Guide No. 2).

[2] See, *Campbell and Fell v. the United Kingdom*, ECtHR, Application No. 7819/77, 28 June 1984, para. 78. See also, UN Human Rights Committee, *General Comment No. 32*, *article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007)*, para. 19. International standards on the independence and accountability of the judiciary, prosecutors and lawyers, including the UN Basic Principles on the Independence of the Judiciary, the European Charter on the Statute for Judges and the Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities also provide authoritative standards against which recent developments in the Turkish judicial system should be measured.

[3] *Neshkov and others v. Bulgaria*, ECtHR, Applications nos. 36925/10 21487/12 72893/12, 27 January 2015, para.184; *Valada Matos das Neves v. Portugal*, Application no. 73798/13, para. 73(c).

[4] *Atanasov and Apostolov v. Bulgaria*, Application no. 65540/16 and others, paras. 52, 63; *Neshkov and others v. Bulgaria*, *op. cit.*, para. 183-184, 281 ("swift redress" for preventive remedies), 283. *Scordino v. Italy (No. 1),* Application no. 36813/97, para. 195: "it cannot be ruled out that excessive delays in an action for compensation will render the remedy inadequate ... ". See in 2015, *Valada Matos das Neves v. Portugal*, *op. cit*., paras. 73 (a) and (b) and 93.

[5] See, *Khlaifia and others v. Italy*, Application no. 16483/12, para. 268, see, among many other authorities, *Kudła*, Application no. 30210/96, para. 157, and *Hirsi Jamaa and others*, Application no. 27765/09, para. 197. See, generally, ICJ, *Practitioners' Guide No. 2*, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, December 2006, pp. 46-54.

[6] Articles 2 and 3, 18-23 of the *UN Basic Principles and Guidelines on the right to a remedy and reparation*; UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity.

The effectiveness of a remedy depends on the circumstances prevailing individual cases and must be assessed in light of both law and in practice.[7] The remedy must be addressed to the substance of the complaint including in light of the relevant State's obligations under international human rights law[8] and be able to declare that such a violation has occurred, if ascertained.[9] It must have the capacity to provide appropriate and sufficient redress through a binding and enforceable decision, rather than a merely declaratory effect. [10]

With regard to the right to liberty under Article 5 ECHR, the Court has held that "Article 5 § 4 of the Convention provides a *lex specialis* in relation to the more general requirements of Article 13."[11] These are consistent with similar obligations under article 9 of the ICCPR. The requirements of an effective review under article 5.4 ECHR reflect the general requirements under article 13. Specifically, it has been held that article 5.4 requires that:

- **The review must be clearly prescribed by law**. Both the law permitting detention, and the procedure for its review must be sufficiently certain, in theory and in practice, to allow a court to exercise effective judicial review of the lawfulness of the detention under national law, and to ensure that the review process is accessible.[12] The review of detention must be accessible to all persons detained, including children. [13] In addition to establishing when detention is permissible, the law must prescribe a specific legal process for review of the lawfulness of detention.[14]

- **The review must be by an independent and impartial judicial body.** This reflects the general standard of the right to a fair hearing, which is given more specific expression in guarantees relating to judicial review of detention.

- **The review must be of sufficient scope and have sufficient powers to be effective.** The scope of the judicial review required will differ according to the circumstances of the case and to the kind of deprivation of liberty involved.[15] The European Court of Human Rights has held that the review should, however, be wide enough to consider the conditions which are essential for lawful detention.[16] The review must be by a body which is more than merely advisory, and which has power to issue legally binding judgments capable of leading, where appropriate, to release.[17][18]

Principle 34; Human Rights Committee (CCPR), *General Comment no. 31*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 16.

[7] *Neshkov and others v. Bulgaria*, *op. cit.*, para. 178, 179-181; *Akdivar and others v. Turkey,* ECtHR, Application no. 21893/93, 1 April 1998, paras. 66-73.

[8] *Neshkov and others v. Bulgaria*, *op. cit.*, paras. 185, 203.

[9] *Scordino v. Italy (No. 1), op. cit.*, para. 193.

[10] *Ibid.*, para. 193. *Neshkov and others v. Bulgaria*, *op. cit.*, paras. 183, 212, 283; *Puchstein v. Austria*, ECtHR, Application no. 20089/06, para. 31

[11] *Khlaifia and others v Italy, op. cit.*, para 266; *Nikolova v. Bulgaria*, Application no. 31195/96, para. 69, and *Ruiz Rivera v. Switzerland*, Application no. 8300/06, para. 47. See also, CCPR, *General Comment no. 35*, paras. 39-52.

[12] *Z.N.S. v. Turkey*, Application no. 21869/08, para. 60; *S.D. v. Greece,* Application no. 53541/07, para.73.

[13] *Popov v. France*, Application no. 39472/07 and another, para. 96.

[14] *Z.N.S. v. Turkey*, *op. cit.*, para. 60.

[15] *Bouamar v. Belgium*, ECtHR, Application No. 9106/80.

[16] *A. and Others v. United Kingdom*, Application no. 3455/05, para. 202; *Chahal v. United Kingdom*, Application no. 22414/93, paras. 127-130

[17] *Chahal v. United Kingdom*, *op. cit.*, para.128.

[18] *A v. Australia*, CCPR, Communication no. 560/1993.

- **The review must meet standards of due process**. Although it is not always necessary that the review be attended by identical guarantees as those required for criminal or civil litigation,[19] it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question.[20] Thus, proceedings must be adversarial and must always ensure "equality of arms" between the parties. Legal assistance must be provided to the extent necessary for an effective application for release.[21] Where detention may be for a prolonged period, procedural guarantees should be close to those for criminal procedures.[22]

- **The review must be prompt**.[23] In *ZNS v. Turkey,*[24] the European Court of Human Rights held that, where it took two months and ten days for the courts to review detention, the right to speedy review of detention was violated. In *Skakurov v. Russia*, the Court held that delays of thirteen and thirty-four days to examine appeals against detention orders were in breach of Article 5.4 ECHR.[25] In *Embenyeli v. Russia*,[26] where it took five months to process a review of detention, there had also been a violation of Article 5.4.

In cases of detention under article 5.1.c based on a reasonable suspicion that a person may have committed a criminal offence, the court of judicial review must be able to examine whether there is sufficient evidence to give rise to such suspicion.[27]

With regard to exhaustion of effective remedies as admissibility requirement to bring a case before this Court under article 35.1, this Court has ruled that a mere doubt as to the prospect of success in domestic remedies is not sufficient to exempt an applicant from submitting a complaint to the competent court.[28] However, where a suggested remedy does not in fact offer reasonable prospects of success, the fact that the applicant did not nevertheless make an inevitably futile effort to use it is no bar to admissibility. When, according to settled domestic case-law, the applicants have had no prospect of success before the domestic courts, exhaustion of local remedies is not required.[29] For example, in the *Vasiloski* judgment, where the Court of Appeal failed to make individual assessment of the arguments in the light of the personal characteristics of each appellant separately in some of the applicants' cases, the Court held that this remedy did not have to be exhausted by the other applicants who did not apply to it as there was no reason "to believe that the Court of Appeal would have decided otherwise if the remaining applicants had appealed".[30]

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[19] *A. and Others v. United Kingdom*, *op. cit.*, para. 203.
[20] *Bouamar v. Belgium,* Application no. 9106/80, para. 60.
[21] *Ibid.*, paras. 60-63; *Winterwerp v. Netherlands,* Application no. 6301/73, para. 60: "essential that the person concerned has access to a court and the opportunity to be heard in person or through a legal representative"; *Lebedev v. Russia,* Application No. 4493/04, paras. 84-89; *Suso Musa v. Malta*, Application no. 42337/12, paras. 61.
[22] *De Wilde, Ooms and Versyp v. Belgium*, Application no. 2832/66 and others, para. 79; *A. and Others v. United Kingdom*, *op. cit.*, para. 217.
[23] See, article 9 ICCPR and CCPR, *General Comment no. 35,* para. 47.
[24] *Z.N.S. v. Turkey*, *op. cit.*, paras. 61-62.
[25] *Shakurov v. Russia*, Application No. 55822/10, para. 187.
[26] *Eminbeyli v. Russia*, Application no. 42443/02, para. 10.5.
[27] *Nikolova v. Bulgaria*, Application no. 31195/96, para 58.
[28] Muazzez Epözdemir v. Turkey (dec.), no. 57039/00.
[29] *Carson and Others v. UK*, Application no. 42184/05, para. 58; *Pressos Compania Naviera S.A. and Others v. Belgium*, Application no. 17849/91, para. 27.
[30] *Vasilkoski and Others v. the former Yugoslav Republic of Macedonia*, Application no. 28169/08, para. 46.

In this third party intervention, the ICJ will provide an assessment of the law and practice on the effectiveness of internal remedies available in principle to detained Member of Parliaments in Turkey, both with regard to the obligations of the State under article 5.4 ECHR and with the requirement of admissibility of a complaint under article 35.1 ECHR.

III. The Right to Individual Application before the Constitutional Court of Turkey

Since the *Hasan Uzun v. Turkey* case was decided, this Court has in multiple instances found that the individual application to the Constitutional Court of Turkey (CC) was an effective remedy that must be exhausted before bringing a case against Turkey before the ECtHR under article 35.1 ECHR.[31] With regard to the obligations of the State under article 5.4 ECHR, the Court has held that the individual application to the Constitutional Court "determines solely whether the decisions ordering the initial and continued detention complied with the Constitution,"[32] but is still nonetheless part of the system of judicial review under this article of the Convention.

The ICJ submits that, whether or not the system of individual application to the CC may be regarded as an effective remedy in general, if it is determined that the CC systematically fails to make individual assessments with regard to claims concerning a particular issue, such as the right to liberty of applicants belonging to a certain group, applicants belonging to that group must be exempted from the need to exhaust this remedy.

According to the jurisprudence of this Court, in deciding this question, account should be taken not only of the existence of formal remedies in the legal system of the Contracting State concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant.[33]

a. *The general context*

On 12 April 2016, the Turkish National Assembly adopted a constitutional amendment which added a provisional article 20 to the Constitution that stripped the parliamentary immunity of MPs "who have files regarding the lifting of the parliamentary immunity which were submitted from the competent authorities authorized to investigate or give investigation or prosecution permit ... ."[34]

The amendment concerned some 800 criminal cases (files) for 139 deputies of the National Assembly: 29 out of 317 serving deputies of the Justice and Development Party (AKP); 59 out of 133 deputies of the Republican People's

[31] *Hasan Uzun v. Turkey*, Application no. 10755/13. See also *Özkan v. Turkey* (dec.), Application no. 28745/11; *Leyla Zana v. Turkey* (dec.), Application no 58756/09; *Berker and others v. Turkey* (dec.), Application no. 54769/13.
[32] *Sahin Alpay v. Turkey,* Application no. 16538/17, para. 135.
[33] *Khashiyev and Akayeva v. Russia*, Application no. 57942/00, para. 117.
[34] Provisional article 20 reads (unofficial translation): "On the date when this Article is adopted in the Grand National Assembly of Turkey, the provision of the first sentence of the second paragraph of Article 83 of the Constitution shall not be applied to the deputies who have files regarding the lifting of the parliamentary immunity which were submitted from the competent authorities authorized to investigate or give investigation or prosecution permit, Chief Public Prosecutor's Offices and courts to the Ministry of Justice, the Prime Ministry, Office of Speaker of the Grand National Assembly of Turkey and the Presidency of Joint Committee consisting of the members of Constitution and Justice Commissions. Within fifteen days as of the entry into force of this Article, the files in the Presidency of the Grand National Assembly of Turkey, Prime Ministry and Ministry of Justice regarding the lifting of parliamentary immunities shall be returned to the competent authority under the presidency of the Joint Commission composed of the members of Constitution and Justice Commissions so as to take the required actions."

Party's (CHP); 55 out of 59 deputies for the Peoples' Democratic Party (HDP), and 10 out of 40 deputies for Nationalist Movement Party (MHP). Almost all HDP deputies (93 percent) were investigated pursuant to 518 different files and then prosecuted.[35]

The COE's Venice Commission, in its report on the subject, characterized the Amendment as "a piece of *ad homines* constitutional legislation."[36] Just after the amendment passed by the Parliament, the Venice Commission observed that, "[w]hile the Amendment is drafted in general terms, in reality it concerns 139 individually identifiable deputies".[37] It noted that "[i]n the present case, it adds to the problem that nearly all Members of Parliament of one opposition party are concerned by the measure."[38]

Following the constitutional amendment provisionally lifting parliamentary immunity, 17 MPs were detained.[39] Some of them have been released. All but one[40] are from the same political party, HDP. Although the files of about 29 AKP and 10 MHP deputies were sent to the Parliament, none of these deputies has been prosecuted. 17 HDP deputies and one CHP deputy have been detained and others have been prosecuted. In other words, although the amendment was drafted in general terms, it has largely affected only one party, which is the third biggest party in the country. One-third of its members have been detained due to this amendment.

The Constitutional Court has delivered 11 rulings in HDP MPs cases.[41] An assessment of the Constitutional Court's interpretation and application of the right to liberty under article 5 ECHR in these cases is necessary to assess whether in such cases the Constitutional Court is capable of providing an effective remedy, in accordance with articles 5.4 and 35.1 ECHR.

All MPs that have challenged the lawfulness of their pre-trial detention in individual applications before the Constitutional Court have argued that the procedure lifting the immunity of deputies breached the Constitution. They challenged the constitutionality of the amendment and its misapplication.[42] Both objections were rejected by the CC in identical terms.[43] The CC referred to its previous decision upon referral of a challenge of constitutionality *in abstracto* at the end of the legislative procedure, where it had held that the

[35] See, among other sources Selahattin Demirtaş and 11 Others v. Turkey, no. 14305/17. The case was communicated to the government on 30 June 2017. See also, CC, Selahattin Demirtaş, para. 41.
[36] Venice Commission, *Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution (Parliamentary Inviolability)*, CDL-AD(2016)027, 14.10.2016, para. 73-74.
[37] *Ibid.,* para. 73.
[38] *Ibid.,* para. 50.
[39] Selahattin Demirtaş, Figen Yüksekdağ, Ferhat Encu, Selma Irmak, Çağlar Demirel, Ayhan Bilgen, İdris Baluken, Besime Konca, Nursel Aydoğan, Nihat Akdoğan, Gülser Yıldırım, Abdullah Zeydan, Burcu Çelik, Enis Berberoğlu, Meral Danış Beştaş, Burcu Çelik, Leyla Birlik.
[40] Enis Berberoğlu.
[41] Besime Konca, app., no. 2017/5867, 3.7.2018, 2nd Chamber; Figen Yüksekdağ Şenoğlu app., no. 2016/25187, 4.4.2018, 2nd Chamber; Meral Danış Beştaş (2) app., no. 2017/5845, 4.7.2018, 1st Chamber; Leyla Birlik app., no. 2016/40882, 4.7.2018, 1st Chamber; Nihat Akdoğan app, 2016/29411, 23.5.2018, 1st Chamber; Ferhat Encu app., no. 2016/29925, 11.6.2018, 1st Chamber; Selma Irmak app., no. 2016/32948, 7.3.2018, 2nd Chamber; İdris Baluken app., no. 2016/41020, 21.3.2018, 1st Chamber; Ayhan Bilgen app., no. 2017/5974, 21.12.2017, Grand Chamber; Selahattin Demirtaş, no. 2016/25189, 21.12.2017; Gülser Yıldırım (2) app., no. 2016/40170, 16.11.2017 Grand Chamber; Aysel Tuğluk app., no. 2017/24447, 18.7.2018, 2nd Chamber.
[42] This argument has two dimensions. The first one was that immunity of the deputies could only be lifted by the Parliament after the deputy's individual file is examined by the competent bodies of the Parliament as envisaged under Article 83-85 of the Constitution and Rules of Procedure (See Venice Commission, *op. cit.,* para. 25 et seq.). A general constitutional amendment, according to this view, in contradiction with the general rule about immunity provided in the Constitution, lifting all immunities for a certain period cannot meet the requirement of legality. Secondly, the applicants explicitly or implicitly argued that acts that they were accused for fall within the category of non-liability and not in the category of inviolability as accepted by the judicial authorities.
[43] İdris Baluken, para. 69-77; Gülser Yıldırım, para. 125-132; Selahattin Demirtaş, para. 136-143.

act adopted by the National Assembly on 12 April 2016 could not be reviewed under Article 85 of the Constitution because it had all formal elements of a constitutional amendment and the Court was not empowered to rule on the constitutionality of constitutional provisions.[44]

The CC has not discussed the scope of the amendment, with the result that no clarity has been provided with regard to the application in practice of the lifting of immunity.

b. The Constitutional Court's application of article 5 ECHR

As observed by this Court in respect of article 5 ECHR, it is essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application in order to meet the standard of "lawfulness" set by the Convention.[45] This standard requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[46]

In its jurisprudence, the CC states that to be lawful, a detention on remand must meet three conditions: a) presence of strong suspicion of a person having committed a crime; b) presence of grounds for detention; c) that any detention measure is a proportionate measure to the grounds on which it is based.[47]

These principles have putatively been applied by the Constitutional Court in cases concerning the detention of Members of Parliament. The Constitutional Court has found inadmissible all cases of MPs[48] challenging the lawfulness of their detention. In all such cases, it has provided identical reasons for these decisions, with two notable exceptions, the cases of Ayhan Bilgen and Meral Danış Beştaş. However these two cases are readily distinguishable from the others in that the finding of a violation of the right to liberty of the applicants by the CC was based on the fact that it was found that their presence at a HDP Central Executive Committee (CEC)'s meeting could not be proven.[49]

i) the scope of the underlying criminal offence

In all of these cases, the applicants were detained and prosecuted on the charge of "being a member of a terrorist organisation"[50] pursuant to articles 220 and 314 of the Turkish Criminal Code. The European Court of Human Rights has in previously cases found violations in relation to the arbitrary prosecution of these offences. In the *Işıkırık* case, this Court found a violation of the right to freedom of association and assembly under article 11 ECHR of the applicant, who had been convicted and sentenced to six years and three months of imprisonment for attending a funeral and making a "V" sign. Having observed that the domestic courts had an over-wide interpretation of

[44] CC, cases nos. E.2016/54, K.2016/117, 3/6/2016, paras. 4-15.
[45] *Khlaifia and Others v. Italy*, *op. cit.,* no. para. 92.
[46] *Ibid.,* para. 92; *Del Río Prada v. Spain*, Application no. 42750/09, para. 125; *Creangă v. Romania*, Application no. 29226/03, para. 120; *Medvedyev and others v. France,* Application no. 3394/03, para. 80.
[47] See, leading judgment in CC, Gülser Yıldırım, paras. 110-124.
[48] In all applications, the applicants argued that: the applicant had been arrested and held in police custody unlawfully; his/her access to the investigation file had been unlawfully rejected; his/her pre-trial detention had been illegal; his/her freedom of expression had been breached; his/her right to free election and political activity had been breached.
[49] Bilgen, para. 121; Beştaş, para. 97-98.
[50] Ayhan Bilgen, para. 19-43; Meral Danış Beştaş (2), para. 16-41.

the notion of "membership" of an illegal organisation under article 220.6, the European Court of Human Rights ruled that "such extensive interpretation of a legal norm cannot be justified when it has the effect of equating mere exercise of fundamental freedoms with membership of an illegal organisation in the absence of any concrete evidence of such membership."[51] In *İmret v. Turkey (2)*, the same line of argument was followed in respect of the applicant's conviction for merely being present at ten demonstrations during a period of one year.[52]

ii) Strong suspicion of commission of a crime

With regard to the element of "strong suspicion" in the cases of detained MPs brought to the Constitutional Court, an assessment of CC's rulings suggests that, for the CC, an overly broad range of conduct might be enough to establish such a suspicion of a deputy's membership of a terrorist organization. In most cases before the Constitutional Court, the MP applicants were detained as a consequence of speeches referring to demands of self-governance and autonomy; allegation of violations of rights during curfews, of mass killings and forced displacements.[53] These statements were interpreted by the Constitutional Court as evidence of the membership of an armed terrorist organization.

For example, in the *Besime Konca* case, the applicant attended a PKK member's funeral. At the funeral, she made short remarks in Kurdish in which she stated *"Çiyager' parents, Çiyager's family and the people of Batman, you are welcome with great pleasure"*, "*We will make our martyr live, we will follow his footsteps*". Konca was then detained for "being a member to a terrorist organization".[54] According to the Constitutional Court, because of these remarks, there was strong suspicion of her membership of the organization at the time of detention.[55] Ferhat Encu was also detained on suspicion of membership due to his tweets and attendance at funerals.[56] The CC in this case stated that the accusation "that he had committed a terror-related crime was not ungrounded,"[57] without defining the term "terror-related" crime.

In two other cases, the CC concluded in both applications that a single tweet[58] was sufficient grounds for suspicion to justify the detention of an MP being a member of terrorist organisation. In addition, the applicants' presence at a CEC meeting was enough to hold them responsible for the tweet sent from the Party's account. Both decisions concluded that although the tweet did not directly call for violence, the fact that it was sent at a time that some PKK sources also invited people to protest against ISIS/Daesh activities in Kobane was enough to ground a reasonable suspicion that they had committed a criminal offence necessitating pre-trial detention.[59]

[51] Işıkırık v. Türkiye, no. 41226/09, 14.11.2017, paras. 55-69.
[52] İmret v. Turkey (2), no. 57316/10, 10.7.2018, paras. 41-58. See also Bakır and Others v. Turkey, in the same line, no. 46713/10, 10.7.2018.
[53] For instance, Leyla Birlik, para. 12; Nihat Akdoğan, para. 12
[54] She later was convicted for terrorist propaganda but not for membership.
[55] Besime Konca, paras. 90-92.
[56] However, he was also later convicted "only" for making terrorist propaganda.
[57] Ferhat Encu, para. 74.
[58] They were held responsible for a tweet sent from the HDP Headquarter's Twitter Account on 6 October 2014 which stated: "*Urgent call to our peoples! An urgent call for our peoples from the HDP's Central Executive Committee which is currently in session! The situation in Kobanê is very dire. We call on our people to go to streets and to support those who are already on the streets in protest against ISIS atacks and the AKP government's embargo against Kobanê*".
[59] Selahattin Demirtaş, para. 146-150 ; Gülser Yıldırım, para. 137-139.

iii. Grounds for detention

As to the grounds for detention, the CC considers that the mere purportedly "terrorist" nature of the crime would be a sufficient ground for detention, as applicants might abscond due to heavy penalty envisaged for their crime.[60] This element must be considered in light of the line of cases described above showing that participation in a demonstration may qualify, under certain circumstances, as an offence of a "terrorist nature".

iv. The assessment of necessity and proportionality

With regard to the assessment of proportionality of detention, the CC has affirmed in these cases that the long period of time between the commission of an alleged crime and detention is not a factor to be considered, the rationale being that crimes relating to terrorism typically create serious difficulties for the authorities. Thus, the right to liberty must not be interpreted in a way that might complicate the work of security and judicial authorities.[61]

However, as the European Court has affirmed, a proportionality test requires the judicial authority to take into account in the analysis of legal interests. A parliamentarian's freedom of expression is a special interest protected under the ECHR in this sense. This Court has stated:

> *"while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament ... call for the closest scrutiny on the part of the Court."*[62]

The CC has, with only the exception of the Ayhan Bilgen and Meral Danış Beştaş cases mentioned above, found all applications regarding detention of MPs related to purported terrorism offences manifestly ill-founded on the grounds of reasonable suspicion of deputies' membership of a terrorist organisation; the risk that the accused would fail to appear for trial; and the proportionality of the pre-trial detention decisions. The reasonable suspicion of membership of a terrorist organisation was based on such activities such as speeches, press briefings, sharing of information on social media. The CC evidently did not regard as an exercise of freedom of expression, protected under law, but rather only as evidence of participation in "terrorist" activities.

e) Conclusions with regard to the Constitutional Court

In its July 2018 report *Justice Suspended - Access to Justice and the State of Emergency in Turkey*, the ICJ expressed doubt regarding the capacity of the Constitutional Court to provide an effective remedy for violations of human rights due not only to its case backlog, but also to the worrying signals that, in sensitive cases, its rulings might not be executed by lower courts. These concerns about the Court's effectiveness are heightened by the 2017

[60] Selahattin Demirtaş, para. 161.
[61] Selahattin Demirtaş, para. 175.
[62] Castells v. Spain, 23.4.1992, Series A no. 236, para. 42.

constitutional changes that undermine the structural independence of the Court.[63]

As described above, in the jurisprudence of the CC in cases of detention of MPs, a "strong" suspicion of being a member of a "terrorist organisation" has been accepted as sufficient to detain a parliamentarian. Both the nature of the substantive offence and the test of strong suspicion has been interpreted in an excessively elastic manner, so that acts such as the publication of a single tweet containing apparently protected political expression, the attendance at a funeral; or a speech made on such an occasion may be sufficient to meet the conditions for the offence of membership of a terrorist organisation.

In light of these considerations, of this Court's jurisprudence in the *Işıkırık* and *İmret* cases cited above and of the treatment of MPs cases by the Constitutional Court to date, the ICJ considers that, at least in regard to cases relating to detention of members of parliament, judicial review by the Constitutional Court has been ineffective in providing a review and remedy for detention.

In particular, in light of the State's obligation under article 5.4 ECHR highlighted above, the law permitting detention is not sufficiently certain and foreseeable, as identified by this Court in *Işıkırık*, because of the interpretation by Turkey's courts, including by the Constitutional Court, that has failed to rectify this interpretation in line with this Court's jurisprudence. Recent episodes of missed - or delayed - implementation of Constitutional Court's ruling ordering the release of detainees, as found in the case of Sahin Alpay and Mehmet Hasan Altan, raise further doubts as to its effectiveness.

With regard to this remedy's effectiveness in light of the requirement under article 35.1 ECHR, an analysis of the Constitutional Court's jurisprudence with regard to MPs stripped of their immunity and detained for terrorism-related offences has shown that this remedy has no reasonable prospects of success because of the consolidated jurisprudence of the Court.[64]

The ICJ therefore considers that this judicial remedy falls short of the conditions for an effective remedy under article 5.4 ECHR and under article 35.1 ECHR.

IV. Compensation Claims

In all cases of detained MPs before the Constitutional Court, applicants contested that they had been wrongfully arrested and held in police custody. All of these complaints have been found inadmissible on the ground that anyone held in police custody under conditions and in circumstances not complying with the law could bring a compensation claim under article 141.1(a) of the CCP. Although this decision appears to be in line with this Court's case-law,[65] the foreseeability and effectiveness of this remedy are questionable. However, since the availability of Article 141 was new and little known at the time of the arrests, none of them brought a case for compensation under Article 141 of the CCP.

[63] ICJ, *Justice Suspended - Access to Justice and the State of Emergency in Turkey,* July 2018, pp. 23-24 (ATTM1).
[64] *Paksas v. Lithuania,* Application no. 34932/04, para. 75; *S.A.S. v. France,* Application no. 43835/11, para. 61,
[65] See for instance, Mehmet Hasan Altan v. Turkey, para. 100.

The European Court of Human Rights has held repeatedly that

> *"the right to obtain release and the right to obtain compensation for a deprivation of liberty in breach of Article 5 are two separate rights, enshrined respectively in paragraphs 4 and 5 of that Article, and this distinction is also relevant for the purposes of Article 35.1. This line of reasoning is of particular importance where the person concerned is still in custody. In such circumstances, the only remedy which may be considered sufficient and adequate is one which is capable of leading to a binding decision for his or her release".*[66]

An analysis of the cases before the Constitutional Court shows that this remedy cannot be deemed an effective remedy for claims that a detention is unlawful. With regard to detained MPs, compensation cases have been rejected for the following reasons:

- The applicant had been convicted, therefore his prior detention was lawful;[67]
- All procedural rules were respected;[68]
- The detention period was proportionate to the seriousness of the crime;[69] and
- The case was pending and the applicant had not been acquitted.[70]

Similar rulings are being delivered in sensitive cases for as long as the applicant is not acquitted at the end of the trial.[71] Even if it has been more than three years since the Turkish judiciary accepted that compensation claims under Article 141 of the CCP could be brought even before the final verdict has been rendered, no official evidence has been presented that this remedy has been successful.

The effectiveness of this remedy must be seen as well against the backdrop of the situation of the Turkish judiciary at large. In its 2018 report, the ICJ concluded that the "lack of institutional independence of the judiciary, the chilling effect of the mass dismissals and the diminished quality and experience of the members of the judiciary that resulted from it are serious threats to the rule of law. These factors clearly undermine the capacity of the judiciary as a whole to provide an effective remedy for human rights violations, both in regard to measures taken under the state of emergency, and in general."[72]

The ICJ considers that, in the absence of any evidence of the success in the use of the procedure under article 141 CCP to ensure immediate release of MPs whose detention is held unlawful by a competent court, this judicial remedy could not be considered as effective in light of the State's obligations under article 5.4 ECHR.

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[66] Gavril Yosifov v. Bulgaria, no. 74012/01, 06.11.2008, para. 40; Varnas v. Lithuania, no. 42615/06, 09.07.2013, para. 86

[67] Abdullah Zeydan case, Yüksekova Assize Court, Case No. 2017/275, Dec. no. 2018/57; Çağlar Demirel Case, Diyarbakır 2nd Assize Court, Case No. 2017/478, Dec. no. 2017/401

[68] Figen Yüksekdağ Şenoğlu Case, 7th Assize Court, Case No. 2017/584, Dec. no. 2018/380.

[69] Gülser Yıldırım Case, Mardin 1st Assize Court, Case No. 2017/636, Dec. No. 2018/68.

[70] Nihat Akdoğan Case, Hakkari 3rd Assize Court, Case No. 2017/3, Dec. No. 2017/55.

[71] See for instance İstanbul Anadolu 11th Assize Court, Case no. 2018/99; İstanbul Anadolu 2nd Assize Court, Case no. 2018/76. This case was approved by İstanbul Appeal Court.

[72] ICJ, *Justice Suspended - Access to Justice and the State of Emergency in Turkey,* July 2018, p. 21.