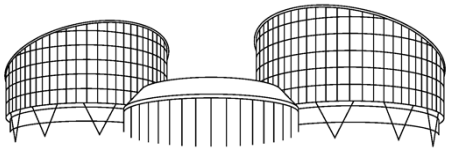

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF AYDIN SEFA AKAY v. TÜRKİYE

(Application no. 59/17)

JUDGMENT

Art 5 § 1 • Procedure prescribed by law • Arrest and pre-trial detention of a judge serving at the United Nations International Residual Mechanism for Criminal Tribunals despite the diplomatic immunity conferred on him by the Mechanism's Statute • Principles set out in Court's case-law on independence of the domestic judiciary applied *mutatis mutandis* in respect of international judges and courts • Domestic courts' delay in assessing the relevance of the applicant's diplomatic immunity was incompatible with Art 5 § 1 and rendered futile any protection afforded to him by virtue of that immunity • Domestic courts' interpretation regarding immunity neither foreseeable nor in keeping with Art 5 § 1 requirements of legal certainty • International court judges not representatives of a member State to a UN organ • Applicant enjoyed full diplomatic immunity, including personal inviolability and not being subject to any form of arrest or detention for the duration of his term of office, as well as when working remotely • Ultimate aim of privileges and immunity to protect the independence of judges and hence the Mechanism tribunal *vis-à-vis* any State
Art 8 • Private life and home • Searches of applicant's person and home not "prescribed by law" • Applicant's place of residence in an analogous position to that of an office given he was working for the Mechanism remotely from his home country • Residence subject to a heightened protection similar to that afforded in the Court's Art 8 case-law to searches of a lawyer's office • Domestic courts' failure to examine that aspect of the applicant's immunity • Certain items seized later used in the criminal proceedings against him • No waiver of immunity from the UN Secretary General nor UN or applicant *ex post facto* consent
Art 15 • Derogation in time of emergency • Art 5 § 1 • Art 8 • Measures inconsistent with Respondent State's "other obligations under international law"

Prepared by the Registry. Does not bind the Court.

STRASBOURG

23 April 2024

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Aydın Sefa Akay v. Türkiye,

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

Arnfinn Bårdsen, *President,*
Jovan Ilievski,
Pauliine Koskelo,
Saadet Yüksel,
Lorraine Schembri Orland,
Frédéric Krenc,
Diana Sârcu*, judges*,

and Dorothee von Arnim, *Deputy Section Registrar,*

Having regard to:

the application (no. 59/17) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Aydın Sefa Akay ("the applicant"), on 21 December 2016;

the decision to give notice of the application to the Turkish Government ("the Government");

the parties' observations;

Having deliberated in private on 26 March 2024,

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

INTRODUCTION

1. The application mainly concerns the question whether the arrest and pre-trial detention of the applicant, who enjoyed diplomatic immunity as a judge serving at the United Nations International Residual Mechanism for Criminal Tribunals, were "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1 of the Convention.

2. The application further concerns, under Article 5 § 1 (c) of the Convention, the alleged lack of any reasonable suspicion warranting the applicant's pre-trial detention, which was predominantly based on his use of the ByLock smartphone application and, under Article 5 § 4 of the Convention, the domestic courts' alleged failure to address the applicant's arguments concerning his diplomatic immunity when examining his objections against his pre-trial detention. Lastly, the application concerns, under Article 8 of the Convention, the allegedly unlawful searches of the applicant's house and person in disregard of his diplomatic immunity.

THE FACTS

3. The applicant was born in 1950 and is currently detained in Rize. He was represented by Dr K. Altıparmak, a lawyer practising in Ankara.

4. The Government were represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye.

5. The facts of the case may be summarised as follows.

I. PROFESSIONAL CAREER OF THE APPLICANT

6. In 1987 the applicant started working as a legal advisor (*hukuk müşaviri*) for the Ministry of Foreign Affairs of Türkiye and between 1989 and 2012 he carried out different tasks and occupied different positions, including at the Permanent Mission of Türkiye to the United Nations ("the UN"); the Permanent Representation of Türkiye to the Council of Europe, where he represented Türkiye before the Court; the Turkish embassy in Nicosia, in the "Turkish Republic of Northern Cyprus"; the Permanent Delegation of Türkiye to UNESCO; and the Ministry of Foreign Affairs in Ankara. Between 2012 and 2014 he served as the ambassador of Türkiye to Burkina Faso and in 2015 he retired.

7. Between 2003 and 2012 the applicant was a judge at the International Criminal Tribunal for Rwanda ("the ICTR"). On 20 December 2011, at its 87th Meeting, the General Assembly of the UN elected the applicant as a judge of the UN International Residual Mechanism for Criminal Tribunals ("the Mechanism") for a four-year term of office beginning on 1 July 2012. On 24 June 2016 the UN Secretary-General reappointed the applicant for a further two-year term with effect from 1 July 2016. In June 2018 the UN Secretary-General did not reappoint the applicant, so his term of office expired on 30 June 2018.

8. On 25 July 2016 the President of the Mechanism, Judge Theodor Meron, assigned a panel of five judges, one being the applicant, to consider an application for review lodged on 8July 2016 by Augustin Ngirabatware in respect of the judgment delivered by the Appeals Chamber of the Mechanism in his case (*Prosecutor v. Augustin Ngirabatware*) on 18 December 2014[1]. At the time of the events giving rise to the present application, the applicant was working on the case remotely from his home country, Türkiye, in accordance with Article 8 § 3 of the Statute of the Mechanism, as is common for judges of the Mechanism (see paragraph 81 below).

[1] Case no. MICT-12-29-R. On 27 September 2019 the Appeals Chamber, pursuant to Article 24 of the Statute and Rule 147 of the Rules, unanimously decided that the Appeal Judgment would remain in force in all respects.

II. ATTEMPTED COUP OF 15 JULY 2016 AND DECLARATION OF A STATE OF EMERGENCY

9. On the night of 15 July 2016 a group of members of the Turkish armed forces calling themselves the "Peace at Home Council" attempted to carry out a military coup aimed at overthrowing the democratically elected Parliament, government and President of Türkiye.

10. During the attempted coup, soldiers under the instigators' control bombarded several strategic State buildings, including the parliament building and the presidential compound, attacked the hotel where the President was staying, held the Chief of General Staff hostage, attacked television channels and fired shots at demonstrators. During the night of violence, more than 300 people were killed and more than 2,500 were injured.

11. In the aftermath of the attempted military coup, the national authorities blamed Fetullah Gülen, a Turkish citizen living in Pennsylvania (United States of America) who was considered to be the leader of a terrorist organisation referred to by the Turkish authorities as the "Fetullahist Terror Organisation/Parallel State Structure" (*Fetullahçı Terör Örgütü/Paralel Devlet Yapılanması* – "FETÖ/PDY"). During and after the attempted coup, in order to dismantle the infiltration within the government and eliminate the continuous threat to it, public prosecutors' offices all over Türkiye initiated criminal proceedings against those who had been directly involved in the attempted coup, as well as against those who had not been directly involved but were suspected of being part of the structural organisation of FETÖ/PDY in various public, health, educational, commercial and media institutions. In the course of these criminal investigations, many people were arrested and subsequently placed in pre-trial detention.

12. On 20 July 2016 the government declared a state of emergency for a period of ninety days from 21 July 2016. It was subsequently extended for further periods of ninety days by the Council of Ministers, chaired by the President.

13. On 21 July 2016 the Turkish authorities gave notice to the Secretary General of the Council of Europe of a derogation from the Convention under Article 15.

14. On 18 July 2018 the state of emergency was lifted.

III. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

A. The applicant's arrest and pre-trial detention and searches of his house and person

15. Shortly after the attempted military coup, the Ankara Chief Public Prosecutor's Office instituted a criminal investigation against the employees of the Ministry of Foreign Affairs suspected of being involved in an armed terrorist organisation, FETÖ/PDY. The public prosecutor in charge of the

investigation issued a written order to the police to (i) arrest the applicant and (ii) carry out searches of his house, person and vehicle and seize any material or items found in view of the strong suspicion and evidence showing that he was a member of FETÖ/PDY. The public prosecutor further ordered the transfer of the applicant to Ankara, stating that hundreds of suspects in the case in question were being investigated by the Anti-Terrorism Branch (TEM) of the Ankara Security Directorate.

16. On 21 September 2016 the applicant was arrested at his home in Büyükada, Istanbul and taken into police custody in the course of that investigation. At the Büyükada police station he was searched and had his watch, glasses, wedding ring, wallet, belt and medication seized. He was subsequently transferred to Ankara as per the public prosecutor's order.

17. On the day of his arrest, the police also conducted a search of his house in Istanbul and seized four computers, three mobile phones, two flash disks, three floppy disks, one videotape and two books, entitled *Örnekleri Kendinden Bir Hareket* ("A Movement with its own Examples"), written by Fetullah Gülen, the leader of FETÖ/PDY, and *Medya: Makasların Gölgesinden İlkelerin Zirvesine* ("Media: From the Shadow of Scissors to the Peak of Principles"), written by E.D., allegedly a high-ranking member of the same organisation. The following day the Adalar Magistrate's Court upheld the seizure of the items collected during the search of the applicant's house.

18. On 26 September 2016 the police took statements from the applicant in the presence of his lawyer at the Ankara Security Directorate. He denied the offences of which he was accused, namely membership of an armed terrorist organisation, carrying out acts and activities on behalf of that organisation aimed at attempting to subvert the constitutional order by the use of force, murder, causing bodily harm, damage to property and attempting a military coup. He stated that he had no relationship with FETÖ/PDY or any other terrorist organisation. He further stated, among other things, that he was a member of the Grand Lodge of Free and Accepted Masons of Türkiye (*Hür ve Kabul Edilmiş Masonlar Büyük Locası*). When asked various questions about the mobile application ByLock, such as whether he had used it, how he had obtained it, for what purpose he had used it and who he had contacted with it, he replied as follows:

> "At the request of the former Minister of Foreign Affairs of Burkina Faso, [D.B.], I downloaded the program from Google Play Store in December 2015 and contacted him and [H.Z.] about Masonic topics for three to four months ...
>
> I only downloaded this program without using any encryption from Google Play Store and used it. There is no encryption. This is the first time I have heard about encryption here ... I haven't talked to anyone else except [D.B. and H.Z.] ..."

When asked about the two books seized from his home, he replied as follows:

> "I have more than 2,000 books on every topic in my library. I am sure they are not criminal. Also, I write books, do academic research and hold conferences/seminars. It is natural to have books by different authors in my library."

19. On 28 September 2016 the applicant and six others were brought before the Ankara 2nd Magistrate's Court. He gave evidence in person, stating as follows:

> "... I want to elaborate on the ByLock program. I suppose I downloaded this program on my phone in December 2015. I downloaded it from the Google Play Store to talk to my friends in Africa about Masonic topics. The person I contacted was the former Minister of Foreign Affairs of Burkina Faso, where I served as ambassador in the past. I am also a Mason, and the person I contacted was one of the masters of this institution. I then uninstalled the program because it was difficult to use. When my background, [social] circle and lifestyle are examined, it will be understood that I have nothing to do with this organisation [FETÖ/PDY]. I like to read books. There are nearly 2,500 books at my house. I may be charged due to two of them. As I said, I read all kinds of books. I am 66 years old. I have diabetes and blood pressure disorders. I am a respected individual nationally and internationally. My duty as a judge of the United Nations International Residual Mechanism for Criminal Tribunals currently continues. I have a diplomatic passport. I went abroad and came back a week ago. I certainly cannot accept this accusation. For these reasons, I do not pose any risk of absconding. I demand my release, failing which, I demand the implementation of appropriate judicial supervision measures."

20. On the same day the magistrate ordered the applicant's pre-trial detention on account of his being a member of an armed terrorist organisation, an offence under Article 314 § 2 of the Criminal Code. The six other suspects were also detained. The following reasoning was given in respect of the applicant:

> "... Having regard to the nature and importance of the [alleged] offence, the state of the available evidence, the reports available in the [case] file, search and seizure reports, the ByLock report and the scope of the case file, the existence of concrete evidence indicating the presence of a strong suspicion of commission of the [alleged] offence within the scope of the case file, the fact that the [alleged] offence is one of the catalogue offences listed in Article l00 of the Code of Criminal Procedure, the fact that the decision on pre-trial detention is proportionate in view of the length of the sentence prescribed by law, and the risk of the applicant's absconding or tampering with evidence, it is understood that the application of judicial supervision measures would be insufficient and [it is decided that] the suspects shall be detained pursuant to Article 100 of the Code of Criminal Procedure."

B. Decisions extending the applicant's pre-trial detention and dismissing his objections

21. On 4 October 2016 the applicant's counsel filed an objection against the order for his pre-trial detention, arguing that the mental element of the offence of which the applicant was accused was not satisfied. His use of ByLock had no connection whatsoever with FETÖ/PDY since he had used it to discuss Masonic topics with the former Minister of Foreign Affairs of Burkina Faso, who did not have any affiliation with the organisation. Counsel

argued that the mere use of ByLock was not sufficient to constitute the offence of membership of an armed terrorist organisation and that ByLock could be downloaded from the Google Play Store and used by anyone. In other words, it was not necessary to be a FETÖ/PDY member to access the ByLock application. In any event, counsel argued that since the applicant did not deny having used the application, it was incumbent on the authorities to carry out the necessary enquiries to determine the date he had first started using it, the people with whom he communicated and the dates and content of his communication. Referring to the applicant's age, illnesses, professional career and profile, and pointing out that he could have freely fled the country had this been his intention, counsel requested the applicant's release with the application of appropriate judicial supervision measures.

22. On 10 October 2016 the Ankara 3rd Magistrate's Court examined and dismissed objections lodged by four suspects, including the applicant, against the order for their detention. The court extended their pre-trial detention, holding (i) that no evidence necessitating the reversal of the pre-trial decisions had been adduced and (ii) that the reasoning provided by the Ankara 2nd Magistrate's Court in its decision of 28 September 2016 was in accordance with procedure and the law.

23. On 24 October 2016 the applicant's counsel applied for the applicant's release, claiming that he enjoyed diplomatic privileges and immunities as a judge of the Mechanism under Article 29 of the Statute of the Mechanism adopted by Security Council Resolution 1966 (2010), which was binding on all member States of the UN (see paragraph 81 below). One of the documents attached to the request was a letter from the President of the Mechanism dated 30 September 2016 indicating the status and immunity of the applicant.

24. On 25 October 2016 the United Nations Office of Legal Affairs communicated a *note verbale* to the Permanent Mission of Türkiye to the UN formally asserting that the applicant enjoyed diplomatic immunity under Article 29 of the Statute of the Mechanism. It accordingly requested his immediate release from detention and the termination of all legal proceedings against him.

25. On the same date the Ankara Chief Public Prosecutor's Office received a letter from the Ministry of Foreign Affairs dated 13 October 2016, the relevant parts of which read as follows:

> "... it has been ascertained that on 28 September 2016 Akay was placed in pre-trial detention in Ankara as part of measures taken as a result of the hideous coup attempt of 15 July 2016.
>
> The principles and procedures concerning Akay's duty as a judge at the Mechanism are set out in the Convention on the Privileges and Immunities of the United Nations dated 13 February 1946. [Article] V, Section 18(a), of that Convention confers on UN officials functional immunity [from legal process] in respect of words spoken or written and all acts performed by them in their official capacity. By the same token, [Article] V, Section 20, of that Convention specifies that the functional immunity in question is granted to UN officials in the interests of the United Nations, not for the personal benefit of the individuals themselves, and also states that the waiving of this immunity is

possible in cases where it would impede the course of justice and that in such a case its waiver is a duty of the UN Secretary-General.

In that connection, the concept of functional immunity, which, in some respects bears resemblance to the concept of parliamentary immunity-inviolability applicable in our country to members of parliament, does not [confer] absolute immunity [on] Aydın Sefa Akay and this person has no special status in respect of issues falling outside his duty [as a judge of the Mechanism], particularly from the standpoint of the judiciary of our country ..."

26. On the same date the Ankara 1st Magistrate's Court decided that there was no need to rule (*karar verilmesine yer olmadığına*) on the applicant's request in view of Article 3 § 1 (ç) of Legislative Decree no. 668, which provided that applications for release were to be examined on the basis of the case file at the time of the automatic review carried out at thirty-day intervals.

27. On 27 October 2016 the public prosecutor asked the trial court to review and continue the pre-trial detention of several suspects, including the applicant, in accordance with Article 108 § 1 of the Code of Criminal Procedure. On the same day the Ankara 3rd Magistrate's Court upheld that request and ordered the continued pre-trial detention of the applicant and sixteen others, considering the following factors:

"...the nature of the offence, the state of the available evidence, the fact that the investigation has not yet been concluded, the continuation of the reasons given for detention, the existence of facts indicating a strong suspicion that an offence was committed, pursuant to Article 100 of the [Code of Criminal Procedure], and reasons for detention under Article 5 of the [European Convention of Human Rights], the proportionality of the detention order, and that the application of judicial supervision measures would be insufficient (*adli kontrol hükümlerinin uygulanmasının yetersiz kalacağı*) ..."

28. On 11 November 2016 the Permanent Mission of Türkiye to the UN in New York submitted a letter to the UN Office of Legal Affairs in reply to its *note verbale* of 25 October 2016. The Permanent Mission stressed that the applicable legal instruments, notably Article 29 § 1 of the Statute, the Convention on the Privileges and Immunities of the United Nations ("the General Convention") and Article 31 § 4 and Article 38 § 1 of the Vienna Convention on Diplomatic Relations ("the Diplomatic Convention") confirmed that the applicant could enjoy functional immunity, that was to say immunity only for acts performed within the framework of his assignment under the Mechanism and that he did not enjoy immunity for charges against him outside the scope of his functions as a judge. The letter further indicated that the provisions in question were an expression of the general principle that there could be no system in which there was a gap in criminal jurisdiction and that immunities could not be construed as a basis for developing or promoting a culture of impunity or for impeding the course of justice.

29. On 14 November 2016 the applicant lodged an individual application with the Constitutional Court, complaining of violations of his rights under Articles 19, 20, 21 and 36 of the Constitution.

30. On 24 November 2016 the Ankara 9th Magistrate's Court, in the course of the automatic periodic review of the detention of several suspects, ordered the applicant's continued pre-trial detention, taking into account the following factors:

> "... the nature of the offence, the existence of facts indicating a strong suspicion that the offence was committed and reasons for detention, the state of the available evidence, the maximum penalty prescribed by law for the offence ..."

31. In a handwritten letter dated 15 December 2016 to the Ankara Magistrate's Court, the applicant asked for his release, explaining, *inter alia*, that his pre-trial detention had disregarded his absolute immunity as a judge of the Mechanism, which could only be waived by the UN Secretary-General.

32. On 22 December 2016 the Ankara 3rd Magistrate's Court, in the course of the automatic periodic review of the detention of fourteen suspects, ordered the continued pre-trial detention of the applicant and several other suspects, essentially reiterating the grounds in its previous decision.

IV. DEVELOPMENTS LEADING TO THE MECHANISM'S ORDER OF 31 JANUARY 2017 TO THE GOVERNMENT OF TÜRKİYE FOR THE APPLICANT'S RELEASE AND ITS DECISION OF NON-COMPLIANCE

33. By a letter dated 5 October 2016 addressed to the President of the UN Security Council, the President of the Mechanism drew the attention of its members to the arrest of the applicant, who had been "engaged on the business of the Mechanism" in his capacity as a judge of its appeals bench.

34. In his address to the UN General Assembly on 9 November 2016, the President of the Mechanism pointed out that the applicant had enjoyed diplomatic immunity from the time of his assignment to the *Ngirabatware* proceedings on 25 July 2016, and that he would continue to enjoy such immunity until the conclusion of those proceedings. He called upon the government of Türkiye, in accordance with its binding international obligations under Chapter VII of the UN Charter, to immediately release the applicant from detention and enable him to resume his lawfully-assigned judicial functions.

35. On 10 November 2016 the defendant in the *Ngirabatware* case (to which the applicant had been assigned on 25 July 2016) lodged a request for the Mechanism to issue an order, pursuant to Article 28 of its Statute and Rule 55 of its Rules of Procedure and Evidence, to the government of Türkiye to cease its prosecution of the applicant so that he could resume his judicial functions in the case.

36. On 28 November 2016 the President of the Mechanism invited the government of Türkiye to file written submissions in response to that request, to no avail.

37. On 8 December 2016 the President of the Mechanism addressed the UN Security Council and urged the release of the applicant from detention in Türkiye.

38. On 21 December 2016 the President of the Mechanism ordered that a public hearing be held on 17 January 2017 at the Mechanism's branch in the Hague to provide the government with an additional opportunity to be heard in relation to the applicant's arrest and detention. No representative of Türkiye attended the hearing.

39. On 31 January 2017 the President of the Mechanism issued an order to the government of Türkiye to: (i) cease all legal proceedings against the applicant; and (ii) take all necessary measures to ensure his release from detention as soon as practicable, but no later than 14 February 2017, so that he could resume his judicial functions in the *Ngirabatware* case. The relevant parts of the order read as follows (footnotes omitted):

> "5. Pursuant to Article 29 of the Statute, the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 applies, *inter alia,* to the judges of the Mechanism, who enjoy [the] privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law when engaged on the business of the Mechanism. Judge Akay was engaged on the business of the Mechanism at the time of his arrest and detention.
>
> 6. On behalf of the Secretary-General of the United Nations, the United Nations Office of Legal Affairs has formally asserted diplomatic immunity with respect to Judge Akay to the authorities of Turkey and requested his immediate release from detention and the cessation of all legal proceedings against him. The Secretary-General's assertion of immunity creates a presumption which cannot be easily set aside by domestic authorities. This full diplomatic immunity has not been waived by the Secretary-General.
>
> ...
>
> 11. It is self-evident that justice and the rule of law begin with an independent judiciary. The right to be tried before an independent and impartial tribunal is an integral component of the right to a fair trial enshrined in Article 19 of the Statute and embodied in numerous human rights instruments. The United Nations Human Rights Committee has stated that the right to an independent and impartial tribunal 'is an absolute right that may suffer no exception'. To uphold this right, in the exercise of their judicial functions, the judges of the Mechanism shall be independent of all external authority and influence, including from their own States of nationality or residence. A corollary guarantee for the independence of the Mechanism's judges is contained in Article 29 of the Statute, which provides for full diplomatic immunity for judges during the course of their assignments – even while exercising their functions in their home country. Accordingly, diplomatic immunity is a cornerstone of an independent international judiciary, as envisaged by the United Nations. The ability of the judges to exercise their judicial functions first and foremost from their home countries reflects the unique characteristics of the Mechanism, which was intended to ensure justice coupled with cost-savings and efficiency. Turkey was a member of the United Nations Security Council at the time of the consideration of our Statute and voted in favour of its adoption, a Statute which guarantees an independent judiciary and full diplomatic immunity for our judges while performing their work ...

12. With the arrest of Judge Akay, proceedings on the merits of Ngirabatware's Request for Review have necessarily come to a standstill ...

...

16. I recall that, while the Mechanism will not lightly intervene in a domestic jurisdiction, there is clear authority to order a state to terminate proceedings against individuals on the basis of the immunity they enjoyed as a result of their connection with the Mechanism. Such orders have been implemented. In the present circumstances, an order to Turkey to immediately cease prosecution and to release Judge Akay so that he can continue to exercise his judicial functions in this case is entirely appropriate and necessary to ensure that the review proceedings can conclude. Such an order is binding on Turkey pursuant to Resolution 1966 adopted by the United Nations Security Council under Chapter VII of the United Nations Charter on 22 December 2010. Article 9 of Security Council Resolution 1966 requires that all States comply with orders issued by the Mechanism.

..."

40. On 6 March 2017, as Pre-Review Judge, the President of the Mechanism, Theodor Meron, issued a decision of non-compliance by Türkiye, holding that the government of Türkiye had failed to comply with its obligations under Article 28 of the Statute to cooperate with the Mechanism in relation to the proceedings in the *Ngirabatware* case and to comply without undue delay with its judicial order of 31 January 2017. The Mechanism therefore decided to report the matter to the UN Security Council.

V. BILL OF INDICTMENT AND THE SUBSEQUENT CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

41. On 2 February 2017 the Ankara public prosecutor filed a bill of indictment against the applicant, accusing him under Article 314 § 2 of the Criminal Code with being a member of an armed terrorist organisation. The prosecutor referred to the following evidence: (i) the fact that since 26 February 2015 the applicant had used ByLock, an encrypted messaging application allegedly used exclusively by the members of FETÖ/PDY, and (ii) the two books by Fetullah Gülen and E.D. (allegedly part of the senior management of the organisation) seized during the search of his house (see paragraph 17), on the first pages of which the following statements were written "1012 111-C, 111-F Aydın Sefa AKAY 23.11.2004 Frankfurt" and "1001 IV-A Aydın Sefa AKAY 23.11.2004 Frankfurt" respectively. Referring to the Ministry of Foreign Affairs' letter dated 13 October 2016 (see paragraph 25 above), the prosecutor took the view that the applicant's functional immunity did not create absolute judicial immunity and that he did not have any special status in terms of matters outside his mandate, especially in terms of the jurisdiction of Türkiye.

42. On 6 February 2017 the Ankara 16th Assize Court (hereinafter "the trial court") accepted the bill of indictment, and the trial subsequently commenced before that court.

43. On 7 February 2017 the trial court drew up a preparatory hearing record (*tensip zaptı*) and ordered the applicant's continued pre-trial detention. It held that alternative measures would be insufficient at that stage of the proceedings on account of the following:

> "... the nature and importance of the offence of which the applicant is accused, the state of the evidence, the existence of concrete evidence giving rise to a strong suspicion of an offence, the fact that the alleged offence [is] listed as a catalogue offence in Article 100 § 3 and [Article] 111 of the Code of Criminal Procedure, in respect of which the existence of grounds for detention is [*sic*] assumed, the existence of a possibility that the evidence would be tampered with ..."

The trial court also asked the Anti-Terrorism Branch (TEM) of the Ankara Security Directorate to provide it with information on the structure and operating principles of the ByLock messaging application, the dates, frequency and manner of its usage by the applicant and cell tower records relating to the mobile phone used by him.

44. On 14 February 2017 the applicant's lawyer lodged an objection against that order and requested the applicant's release. Counsel referred, among other things, to the order issued by the Mechanism on 31 January 2017 (see paragraph 39 above), which stated that the applicant would be released no later than 14 February 2017. The lawyer further argued that the order was binding on Türkiye by virtue of Security Council Resolution 1966 (2010), which had been issued in accordance with Chapter VII of the Charter of the United Nations, and further took the view that all States were required to comply with the order, pursuant to operative paragraph 9 of the UN Security Council Resolution 1966 (2010) (see paragraph 81 below).

45. In observations submitted the same day, the public prosecutor's office requested the dismissal of the applicant's objection, referring, among other things, to the existence of a strong suspicion that the applicant had committed the crime of being a member of an armed terrorist organisation in view of the current state of the evidence in the case file (being a user of ByLock, having confessed to such use and being in possession of books written by leaders of the organisation).

46. On 15 February 2017 the trial court dismissed the applicant's objection, holding that the applicant was a "red ByLock user" (meaning his ByLock use was judged to have been frequent by the police on the basis of data showing the number of connections made from his mobile phone to the ByLock servers), that he had admitted having used that application for different purposes in his previous statements and that none of the grounds indicated in its decision on 7 February 2017 had been changed. Accordingly, the trial court held that there was no legal reason which could necessitate a change in the grounds for detention "in the present case, where a lawyer asked for the applicant's release, arguing that he had been a judge at the UCM[2] [*sic*]." The case file was thus sent to the Ankara 17th Assize Court for review.

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[2] The abbreviation for the International Criminal Court in Turkish.

47. On 20 February 2017 the Ankara 17th Assize Court dismissed the applicant's objection on account of the following:

> "the nature of the offence [of which] the suspect [is accused], the fact that there is strong evidence indicating the commission of the alleged offence, that the alleged offence is one of the catalogue offences listed in Article l00 of the Code of Criminal Procedure and that the application of the judicial supervision measure would be insufficient at this stage."

48. On 13 March 2017 the applicant's lawyer applied to the trial court and asked for the applicant's release, the termination of the criminal proceedings and his acquittal submitting, among other things, that he enjoyed absolute diplomatic immunity, as confirmed by Article 29 of the Statute and the order issued by the President of the Mechanism on 31 January 2017. The lawyer took the view that the opinions proffered by the Ministry of Foreign Affairs and the Ministry of Justice were contrary to the international conventions on the subject signed by Türkiye. The lawyer alleged that the criminal case had been brought against the applicant on account of the erroneous guidance given to the political authorities and the judiciary. In any event, the ByLock application had not only been used in encrypted form by the members of FETÖ/PDY, but also by ordinary people who had no connection whatsoever with FETÖ/PDY and who had downloaded the application from mobile application stores and used it. Moreover, in order to attach any weight to the ByLock application in making out the offence of being a member of an armed terrorist organisation, the communications undertaken via that application should have been made in the context of the activities of FETÖ/PDY and its content should have constituted an offence. However, the case file revealed that the applicant's communications had been of a social nature.

49. On 14 March 2017 the applicant's lawyer filed defence submissions in respect of the offence of being a member of an armed terrorist organisation and regarding the ByLock application. In his view, even though the National Intelligence Agency of Türkiye (*Milli İstihbarat Teşkilatı*) had suggested that ByLock had been developed for the exclusive use of FETÖ/PDY, it had failed to explain why such an organisation, which allegedly attached so much importance to secrecy, had uploaded the ByLock application to mobile application stores, which were accessible to anyone. The lawyer pointed out that at no point in his career had the applicant had any involvement with the organisation in question, except in certain instances required by his position as ambassador. Moreover, and more importantly, all the ByLock call records allegedly belonging to the applicant consisted of "cancelled", "rejected" or "missed" calls, showing that he had not made any voice calls via ByLock. As regards the content of his messages on ByLock, the applicant accepted most of them, with the exception of certain messages which could have given the impression that he had been affiliated with FETÖ/PDY, arguing that they could have been forged. In that connection, the applicant adamantly denied having texted "I have important ideas about the Hizmet Movement" or any other message concerning the repayment of his mortgage, arguing that neither

he nor any of his family members had had a mortgage at the material time. Lastly, the lawyer submitted that in his capacity as an ambassador, the applicant had been in contact with people from different layers of Turkish society in Burkina Faso and that most of his messages had concerned the construction of a library, the shea butter trade and the opening of a football academy by a Turkish football club. Accordingly, he had exchanged messages on ByLock in the context of his personal affairs, which had had nothing to do with FETÖ/PDY, as alleged.

50. By a letter dated 15 March 2017 the applicant reiterated his lawyer's requests.

51. At the first hearing, held on 15 March 2017, the applicant gave evidence in person, stating, *inter alia*, that his pre-trial detention was in violation of international law, under which he was entitled to enjoy diplomatic immunity as a judge of the Mechanism. He also stated that his pre-trial detention had prevented him from taking part in its hearings, bringing to a halt the case to which he had been assigned, making it impossible for him to carry out his duties as an international judge. Stating that he had served the Ministry of Foreign Affairs for a long time, the applicant expressed his dismay at and disagreement with their opinion (see paragraph 25 above), stressing that he would continue enjoying his immunity unless the UN Secretary-General waived it.

52. The applicant further indicated that following his appointment as ambassador to Burkina Faso in 2012, he had set up the Turkish embassy there and had been in contact with several religious organisations, including the organisation currently referred to as "FETÖ/PDY" by the authorities, which had been referred to at the material time as "the Gülen movement", arguing that he had not even known the difference between those organisations. As to his use of ByLock, he reiterated that he had explicitly admitted having used it even though he had known that other people had denied having done so. Although he was unsure of the exact date, he stated that he had downloaded the ByLock application to his mobile phone from Google Play Store in around December 2014 and had started using it for social purposes following the advice of his friend, B., who had been the Minister of Foreign Affairs of Burkina Faso. The applicant stressed that he had only contacted Z., a businessman from Burkina Faso and Z.G., the principal of a school belonging to the Gülen movement. The applicant further submitted that the content of the deciphered conversations contained in the case file had not belonged entirely to him, arguing that the conversation regarding the taking of a loan from a certain bank did not concern him. Lastly, he stressed that even though the ByLock application was regarded as having overwhelmingly been used by FETÖ/PDY members, and that even if there was a 0.5% chance that ByLock had been used by people outside that organisation, that possibility had materialised in his case since he did use it for social purposes.

53. At the end of the hearing, the trial court decided to request clarification from the Ministry of Foreign Affairs concerning the applicant's immunity,

the binding power of the Statute of the Mechanism on Türkiye and the procedure for appointing the applicant to the Mechanism. It ordered, among other things, the applicant's continued pre-trial detention on the grounds (i) that there were concrete facts giving rise to the offence attributed to him based on his being a user of ByLock, which was an encrypted communication application used by FETÖ/PDY members, (ii) that the offence was amongst the "catalogue offences" listed in Article 100 of the Code of Criminal Procedure, and (iii) that the pre-trial detention was a proportionate measure in view of the sentence and security measures anticipated to be imposed on him.

54. At the second hearing, held on 13 April 2017, the applicant and his counsel objected to an undated information note drawn up by the Ministry of Justice regarding the applicant's immunity, arguing that it should not be used as evidence, since its author was unknown and it bore no signatures. The parties did not submit that document to the Court. Counsel further asked the trial court to hear evidence from Dr K. Altıparmak (the applicant's representative in the proceedings before the Court) in his capacity as an expert on the issue of diplomatic immunity. At the end of the hearing, the trial court dismissed that request, but decided to ask the Ministry of Justice to clarify the points raised by the applicant in relation to the information note and to submit a fresh opinion in view of the written expert opinion of Dr Altıparmak submitted by him. Having regard to the importance of the issue, the fact that the evidence had not yet been fully collected and the grounds previously indicated in its decision dated 15 March 2017, the trial court ordered the applicant's continued pre-trial detention.

55. By a letter dated 27 April 2017 the Ministry of Justice clarified that the previous information note dated 11 April 2017 had been drawn up by the Ministry of Foreign Affairs and submitted a fresh opinion by its General Directorate for Research and Security dated 27 April 2017 in response to the trial court's request regarding the applicant's immunity. The General Directorate stated, among other things, that the immunity of UN officials under Article V, Section 18, of the General Convention was functional, not absolute. Moreover, applying Articles 31 § 4 and 38 § 1 of the Diplomatic Convention to the applicant's situation, the Directorate held as follows:

> "... it may be said that a judge of the UN may enjoy the privileges and immunities in his or her State of nationality only in respect of official acts performed in the exercise of his or her functions."

In the Directorate's view, that specific situation had also been taken into account in Article IV, Section 15 of the General Convention, which provided that such privileges and immunities were not applicable before the authorities of the State of nationality of representatives.

56. On 8 and 10 May 2017 the applicant's counsel lodged an objection against the applicant's continued detention and requested his release on account of his diplomatic immunity, arguing that the Ministry of Foreign

Affairs had "passed the buck" ("*topu taca atmak*") by expressing a perfunctory opinion. On the latter date, the trial court dismissed the applicant's objection and decided to extend his pre-trial detention, holding that judicial supervision measures would be insufficient on account of (i) the existence of concrete evidence giving rise to a strong suspicion that he had committed the offence of being a member of an armed terrorist organisation, (ii) the persistence of an imminent and concrete danger, and (iii) the risk that he would flee or tamper with evidence.

57. At the third hearing, held on 30 May 2017, the applicant's lawyer asked for the applicant's release, arguing that the opinion of the Ministry of Foreign Affairs merely reflected its comments, which were not binding on the trial court. In that regard, the lawyer also invited the trial court to commission a panel of experts with a view to clarifying the issues concerning the applicant's immunity. The trial court rejected the request for an expert examination on the grounds that it was not possible to obtain an expert opinion on legal matters. It ordered the applicant's continued pre-trial detention on the same grounds as those indicated in its decision dated 13 April 2017 and without carrying out an assessment as regards his immunity.

58. At the final hearing, held on 14 June 2017, the Ankara 16th Assize Court convicted the applicant under Article 314 § 2 of the Criminal Code of being a member of an armed terrorist organisation and sentenced him to seven years and six months' imprisonment. The court also ordered his release on bail in the form of a ban on him leaving the territory of Türkiye, in view of (i) the period he had already spent in detention, (ii) the fact that he had a fixed abode and (iii) the absence of any risk that he might flee. In rejecting the applicant's claim for diplomatic immunity pursuant to Article 29 § 2 of the Statute of the Mechanism, the trial court stated as follows:

> "The procedures and principles governing the office of judge of the Mechanism are regulated by the Convention on the Privileges and Immunities of the UN, Article V Section 18(a), which provides UN officials with functional immunity in respect of words spoken or written and [all] acts performed by them [in their official capacity]. According to Article V Section 20 of this Convention, since privileges and immunities are granted to UN officials in the interests of the UN and not for their personal benefit, [the UN Secretary-General has the duty to] waive this immunity in any case where the immunity would impede the course of justice ... [For this reason,] the notion of functional immunity, which is similar to the concept of inviolability and legislative non-liability (*yasama dokunulmazlığı/sorumsuzluğu*) applicable to members of parliament in our country, does not create absolute judicial immunity for the defendant. [The court concludes that] the defendant does not have a special status in terms of matters outside his mandate and especially in terms of jurisdiction of our country."

59. Following his provisional release, the applicant resumed his work as a judge in the *Ngirabatware* case at the Mechanism and worked remotely from Türkiye.

60. On 13 February 2018 the Ankara Regional Court of Appeal dismissed an appeal by the applicant against the judgment of 14 June 2017. As to his

claim for diplomatic immunity, the court first acknowledged that under Article 29 § 2 of the Statute he enjoyed "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law". It then reproduced the wording of Sections 11, 12, 14, 15 and 20 of the General Convention, concluding that under Section 15, concerning "representatives of Members" (see paragraph 79 below), the immunities listed in the General Convention were not applicable as between the applicant and the authorities of Türkiye, the State of which he was a national. Accordingly, the appellate court took the view that the applicant could not enjoy the immunities listed in the General Convention before the Turkish authorities.

61. On 29 June 2018 the UN Secretary-General reappointed all the judges on the roster of the Mechanism for a new two-year term, with the exception of the applicant.

VI. THE CONSTITUTIONAL COURT'S RULING IN RESPECT OF THE APPLICANT

62. On 12 September 2019 the Constitutional Court declared the applicant's complaints (see paragraph 29 above) inadmissible. Its reasoning can be summarised as follows.

A. Alleged violation of the right to a fair trial

63. The applicant complained that his right to a fair trial had been violated because the decisions of the Ankara 2nd and 3rd Magistrate's Courts had not contained any reasons in that they had not contained an answer or assessment in respect of his claim for diplomatic immunity.

64. In its decision, the Constitutional Court noted that the applicant had complained that investigative measures had been carried out without his immunity being lifted and his objections based on that point being examined. The court declared that complaint inadmissible for non-exhaustion of domestic remedies, taking the view that since the criminal proceedings against him were pending, he had been in a position to raise his complaints at the appeal and appeal in cassation stages.

B. Alleged violation of the right to respect for private life and inviolability of the home

65. The applicant further complained that his prosecution, the searches of his house and person and the seizure of his belongings, which had all been carried out in disregard of his immunity, had breached his right to respect for private life and inviolability of the home.

66. The Constitutional Court declared that complaint inadmissible as being manifestly ill-founded, holding that the applicant's house and

workplace had been searched pursuant to a warrant issued by the investigating authorities with the aim of collecting evidence. Furthermore, the searches had been based on a foreseeable and clear legal provision and the applicant had been given the opportunity to effectively submit his objections to the competent bodies. The court held that the measure in question had not been executed in such a manner as to become permanent, and had lasted no longer than the circumstances at the time required or had otherwise been ill-suited to the aim pursued. The court concluded, taking into account the type, duration and manner of application of the measure and its effects on the applicant's life, that the damage sustained by him had been no more severe than the unavoidable damage, and that the measure had not been applied arbitrarily.

C. Alleged violation of the right to liberty and security

1. Complaint concerning the unlawfulness of his arrest and placement in custody

67. The applicant complained that his arrest and police custody had infringed his right to liberty and security of person because he had been detained without there being any specific or concrete evidence showing that he had committed an offence and without respect for the guarantees laid down in international law.

68. The Constitutional Court declared the complaint inadmissible for non-exhaustion of domestic remedies, holding that the applicant had failed to avail himself of the effective remedy set out in Article 141 of the Code of Criminal Procedure, namely a compensation claim to have the lawfulness of his arrest and police custody reviewed and obtain compensation in the event that those measures were found to be unlawful. In any event, there was nothing in his individual application to indicate that he had lodged an objection in accordance with Article 91 § 5 of the Code of Criminal Procedure against the decisions authorising his arrest and police custody with a view to securing his release.

2. Complaint concerning the unlawfulness of his pre-trial detention

69. According to the Constitutional Court, the applicant complained that he had been placed in pre-trial detention in the absence of a reasonable suspicion that he had committed the offence attributed to him or any concrete evidence and facts justifying it; that there had been no risk of his absconding or tampering with evidence; and that the decisions concerning his pre-trial detention and those given following his objections had been delivered without his objections being examined and without any reasoning. The applicant further argued that he had been placed in pre-trial detention without respect for the diplomatic guarantees; that he had been granted diplomatic immunity as he had served as a judge at the Mechanism at the material time; and that

his immunity should have been lifted by the UN Secretary-General to carry out an investigation and prosecution against him or to place him in pre-trial detention.

70. The Constitutional Court examined the question as to whether the applicant had immunity pursuant to the Statute of the Mechanism, the General Convention and the Diplomatic Convention. Referring to Articles 29, 30 and 31 § 1 and 4 of the Diplomatic Convention and Article IV, Section 15, of the General Convention, concerning "representatives of Members", it held as follows:

> "... privileges and immunities are provided before the authorities of the receiving State. Since [these] privileges and immunities cannot be asserted against the authorities of the sending State, in other words, the State of which the applicant is a national and which he represents, the investigation will be conducted in accordance with general provisions and the detention measure in this investigation can be decided by the magistrate's court (*sulh ceza hakimliği*) as the judicial body with general jurisdiction. Moreover, the accusation against the applicant, which is the subject of the detention measure, does not have any connection with the applicant's duty as a judge, and the alleged acts are of the nature of personal offence related to terrorism ..."

71. The Constitutional Court went on to hold that the applicant's allegation that he had been unlawfully detained without observation of the safeguards arising from international law due to his status as judge of the Mechanism was not justified. Accordingly, it found that his pre-trial detention had had a legal basis under Article 19 of the Constitution (the provision corresponding to Article 5 of the Convention).

72. In assessing the question whether there was a reasonable suspicion indicating that the applicant had committed the offence, the Constitutional Court held that, according to the bill of indictment and the judicial decisions on his pre-trial detention, he had been a user of the ByLock messaging application. In view of the features of that application, it was acceptable for its use or installation for use to have been treated by the investigating authorities as evidence of a link to FETÖ/PDY. It referred in that connection to its judgment of 20 June 2017 in *Aydın Yavuz and Others*[3]. For that reason, in view of the features of the messaging application, the Constitutional Court found that the investigating authorities or courts that had ordered the applicant's detention could not be said to have followed a groundless and arbitrary approach in accepting that his use of the ByLock application could, in the circumstances of the case, be regarded as "strong evidence" of the commission of the offence of membership of FETÖ/PDY. Accordingly, the Constitutional Court declared the complaint inadmissible as being manifestly ill-founded.

[3] Further information on this case may be found in *Baş v. Turkey* (no. 66448/17, §§ 91-97, 3 March 2020).

3. Complaint concerning the length of his pre-trial detention

73. The Constitutional Court declared this complaint inadmissible for failure to avail himself of the compensatory remedy provided for under Article 141 of the Code of Criminal Procedure.

VII. FURTHER DEVELOPMENTS IN THE APPLICANT'S TRIAL

74. By a final judgment of 10 February 2021 the Court of Cassation rectified and upheld the judgment of the Ankara Regional Court of Appeal.

75. On 29 April 2021 the applicant lodged an individual application with the Constitutional Court with respect to his conviction. According to the information provided by the parties, that application is currently pending. According to the applicant's observations on the admissibility and merits of the case, he is currently serving his sentence in Rize L-Type Prison.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

76. The relevant provisions of the Constitution, the Criminal Code and the Code of Criminal Procedure may be found in, among other authorities, *Ahmet Hüsrev Altan v. Turkey* (no. 13252/17, §§ 68-69 and §§ 77-84, 13 April 2021), *Budak v. Turkey* (no. 69762/12, § 34, 16 February 2021) and *Kavala v. Turkey* (no. 28749/18, § 73, 10 December 2019).

77. The domestic courts' case-law on the use of the ByLock application in relation to complaints under Article 5 of the Convention may be found in *Akgün v. Turkey* (no. 19699/18, §§ 66-105, 20 July 2021; see also *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, §§ 155-88, 26 September 2023, for a more comprehensive analysis of the domestic courts' case-law on the ByLock application).

II. INTERNATIONAL LAW AND PRACTICE

A. Charter of the United Nations (UN Charter), signed on 26 June 1945 in San Francisco

78. Article 105 of the UN Charter provides as follows:

> "1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
>
> 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
>
> 3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

B. Convention on the Privileges and Immunities of the United Nations

79. The relevant parts of the Convention on the Privileges and Immunities of the United Nations ("the General Convention"), adopted by the General Assembly of the United Nations on 13 February 1946 and to which Türkiye became a party on 22 August 1950 by accession, provide as follows:

Article IV
REPRESENTATIVES OF MEMBERS

"SECTION 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

...

SECTION 12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

...

SECTION 15. The provisions of Sections 11, 12 and 13 are not applicable as between a representative and the authorities of the [S]tate of which he is a national or of which he is or has been the representative.

SECTION 16. In this article the expression 'representatives' shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

Article V
OFFICIALS

SECTION 17. The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

SECTION 18. Officials of the United Nations shall:

(a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

...

SECTION 19. In addition to the immunities and privileges specified in Section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities,

exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

SECTION 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

SECTION 21. The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article.

Article VI
EXPERTS ON MISSIONS FOR THE UNITED NATIONS

SECTION 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage;

(b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

..."

C. 1961 Vienna Convention on Diplomatic Relations

80. The relevant provisions of the 1961 Vienna Convention on Diplomatic Relations ("the Diplomatic Convention") provide as follows:

Article 1

"For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) The 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity;

...

(d) The 'members of the diplomatic staff' are the members of the staff of the mission having diplomatic rank;

...

(e) A 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission;

...

(i) The 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission."

Article 22

"1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

...

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

Article 29

"The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

Article 30

"1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability."

Article 31

"1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. ...

...

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State."

Article 38

"1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.

2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission."

D. UN Security Council Resolution 1966 (2010)

81. UN Security Council Resolution 1966 (2010), adopted by the Security Council at its 6463rd meeting on 12 December 2010, established the International Residual Mechanism for Criminal Tribunals ("the Mechanism") with two branches[4] and adopted the Statute of the Mechanism ("the Statute") in Annex 1. The relevant parts of the Resolution provide as follows:

> "The Security Council,
>
> ...
>
> 1. *Decides* to establish the International Residual Mechanism for Criminal Tribunals ('the Mechanism') with two branches, which shall commence functioning on 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY), respectively ('commencement dates'), and to this end *decides* to adopt the Statute of the Mechanism in Annex 1 to this resolution;
>
> ...
>
> 9. *Decides* that all States shall cooperate fully with the Mechanism in accordance with the present resolution and the Statute of the Mechanism and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute of the Mechanism, including the obligation of States to comply with requests for assistance or orders issued by the Mechanism pursuant to its Statute;
>
> ..."

Article 2: Functions of the Mechanism

> "The Mechanism shall continue the functions of the ICTY and of the ICTR, as set out in the present Statute ('residual functions'), during the period of its operation.

Article 3: Structure and Seats of the Mechanism

> The Mechanism shall have two branches, one branch for the ICTY and one branch for the ICTR, respectively. The branch for the ICTY shall have its seat in The Hague. The branch for the ICTR shall have its seat in Arusha.

Article 4: Organization of the Mechanism

> The Mechanism shall consist of the following organs:
>
> (a) The Chambers, comprising a Trial Chamber for each branch of the Mechanism and an Appeals Chamber common to both branches of the Mechanism;
>
> (b) The Prosecutor common to both branches of the Mechanism;
>
> (c) The Registry, common to both branches of the Mechanism, to provide administrative services for the Mechanism, including the Chambers and the Prosecutor.

[4] A branch for the International Criminal Tribunal for Rwanda ("the ICTR") and another one for the International Criminal Tribunal for Yugoslavia ("the ICTY").

Article 8: Roster of Judges

1. The Mechanism shall have a roster of 25 independent judges ('judges of the Mechanism'), not more than two of whom may be nationals of the same State.

...

3. The judges of the Mechanism shall only be present at the seats of the branches of the Mechanism as necessary at the request of the President to exercise the functions requiring their presence. In so far as possible, and as decided by the President, the functions may be exercised remotely, away from the seats of the branches of the Mechanism.

...

Article 9: Qualification of Judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. Particular account shall be taken of experience as judges of the ICTY or the ICTR.

2. In the composition of the Trial and Appeals Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 10: Election of Judges

1. The judges of the Mechanism shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges, preferably from among persons with experience as judges of the ICTY or the ICTR, from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in Article 9 paragraph 1 of the Statute;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than 30 candidates, taking due account of the qualifications set out in Article 9 paragraph 1 and adequate representation of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect 25 judges of the Mechanism. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected.

...

3. The judges of the Mechanism shall be elected for a term of four years and shall be eligible for reappointment by the Secretary-General after consultation with the Presidents of the Security Council and of the General Assembly.

..."

Article 12: Assignment of Judges and Composition of the Chambers

"...

4. ... In the event of an application for review of a judgment rendered by the Appeals Chamber, the Appeals Chamber on review shall be composed of five judges.

..."

Article 28: Cooperation and Judicial Assistance

"...

2. States shall comply without undue delay with any request for assistance or an order issued by a Single Judge or Trial Chamber in relation to cases involving persons covered by Article 1 of this Statute, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the Mechanism."

Article 29: The Status, Privileges and Immunities of the Mechanism

"1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the Mechanism, the archives of the ICTY, the ICTR and the Mechanism, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2. The President, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law. The judges of the Mechanism shall enjoy the same privileges and immunities, exemptions and facilities when engaged on the business of the Mechanism.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this Article.

..."

E. Rules of Procedure and Evidence of the Mechanism

82. Rule 55, headed "General rule", of the Rules of Procedure and Evidence of the Mechanism (which was adopted on 8 June 2012 and has since been subject to various amendments), provided, at the material time, as follows:

"At the request of either Party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants, and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

F. Code of Professional Conduct for the Judges of the Mechanism

83. Article 2 § 1 of the Code of Professional Conduct for the Judges of the Mechanism (MICT/14), as in force at the material time (dated 11 May 2015), provides as follows:

> "In the exercise of their judicial functions, judges shall be independent of all external authority or influence."

G. Relevant case-law of the International Court of Justice

84. In its Advisory Opinion of 29 April 1999 ("the 1999 Advisory Opinion", Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights), the ICJ examined the question of the applicability of Article VI, Section 22, of the General Convention in the case of Dato' Param Cumaraswamy, as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers. The relevant paragraphs read as follows:

> "60. As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.
>
> 61. When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.
>
> The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information.
>
> ...
>
> 63. Section 22 (b) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule in limine litis on the immunity of the Special Rapporteur (see paragraph 17 above), thereby nullifying the essence of the immunity rule contained in Section 22 (b)..."

III. NOTICE OF DEROGATION BY TÜRKİYE

85. On 21 July 2016 the Permanent Representative of Türkiye to the Council of Europe sent the Secretary General of the Council of Europe the following notice of derogation:

> "I communicate the following notice of the Government of the Republic of Turkey.
>
> On 15 July 2016, a large-scale coup attempt was staged in the Republic of Turkey to overthrow the democratically-elected government and the constitutional order. This despicable attempt was foiled by the Turkish [S]tate and people acting in unity and solidarity. The coup attempt and its aftermath together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms.
>
> The Republic of Turkey is taking the required measures as prescribed by law, in line with the national legislation and its international obligations. In this context, on 20 July 2016, the Government of the Republic of Turkey declared a State of Emergency for a duration of three months, in accordance with the Constitution (Article 120) and the Law No. 2935 on State of Emergency (Article 3/1b) ...
>
> The decision was published in the Official Gazette and approved by the Turkish Grand National Assembly on 21 July 2016. Thus, the State of Emergency takes effect as from this date. In this process, measures taken may involve derogation from the obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms, permissible in Article 15 of the Convention.
>
> I would therefore underline that this letter constitutes information for the purposes of Article 15 of the Convention. The Government of the Republic of Turkey shall keep you, Secretary General, fully informed of the measures taken to this effect. The Government shall inform you when the measures have ceased to operate.
>
> ..."

86. The notice of derogation was withdrawn on 8 August 2018, following the end of the state of emergency.

THE LAW

I. PRELIMINARY QUESTION CONCERNING THE DEROGATION BY TÜRKİYE

87. The Government invited the Court to examine the present application with due regard to the derogation notified under Article 15 of the Convention to the Secretary General of the Council of Europe on 21 July 2016. Article 15 provides:

> "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 [the] 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."

A. The parties' submissions

88. The Government pointed out that the perpetrators of the attempted coup of 15 July 2016 had killed 251 people and injured thousands more, profoundly disturbing the public order and the orderly life of society, giving rise to a situation threatening the life of the nation within the meaning of Article 15 of the Convention. All the necessary measures taken to fight against terrorism and overcome the consequences of the treacherous coup attempt had been strictly required by the exigencies of the situation and had been consistent with the other obligations of Türkiye under international law. In the Government's view, the applicant's pre-trial detention in the present case had been appropriate in the circumstances and necessary at a time when the imminent threat arising from the coup attempt had not yet been contained and investigations concerning large numbers of suspects were pending across the country. Similarly, the searches of the applicant's house and person also had to be seen from that perspective, since they had been carried out on suspicion of his being a member of FETÖ/PDY, the organisation behind the attempted coup.

89. The applicant argued that the brutal and fatal terror attacks referred to by the Government had no relevance to the present case. His arrest and pre-trial detention had not been related to the attempted coup, as was clear from their failure to cite any facts which could remotely show otherwise.

B. The Court's assessment

90. The Court has already found that the attempted military coup disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention (see *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 93, 20 March 2018). In the present case, the applicant was arrested and placed in pre-trial detention in September 2016, shortly after the attempted coup which gave rise to the Government's notice of derogation under Article 15 of the Convention. Moreover, the Constitutional Court also carried out its examination in respect of the applicant from the standpoint of Article 15 of the Constitution (the provision equivalent to Article 15 of the Convention). In view of the above, the Court is of the view that the state of emergency is undoubtedly a contextual factor that should be fully taken into account in interpreting and applying Article 5 of the Convention in the present case (see *Ahmet Hüsrev Altan v. Turkey*,

no. 13252/17, §§ 101-03, 13 April 2021). As to whether the measures taken in the present case were strictly required by the exigencies of the situation and consistent with the other obligations under international law, the Court considers it necessary to examine the applicant's complaints on the merits, and will do so below (see *Kavala v. Turkey*, no. 28749/18, § 88, 10 December 2019).

II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

91. The applicant complained, under Article 5 § 1 of the Convention, that his arrest and pre-trial detention had not been in accordance with a procedure prescribed by law in that they had been contrary to the diplomatic immunities he had enjoyed as a judge of the Mechanism under the UN General Convention and Diplomatic Convention. He further complained that his arrest and pre-trial detention had been in breach of Article 5 § 1 (c) in the absence of any evidence giving rise to a reasonable suspicion of his having committed an offence. Lastly, he complained of a breach of Article 5 § 4, submitting that the domestic courts had failed to address his arguments regarding his diplomatic immunity in their decisions ordering and extending his pre-trial detention. The relevant parts of Article 5 read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.
>
> ...
>
> 4. Any person deprived of his liberty by arrest or detention has the right to appeal to a court, so that he may rule at short notice on the legality of his detention and order his release if the detention is unlawful."
>
> ..."

A. Admissibility

92. The Government raised a plea of non-exhaustion of domestic remedies, arguing that the applicant should have lodged a claim under Article 141 of the Code of Criminal Procedure to challenge the lawfulness of his pre-trial detention once it had ended on 14 June 2017 with his conviction and raise his complaint concerning the lack of a reasonable suspicion of his having committed an offence under Article 5 § 1 (c) of the Convention.

93. The applicant submitted that the Grand Chamber had recently examined and dismissed an identical preliminary objection in *Selahattin*

Demirtaş v. Turkey (no. 2) ([GC], no. 14305/17, §§ 209-14, 22 December 2020), holding that a compensation claim under Article 141 § 1 (a) of the Code of Criminal Procedure would have been bound to fail, given that none of the domestic courts called upon to review the applicant's pre-trial detention had acknowledged that it had been unlawful. Since none of the domestic courts, in particular the Constitutional Court, had found his pre-trial detention to have been improper or unlawful, the applicant invited the Court to dismiss the Government's plea of non-exhaustion.

94. The Court has already examined and dismissed identical preliminary objections by the Government in respect of applicants whose pre-trial detention had come to an end by the time the Court carried out its assessment (see *Turan and Others v. Turkey*, nos. 75805/16 and 426 others, §§ 58-60, 23 November 2021). In so doing, the Court stressed that where the domestic courts had not acknowledged the unlawfulness of the pre-trial detention, a compensation claim under Article 141 § 1 (a) of the Code of Criminal Procedure could not be regarded as offering any prospects of success in the absence of any pertinent examples of case-law capable of showing otherwise. In the present case, the Court discerns no reason to depart from those findings and thus dismisses the Government's preliminary objection based on non-exhaustion.

95. The Court further notes that even though the Constitutional Court declared the applicant's complaints under Article 5 of the Convention concerning his arrest and police custody inadmissible owing to his failure to avail himself of either an objection against those measures under Article 91 § 5 or a claim for compensation under Article 141 § 1 of the Code of Criminal Procedure respectively (see paragraph 68 above), the Government did not raise a plea of non-exhaustion in respect of this part of the applicant's complaint under Article 5 of the Convention, their preliminary objection being limited to his pre-trial detention. Since the Court cannot, of its own motion, examine the issue of exhaustion of domestic remedies under Article 35 of the Convention, it is not prevented from examining the applicant's arrest (which preceded his pre-trial detention) in the context of its examination under Article 5 of the Convention (see *International Bank for Commerce and Development AD and Others v. Bulgaria*, no. 7031/05, § 131, 2 June 2016). Accordingly, the term "pre-trial detention" in the context of the Court's examination below should be taken to include, *inter alia*, his arrest and his police custody.

96. The Court notes that the complaints under Article 5 are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The alleged unlawfulness of the applicant's pre-trial detention

(a) Parties' submissions

(i) The applicant

97. The applicant submitted that on 25 July 2016 he had been assigned to the case of *Prosecutor v. Ngirabatware* and had thereafter been "engaged on the business of the Mechanism" as a judge. He had thereby enjoyed diplomatic immunity in accordance with Article 29 of the Statute, which referred, for that purpose, to the provisions of the General Convention. In that regard, the applicant adamantly contested the Government's contention that judges of the Mechanism were representatives of member States within the meaning of Article IV, Section 11, of the General Convention and enjoyed the immunities set out therein, save for in their State of nationality, in the present case Türkiye, in accordance with Section 15 of the same Convention. In the applicant's view, the Government's contention was untenable on at least two grounds. Firstly, the composition of the Mechanism did not include judges from all UN member States and, secondly, international judicial bodies were based on the principle of independence and impartiality, which could not be ensured if judicial officers were regarded as civil servants of member States.

98. Moreover, under Article 31 of the Vienna Convention on the Law of Treaties ("the VCLT"), treaties had to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose. Since international criminal tribunals had been established with a view to prosecuting the most heinous crimes by the international community, judges of those tribunals represented the international community and not their home country. The UN, as an organisation, represented an international community that had common interests which might be different from those of its individual member States. In the applicant's view, there was therefore almost a consensus, contrary to the Government's claims, in respect of the status of the judges of the Mechanism. They were not representatives of member States but had to be seen as officials of the UN, as attested by decision no. 60/553 of the UN General Assembly of 6 February 2006, which stated that international judges serving in the international criminal tribunals "should be deemed UN officials for the purposes of their terms and conditions of service, and approved the granting of that status"[5].

[5] The relevant part of which reads as follows: "The General Assembly concurs with the recommendation of the Secretary-General in his report on Khmer Rouge trials [(A/60/565)] that the international judges, the international co-prosecutor and the international co-investigating judge [of the Extraordinary Chambers in the Courts of Cambodia] should be deemed officials of the United Nations for the purposes of their terms and conditions of service and approves the granting of that status to them for those purposes."

99. In that regard, the applicant further emphasised that the UN Office of Legal Affairs, acting on behalf of the UN Secretary-General, had formally asserted his diplomatic immunity and requested his immediate release and the termination of the criminal proceedings against him. Similarly, by his decision dated 31 January 2017, the President of the Mechanism, Judge Theodor Meron, had acted in an identical manner and emphasised that the Secretary-General's assertion of immunity had created a presumption which could not be easily set aside by the domestic courts. Counsel for Augustin Ngirabatware had also made a similar request to the Mechanism. Lastly, all academic works concerning the immunity of international judges had recognised that judges appointed to the UN tribunals did not represent their home country, but the UN, and enjoyed immunity in all member States, including their own. Accordingly, it could not be reasonably argued that judges of the Mechanism represented their State of nationality, with the result that they fell within the scope of Article V of the General Convention (headed "[UN] Officials") and not, as the Government had contended, Article IV thereof.

100. The applicant further submitted that the Government's contention that absolute immunity was only conferred on the President, the Prosecutor and the Registrar of the Mechanism, but not on its judges, who allegedly only had functional immunity, led to a manifestly absurd result within the meaning of Article 32 (b) of the VCLT. If the Government's view were true, judges of the Mechanism could only be protected against abuse by States if they could prove that they dealt with the work of the Mechanism. According to that approach, if a judge were detained whilst shopping, he or she could not assert immunity as he or she would not have been working for the Mechanism whilst shopping.

101. By the same token, the Government's stance on "absolute immunity" was also absurd, because it meant that whilst the judges of the Mechanism had virtually no immunity from the actions of governments; the President, the Prosecutor and the Registrar of the Mechanism enjoyed unlimited immunity. In the applicant's view, while the Statute made a distinction between those two groups, they all enjoyed the same privileges and immunities, namely those "accorded to diplomatic envoys, in accordance with international law". The only difference was that the judges of the Mechanism were entitled to those privileges and immunities solely "when engaged on the business of the Mechanism". In the applicant's view, adopting the Government's narrow interpretation of that phrase as being limited to instances where judges sat on the bench would also lead to an absurd result, since it would be quite easy to create excuses for any government which might wish to interfere with the work of international judicial bodies. In fact, the Statute of the ICJ contained a similar phrase ("when engaged on the business of the Court"), which had been perceived as "the duration of their office". In sum, as the applicant had been a member of a five-member bench of the Mechanism since July 2016, he had enjoyed the same personal immunity as the President of the

Mechanism, which was supposed to have protected him from arrest, detention, prosecution and other similar such measures imposed by all governments, including that of his home country.

102. The applicant further submitted that the Government's interpretation of the Diplomatic Convention was also unacceptable, unreasonable and absurd. In fact, if their contention were true that judges could only enjoy diplomatic immunity in the receiving State and could not assert it in the sending State, judges assigned to a position in the Hague would, for example, only be granted immunity against the Dutch government. Moreover, the immunity of the international judges of the Mechanism in countries other than where the seat of the Mechanism was located became significant for the proper functioning of international justice, given that those judges generally discharged their judicial duties in their home countries as a result of budgetary reasons and technological developments. Accordingly, since Türkiye was not a "sending State" in his case, the applicant argued that he had been "a UN staff [member]" at the time of his pre-trial detention and had enjoyed diplomatic status analogous to that of diplomatic envoys, as defined in the Diplomatic Convention.

103. Similarly, the Government's argument that granting the applicant diplomatic immunity for non-official acts in his State of nationality could enable judges of the UN to commit crimes unlimitedly without the risk of prosecution was also misplaced. That was because judges only enjoyed absolute immunity in respect of words spoken or written and all acts performed by them in their official capacity, but their personal immunity was not absolute and could be lifted, not by any member State, but by the UN. In fact, Article V, Section 20, of the General Convention conferred on the Secretary-General both a right and a duty to waive the immunity of any official in any case where such immunity would impede the course of justice and could be waived without prejudice to the interests of the UN. However, the Turkish government had directly breached all the established rules of international law by placing him in pre-trial detention. Accordingly, the applicant concluded that his arrest and pre-trial detention had not been carried out in accordance with a procedure prescribed by law, in breach of Article 5 § 1 of the Convention.

(ii) The Government

104. The Government argued at the outset that judges of the Mechanism, including the applicant, in principle enjoyed the diplomatic immunities and privileges granted to "diplomatic representatives" in accordance with international law, but only in the receiving State where judges were to carry out their duties. Accordingly, no immunity, privilege or inviolability claim could be asserted against the sending State of which the judge was a national or in cases where he or she was or had been the representative thereof. To hold otherwise would mean that judges could commit an infinite number of

crimes, such as murder and terrorist acts, in the State of which they were citizens, with the result that they could not be prosecuted by the authorities of that State without the permission of the United Nations – a view which was, according to the Government, untenable.

105. In any event, were the Court to consider that the applicant's diplomatic immunity was applicable in the sending State, the Government submitted that his diplomatic immunity was "functional" and did not extend to personal offences, unlike, in their view, that of the President, the Prosecutor and the Registrar of the Mechanism. Judges of the UN could therefore only enjoy immunity and inviolability in respect of "procedures" carried out during the performance of their duties in the country of which they were citizens. However, neither the offence of which the applicant was accused (membership of an armed terrorist organisation) nor the acts and evidence constituting the basis of his pre-trial detention had been related to his duty as a judge of the Mechanism, and instead had the characteristics of a personal offence connected to terrorism. To support that contention, the Government referred to the Report by the Executive Committee to the Preparatory Commission of the UN dated 12 November 1945, which stated as follows:

> "... it is also a principle that no official can have, in the country of which he is a national, immunity from being sued in respect of his non-official acts and from criminal prosecution ..."

106. Even though the applicant had relied on the *note verbale* of 25 October 2016 drawn up by the UN Office of Legal Affairs, in which it had been stated that he was a judge of the Mechanism and that all judges of the Mechanism fully enjoyed diplomatic immunity in the UN system, the Government insisted that it had been functional, not absolute.

107. Furthermore, Article 28 of the Statute, headed "Cooperation and Judicial Assistance", on which the President of the Mechanism had relied in ordering the applicant's release in the present case, had simply concerned people who were or had been tried before the International Criminal Court for the Former Yugoslavia ("the ICTY") or the International Criminal Tribunal for Rwanda ("the ICTR"). Similarly, Article 28 § 2 of the Statute laid down instances concerning the merits of cases tried before those bodies or the Mechanism, such as the identification, location, arrest and detention of individuals and taking testimony from witnesses. It should therefore be construed and interpreted in that limited context even though the provision in question stated that cooperation and judicial assistance were not limited to those instances. A different interpretation would allow the Mechanism to interfere in the judicial process concerning a person who was a national of a sovereign UN member State on an issue not related to the Mechanism, overreaching the authority it had assumed from the UN Security Council's Resolution 1966 (2010). The same was also true in respect of Rule 55 of the Rules of Procedure and Evidence of the Mechanism. Accordingly, the Government took the view that the President of the Mechanism had no

authority to deliver a decision ordering the applicant's release, which had been a matter of domestic law given that his pre-trial detention had not been based on the activities he had undertaken on behalf of the UN.

108. Lastly, the reference made by the Mechanism to the principle of judicial independence while at the same time calling on the independent Turkish judiciary to terminate the case against the applicant constituted an inconsistency. In any event, on 29 June 2018 the UN Secretary-General had decided not to reappoint him as a judge of the Mechanism.

(b) The Court's assessment

(i) The general principles

109. Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, § 132, 1 June 2021, with further references).

110. Sub-paragraphs (a) to (f) of Article 5 § 1 of the Convention contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds. Only a narrow interpretation of the exhaustive list of permissible grounds for deprivation of liberty is consistent with the aim of Article 5, namely to ensure that no one is arbitrarily deprived of his liberty (ibid., § 124).

111. Any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law, but also, where appropriate, to other applicable legal standards, including those which have their source in international law (see *Medvedyev and Others v. France* [GC], no. 3394/03, § 79, ECHR 2010, and *Toniolo v. San Marino and Italy*, no. 44853/10, § 44, 26 June 2012). In all cases, the Convention establishes the obligation to conform to the substantive and procedural rules of the laws concerned, but also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely, to protect the individual from arbitrariness (see *Medvedyev and Others*, cited above, § 79).

112. The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen

– if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail (see, among other authorities, *Medvedyev and Others*, cited above, § 80, with further references).

113. Furthermore, the Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties (see *Baka v. Hungary* [GC], no. 20261/12, § 165, 23 June 2016, with further references). This consideration, set out in particular in cases concerning the right of judges to freedom of expression, is equally relevant in relation to the adoption of a measure affecting the right to liberty of a member of the judiciary. In particular, where domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements be properly complied with (see *Alparslan Altan v. Turkey*, no. 12778/17, § 102, 16 April 2019). Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018), the Court must be particularly attentive to the protection of members of the judiciary when reviewing the manner in which a detention order was implemented from the standpoint of the provisions of the Convention (see *Turan and Others*, cited above, § 82, with further references). Indeed, the case-law just referred to relates to the independence of the domestic judiciary. However, the Court uses this occasion to make clear that the principles described therein apply *mutatis mutandis* in respect of international judges and courts, their independence being equally a *conditio sine qua non* for the proper administration of justice.

(ii) Application of the general principles to the present case

114. The Court observes that the applicant, a Turkish national and a judge serving at the Mechanism at the material time, was arrested at his home in Türkiye on 21 September 2016 and placed in pre-trial detention on 28 September 2016 on the basis of the domestic authorities' assessment that there was a reasonable suspicion of his having committed the offence under Article 314 § 2 of the Criminal Code of being a member of an armed terrorist organisation, FETÖ/PDY. In the subsequent trial, the Ankara Assize Court convicted him of the same offence on 14 June 2017, and he was released on bail on the same date. Furthermore, the Constitutional Court also examined, *inter alia*, the lawfulness of the applicant's pre-trial detention and concluded that it had a legal basis and was therefore in conformity with Article 19 of the Constitution (the provision corresponding to Article 5 of the Convention).

115. It is common ground that the applicant was placed in pre-trial detention on the basis of Articles 100 et seq. of the CCP, notwithstanding the diplomatic immunity conferred on him by Article 29 § 2 of the Statute of the Mechanism. His pre-trial detention may therefore be regarded as having a legal basis in domestic law for the purposes of Article 5 § 1 of the Convention. However, the applicant's argument before the domestic authorities and the Court in relation to the alleged unlawfulness of his pre-trial detention was that since he enjoyed diplomatic immunity as a judge of the Mechanism, he could not be deprived of his liberty in the absence of a waiver by the UN Secretary-General of that immunity, an argument contested by the Government. Accordingly, in order to ascertain whether the applicant was "lawfully" detained for the purposes of Article 5 § 1 and was deprived of his liberty "in accordance with a procedure prescribed by law", the Court will ascertain whether the domestic courts' stance *vis-à-vis* the diplomatic immunity conferred on the applicant by virtue of his status as a judge of the Mechanism in accordance with Article 29 § 2 of its Statute – which paved the way for his pre-trial detention – was such that his pre-trial detention could be regarded as being foreseeable and compatible with the requirements of legal certainty under Article 5 § 1 of the Convention. In this regard, the Court would emphasise that in general, the principle of legal certainty may be compromised if domestic courts introduce exceptions in their case-law which run counter to the wording of the applicable statutory provisions or adopt an extensive interpretation negating procedural safeguards afforded by law notably to protect members of the judiciary from interference by the executive.

116. In the present case, the Court notes at the outset that the applicant's counsel raised the issue of the applicant's immunity as an international judge as early as 24 October 2016 in an application for his release, referring to the Statute of the Mechanism and an attached letter from the President of the Mechanism confirming that he enjoyed immunity in his capacity as a judge of the Mechanism (see paragraph 23 above). The following day, a *note verbale* from the United Nations Office of Legal Affairs formally asserting that the applicant enjoyed immunity under Article 29 of the Statute of the Mechanism was communicated to the Permanent Mission of Türkiye to the UN, requesting his immediate release from detention and the termination of all legal proceedings against him (see paragraph 24 above). Nevertheless, it appears that the first time a more detailed assessment on the relevance of the applicant's diplomatic immunity was carried out by the domestic courts was on 14 June 2017, more than eight and a half months after his arrest and pre-trial detention and seven and a half months after his counsel, backed by the President of the Mechanism and the competent UN body, asked for his release on this ground, when the trial court found him guilty and ordered his release (see paragraph 58 above). In the Court's view, and irrespective of the trial court's conclusion that the applicant's immunity did not hinder his conviction, the delay with which the domestic courts addressed

the issue of his diplomatic immunity, an issue that should have been addressed by those courts swiftly and thoroughly, was by and of itself incompatible with Article 5 § 1, in so far as any delay *de facto* rendered futile any protection afforded to him by virtue of his immunity, that being detrimental to the proper functioning of the Mechanism (see, to the same effect, paragraph 84 above).

117. Turning now to the question whether the domestic courts' interpretation of the extent of the applicant's diplomatic immunity was foreseeable and compatible with the principle of legal certainty under Article 5 § 1 of the Convention, the Court notes that the trial court, when reviewing the lawfulness of the applicant's pre-trial detention, held that the applicant only enjoyed functional immunity under Section 18 of the General Convention, which concerned UN officials, and that he had no special status with regard to matters outside of his mandate and, in particular, in terms of the jurisdiction of the Turkish authorities (see paragraph 58 above). Accordingly, the trial court was satisfied that the applicant had no immunity in the jurisdiction of Türkiye for his acts unrelated to his duties as a judge of the Mechanism.

118. Subsequently, when assessing the lawfulness of the applicant's pre-trial detention, the Constitutional Court held that even though, in principle, he enjoyed the immunities accorded to the judges of the Mechanism in accordance with Article 29 of the Statute, that provision made references to the General Convention and the Diplomatic Convention, which should be examined to ascertain whether he enjoyed such immunities (see paragraph 70 above). Accordingly, the Constitutional Court found that the applicant's pre-trial detention had had a legal basis under Article 19 of the Constitution, since Section 15 of the General Convention and Article 31 § 4 of the Diplomatic Convention meant that he could not assert the immunities in question before the authorities of the State which he had represented or of which he was a national.

119. Bearing in mind that its only task is to apply the Convention and that it therefore has no competence to decide on the applicant's immunity as such, the Court must nevertheless be convinced that the domestic courts' approach was compatible with Article 5 § 1 of the Convention. In that respect, the Court stresses the following.

120. The first paragraph of Article 29 of the Statute, headed "The Status, Privileges and Immunities of the Mechanism" provides that the General Convention is applied to, *inter alia*, judges of the Mechanism, while the second paragraph of the provision states that:

> "The President, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law. The judges of the Mechanism shall enjoy the same privileges and immunities, exemptions and facilities when engaged on the business of the Mechanism."

121. The Court cannot but note that the only provision of the General Convention which contains an identical choice of words to those in Article 29 of the Statute is Article V, Section 19, which confers full diplomatic immunity (that is diplomatic immunity *ratione personae*) on certain high-ranking UN officials, including the UN Secretary-General. Accordingly, based on the ordinary meaning of the very wording of the relevant instruments, read in context, he appears to have enjoyed full diplomatic immunity, including, *inter alia*, personal inviolability and not being subject to any form of arrest or detention for the duration of his term of office as a judge in the *Ngirabatware* case at the Mechanism, from 25 July 2016 to 30 June 2018, including when working on that case remotely in accordance with the framework for the operation of the Mechanism (see paragraph 81 above for Article 8 § 3 of the Statute).

122. The Court further observes that this interpretation of the nature of the applicant's immunity was confirmed by the order of the President of the Mechanism of 31 January 2017 (see paragraph 39 above), which reads, in so far as relevant, as follows:

> "Turkey was a member of the United Nations Security Council at the time of the consideration of our Statute and voted in favour of its adoption, a Statute which guarantees an independent judiciary and full diplomatic immunity for our judges while performing their work."

This statement has in part a bearing because it expresses, in clear terms, the view of the President of the Mechanism. Moreover, and even more importantly, the statement identifies in a succinct and precise manner the direct linkage between the pertinent rules of immunity and the independence of the Mechanism as an international judicial body, thereby also casting light on the very object and purpose of those rules.

123. Moreover, the Court recalls that the UN Office of Legal Affairs, acting on behalf of the UN Secretary-General formally asserting the applicant's immunity made it clear in its *note verbale* to the Permanent Mission of Türkiye to the UN that the applicant enjoyed full diplomatic immunity, which shielded him from, *inter alia*, arrest, police custody and pre-trial detention (see paragraph 24 above). This, as the ICJ held in its 1999 Advisory Opinion, created a presumption which could not be easily set aside (see paragraphs 39 and 84 above).

124. The Court is aware that the Constitutional Court found that the applicant's immunity was not applicable *vis-à-vis* his State of nationality, Türkiye, referring to Article 31 § 4 of the Diplomatic Convention, which provided that the immunity of a diplomatic agent was not applicable in "the sending State", and to Section 15 of the General Convention, which provided that the immunity conferred on representatives of member States under Article IV of the same Convention was not applicable between a representative and the authorities of the State of which he or she was a national or of which he or she was or had been the representative.

125. In that connection, the Court stresses that the fact that the applicant enjoyed, under Article 29 of the Statute, the privileges and immunities "accorded to diplomatic envoys, in accordance with international law" does not mean that he himself was a diplomatic envoy. The status of the judges of the Mechanism as explained above and the concepts defined under Article 1 of the Diplomatic Convention such as "head of mission", "members of the diplomatic staff" and "diplomatic agent" bear fundamental differences. On that basis, the Court emphasises that while the provisions of the Diplomatic Convention are certainly relevant in assessing the scope of the immunity accorded to the applicant, not least because it is part of customary international law on the issue of privileges and immunities, it is not wholly transposable to the situation of the applicant, who benefited from such privileges and immunities in his capacity as a judge of the Mechanism, the ultimate aim being to protect the independence of the judges, and hence of the tribunal, *vis-à-vis* any State.

126. The Court further points out, for the purposes of comparison, that Article 1 of Protocol No. 6 to the General Agreement on Privileges and Immunities of the Council of Europe[6] is worded almost identically to Article 29 of the Statute, which accords judges of the Court and their spouses and minor children "... the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law". When called upon to assess – on two different occasions – requests to waive the immunities attached to the spouses of judges, the plenary Court held as follows[7]:

> "[T]he concepts of 'sending' and 'receiving' State in the Vienna Convention on Diplomatic Relations, 18 April 1961, do not apply to relations between the Court and one of the High Contracting Parties to the European Convention on Human Rights, and therefore there is no exclusion of immunity on the basis that the requesting State is the High Contracting Party in respect of which the concerned Judge has been elected."

127. As regards the Constitutional Court's interpretation that the applicant fell under the category of "representatives" of member States of the UN within the meaning of Article IV of the General Convention, the Court makes the following observations. Article 105 § 2 of the UN Charter confers on "representatives of the Members of the United Nations" and "officials of the

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[6] For further information on the international legal framework, see *Bîrsan v. Romania* ((dec.), no. 79917/13, §§ 41-43, 2 February 2016).

[7] See, Decision of the Court, sitting in plenary sessions on 29 June and 6 July 2020 in accordance with Article 4 of Protocol No. 6 to the General Agreement on Privileges and Immunities of the Council of Europe, on the request for the waiver of immunity which Mr Georgii Volodymyrovych Logvynskyi derives from the immunity of his spouse Judge Ganna Yudkivska, elected to the Court in respect of Ukraine, which was adopted on 6 July 2020. See also, Decision of the Court, sitting in plenary sessions on 21 and 23 November 2011 in accordance with Article 4 of Protocol No. 6 to the General Agreement on Privileges and Immunities of the Council of Europe, on the requests for the waiver of immunity accorded to Judge Corneliu Bîrsan, elected in respect of Romania, and his spouse Mrs Gabriela Victoria Bîrsan.

Organization" certain privileges and immunities in so far as they are necessary for the fulfilment of the purposes of the UN. In accordance with Article 105 § 3 of the UN Charter, which provides that details of those privileges and immunities may be further regulated and clarified by means of recommendations by the General Assembly or conventions between member States, the General Convention was enacted in 1946, to which Türkiye became a party on 22 August 1950. The General Convention laid down three categories of individuals with different degrees of, *inter alia*, immunities: (i) representatives of States (Article IV), (ii) UN officials (Article V), including high-ranking officials (under Section 19), and (iii) experts on mission for the UN (Article VI).

128. In the light of the above the Court finds that there are strong arguments for concluding that a judge of an international court is not a representative of a member State to an organ of the UN, that being incompatible with the very independence that defines a judge and judiciary, be it national or international. More concretely, the judges of the Mechanism are not to represent the States nominating them for election to the principal and subsidiary organs of the UN under the applicable rules. Article 8 of the Statute indicates that judges of the Mechanism are independent (see paragraph 81 above) and Article 2 § 1 of the Code of Professional Conduct for the Judges of the Mechanism specifies that in the exercise of their judicial functions they are independent of all external authority and influence (see paragraph 83 above), including from their own State of nationality, a point that was reiterated by the President of the Mechanism in his order to the government of Türkiye (see paragraph 39 above).

129. In light of the above, the Court finds that the domestic courts' interpretation on the applicant's diplomatic immunity was neither foreseeable nor in keeping with the requirements of the principle of legal certainty under Article 5 § 1 of the Convention.

130. As regards the question whether the applicant's above-mentioned pre-trial detention could be seen as justified under Article 15 of the Convention in view of the conditions giving rise to Government's notice of derogation, the Court makes the following observations. In time of war or other public emergency threatening the life of the nation, States may adopt measures derogating from their obligations under the Convention, provided that the conditions laid down in Article 15 § 1 are met, that is to say that the measures were strictly required by the exigencies of the situation and consistent with the State's other obligations under international law. In the present case, however, the Court is not convinced that the domestic courts' failure to assess the applicant's diplomatic immunity up until the trial court pronounced itself on the merits of the case and convicted the applicant on 14 June 2017 could be regarded as strictly required by the exigencies of the attempted coup d'état of 15 July 2016 which gave rise to the state of emergency. Moreover, the Court's finding above regarding the applicant's pre-trial detention implies that the measure in question was inconsistent with

Türkiye's "other obligations under international law" within the meaning of Article 15 of the Convention. That being the case, the applicant's pre-trial detention cannot be regarded as justified under Article 15 of the Convention.

131. Accordingly, there has been a violation of Article 5 § 1 of the Convention.

2. Remaining complaints under Article 5 of the Convention

132. In view of its findings above on the lawfulness of the applicant's pre-trial detention, the Court is not called upon to make a separate assessment of whether that detention was nevertheless based on a "reasonable suspicion" as required by Article 5 § 1 (c) of the Convention. Moreover, having particular regard to its findings under Article 5 § 1 of the Convention and to the intertwined nature of the complaint under that provision and that under Article 5 § 4 of the Convention, namely the domestic courts' failure to address his arguments regarding his immunity in their decisions examining his challenges against his pre-trial detention, the Court does not consider it necessary to carry out a separate examination of the latter complaint (see *Kavala v. Turkey*, no. 28749/18, § 234, 10 December 2019).

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

133. The applicant complained that the searches undertaken by the domestic authorities, particularly those of his house and person, had been in blatant disregard of his diplomatic immunity and had entailed a violation of Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

134. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Parties' submissions

(a) The applicant

135. The applicant submitted that the diplomatic immunity he had been entitled to under international law had also included the inviolability of his home in accordance with Article 30 of the Diplomatic Convention. Therefore, the search of his home, vehicle and person, as well as the seizure of his belongings, had constituted an interference contrary to international law and therefore lacked any legal basis. Relying on the Court's findings in *Ahmet Hüsrev Altan* (cited above, § 225) that the requirements of lawfulness under Articles 5 and 10 of the Convention had been aimed in both cases at protecting the individual from arbitrariness, the applicant argued that where a detention measure was regarded as unlawful and also constituted an interference with one of the freedoms guaranteed by the Convention, it could not be regarded in principle as a restriction of that freedom prescribed by national law. Accordingly, the applicant submitted that since his pre-trial detention had been unlawful, the restriction of his rights under Article 8 of the Convention could not be regarded as having been prescribed by law. On that basis, he invited the Court to find a violation of Article 8.

(b) The Government

136. Reiterating their submissions concerning the functional nature of the applicant's immunity and the fact that the acts of which he had been accused had not related to his activities as a judge of the Mechanism, the Government submitted that "the investigation procedure" against him had complied with international law and the guarantees under Article 8 of the Convention. Moreover, he had not invoked his diplomatic immunity during the search of his house or his questioning.

137. The Government maintained that the searches had been prescribed by law, namely Articles 116 and 119 of the Code of Criminal Procedure, and had been carried out pursuant to the warrant issued by the public prosecutor, who had been entitled to do so in cases where a delay would be detrimental, such as in the present case, as attested by the pressing and immediate need stemming from the vast number of investigations conducted in the aftermath of the attempted coup. Moreover, the searches had yielded evidence such as computers, flash drives, floppy disks, video cassettes and books, as well as mobile phones on which the applicant had used the ByLock application. The public prosecutor's warrant had subsequently been upheld by the judge competent to carry out an *ex post facto* review. The interference in the form of searches had also pursued the legitimate aims of public safety and the prevention of crime as they had been conducted as part of the investigation initiated against the applicant for being a member of FETÖ/PDY, the

organisation behind the attempted coup, and had been aimed at arresting the suspect, obtaining evidence and thwarting offences.

138. Against the above background, the Government further submitted that the search warrant had not been drafted in extremely broad terms and had contained relevant and sufficient reasons, such as the purpose of the searches, information about the ongoing investigation and the reasons why the authorities believed that the searches would yield evidence relevant to the accusation against the applicant of having committed the offence of being a member of an armed terrorist organisation. Moreover, the searches had been conducted in the presence of the district chief (*muhtar*), the applicant and his wife, and had lasted no longer than necessary. Accordingly, the Government took the view that the domestic authorities had fulfilled their duty to give relevant and sufficient reasons for issuing the search and seizure warrant, which had contained the necessary guarantees intended to protect the applicant against arbitrary practices.

139. Lastly, the Government argued that the search of the applicant's house and person had taken place at a time when the danger posed by the coup attempt on national security and public order had continued to its fullest extent, and had been based on the suspicion of the commission of crimes concerning FETÖ/PDY, the armed terrorist organisation behind the coup attempt. On that basis, the Government invited the Court to take due account of the derogation they had submitted under Article 15 of the Convention when assessing the alleged interference with the applicant's private life under Article 8 of the Convention and to find it manifestly ill-founded or that there had been no violation of that provision.

2. The Court's assessment

140. The Court notes that the search of the applicant's house and person on 21 September 2016 entailed an interference with his rights under Article 8 of the Convention, namely his right to respect for his private life and home (see *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 63, ECHR 2010 (extracts), and *Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania*, no. 27153/07, §§ 69-70, 17 January 2017; and see, for searches of an individual's home, *Budak v. Turkey*, no. 69762/12, § 51, 16 February 2021, with further references). Accordingly, it has to be determined whether the interference was justified under Article 8 § 2, in other words, whether it was "in accordance with the law", pursued one or more of the legitimate aims set out in that paragraph, and was "necessary in a democratic society" to achieve the aim or aims in question.

141. The Court reiterates its findings regarding the interpretation of the scope of the applicant's diplomatic immunity in the context of the lawfulness of his pre-trial detention under Article 5 § 1 of the Convention. The scope of the immunity under Article 29 § 2 of the Statute of the Mechanism was, to a certain extent, circumscribed by the General Convention and the Diplomatic

Convention, which in its Articles 29 and 30 provided, respectively, for inviolability of the person and the private residence of a diplomatic agent.

142. The Court notes that the Government did not contest that the house where the search was conducted was the applicant's "private residence" within the meaning of Article 30 of the Diplomatic Convention. In that regard, the Court further stresses that in view of Article 8 § 3 of the Statute, which enables judges of the Mechanism to exercise their functions remotely, away from the seats of the branches of the Mechanism subject to the President's decision, the applicant's place of residence was in an analogous position to that of an office, given that at the material time he was working for the Mechanism remotely from his home country, Türkiye. Therefore, it was subject to a heightened protection, similar to the protection afforded to searches of a lawyer's office in the Court's case-law under Article 8 of the Convention (see, *mutatis mutandis*, *Kruglov and Others v. Russia*, nos. 11264/04 and 15 others, § 125, 4 February 2020). Moreover, the Court cannot disregard the fact that the search of the applicant's house yielded certain materials, such as computers and mobile phones as well as the two books which were later used in the criminal proceedings, as they formed part of the bill of indictment filed against him (see paragraph 41).

143. As regards the Government's argument that the applicant failed to raise his diplomatic immunity in the course of the search, the Court points out that the immunity under Article 29 § 2 of the Statute does not belong to him, but to the UN (pursuant to Section 20 of the General Convention), which formally asserted his immunity before the Turkish authorities in October 2016 (see paragraph 24). Therefore, the applicant's alleged failure to invoke his diplomatic immunity has little bearing on the question whether the domestic authorities acted in accordance with international law in carrying out a search of his house and person. In other words, he cannot waive his diplomatic immunity by failing to raise it at the time of the searches in question. The Government did not argue that the domestic authorities had duly obtained a waiver of the applicant's diplomatic immunity from the UN and it is clear that the UN and the applicant had not, *ex post facto*, consented to the searches. In view of the above, the Court dismisses the Government's argument that the applicant failed to invoke his diplomatic immunity during the searches. What is more, neither the Magistrate's Court which oversaw the legality of the seizure of the items collected during the search of the applicant's house nor the Constitutional Court which examined the applicant's complaint in that regard under Article 8 of the Convention touched upon the question whether the diplomatic immunity enjoyed by the applicant was respected in relation to the search of his house (see paragraphs 17 and 66).

144. In light of the above, and recalling its findings regarding the applicant's diplomatic immunity in the context of its assessment under Article 5 § 1 of the Convention, the Court concludes that the interference with the applicant's rights under Article 8 of the Convention cannot be regarded

as having been "prescribed by law" under the second paragraph of that provision. Similarly, the searches in question were not justified under Article 15 of the Convention, as being inconsistent with Türkiye's "other obligations under international law" within the meaning of that provision.

145. Accordingly, there has been a violation of Article 8 of the Convention.

IV. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

A. Article 46 of the Convention

146. The relevant parts of Article 46 of the Convention provide:

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

147. The applicant submitted that his case differed significantly from other unlawful detention cases in that his pre-trial detention had stemmed not only from the absence of a reasonable suspicion of his having allegedly committed an offence, but also from the removal of his diplomatic immunity in violation of international law. In the applicant's view, this second aspect had not only rendered his pre-trial detention unlawful, but had also vitiated the entirety of the criminal proceedings against him. Yet, he had been taken to prison after his conviction had become final and was still serving his sentence in Rize Prison. Accordingly, he argued that even though his current deprivation of liberty was based on his conviction, both his pre-trial detention and conviction had been flawed owing to the violation of his diplomatic immunity, and his continued deprivation of liberty on grounds pertaining to the same factual context "would entail a prolongation of the violation of his rights as well as a breach of the obligation on the respondent State to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention." On that basis, he asked the Court to urgently order his immediate release.

148. The Government did not submit any observations on this issue.

149. The Court notes that its findings of a violation under Article 5 of the Convention concern the applicant's pre-trial detention, which ended on 14 June 2017 with the trial court's decision to release him, whereas his current deprivation of liberty stems from the execution of the sentence imposed on him by the Court of Cassation on 10 February 2021. In other words, the legal regime of his pre-trial detention and that of his current deprivation of liberty are different. The Court nevertheless also recalls that the Member States are obliged to grant *restitutio in integrum* by putting an end to the breach found and making reparation for its consequences in such a

way as to restore as far as possible the situation existing before the breach (see, among many authorities, *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, § 404, 26 September 2023). In that regard, the Court further observes that the search of the applicant's house and person gave rise to a separate breach of Article 8 of the Convention, which is another matter requiring the respondent State to take the necessary steps to act in conformity with their obligations under Article 46 of the Convention. In doing so, in principle the respondent State remains free to choose the means by which it will discharge its legal obligation under the said provision, bearing in mind their primary aim of achieving *restitutio in integrum* and provided that the execution is carried out in good faith and in a manner compatible with the "conclusions and spirit" of the judgment.

150. In view of the foregoing considerations, and having regard to the general assumption on which the whole structure of the Convention rests, namely that public authorities in the Contracting States act in good faith in complying with the Convention's requirements and the Court's findings, the Court is unable to grant the applicant's specific request under Article 46 of the Convention.

B. Article 41 of the Convention

151. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

152. The applicant claimed 150,000 euros (EUR) in respect of pecuniary damage on the grounds that he had lost all his professional opportunities as an international expert, with the result that he had been deprived of at least EUR 30,000 for each year he had been in pre-trial detention. He further claimed EUR 110,000 in respect of non-pecuniary damage, arguing that he had not only been deprived of his liberty for almost a year, but had also lost his reputation as an international judge.

153. The Government contested the claims, arguing that they were excessive, unsubstantiated and inconsistent with the amounts awarded in similar cases.

154. The Court notes that the applicant did not submit any documents in support of his alleged pecuniary loss; it therefore rejects this claim. However, having regard to the multiple violations found in the present case, the Court awards the applicant EUR 21,100 in respect of non-pecuniary damage, plus any tax that may be chargeable.

2. Costs and expenses

155. The applicant also claimed EUR 7,000 for the costs and expenses incurred before the Court, corresponding to seventy hours' legal work at a rate of EUR 100 per hour. In support of that claim, he submitted a legal fee agreement and a breakdown of itemised costs drawn up by his lawyer indicating the hours spent on different legal tasks connected with the present case.

156. The Government contested the claim, arguing that the applicant had failed to submit any documentary proof of having actually paid the amounts indicated in the legal fee agreement or the breakdown of costs. They further argued that the claim under the present head was groundless and excessively high, given the lack of complexity of the procedure and the limited number of issues.

157. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum claimed in full for the proceedings before it, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there is no need to examine the complaints under Article 5 § 4 of the Convention;

4. *Holds* that there has been a violation of Article 8 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 21,100 (twenty-one thousand one hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 April 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar	Arnfinn Bårdsen President

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

A.B.
D.V.A.

CONCURRING OPINION OF JUDGE KRENC JOINED BY JUDGE SCHEMBRI ORLAND

1. I have subscribed to the findings of the present judgment and the reasoning that underpins it. However, I would like to highlight certain points which I believe to be essential.

2. First, this case touches on a very important issue, namely the protection of international judges' independence and the respect due for their immunity.

To date, the Court has mainly ruled on issues relating to the independence of national judges (see, for instance, *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016; *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022; and *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019). In this sense, the present case raises a novel question which transcends the specific circumstances of the matter in issue.

Far from being confined to domestic courts, judicial independence also concerns international judges. Such independence requires that international judges, in the exercise of their judicial functions, remain free from any external authority, influence or pressure, including from their State of nationality or residence.

In this regard, the immunity granted to international judges protects them against arbitrary arrest and detention while they perform their judicial functions and serves as a vital safeguard against undue interference. It is not merely a privilege for the judges themselves but a crucial tool for upholding the rule of law and ensuring the proper functioning of international justice.

3. Second, the present judgment provides important guidance on another key aspect of Article 8 of the Convention, relating to the protection of judges' homes.

The present judgment (see paragraph 142) rightly emphasises the "heightened protection" of judges' homes, as confidential documents may be stored there.

Such protection was all the more important in the present case because the applicant was allowed to exercise his functions remotely from his home country.

Protecting judges' homes from search and seizure is essential to maintaining judges' independence as well as safeguarding the integrity of the judicial process.

4. My third and final point concerns the execution of the present judgment by the domestic authorities.

The Court has found violations of both Article 5 and Article 8 of the Convention. The finding of a violation of Article 5 is based on the ground

that the arrest and deprivation of liberty carried out in breach of the applicant's immunity were not lawful within the meaning of that provision. The breach of Article 8 has been found on the basis that the search of the applicant's home, the seizure of objects during that search and their subsequent use in the criminal proceedings constituted an interference which could not be considered "in accordance with the law".

According to the Court's settled case-law, a judgment finding a breach of the Convention imposes a legal obligation on the respondent State to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see, among other authorities, *Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II; *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, § 79, ECHR 2014; and *Molla Sali v. Greece* (just satisfaction) [GC], no. 20452/14, § 32, 18 June 2020).

Consequently, I consider that reparation should aim to restore the applicant to the position in which he would have been had Article 5 and Article 8 of the Convention not been violated.

It should be recalled that the Convention guarantees rights which are practical and effective, not theoretical and illusory. The immunity of judges cannot be an empty shell.