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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020

Opinion No. 2/2020 concerning Abdulmuttalip Kurt (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 9 August 2019 the Working Group transmitted to the Government of Turkey a communication concerning Abdulmuttalip Kurt. The Government replied to the communication on 8 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. Abdulmuttalip Kurt is a national of Turkey, born in 1981, who usually resides in Yenimahalle, Turkey. According to the source, Mr. Kurt was arrested twice at his home by the police, first on 29 May 2017 and then again on 17 November 2017. The source explains that the police had no arrest warrant and did not inform Mr. Kurt about the reasons for his arrest. Reportedly, the police only told him that the arrest was part of a secret investigation and the case was related to the so-called “Fethullah terrorist organization/Parallel State Structure”, referred to as the Hizmet movement by followers.

5. The source explains that, at the police station following his second arrest, Mr. Kurt was questioned by the police, without the presence of a lawyer. He was not allowed to contact any family members. He was allegedly held in a small and unsanitary underground cell at the police station. Again, he was not given any information about the reasons for his arrest. The source also specifies that Mr. Kurt was subjected to sleep deprivation.

6. The source argues that, prior to his interrogation, Mr. Kurt was permitted to meet with his lawyer for the first time, but only for a few minutes and their conversation was recorded and filmed. During Mr. Kurt’s meetings in detention with his lawyer, their conversations were similarly restricted, monitored and recorded. As such, it was nearly impossible for them to discuss mistreatment in the prison or any details about his case. Lawyers were subject to full body searches when they visited, and were not allowed to bring in any legal documents with them. Furthermore, they could not leave any reading materials or notes with Mr. Kurt.

7. According to the source, Mr. Kurt remained in custody following his second arrest until 20 November 2017, when he was brought before a judge and placed in detention, without any evidence being presented against him or any grounds adduced for keeping him detained. The source submits that Mr. Kurt was not permitted to present any information in his defence, nor was he allowed to choose his own lawyer, as the Government provided him with a State-appointed lawyer. Allegedly, however, this lawyer avoided meeting him and tried to convince Mr. Kurt to plead guilty to the charges. Meanwhile, Mr. Kurt’s private lawyer was deprived of any information related to Mr. Kurt. The source also explains that Mr. Kurt met his lawyer for only a few minutes before being questioned. According to the source, Mr. Kurt has been held in detention since then, without any official indictment.

8. The source explains that Mr. Kurt was made aware of certain allegations against him and questioned thereon, but he was never informed of any direct evidence against him. On the contrary, the evidence against Mr. Kurt is circumstantial and factually incorrect. The source also states that Mr. Kurt reportedly had to sign a document on which it was written that he had been given enough time and the proper environment to meet with his lawyer and that he had testified of his own freewill on the accusations against him, even though he had not been given enough time to read the document.

9. Mr. Kurt has been reportedly accused of having a bank account at Bank Asya; downloading the encrypted messaging software application ByLock; being a student at a Hizmet movement-affiliated college; being a member of Hizmet movement-affiliated associations; being a member of a trade union; making donations to charity organizations; organizing fundraising for students in need; sharing or retweeting Hizmet movement-related social media content; subscribing to a Hizmet movement-affiliated newspaper, journal or magazine; sending his children to schools promoting the Hizmet movement ideology; and working for Hizmet movement-affiliated institutions that had been shut down.

Legal analysis

(i) Category I

10. The source states that Mr. Kurt was arrested and detained without any legitimate legal basis, in violation of Turkish law, article 9 of the Covenant and article 9 of the Universal Declaration of Human Rights.

11. The source provides an explanation of the context of the attempted coup d'état of 15 July 2016 and the multiple arrests and detentions that followed the coup, even though the arrested individuals did not have any connection to the attempted coup. According to the source, the reasons for the arrest and detention of Mr. Kurt concern legal activities and his fundamental human rights protected by articles 18, 19, 21, 22, 25, 26 and 27 of the Covenant. In this case, the source submits that Mr. Kurt was arrested and detained without being shown any evidence of his involvement in the coup d'état on 15 July 2016.

12. The source claims that the Government has targeted a number of actions as pretexts for the arrest and detention of certain individuals even though they are not defined as crimes in law, which is contrary to the principle of legality. These include having a subscription to a Hizmet movement-affiliated newspaper (*Zaman*), journal or magazine; being a client of the bank associated with the Hizmet movement, Bank Asya; being a member of a union; and possessing books or other materials of Fethullah Gülen.

13. Moreover, the source reports that Mr. Kurt was arrested contrary to national law (in particular, article 91 (2) of the Code of Criminal Procedure) and article 9 (1) of the Covenant. Furthermore, detention needs to be based on a strong criminal suspicion, according to article 19 of the Constitution. The source states that Mr. Kurt was detained without solid evidence to suggest strong criminal suspicion (contrary to articles 100 and 101 of the Code of Criminal Procedure), while no justification for his detention was given. As stated above, all allegations against Mr. Kurt concerned legal activities and rights protected under the Covenant.

14. The source also states that the arrest and detention warrants did not include any concrete facts or justification for Mr. Kurt's detention or why judicial control would have been insufficient. Neither was he presented with any evidence demonstrating a strong suspicion of the commission of a crime. Moreover, the source argues that none of the decisions concerning detention or its continuation met the basic requirements enshrined in national law, but rather consisted of formulaic expressions and showed a lack of solid evidence, facts and findings. The authorities thus failed to justify Mr. Kurt's detention.

15. In addition, the source recalls that Mr. Kurt has been detained for more than 28 months without an official indictment. The source thus claims that the detention is unreasonably long.

16. The source also argues that Mr. Kurt was arrested and kept in inhuman conditions for the first five days after arrest. Therefore, the source argues that article 9 of the Covenant was violated because Mr. Kurt was kept in detention for a prolonged period. The source emphasizes that Mr. Kurt had nothing to do with the coup attempt and there was no justification requiring an extension of his detention. Moreover, the source specifies that Mr. Kurt's detention is impossible to justify on the basis of the events that led to the state of emergency, as the coup attempt had failed, and the Government announced before the end of July 2016 that any potential danger was over. Mr. Kurt's detention could not, therefore, be a measure required under the state of emergency.

(ii) Category II

17. The source submits that the accusations against Mr. Kurt concern his fundamental rights that are protected under articles 18, 19, 21, 22, 25, 26 and 27 of the Covenant and that his arrest violates these rights.

18. With regard to the accusation related to Mr. Kurt's subscription to Hizmet movement-affiliated newspapers, journals or magazines or possession of books or other written and visual materials on or by Fethullah Gülen, the source underlines that, before the coup attempt, such materials were legal and had been sold with the permission of the Ministry of Culture. Moreover, in a country in which the rule of law is respected, newspapers, journals and 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.

19. In respect of the accusation of being a member of, working for or receiving services from Hizmet movement-affiliated associations, unions, foundations or other institutions, the source states that, after the coup attempt, these institutions were closed on 23 July 2016

(pursuant to Decree Law No. 667). Accordingly, prior to that date, they were officially registered, duly authorized and legitimate. The source states that being a member of, working for or receiving services from them was legal, and that these activities are protected under articles 18, 19, 21, 22, 25 and 26 of the Covenant.

20. In relation to the accusation of participating in fundraising activities and making donations to charity organizations related to the Hizmet movement, the source argues that after the coup attempt, all Hizmet movement-related charity organizations, foundations, schools and institutions were shut down on 23 July 2016 (pursuant to Decree Law No. 667). However, prior to that date, they were officially registered, duly authorized and legitimate and, therefore, activities related to volunteering, fundraising and making donations were legal and protected under articles 18, 21, 22 and 26 of the Covenant.

21. As far as the accusation of participating in social gatherings and other social activities is concerned, the source submits that mere participation in social gatherings or social activities, without promoting terrorism or violence, cannot be banned and is protected under articles 18, 19, 21 and 26 of the Covenant.

22. Finally, with respect to the accusation of having a bank account at Bank Asya, the source argues that this bank is a legal corporation, which was seized 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.

(iii) Category III

23. According to the source, Mr. Kurt suffered serious violations of his right to a fair trial as set forth in article 14 of the Covenant.

24. First, 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 Criminal Judgeships 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. They were allegedly appointed to persecute members of the Hizmet movement. As appeals against decisions by a Criminal Judge of Peace can only be filed with another Criminal Judge of Peace, such a situation reportedly creates a “closed circuit” system.

25. Second, the source argues that the authorities failed to provide Mr. Kurt with a timely explanation of the reason for his arrest (he was not informed of the reasons for his arrest until his interrogation by the police during the days following his arrest) and held him without charge.

26. In addition, the source submits that Mr. Kurt’s right to prepare his defence and to call and examine witnesses was violated. Indeed, the source affirms that Mr. Kurt has never been given the time to prepare himself for interrogation. Instead, he was physically and psychologically pressured into accepting drafted statements by the police and induced by the prosecutor and the judge to agree with statements collected by the police.

27. Moreover, the source also submits that Mr. Kurt’s right to consult with counsel was violated. In that regard, the source cites provisions of national law (in particular, article 3 of Decree Law No. 668 of 25 July 2016), according to which detainees are denied (in certain circumstances) access to lawyers for the first five days of deprivation of liberty. This ban on having access to a lawyer of choice was reportedly lifted by Decree Law No. 684 of 23 January 2017. Moreover, the source alleges that the meetings between Mr. Kurt and his lawyer were recorded and monitored by prison officers.

28. The source claims a violation of the principle of equality of arms in the present case. In fact, the source reports that Mr. Kurt was denied access to his case file and 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.

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

30. With regard to the right to defence, the source asserts that there has been a relentless campaign of arrests targeting lawyers across the country. Allegedly, in 77 of the 81 provinces in Turkey, lawyers have 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 submission, the source argued that 523 lawyers had been arrested and 1,318 lawyers had been prosecuted. Moreover, lawyers have reportedly been stripped of valuable tools to defend their clients under the pretext of counter-terrorism efforts and face pressure to testify against them. Therefore, many suspects cannot find a lawyer to defend them. This situation thus violates their right to a defence.

(iv) Category V

31. The source argues that Mr. Kurt's detention is due to his social background, and that it is discriminatory in nature and therefore arbitrary.

32. The source asserts that persons who are charged with being members of the Hizmet movement are faced with widespread discrimination. There is an emerging pattern in Turkey of the arbitrary deprivation of liberty of persons who are accused of being followers of the Hizmet movement. The source underlines that it does not matter whether such persons accept or reject the connection with the movement.

33. In this context, the source argues that Mr. Kurt has been arbitrarily deprived of his liberty according to category V because of the discrimination he faced as a Hizmet 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

34. On 9 August 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 8 October 2019, detailed information about the current situation of Mr. Kurt and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Turkey 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 to ensure Mr. Kurt's physical and mental integrity.

35. On 8 October 2019, the Government submitted its reply in which it firstly reaffirmed that Turkey, as a democratic State governed by the rule of law and a member of the Council of Europe since 1950, upheld human rights, the rule of law and democracy. It explained that Turkey continues to fight against several terrorist organizations within the framework of its Constitution and legislation and in compliance with its international obligations and the fundamental principles of a democratic State. The Government then recalled its national legal provisions on human rights.

36. The Government argues that Mr. Kurt is deprived of his liberty in accordance with the decisions of competent courts. All proceedings that led to his custody, detention and conviction were carried out in accordance with the relevant legislation, as well as the international obligations of Turkey.

37. With regard to the proceedings against Mr. Kurt, the Government explains that, on 29 May 2017, Mr. Kurt was taken into custody upon the instruction of the Kırklareli Chief Public Prosecutor's Office while he was visiting his wife who was in custody. They were both charged with "membership of an armed terrorist organization". He was informed of his legal rights and the charges against him. He gave his testimony at the police department on the same day, as well as before the Kırklareli Chief Public Prosecutor on 2 June 2017, both in the presence of a lawyer. He was brought before a judge on 2 June 2017. After listening to Mr. Kurt in the presence of his lawyer and evaluating the evidence collected thus far, Kırklareli Magistrates' Court, even though there was strong suspicion and concrete evidence that would have justified his detention, ruled on his release due to the fact that the suspect's

wife was detained and they had a young child. Accordingly, the Court imposed a travel ban on Mr. Kurt, together with a judicial control decision in accordance with article 109 (3) (a) of the Code of Criminal Procedure.

38. The Government also reports that the Kırklareli Chief Public Prosecutor's Office challenged the decision of Kırklareli Magistrates' Court on 16 November 2017 and, accordingly, an arrest warrant was issued for Mr. Kurt. On 20 November 2017, after Mr. Kurt gave his testimony before Kırklareli Magistrates' Court in the presence of his lawyer, the judge ruled on Mr. Kurt's detention, deciding that judicial control measures would be inadequate considering the gravity of the charges and the presence of strong suspicion supported by concrete evidence. The indictment concerning Mr. Kurt was issued on 17 April 2018. On 1 August 2018, he was convicted by Kırklareli 2nd Assize Court to six years and three months of imprisonment for being a member of an armed terrorist organization. On the same day, his lawyer contested the decision and appealed before Istanbul Regional Court of Justice. On 7 February 2019, Istanbul Regional Court of Justice upheld the decision of imprisonment handed down by the Assize Court. Subsequently, his lawyer appealed before the Court of Cassation on 18 February 2019. The case is currently before the Court of Cassation.

39. With regard to the conditions of detention of Mr. Kurt, the Government recalls that article 91 (4) of the Code of Criminal Procedure states that the duration of custody for crimes falling under the scope of the law on counter-terrorism (Law No. 3713 of 12 April 1991) is four days, at the end of which the person has to be brought before a judge. Regarding the allegations concerning the conditions and duration of detention, especially the one suggesting that the aforementioned article of the Code of Criminal Procedure had not been respected, it is important to underline that, after being taken into custody on 29 May 2017 at 2 p.m., Mr. Kurt gave his testimony on 1 June 2017 and was brought before a judge the next day at 11 a.m. Moreover, the charges against him include suspicion of being a member of an armed terrorist organization. Therefore, there is no breach of article 91/4 of the Code of Criminal Procedure since Mr. Kurt was brought before Kırklareli Magistrates' Court within the time stipulated by law.

40. According to the Government, during the four days spent in custody at Kırklareli Şehit Hayrettin Yesin Police Department, he was given all the necessary information, both written and oral, regarding his situation and the charges against him. The police department has three detention cells under surveillance. All allegations of sleep deprivation are ill-founded, and there is no written or oral complaint made by Mr. Kurt regarding any mistreatment at the police department.

41. The Government reiterates that, between 2 June 2017 and 16 November 2017, Mr. Kurt was released by the Court on judicial control. Starting from 16 November 2017, he was detained pending trial. On 1 August 2018, he was convicted by Kırklareli 2nd Assize Court to six years and three months of imprisonment.

42. The Government argues that, throughout the whole legal procedure, a lawyer appointed by the Kırklareli Bar Association assisted Mr. Kurt in accordance with article 150 of the Code of Criminal Procedure. This article does not hinder his right to choose his own lawyer to conduct the judicial procedure. However, there was no written or oral request by Mr. Kurt to choose his own lawyer.

43. With regard to access to the case file by Mr. Kurt's lawyer, the Government contests the source's allegations. The Government states that, according to article 157 of the Code of Criminal Procedure, some procedural acts undertaken during the investigation stage need to be kept confidential to ensure that the public prosecutor carries out all the necessary steps with regard to the investigation. The confidentiality of the investigation does not hinder the right of defence since article 153 (1) of the Code of Criminal Procedure states that the lawyer can examine the case file and obtain a copy of the documents during the whole investigation. For investigations related to crimes falling under the scope of article 153 (2) of the Code of Criminal Procedure, a decision on confidentiality can be taken by the relevant judge upon the request of the public prosecutor if the importance and gravity of the investigation justifies it. Membership of an armed terrorist organization is included among crimes that can necessitate additional precautions regarding confidentiality. The existence of a decision on

confidentiality does not affect the right of a lawyer to access the minutes of the testimonies, expert reports and all procedural acts requiring the presence of Mr. Kurt. It is also essential to underline that, as in any case, confidentiality ends as soon as an indictment is issued. The lawyer can examine the case file and all the evidence and reports gathered during the investigation once the prosecution stage starts.

44. Turning to the assessment of the lawfulness of the detention of Mr. Kurt, the Government explains that it is useful to examine the case law of the European Court of Human Rights as regards the issue of the legal grounds justifying Mr. Kurt's detention. According to the Court's judgments, it is necessary for there to be a reasonable suspicion that an offence has been committed in order for a person to be deprived of liberty. This condition should be present at every stage of the proceedings. The Government argues that there are concrete elements indicating the existence of a reasonable suspicion that Mr. Kurt is a member of a terrorist organization. The indictment contains concrete reasons that are also included in the reasoned judgment of the Assize Court, which can be summarized as follows. First, Mr. Kurt possesses a deposit account at Bank Asya, a key institution that provided financial resources for the Fethullah terrorist organization. It was established that the leader of the terrorist organization had, on 25 December 2013, instructed its members to put money into their accounts at the bank in order to ameliorate the financial situation of the institution and to increase the volume of transactions. The examination of Mr. Kurt's account activity demonstrates that his investments rose significantly and that his financial activity intensified after 25 December 2013. Therefore, Mr. Kurt acted upon the instruction of the leader of the Fethullah terrorist organization in order to increase the volume of transactions of the bank and to contribute to the financial resources of the terrorist organization. Second, it has been established that Mr. Kurt worked as the director of a student dormitory known to be affiliated with the Fethullah terrorist organization. Thus, he had direct connections with the terrorist organization, as he was included in its hierarchical structure. Third, Mr. Kurt also participated in demonstrations against the closure of the newspaper *Zaman*, which was used for propaganda purposes by the Fethullah terrorist organization. When analysed together with other elements indicating his affiliation with the Fethullah terrorist organization, it is clear that Mr. Kurt did not, of his own freewill, exercise his constitutional right to protest the closure of *Zaman*, but that he acted upon the instructions of the terrorist leader. Fourth, Mr. Kurt was a member of the Pakis trade union mentioned in Decree Law No. 667, which was among the list of trade unions affiliated with the Fethullah terrorist organization and closed down accordingly. Such trade unions aimed to recruit members to the terrorist organization and establish a network in Turkey and abroad. His membership is also proof of the connection between Mr. Kurt and the Fethullah terrorist organization. Fifth, Mr. Kurt worked for Gaye Özel Eğitim Öğretim Ticaret Hizmetleri, an educational institution providing financial resources, which was closed down due to its affiliation with the Fethullah terrorist organization.

45. Therefore, the Government argues that the existence of the aforementioned reasons, also reaffirmed in the reasoned judgment of the Assize Court, constituted a reasonable suspicion to justify detention, as well as a solid basis for the conviction of Mr. Kurt due to his membership to the Fethullah terrorist organization.

46. The Government also explains that the European Court of Human Rights states that, with regard to detention exceeding a certain period, the existence of reasonable suspicion alone is not sufficient for the continuation of detention. There also needs to be a public interest to justify the deprivation of liberty. Mr. Kurt was charged with being a member of an armed terrorist organization that had orchestrated and carried out the coup attempt of 15 July 2016, which had aimed to demolish the constitutional order in Turkey and overthrow the elected President, the Parliament and the Government. The Fethullah terrorist organization killed 251 Turkish citizens during the coup attempt. Therefore, there is clearly a public interest in the courts' detaining a person who is charged with being a member of such a terrorist organization, which posed a threat to public order and security, as explained above.

47. Furthermore, in the decisions concerning an extension of Mr. Kurt's detention, the relevant courts reasoned that the gravity of the crime that he had been charged with and the evidence collected against him constituted the legal grounds for his detention before his conviction. Indeed, a basis for detention is presumed to exist for crimes under the scope of

article 100 of the Code of Criminal Procedure, such as membership of an armed terrorist organization.

48. Concerning the allegations of the source regarding the periods of detention mentioned above, the Government states that Mr. Kurt was brought before a judge after he was taken into custody within the legal period according to article 91 (4) of the Code of Criminal Procedure. His indictment was prepared without delay despite the huge number of cases before the judiciary at that time.

49. The Government argues that Mr. Kurt was convicted by competent courts based on reasoned decisions. Those decisions by an independent judiciary, as well as the proceedings throughout the trial process, were in accordance with national legislation. The conformity of national legislation with the international obligations of Turkey, particularly those concerning human rights, is guaranteed in article 90 of the Constitution. It is also important to stress that the judgment in the case of Mr. Kurt has not yet been finalized as it is currently before the Court of Cassation. He also has the right to lodge an individual application before the Constitutional Court when the appeal process before the Court of Cassation is complete. He can also lodge an application before the European Court of Human Rights.

50. The Government concludes that the source's allegations of arbitrary detention are unsubstantiated since his detention was based on the reasoned decisions of competent courts and the investigation and prosecution were carried out in accordance with the relevant legislation. Proceedings against Mr. Kurt were carried out swiftly and in accordance with the international obligations of Turkey despite the fact that Turkey, during the considerable period of time that he was in detention, had resorted to its right of derogation from its obligations under the Convention for the Protection of Fundamental Freedoms and Human Rights and the Covenant, and had already submitted the notifications of derogation to the Council of Europe, in accordance with article 15 of the Convention, and the Secretary-General, in accordance with article 4 of the Covenant.

51. The Government wishes to bring to the attention of the Working Group that the source alleges that Mr. Kurt was accused of, among other things, downloading the ByLock application. However, nowhere in the case file or at any stage during the judicial procedure was Mr. Kurt accused of downloading the aforementioned application. In fact, the indictment clearly states that the suspect had no record of using the ByLock application. Accordingly, the Government challenges the credibility of the allegations.

52. In light of the explanations provided above, the Government argues that the allegations communicated by the source to the Working Group are unfounded and should therefore be dismissed.

Additional comments from the source

53. The Government's reply was sent to the source for comments on 9 October 2019. The source submitted a reply on 5 November 2019. The source confirmed that Mr. Kurt was sentenced on 17 April 2018 by the Kırklareli 2nd Assize Court to six years and three months of imprisonment; that he appealed unsuccessfully on 7 February 2019 to the Istanbul Regional Court of Justice, which confirmed the sentence imposed by the Assize Court; and that Mr. Kurt's lawyer then proceeded to a further appeal to the Court of Cassation on 18 February 2019, which was currently pending.

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 the situation of Mr. Kurt falls within the scope of the derogations that Turkey had made under the Covenant. On 21 July 2016, the Government of Turkey informed the 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.¹

56. 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. Kurt. As the Human Rights Committee has stated, States parties derogating from articles 9 and 14 must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.²

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

Category I

58. The Working Group recalls that it considers a detention to be arbitrary and falling under category I if such detention lacks a legal basis. In the present case, the Working Group must therefore examine the circumstances of Mr. Kurt's arrest, noting that he was arrested twice, on 29 May 2017 and then again on 17 November 2017. However, the Working Group observes inconsistencies in the source's submissions. The source initially claimed that Mr. Kurt had been arrested without an arrest warrant (see para. 4 above), without explaining whether the lack of arrest warrant concerned both arrests or only one. Moreover, later in the submission, the source discussed the content of both the arrest and detention warrants (see para. 14 above). This statement indicates to the Working Group that there must have been an arrest warrant and that the source was familiar with its content, and was therefore aware of the reasons for the arrest. The Working Group notes that the Government also claimed that there were arrest warrants and the source did not contest this claim in its further comments. The Working Group is therefore unable to conclude that Mr. Kurt was arrested in the absence of an arrest warrant on either of the two occasions.

59. Having said this, the Working Group is mindful that the first arrest took place on 29 May 2017 and, according to the Government, Mr. Kurt was presented to the judge on 2 June 2017, who ordered his conditional release pending the investigation, while imposing a travel ban. This means that, following the arrest on 29 May, Mr. Kurt was first presented to the judicial authority only four days after the arrest. Moreover, the Working Group notes that, according to the source, Mr. Kurt was arrested for the second time on 17 November 2017 and was presented to a judge on 20 November 2017. The Government argued that this arrest took place on 16 November 2017, but confirms that Mr. Kurt was presented to the judge on 20 November 2017. The Government also recalled that article 91 (4) of the Code of Criminal Procedure allowed for four days of custody before those arrested were brought before a judge (in accordance with the law on counter-terrorism (Law No. 3713)), as was the case of Mr. Kurt. Therefore, this provision, according to the Government, was respected.

60. The Working Group recalls that article 9 (3) of the Covenant requires that anyone arrested on a criminal charge is brought promptly before a judge. As explained by the Human Rights Committee, in its general comment No. 35 (2014) on liberty and security of person, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial

¹ Depository notification C.N.580.2016.TREATIES-IV.4.

² See Human Rights Committee, general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 4. See also Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 6; general comment No. 34 (2011) on the freedoms of opinion and expression, para. 5; and general comment No. 35 (2014) on liberty and security of person, paras. 65–66.

hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.³

61. In the present case, the Working Group notes that the Government has not provided any exceptional reasons that would have justified a delay of more than 48 hours to present Mr. Kurt to the judicial authority following both arrests, but merely cited its compliance with the stipulations of its national law. However, as the Working Group has repeatedly stated in its jurisprudence, even when the detention of a person is carried out in conformity with national legislation, the Working Group must ensure that the detention is also consistent with the relevant provisions of international law.⁴ The Working Group therefore finds a violation of article 9 (3) of the Covenant.

62. The Working Group also finds that the failure to present Mr. Kurt to the judicial authority in accordance with the stipulations of article 9 (3) of the Covenant meant that he was unable to exercise his right to challenge the legality of his detention without delay. This right belongs to anyone arrested, as stipulated in article 9 (4) of the Covenant.⁵ In the case of Mr. Kurt, following both of his arrests, he was presented before a judge four days after the arrest and the Government has not presented any explanation for this delay except citing its compliance with national law. The Working Group therefore finds a breach of article 9 (4) of the Covenant.

63. The Working Group further considers that judicial oversight of detention is a fundamental safeguard of personal liberty⁶ and is essential in ensuring that detention has a legal basis. Given that Mr. Kurt was not able to challenge his continued detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was also violated.

64. Finally, the source also alleged that Mr. Kurt had not been informed of any charges against him. However, the Government argued that, following his first arrest on 29 May 2017, Mr. Kurt had been given all the necessary information, both in writing and orally, regarding his situation and the charges against him (see para. 40 above). Moreover, the Government explained that Mr. Kurt had been presented before a judge four days after the arrest at which time charges would be normally brought (see paras. 37–38). Noting that the source has failed to respond to this in its further comments, the Working Group is unable to make any findings on the point.

65. Given all the above, the Working Group concludes that the arrest and detention of Mr. Kurt amounted to a violation of Mr. Kurt's rights under article 9 (3) and (4) of the Covenant. Consequently, the Working Group concludes that the detention of Mr. Kurt was arbitrary and falls under category I.

Category II

66. The source submitted that the detention of Mr. Kurt fell under category II since his arrest and detention were based on the allegation that he had held a bank account at Bank Asya; that he had downloaded the ByLock application on his smartphone; that he had been a student at a Hizmet movement-affiliated college; that he had been a member of Hizmet movement-affiliated associations; that he had been a member of a trade union; that he had made donations to charity organizations; that he had organized fundraising for students in need; that he had shared or retweeted Hizmet movement-related social media content; that he had subscribed to Hizmet movement-affiliated newspapers, journals or magazines; that he had sent his children to schools promoting the Hizmet movement ideology; and that he had worked for institutions affiliated to the Hizmet movement that had been closed down.

³ General comment No. 35, para. 33.

⁴ See, e.g., opinion No. 46/2011, para. 22; opinion No. 42/2012, para. 29; opinion No. 79/2017, para. 51; opinion No. 1/2018, para. 60; and opinion No. 20/2018, paras. 64 and 69.

⁵ See also United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 8 (A/HRC/30/37, annex).

⁶ *Ibid.*, para. 3.

67. The Government argues that Mr. Kurt was arrested, detained, charged with and ultimately sentenced for terrorism offences. In particular, the Government has listed five activities of Mr. Kurt that fall into that category: (a) he held a bank account at Bank Asya, which was linked to the Hizmet movement; (b) he was a director of a student dormitory affiliated with the Hizmet movement; (c) he took part in demonstrations against the closure of the *Zaman* newspaper, which was used by the Hizmet movement for propaganda purposes; (d) he was a member of a trade union linked to the Hizmet movement; and (e) he worked at an educational institution linked to the Hizmet movement. The Government specifically denies that the charges against Mr. Kurt involved allegations that he had downloaded and used the ByLock application and points out that there was no evidence in his case that this had taken place.

68. The Working Group observes a significant discrepancy between the initial submissions made by the source regarding the charges against Mr. Kurt and the response of the Government. Therefore the Working Group will only examine the five charges against Mr. Kurt noted by both the source and the Government.

69. In the present case, the Working Group observes that at the core of the allegations against Mr. Kurt, as presented by the Government, is his alleged alliance with the Hizmet movement which, according to the Government, stems from the various activities listed in paragraph 44. However, aside from the loose associations with the Hizmet movement, none of those activities in itself could be construed as a criminal act, but rather as the peaceful exercise of the rights protected by the Covenant and the Universal Declaration of Human Rights. Notably, the Government has not indicated that any of these actions by Mr. Kurt were violent or incited others to violence. In fact, there is nothing in the Government's response that would indicate that all these actions were something other than the peaceful exercise of Mr. Kurt's rights under the Covenant, including his rights to hold opinions and to freedom of association.

70. The Working Group is mindful of the state of emergency that was declared in Turkey at the time. However, while the National Security Council of Turkey had already officially designated the "Fethullah terrorist organization/Parallel State Structure" as a terrorist organization in 2015, the fact that this organization was ready to use violence had not become apparent to Turkish society at large until the coup attempt in July 2016. As noted by the Commissioner for Human Rights of the Council of Europe:

Despite 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.⁷

71. In this light, the Commissioner for Human Rights pointed out that there was 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".⁸

72. The Working Group observes that the allegations against Mr. Kurt concern his perceived alliance with the Hizmet movement, which has manifested itself through ordinary activities, such as holding a bank account, having a job (as director of a dormitory and working in an educational institution) and taking part in a protest. The Government has only

⁷ Council of Europe, Commissioner for Human Rights, "Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey", CommDH(2016)35, para. 20.

⁸ *Ibid.*, para. 21.

presented vague claims that these were part of terrorist activities without any concrete evidence of how these normal activities could be construed as terrorist actions. Noting the widespread reach of the Hizmet movement, as documented in the report of the Commissioner for Human Rights cited above, “it would be rare for a Turkish citizen never to have had any contact or dealings with this movement in one way or another”.⁹

73. The Working Group therefore concludes that the arrest and detention of Mr. Kurt resulted from his exercise of the rights guaranteed by articles 19, 21 and 22 of the Covenant and fall under category II.

Category III

74. Given its finding that the deprivation of liberty of Mr. Kurt is arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Kurt should have taken place.

75. In this regard, the Working Group notes that, according to the initial submissions of the source, Mr. Kurt is detained without any charges and that no trial proceedings against him have taken place. This was objected to by the Government, who, in its reply, stated that Mr. Kurt had been indicted on 17 April 2018; that he had been subsequently convicted on 1 August 2018 to six years and three months of imprisonment by the Kırklareli 2nd Assize Court; that Mr. Kurt’s lawyer had appealed that judgment on the same day, although, on 7 February 2019, the judgment had been upheld by the Istanbul Regional Court of Justice; and that Mr. Kurt’s lawyers had submitted an appeal to the Court of Cassation on 18 February 2019, which was still pending.

76. The source also made a number of allegations concerning the failure to observe Mr. Kurt’s right to a fair trial, including the failure to allow prompt legal assistance to Mr. Kurt and denial of access to case information and the case file to Mr. Kurt and his lawyer, ill-treatment of Mr. Kurt and denial of the right to appeal. However, the Working Group must observe that, in its reply, the Government has responded to these allegations (see notably paras. 37–38, 40 and 42–43) and that the source has not further contested these submissions. Noting the severity of the discrepancy in the claims by the source and the response by the Government, the Working Group is unable to make any assessment of the arbitrary character of the detention of Mr. Kurt under category III of its methods of work.

Category V

77. The source alleges that the detention of Mr. Kurt 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 is due to his alleged membership of a terrorist organization.

78. The present case is the latest case concerning individuals with alleged links to the Hizmet movement that has come before the Working Group in the past two years.¹⁰ In all these cases, the Working Group has found that the detention of the individuals concerned was arbitrary, and it appears that a pattern is emerging whereby those with alleged links to the Hizmet movement are being targeted on the basis of their political or other opinion. Accordingly, the Working Group finds that the Government detained Mr. Kurt on the basis of a prohibited ground for discrimination, and that the case falls within category V.

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 trials. The Working Group urges the Government to resolve these cases as quickly as possible in accordance with its international human rights obligations.

⁹ Ibid., para. 20.

¹⁰ See opinions No. 1/2017, No. 38/2017, No. 41/2017, No. 11/2018, No. 42/2018, No. 43/2018, No. 44/2018, No. 78/2018, No. 10/2019, No. 53/2019 and No. 79/2019.

80. In the past three years, the Working Group has noted a significant increase in the number of cases brought to it concerning arbitrary detention in Turkey.¹¹ 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.

81. The Working Group would welcome the opportunity to conduct a country visit to Turkey. Given that a significant period has passed since its previous visit to Turkey, in October 2006, the Working Group considers that it is an appropriate time to conduct another visit.

Disposition

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

The deprivation of liberty of Abdulmuttalip Kurt, being in contravention of articles 2, 7, 9, 19, 20 and 23 (4) of the Universal Declaration of Human Rights and articles 2, 8, 9, 19, 21, 22 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and V.

83. The Working Group requests the Government of Turkey to take the steps necessary to remedy the situation of Mr. Kurt 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.

84. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Kurt immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the coronavirus disease 2019 (COVID-19) global pandemic and the threat that it poses in places of detention, the Working Group calls on the Government to take urgent action in ensuring the immediate release of Mr. Kurt.

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

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

Follow-up procedure

87. 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 Mr. Kurt has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Kurt;
- (c) Whether an investigation has been conducted into the violation of Mr. Kurt's rights and, if so, the outcome of the investigation;
- (d) 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;
- (e) Whether any other action has been taken to implement the present opinion.

88. 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.

89. 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.

¹¹ Ibid.

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.

90. 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.¹²

[Adopted on 29 April 2020]

¹² Human Rights Council resolution 42/22, paras. 3 and 7.