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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its 86th session, 18-22 November 2019

Opinion No. 79/2019 concerning Mr. Ercan Demir (Turkey)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 19 July 2019, the Working Group transmitted to the Government of Turkey a communication concerning Mr. Ercan Demir. The Government replied to the communication on 17 October 2019. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Ercan Demir is a Turkish citizen born in August 1965 who normally resides in Sinop, Turkey. Before his arrest, Mr. Demir was an English teacher.

Arrest and Detention

5. According to the source, Mr. Demir was arrested on 25 July 2016 at his house, at 3am, by the police. The source explains that the police had no warrant (arrest or search) and that it did not inform Mr. Demir about the reasons for his arrest. Apparently, when he asked them, the police told him that it was a secret investigation and that they could only say that the case was related to the so-called terrorist organization FETÖ (Fethullahçı Terör Örgütü) / PDY (Paralel Devlet Yapılanması).

6. The source explains that Mr. Demir was handcuffed and taken to the police station in Sinop where he was questioned by the police, without the presence of a lawyer. Mr. Demir was not allowed to contact any family members. He was reportedly detained in an underground, small and unsanitary cell at the police station without any information about why he had been arrested and he could thus not prepare for interrogation. He was subjected to severe sleep deprivation.

7. Allegedly, prior to the interrogation by the prosecutor, Mr. Demir was not permitted to meet with any lawyer and he only saw a lawyer in the room of the prosecutor who questioned him.

8. The source explains that Mr. Demir remained in custody until 28 July 2016. On that day, he was brought before a judge and was placed in detention, without any evidence being presented against him or without any grounds for keeping him in detention. Mr. Demir was not allowed to present any information in his defence, he was solely questioned by a prosecutor asking about "his life story". Specifically, Mr. Demir was presented with allegations and general questions asking where he worked, when he got married, why he worked in different places and such. No direct evidence against him was presented. All of the evidence referenced by the authorities was circumstantial and factually incorrect. The source also claims that Mr. Demir had to sign a document stating that he had been given enough time and the proper environment to meet with his attorney and, according to the accusations given to him, he gave his testimony of his free will, even though he was not given enough time to read the document.

9. The source adds that Mr. Demir was not allowed to choose his own lawyer. The Turkish Government provided him with a state appointed attorney, but this attorney avoided meeting him and tried to convince him to concede the charges. Meanwhile, his private attorney was deprived of basic information related to Mr. Demir. As mentioned previously, Mr. Demir could not meet with his lawyer before the start of questioning, and, during the questioning, his lawyer's ability to speak in his defence or to object to any questions or answers was limited.

10. The source claims that, after ten months of detention, upon receipt of the casefile from Sinop Heavy Penal Court, Mr. Demir learned that he was accused of "having a bank account at Bank Asya; being a teacher at a Gülen affiliated college; being a member of any Gülen affiliated associations; being a member of teachers union, making donations to charity organizations; organizing fundraising for students in need; sharing or retweeting any Gülen related social media account; subscribing to any Gülen affiliated newspaper, journal or magazine; sending his children to Gülen inspired schools; working for affiliated institutions with the Gülen Movement; and cancelling Digiturk subscriptions.

11. The source also indicates that Mr. Demir was held in detention for 11 months 26 days without any official indictment. Mr. Demir was released on 21 July 2017. On 24 May 2019, Mr. Demir was acquitted by the Sinop Heavy Penalty Court on the basis of the fact that there is not enough proof to show guilt (pursuant to Penalty Law Decisions, article 223 2/e). In addition, reportedly, the Extraordinary State Commission used the same legal provision to forbid him to return to his employment (by the State). The source also reports repercussions

to some of his family members, such as prohibition to apply for state employments vacancies, dismissal from employment as well as arrest and detention after using an encrypted software “By Lock” on a phone.

Legal analysis

Category I

12. The source states that Mr. Demir was arrested and detained without any legitimate legal basis, in violation of domestic law and article 9 of the International Covenant on Civil and Political Rights (the “Covenant”) and article 9 of the Universal Declaration of Human Rights.

13. At the outset, the source provides an explanation of the context of the attempted coup d’Etat of 15 July 2016 and the multiple arrests and detentions that have followed the coup, even though the arrested individuals did not have any connection to the attempted coup. In the case at hand, the source argues that Mr. Demir was arrested and detained without being shown any evidence about the aftermath of 15 July 2016 events, and claims that the detention was carried out when there was no reasonable suspicion of the alleged crime.

14. According to the source, the reasons for arrest and detention of Mr. Demir concern legal activities as well as his fundamental human rights protected by the articles 18,19, 21,22 and 25-27 of the Covenant.

15. In general, the source submits that the Government has outlined a number of actions as pretexts for the arrest and detention of certain individuals even though they are not defined as crimes in the law, which is thus contrary to the principle of legality. These include: subscriptions to the Gülen affiliated Zman newspaper, journal or magazine; being a client of movement affiliated institutions like Bank Asya; union membership; membership in business association like Tuskon; Volunteering for the Kimse Yok MuCharity; Possession of books or other materials of Fethullah Gülen; Cancellation of Digiturk subscriptions; Possession of one-dollar bills; criminalization of encrypted software (By Lock).

16. The source also reports that Mr. Demir was arrested contrary to domestic law (in particular, article 91/2 of the Code of Criminal Procedure) without reasonable suspicion of a crime. Further, he was detained without solid evidence in the casefile to suggest strong criminal suspicion (contrary to articles 100 and 101 of the Code of Criminal Procedure) and no justification for the detention was given. As stated above, all allegations against Mr. Demir were legal activities and rights protected under the Covenant.

17. The source also alleges that the arrest and detention warrant did not include any concrete facts or justifications for detention and did not show why judicial control would have been insufficient. Neither was presented any evidence demonstrating a strong suspicion of the commission of a crime by Mr. Demir. Moreover, the source argues that none of the decisions for detention or its continuation presents the basic requirements enshrined in the domestic law, but rather consisted of formulaic expressions, and showed the lack of solid evidence, facts and findings. They thus failed to justify the detention.

18. In addition to this argument, the source recalls that Mr. Demir was deprived of liberty for almost a year without an official indictment and states thus that the authorities did not prepare the official indictment in a speedy manner.

19. The source further argues that Mr. Demir was kept in detention in inhumane conditions for three days without the procedure having started. The source claims that such practice amounts to a violation of article 9 of the Covenant. This article was also breached by the fact that Mr. Demir was held in detention for a prolonged period, even though he had nothing to do with the coup attempt and there was no justification requiring the extension of his detention. Moreover, the source specifies that this measure is impossible to justify with the events that led to the state of emergency, as the coup attempt failed and the Government announced before the end of July 2016 that any potential danger was over. The detention thus cannot be a measure required under the state emergency.

Category II

20. The source submits that the accusations against Mr. Demir concern his fundamental rights which are protected under articles 18,19, 21,22 and 25-27 of the Covenant and that his arrest violates these rights.

(a) The subscription to Gülen affiliated newspapers, journals, magazines or possession of Gülen's books or other written and visual materials: with regard to this accusation, the source underlines that, before the coup attempt, Gülen affiliated newspapers, journals or magazines, books and other written and visual materials were legal and had been sold with the permission of the Ministry of Culture. Moreover, in a country where the rule of law is respected, newspapers, journals, magazines that do not promote terrorism or violence cannot be banned and people in possession of these items cannot be accused of being members of terrorist organizations. Therefore, according to the source, these activities are protected under articles 18 and 19 of the Covenant;

(b) Being a member of, working for, getting services from Gülen affiliated associations, unions, foundations and other institutions: the source states that, after the coup attempt, these associations were closed on 23 July 2016 (pursuant to Decree Law no. 667). Accordingly, before that day, they were officially registered, duly authorized and legitimate. The source states that belonging to them was legal, as well as working for them or getting services from them, and these activities are protected under articles 8, 19, 21, 22, 25, 26 of the Covenant;

(c) Participating in fund raising activities and making donations to the Movement related charity organisations of institutions: the source argues further that after the coup attempt, all Movement-related charity organisations, foundations, schools, institutions were shut down on 23 July 23 (pursuant to Decree Law no. 667). Yet, they were prior to that date officially registered, duly authorized and legitimate, Therefore, activities related to volunteering, fund raising and making donations were legal and are protected under articles 18, 21, 22, 26 of the Covenant;

(d) Participating in social gatherings and other social activities: the source submits that mere participation in social gatherings or social activities without promoting terrorism or violence cannot be banned are protected under the articles 18, 19, 21, 26 of the Covenant;

(e) Downloading and using By Lock, Tango, Kakao, Eagle, etc.: the source states that this activity is protected under articles 19 and 26 of the Covenant;

(f) Having a bank account at Bank Asya: with regard to this accusation, the source argues that this bank is a legal cooperation and was confiscated by the Government on 29 May 2015. Having a bank account there is, according to the source, protected under articles 21, 25, 26 and 27 of the Covenant.

Category III

21. According to the source, Mr. Demir suffered serious violations of his right to a fair trial as prescribed in article 14 of the Covenant.

22. First of all, the source asserts that the Government failed to provide him with an independent and impartial tribunal. To support this argument, the source provides an explanation of the judicial context following the coup attempt. In this respect, the source underlines that the motivation for the creation of the Special Courts (i.e. the Penal Judges of Peace) was to fight against the opposition, especially the Hizmet movement. These judges are reportedly exclusively authorized to carry out all investigatory processes, including detention, arrests, property seizures and search warrants, and the penal judges of peace have allegedly been introduced to persecute members of the Hizmet movement who are treated as opponents to the Government. As appeals against decisions by a penal judge of peace can be filed only with another penal judge of peace, this reportedly creates a "closed circuit" system.

23. Secondly, the Government failed to provide Mr. Demir with a timely explanation of the reason for his arrest as he was not informed of the reasons for his arrest until his interrogation by the police in the following days of his arrest. Furthermore, he was held without being charged.

24. In addition, the source argues that Mr. Demir's right to have the time and the opportunity to prepare his defence and to call and examine witnesses was violated. Indeed, the source affirms that Mr. Demir has never been given time to prepare himself for interrogations. Instead, he was physically and psychologically oppressed to accept drafted statements by the police, or he was induced by the prosecutor or the judge to agree with statements collected by the police.

25. Moreover, the source submits that his right to access to a counsel was violated. In that regard, the source cites provisions of domestic law (in particular, article 3 of Decree Law no. 668 dated 25 July 2016) according to which detainees would be denied access to lawyers for the first five days of deprivation of liberty (in certain conditions). This ban on legal assistance was reportedly lifted with Decree Law no. 684 dated 23 January 2017. Moreover, the source alleges that the meetings between Mr. Demir and his lawyer were recorded and monitored by the prison officers.

26. The source further argues a violation of the principle of the equality of arms. In fact, the source reports that Mr. Demir was denied access to his case file and he thus failed to object to the decisions effectively, as he was unable to prepare for his defence adequately or to challenge the charges against him. The source also states that this is a general trend that has occurred in the last years.

27. The source further reports that Mr. Demir was deprived of liberty for an extended period of time before he could appear in a court hearing. Moreover, allegedly, his objection against his arrest and detention was denied by the court without a reasoned decision.

28. With regard to the right to defence, the source asserts that there has been a relentless campaign of arrests which has targeted lawyers across the country. Allegedly, in 77 of 81 provinces in Turkey, lawyers have allegedly been detained and arrested on trumped-up charges as part of criminal investigations orchestrated by the political authorities and conducted by provincial public prosecutors. At the time of the submission by the source, 523 lawyers had been arrested and 1318 lawyers were under prosecution. Moreover, lawyers have reportedly been stripped off valuable tools to defend their clients under the pretext of counter-terrorism efforts and face pressure as they are forced to testify against their clients. Therefore, many suspects cannot find a lawyer to defend them. This situation thus violates their right to a defence.

Category V

29. Finally, the source argues that Mr. Demir's detention is due to his social background, and that it is discriminatory in nature and therefore arbitrary.

30. The source asserts that people who are charged with being a member of FETÖ are faced with widespread discrimination. There is an emerging pattern involving the arbitrary deprivation of liberty of people who are accused of being Gülen Followers in Turkey. The source underlines that it does not matter whether they accept or reject the connection with Gülen Movement.

31. In this context, the source argues that Mr. Demir has been arbitrarily deprived of his liberty according to category V because of discrimination against him as a Gülen Movement sympathizer. The source adds that the arrest and detention of more than 150.000 individuals have been motivated solely by their social background and political stance.

Response from the Government

32. On 19 July 2019, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 17 September 2019, detailed information about the current situation of Mr. Demir and to clarify the legal provisions justifying his continued detention, as well as its compatibility with Turkey's obligations under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Turkey to ensure his physical and mental integrity.

33. On 17 September 2019, the Government requested an extension of the deadline in accordance with paragraph 15 of Working Group's Methods of Work which was granted on

the next day with the new deadline of 17 October 2019. On 17 October 2019, the Government of Turkey submitted its reply.

34. The Government explains that, on 24 July 2016, on suspicion of being a member of an armed terrorist organization and attempting to overthrow the Constitutional order, the Criminal Magistrates' Office of Sinop issued a search warrant numbered 2016/858, authorising the search of Mr. Demir's house, as well as the copy, the analyse, and the textualization of his computer records and if deemed necessary, provisional seizure of the computer and relevant equipment to obtain hidden evidence. As a result of the search conducted with the presence of the Public Prosecutor on 25 July 2016, the computers, memory cards and more than three hundred CD's were seized.

35. According to the Government, upon arrest, Mr. Demir was notified of his legal rights and the charges against him. Prior to the statement-taking process, he was also reminded of the charges against him, of his right to choose a defense lawyer and benefit from his legal assistance, to have his lawyer present during statement taking and interrogation, or to ask a defence lawyer to be appointed by the Bar Association to assist him if he could not afford one, as well as other rights such as communication with his family, providing evidence in his favor and demanding for the collection of these. Subsequently, he gave his statement to the Public Prosecutor in the presence of his lawyer on 27 July 2016.

36. The Government explains that Mr. Demir declared in his statement that he worked for FETÖ-affiliated schools for a long time. Due to financial matters, he quit his position in 2010 to be hired as a public official to work for public schools. He added that, following the developments proceeding the 15 July coup attempt, he began to think less of FETÖ organization and described it as terrorist organization. He also stated that he understood the provisions of the "effective regret". However, he specified that the implementation of these provisions were not required in his case, since he had not committed any crime.

37. Moreover, the Government reports that Mr. Demir was brought on the same day before the Sinop Criminal Magistrate's Office. He was interrogated by the Magistrate in the presence of his lawyer. He was detained on remand on 27 July 2016. In the detention on remand decision, evidence, qualification and nature of the attributed offenses (which are classified under article 100 of the Code of Criminal Procedure), were taken into consideration. The decision also included a reasoning referring to the contents of the file and the presence of concrete evidence that indicates a strong suspicion of crime. Also, it was evaluated that detention measure was proportional compared to the amount of penalty for the related offence, and that solely applying judicial control measures would not be sufficient in the present case. Mr. Demir was informed that he had the right to appeal against the decision of detention.

38. In this regard, the Government emphasizes that Mr. Demir was swiftly brought before the judge after he was taken into custody and he was informed of the accusations against him. Furthermore, all decisions of arrest, custody and detention were given by independent judges. These decisions contained detailed reasoning regarding the grounds why these measures were taken, meaning that they were not arbitrary. In addition, these decisions were appealed by the detainee and his lawyer, and duly reviewed by competent authorities.

39. The Government states that, On 21 April 2017, in the scope of the investigation no. 2016/2451 conducted by the Chief Public Prosecutor's Office of Sinop, an indictment was drawn up containing charges of being a member of armed terrorist organization under article 314/2 of Penal Code. According to the Government, the indictment detailed evidence and findings such as witness statements, bank account records, his membership to a FETÖ affiliated union, the records of his employment by FETÖ affiliated companies and the content of his social media sharing in favour of the terrorist organisation that raise a strong suspicion against him were detailed and submitted to the related court. In addition, it was stated that as a result of the examination of digital materials seized during the search conducted on 25 July 2016, a large number of voice recordings and audio records of speeches given by the leader of the terrorist organization FETÖ/PDY were detected.

40. On 21 July 2017, the Court ordered Mr. Demir's release pending trial, taking into account of the evidence obtained, the length of his detention and the particular circumstances of the case.

41. The Government also reports that following the completion of the judicial proceedings, the Court decided to render a judgment of acquittal in accordance with article 223/2-e of the Code of Criminal Procedure. In its reasoning, the court assessed that Mr. Demir's participation in the meetings of the organization, his membership in the affiliated trade union and being a deposit holder of affiliated Bank Asya, were direct and natural consequences of his employment in an institution which was affiliated to FETÖ at the time. Thus, those actions as well as small number of times he connected to the FETÖ affiliated websites were not sufficient to prove membership to the terrorist organisation.

42. On 29 May 2019, Ercan Demir's lawyer appealed for the acquittal judgment and requested that his client be acquitted in accordance with article 223/2-b of the Code of Criminal Procedure. Consequently, the present case is pending before the Court of Appeals and has not been finalized yet.

43. The Government specifies that, on 28 September 2016, Mr. Demir lodged an individual application (no. 2016/74693) with the Constitutional Court. The Constitutional Court found the application inadmissible due to non-exhaustion of legal remedies on 7 November 2018.

44. The Government argues that Mr. Demir's detention was not arbitrary and the period of his detention was reasonable, considering the evidence and findings that raise strong suspicion of having committed the crime. Moreover, he was released pending trial as soon as his detention was no longer justified. Later on he was acquitted by the Court on the grounds that it was not proven that the charged offence had been committed by him. The decisions of detention, release pending trial and acquittal were based on reasoned decisions given by independent judiciary. The said decisions as well as all proceedings throughout the trial process are in accordance with the national legislation.

45. Furthermore, the Government recalls that, according to article 141/1 (a) and (d) of the CCP, "those who were unlawfully arrested or placed in pre-trial detention or their period of detention was unlawfully extended" and "those who were lawfully placed in pre-trial detention but were not brought before a judicial authority within a reasonable time and in respect of whom a decision was not delivered within the same period", respectively, may file an action for compensation. Yet, the Government claims that Mr. Demir has not brought an action for compensation due to his arrest, custody and detention.

46. With reference to the creation of special courts and the fact that they were created to fight the opposition, the Government recalls the legislation on the creation of offices of criminal magistrates and recalls their independency and impartiality.

47. Lastly, the Government would like to stress that, proceedings against Mr. Demir were carried out swiftly and in accordance with Turkey's international obligations, even though Turkey, at the time of the proceedings, was under exceptional circumstances that led the Government to resort to the right to derogation from its obligations under the Covenant, due to the grave threat to public security amounting to threat to the life of the nation, posed by the 15 July coup attempt.

Further comments from the source

48. The Government's reply was sent to the source for further comments on 18 October 2019 which it submitted on 29 October 2019.

49. The source explains that the Government declared and published a list of the names of the civil servants who were dismissed, and most were also arrested, for alleged connections with the coup, including 107,944 individuals named in lists attached to emergency decrees. The source specifies that the name of Mr. Demir was on the list. The source specifies that names on the list were members of the Teachers Union, which was legal.

50. The source claims that on 25 July 2016, at 3 o'clock, 12 police officers and a public prosecutor came to Mr. Demir's home and showed a search warrant for searching his and for his arrest thereafter. The police did not show or read the reasons, but just showed very briefly the paper. The source specifies that the police officers seized some books. On 27 July 2016, these books were added to a list of the names of publishers which were banned to publish. Mr. Demir was then accused of possessing and having read these books.

51. Upon arrest, Mr. Demir was arrested and taken to the Police Center. He was placed into a room full of teachers and other civil servants. The source reiterates that Mr. Demir did not have a lawyer. Three days later, Mr. Demir was taken to the hospital where a doctor saw him. He was then taken to the court and to the prosecutor's office. During questioning, a lawyer appointed by the Bar Association was present, but Mr. Demir did not discuss with him prior to it. The source claims that Mr. Demir explained his different employments in school but did not speak about Fethullah Gülen or his organisation. The source claims that the prosecutor did not say or show any document stating the charges against him. Mr. Demir was placed after the questioning before a judge, to whom Mr. Demir that he was innocent and wanted to be released. The judge would have replied that Mr. Demir worked "for their schools" and ordered his detention. He then received a document stating that he was charged with "joining the coup and helping the attempt".

52. The source then argues against the evidence presented in the indictment and claims that the witness statements were not referring to Mr. Demir, and that the bank account, digital material and participation in a teachers union were legal. With regard to the social medial activity, the source states that the only articles he shared were actually criticizing Fethullah Gülen. Yet, this constituted a crime.

53. The source then describes the poor conditions of his detention.

Discussion

54. The Working Group thanks the source and the Government for their submissions and appreciates the cooperation and engagement of both parties in this matter.

55. As a preliminary issue, the Working Group notes that Mr. Demir was released on 21 July 2017 and has not been detained since. However, the Working Group notes that in accordance with its methods of work, paragraph 17 (a), it "reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned". In the present case, the Working Group considers that the allegations made by the source are serious and therefore shall proceed to deliver the opinion.

56. As a further preliminary issue, the Working Group wishes to clarify that the procedural rules governing its consideration of communications on alleged cases of arbitrary detention are contained in its methods of work. There is no provision in the methods of work that prevents the Working Group from considering communications due to the lack of exhaustion of domestic remedies in the country concerned. The Working Group has also confirmed in its jurisprudence that there is no requirement for petitioners to exhaust domestic remedies in order for a communication to be considered admissible.¹

57. As a final preliminary issue, the Working Group notes that the situation of Mr. Demir falls within the scope of the derogations that Turkey had made under the Covenant. On 21 July 2016, the Government of Turkey informed the UN Secretary-General that it had declared a state of emergency for three months, in response to the severe dangers to public security and order, amounting to a threat to the life of the nation within the meaning of article 4 of the Covenant.²

58. While acknowledging the notification of these derogations, the Working Group emphasizes that, in the discharge of its mandate, it is also empowered under paragraph 7 of its methods of work to refer to the relevant international standards set forth in the Universal Declaration of Human Rights, and to customary international law. Moreover, in the present case, articles 9 and 14 of the Covenant are most relevant to the alleged detention of Mr. Demir. As the Human Rights Committee has stated, States parties derogating from articles 9

¹ See, e.g., opinions No. 19/2013 and No. 11/2000. See also opinions No. 41/2017, para. 73; No. 38/2017, para. 67; No. 11/2018 at para 66; 20/2019 at para 81 and 53/2019 at para 59 in which the Working Group clarified that it did not require the exhaustion of domestic remedies to be seized of the communication under its regular procedure.

² Depositary notification C.N.580.2016.TREATIES-IV.4.

and 14 must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.³

59. In determining whether Mr. Demir's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. The Government can meet this burden of proof by producing documentary evidence in support of its claims.⁴ Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (see A/HRC/19/57, paragraph 68).

60. Turning to the specific allegations, the Working Group notes that the source has argued that the detention of Mr. Demir was arbitrary, falling categories I, II, III and V of the Working Group. The Government, whilst not addressing the categories of the Working Group separately, denies all allegations and submits that the arrest and detention of Mr. Demir was carried out and follows all international human rights obligations undertaken by Turkey. The Working Group shall proceed to examine the submissions under each of the categories in turn.

61. The source argued in its initial submission that, at the time of the arrest, "the police had no arrest warrant or search warrant", an allegation denied by the Government which claims that the arrest was preceded by the duly authorised search warrant, providing the requisite identifying details of the warrant (see paragraph 34). In its reply, the source explains that police officers and a prosecutor who came to the house of Mr. Demir showed a search warrant for searching his house and his arrest. The source also specifies that they did not show or read the reasons developed in this warrant, while the Government states that upon arrest, Mr. Demir was notified of his legal rights and the charges against him. Noting this inconsistencies in the source's submissions, the Working Group is unable to determine whether an arrest warrant was presented to Mr. Demir and whether the reasons for the arrest were invoked to him, at the time of the arrest.

62. The source has further claimed that Mr. Demir was not notified of the charges and that he was kept without official indictment for 11 months and 26 days, that is, until the day of his release by the court on 21 July 2017. The Government on the other hand argues that Mr. Demir was informed of the charges at the time of the arrest and repeatedly again upon interrogation. It argues that Mr. Demir was formally indicted on 21 April 2017, presenting the official case number in its reply, which would be some 9 months after the arrest.

63. The Working Group is mindful of the earlier inconsistencies in the facts presented by the source and is therefore unable to conclude that Mr. Demir was not promptly informed of the charges. It also unable to conclude that Mr. Demir was not presented with the indictment until the day he was in fact released by the court. The Working Group also wishes to remind that while article 9 requires prompt notification of charges, which requires that the arrested person be informed "promptly" of any charges, not necessarily "at the time of arrest".⁵

64. Therefore, noting all the above, the Working Group concludes that the initial arrest and detention of Mr. Demir does not fall under category I.

65. The source has further claimed that the arrest and detention of Mr. Demir falls under category II as he was arrested purely for the peaceful exercise of his rights protected by the

³ CCPR/C/21/Rev.1/Add.11, para. 4; see also CCPR/C/GC/32, para. 6; CCPR/C/GC/34, para. 5 and CCPR/C/GC/35, paras. 65-66.

⁴ See opinion No. 41/2013, in which the Working Group notes that the source of a communication and the Government do not always have equal access to the evidence, and frequently the Government alone has the relevant information. In that case, the Working Group recalled that, where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out". See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ, Judgment, 30 November 2010, para. 55.

⁵ See at CCPR/C/GC/35, para. 30.

Covenant. The Government denies this allegation and argues that the arrest of Mr. Demir followed reasonable suspicion of him being linked to the Gülen movement, which the Government considers to be a terrorist organisation.

66. The Working Group is mindful of the state of emergency situation, which was declared in Turkey at the time. However, while the National Security Council of Turkey had already designated FETÖ/PDY, the Gülen group, as a terrorist organisation in 2015, the fact that this organisation is ready to use violence, had not become apparent to Turkish society at large until the coup attempt in July 2016. As noted by the CoE High Commissioner for Human Rights:

“[D]espite deep suspicions about its motivations and modus operandi from various segments of the Turkish society, the Fethullah Gülen movement appears to have developed over decades and enjoyed, until fairly recently, considerable freedom to establish a pervasive and respectable presence in all sectors of Turkish society, including religious institutions, education, civil society and trade unions, media, finance and business. It is also beyond doubt that many organisations affiliated to this movement, which were closed after 15 July, were open and legally operating until that date. There seems to be general agreement that it would be rare for a Turkish citizen never to have had any contact or dealings with this movement in one way or another”.⁶

67. In this light, the CoE Commissioner for Human Rights pointed out that there is therefore a need “[...] when criminalising membership and support of this organisation, to distinguish between persons who engaged in illegal activities and those who were sympathisers or supporters of, or members of legally established entities affiliated with the movement, without being aware of its readiness to engage in violence”.⁷

68. The Working Group observes that the core of allegations against Mr. Demir was his alleged perceived alliance with the Gülen group which is said to have manifested mainly through such regular activities as subscription to newspapers, magazines and journals, purchase of books and other publications, working for Gülen affiliated associations and unions, participating in social gatherings and other social activities, having downloaded ByLock application and having a bank account at Bank Asya. The Working Group wishes to particularly point out that in its reply the Government has simply stated that these regular activities were sufficient to justify reasonable suspicion that Mr. Demir has committed a criminal offence for which he was arrested and tried without actually explaining how it could arrive at such a conclusion.

69. The Working Group further notes the failure on behalf of the Turkish Government to show any evidence that he was in fact a member of FETÖ/PDY. Indeed, noting the widespread reach of the Fethullah Gülen movement, as document in the report the CoE Commissioner for Human Rights cited above (see paragraph 66), “it would be rare for a Turkish citizen never to have had any contact or dealings with this movement in one way or another”.⁸ The Working Group takes note of the report of the Special Rapporteur on Freedom of Expression who visited Turkey in November 2016 and recorded numerous cases of arrests based purely on the presence of ByLock on the accused’s computer and ambiguous evidence.⁹ The Working Group also notes the recent findings of the Human Rights Committee in the Communication 2980/2017 in which it dismissed the mere use of ByLock application as sufficient basis for an arrest and detention of an individual.¹⁰

70. In the present case, it is clear to the Working Group that even if Mr. Demir did use the ByLock application, an allegation denied by him, it would have been mere exercise of his freedom of expression. The same is to be said about Mr. Demir’s subscriptions to various newspapers, magazines and journals as well as his purchases of books and other publications.

⁶ Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey CommDH(2016)35 of 7 October 2016, p.4.

⁷ *Ibidem*.

⁸ *Ibidem*.

⁹ A/HCR/35/22/Add.3, para. 54.

¹⁰ CCPR/C/125/D/2980/2017.

To this end the Working Group notes that freedom of opinion and freedom of expression as expressed in article 19 of the Covenant are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation stone for every free and democratic society.¹¹ According to the Human Rights Committee, no derogations can be made to article 19 simply because 'it can never become necessary to derogate from it during a state of emergency'.¹²

71. Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.¹³ Moreover, article 19 (2) of the Covenant protects all forms of expression and the means of their dissemination, including all forms of audio-visual as well as electronic and internet-based modes of expression.¹⁴

72. The Working Group is mindful that this is not the first time it is examining the arrest and prosecution of Turkish nationals on the basis of alleged use of ByLock application as one of the key manifestation of an alleged criminal activity.¹⁵ The Working Group recalls that in those other instances it concluded that in the absence specific explanation of how the alleged mere use of ByLock communications application constitutes a criminal activity on behalf of the individual, their detention was arbitrary. The Working Group regrets that its views in these Opinions have not been respected by the Turkish authorities. The Working Group therefore finds that the arrest of Mr. Demir followed his peaceful exercise of his right to freedom of expression as encapsulated in article 19 of the Covenant.

73. Moreover, the Government has also failed to explain how attending of various gatherings and meetings as well as working for organisations associated with the Gülen movement amounts to a criminal activity. The Working Group once again wishes to underscore the deep entanglement of the Gülen movement in the Turkish society and the recognition by the international community that its criminal intentions were unknown to the population at large (see paras 66 and 67 above). There has been no evidence presented by the Government that any actions of Mr. Demir have been anything but peaceful and the Working Group therefore considers that his arrest was a direct result of his peaceful exercise of the freedom of assembly as encapsulated in article 21 of the Covenant.

74. The Working Group therefore concludes that the arrest and detention of Mr. Demir resulted from his exercise of the rights guaranteed by articles 19 and 21 of the Covenant and falls under category II.

Category III

75. Given its finding that the deprivation of liberty of Mr. Demir is arbitrary under category II, the Working Group wishes to emphasize that no trial of either Mr. Demir should have taken place. However, the trial did take place and the source has submitted that there were severe violations of his fair trial rights, falling under category III. Nevertheless, on the basis of the information submitted to it, the Working Group is unable to arrive at any conclusions concerning the allegations made in relation to category III.

Category V

76. Finally, the source has alleged that the detention of Mr. Demir falls under category V since it constitutes discrimination on the basis of political or other opinion. The Government rejects this allegation, explaining that his detention was due to his alleged membership in a terrorist organisation.

¹¹ CCPR/C/GC/34 at para 2.

¹² CCPR/C/GC/34 at para 5.

¹³ CCPR/C/GC/34 at para 11.

¹⁴ CCPR/C/GC/34 at para 12.

¹⁵ See opinions No. 42/2018 and No. 44/2018; see also opinion No. 53/2019.

77. The present case is the eleventh case concerning individuals with alleged links to the Gülen movement that has come before the Working Group in the past two years.¹⁶ In all these cases, the Working Group has found that the detention of the concerned individuals was arbitrary, and it appears that a pattern is emerging whereby those with alleged links to the Gülen movement are being targeted on the discriminatory basis of their political or other opinion. Accordingly, the Working Group finds that the Government of Turkey detained Mr. Demir on the basis of a prohibited ground for discrimination, and that the case falls within category V.

78. In the last two years, the Working Group has noted a significant increase in the number of cases brought to it concerning arbitrary detention in Turkey.¹⁷ The Working Group expresses its grave concern over the pattern that all these cases follow and urges the Government to implement the opinions of the Working Group without further delay.

79. The Working Group welcomes the lifting of the state of emergency in Turkey in July 2018 and the revocation of derogations made from its obligations under the Covenant. However, the Working Group is aware that a large number of individuals were arrested following the attempted coup d'état of 15 July 2016, including judges and prosecutors, and that many remain in detention and are still undergoing trial. The Working Group urges the Government to resolve these cases as quickly as possible in accordance with its international human rights obligations.

80. The Working Group would welcome the opportunity to conduct a country visit to Turkey. Given that a significant period has passed since its last visit to Turkey, in October 2006, the Working Group considers that it is an appropriate time to conduct another visit. The Working Group recalls that the Government of Turkey issued a standing invitation to all thematic special procedure mandate holders in March 2001 and looks forward to a positive response to its country visit requests of 15 November 2016 and 8 November 2017.

Disposition

81. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Mr. Ercan Demir, being in contravention of articles 2, 7, 19 and 20 of the Universal Declaration of Human Rights and articles 2, 19, 21 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II and V.

82. The Working Group requests the Government of Turkey to take the steps necessary to remedy the situation of Mr. Ercan Demir without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

83. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Ercan Demir an enforceable right to compensation and other reparations, in accordance with international law.

84. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Ercan Demir and to take appropriate measures against those responsible for the violation of his rights.

85. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

¹⁶ See opinions No. 1/2017, No. 38/2017, No. 41/2017, No. 11/2018, No. 42/2018, No. 43/2018, 44/2018, No. 78/2018, No. 10/2019, and No. 53/2019.

¹⁷ *Ibidem*.

Follow-up procedure

86. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether compensation or other reparations have been made to Mr. Ercan Demir;

(b) Whether an investigation has been conducted into the violation of Mr. Ercan Demir's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Turkey with its international obligations in line with the present opinion;

(d) Whether any other action has been taken to implement the present opinion.

87. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

88. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

89. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.¹⁸

[Adopted on 21 November 2019]

¹⁸ See Human Rights Council resolution 42/22, paras. 3 and 7.

