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**Human Rights Council**  
**Working Group on Arbitrary Detention**

## **Opinions adopted by the Working Group on Arbitrary Detention at its eighty-ninth session, 23–27 November 2020**

### **Opinion No. 74/2020 concerning Nermin Yasar (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 8 April 2020 the Working Group transmitted to the Government of Turkey a communication concerning Nermin Yasar. The Government replied to the communication on 28 May 2020. 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. Nermin Yasar is a citizen of Turkey born in 1968. She was working as a contract teacher at Manisa Technical and Industrial Vocational High School from 2013 until her arrest.

a. Arrest and detention

5. According to the source, Ms. Yasar was arrested at her home on 28 October 2016 by the Manisa police counter-terrorism department. The police officers reportedly told her that they had a warrant to search the house. They seized digital materials owned by Ms. Yasar and her family members. The source explains that, at the time of arrest, the police officers showed her only the search warrant, but no arrest warrant. They did not mention any legal basis for her arrest. They told her only that the arrest was related to the “Fethullah terrorist organization/Parallel State Structure”, also known as the Hizmet movement by the followers of Fetullah Gülen.

6. The source explains that Ms. Yasar was then transferred to Manisa police station, to the counter-terrorism branch. She was detained there in a small and unsanitary cell with 33 other women and was not allowed to contact her family. She was allegedly subjected to severe sleep deprivation, she was obliged to sleep on the floor and there were not enough blankets. The source reports that she was held in custody for 20 days. During that time, she was allowed one shower. There was no clean drinking water.

7. According to the source, prior to her official interrogation, Ms. Yasar was allowed to meet with her lawyer. However, their conversation was recorded and filmed. During her subsequent meetings with her lawyer, their conversations were similarly restricted, monitored and recorded. As such, it was nearly impossible for them to discuss any mistreatment in the prison or any details about her legal case. Moreover, her lawyer was subjected to full body searches before the visits and was unable to bring in any legal documents or leave any reading materials or notes with her.

8. The source further explains that Ms. Yasar was not provided with any details about her arrest until 9 November 2016, when she was interrogated for the first time. Ms. Yasar learned that the charges against her concerned her using the ByLock mobile application and attending meetings of and supporting the Hizmet movement, all of which Ms. Yasar denied.

9. Ms. Yasar reportedly remained in custody until 16 November 2016. On that day, she was brought before a judge and was placed in detention, allegedly without any evidence being presented against her or any grounds for keeping her detained. The source specifies that she was not permitted to present any information in her defence or to see the evidence. Moreover, a confidentiality decision has been adopted with regard to her case, so she has no access to any evidence. According to the judge, owing to the possible punishment for this crime, which is defined as a “catalogue crime”, there is a suspicion that Ms. Yasar will flee. The application of judicial control would thus not be sufficient in this case based on legal and factual grounds and she must therefore be held in pretrial detention.

10. The source reports that, during detention, Ms. Yasar has been suffering poor conditions. She stays in an overcrowded cell together with more than 25 people. The cell measures 35 square metres and has six bunk beds. She has a serious illness that requires continuous treatment. However, she has not had access to proper treatment and her lawyer’s request for a report on her health has been rejected. The source explains that Ms. Yasar was allowed to see her family after two months of detention and she is able to see them every two months. She is permitted to make telephone calls on a weekly basis.

11. The source reports that, during this detention period, all petitions for release and judicial control have been rejected. After 10 months, on 11 August 2017, an indictment was prepared by which Ms. Yasar was charged with being a member of the Fethullah terrorist organization, especially related to women’s branches, of installing and using the ByLock mobile application and of founding a society called Empati Kadın ve İş Derneği (Empathy Women and Business Association).

12. According to the source, during the first trial hearing, on 14 November 2017, Ms. Yasar was asked about her use of the ByLock mobile application. She denied having used it. Witnesses reportedly explained that she had attended social events related to the Hizmet movement. During that hearing, the judge decided to extend her detention.

13. The source explains that Ms. Yasar's lawyer contested the legality of the evidence used concerning her use of ByLock. The evidence consisted of a spreadsheet sent by the Turkish intelligence service containing a list of "Bylock users", and the presence of individuals' names in that list was reportedly sufficient to find them guilty. This objection was rejected.

14. During a hearing on 17 April 2018, the Manisa Third Assize Court reportedly concluded that Ms. Yasar did attend meetings, seminars and fundraising events of the Fethullah terrorist organization/Parallel State Structure. The Court also concluded that she had founded Empati Kadın ve İş Derneği and had arranged meetings, trips and events, in order to motivate other members. Lastly, the Court found that she had installed and used the ByLock mobile application. She was sentenced to seven and a half years in prison.

15. Afterwards, without any hearing, on 7 November 2018, the Izmir Second Regional Court of Appeal approved the decision of the Assize Court. Ms. Yasar's case is now pending before the Court of Cassation. Ms. Yasar is detained in Manisa E-type Closed Prison.

b. Analysis of violations

(i) Category I

16. The source submits that Ms. Yasar's arrest and detention are incompatible with domestic law (namely articles 91 (2) and 100 (1) of the Turkish Criminal Procedure Code) and basic principles of law, such as article 9 (1) of the Covenant.

17. The source reiterates that detention should be applied when judicial control is not sufficient. However, in the case at hand, judicial control would have been sufficient to keep Ms. Yasar in Turkey, especially in view of her illness. Yet, the source argues, the judicial authority preferred to use detention to penalize her. This action also demonstrates, to the source, that the judicial authority violated the principle of the presumption of innocence. The source thus contends that the decision to arrest and detain her are not based on any concrete facts or findings that make the arrest and detention necessary. The decision further lacks justification as to why judicial control, instead of pretrial detention, is not sufficient. Ms. Yasar's arrest is thus in violation of articles 100 and 101 of the Turkish Criminal Procedure Code and article 9 (1) of the Covenant.

18. The source argues that Ms. Yasar was arrested without reasonable suspicion of a crime as to convince an objective observer. The source recalls that most of the individuals arrested after the coup of 15 July 2016 had no connection to it, and neither did Ms. Yasar as she has never participated in any armed or unarmed illegal activities. The source alleges that Ms. Yasar was arrested without any precise proof demonstrating a crime.

19. The source states that the facts on the basis of which she was accused are legal and protected by the Covenant. Specifically, the source recalls that the activities constituting the crime are: (a) founding and becoming a member, eight years before the coup of 15 July 2016, of a legally established society, allowed and audited by the Government; (b) attending social events and trips before 15 July 2016; and (c) installing and using the ByLock mobile application for communication long before 15 July 2016. With regard to the use of the application, the source states that it was used worldwide, and it cannot be suggested that all users were members of the Hizmet movement. Moreover, the messages were not related to any terrorist activity. The source further claims that Ms. Yasar did not acknowledge having used the application.

20. The source argues that the investigations and the preparation of the indictment were not speedy. This is demonstrated by the fact that 10 months passed before the indictment against Ms. Yasar was issued.

(ii) Category II

21. The source submits that all the accusations against Ms. Yasar relate to her fundamental human rights protected under articles 18, 19, 21, 22, 25, 26 and 27 of the Covenant.

22. With regard to the accusation of being a member of Hizmet-affiliated associations, unions, foundations and other institutions, the source recalls that, after the coup attempt, all these alleged associations were shut down on 23 July 2016 through Decree Law No. 667. Before that day, they were officially registered, duly authorized and legitimate. Activities such as being a member of associations, unions, foundations and other institutions, merely participating in social gatherings, volunteering, fundraising and making donations were therefore legal and are protected under articles 18, 19, 21, 22 and 26 of the Covenant.

23. With regard to the accusation of downloading and using the ByLock mobile application, the source reiterates that it was a legal activity that is protected under articles 19 and 26 of the Covenant.

(iii) Category III

24. According to the source, Ms. Yasar's right to a fair trial has been violated.

25. The source argues that the Government failed to ensure that Ms. Yasar was heard before an independent and impartial tribunal. The source claims that the aim of founding the Criminal Courts of Peace was to scare the opposition and Hizmet supporters. The source explains that these courts hold all the powers to execute steps during an investigation, including arrest, detention and searches. Objections may be made to another Criminal Court of Peace. The source thus argues that this system is a closed circuit and that all the cases similar to Ms. Yasar's are handled by these courts.

26. The source contends that Ms. Yasar was not given time to prepare for interrogations. The source states that, instead, she was physically and psychologically coerced by the police into accepting drafted statements or was induced by the prosecutor or the judge to accept statements collected by the police.

27. The source also states that, for about six months, Ms. Yasar's right to legal assistance was violated. Meetings between Ms. Yasar and her lawyer were recorded and monitored by prison officers. She was able to see her lawyer once a week for one hour in Manisa prison.

28. The source argues that the principle of equality of arms has been violated. To support this allegation, the source explains that Ms. Yasar was denied access to the case file (related to the detention and presented to the court), in violation of article 153 of the Criminal Procedure Code. She thus failed to object to the decisions effectively, and she was unable to prepare her defence adequately or to challenge the charges against her. The source claims that this denial of access occurs in most cases that have a political or public dimension.

29. It is also alleged that Ms. Yasar's objection against her arrest and detention was rejected by the court without having reviewed the arguments stated in the petitions and with insufficient and irrelevant motivation.

30. The source reiterates that Ms. Yasar was not shown any evidence supporting her use of the ByLock mobile application. Without such evidence, she was therefore unable to disprove the accusation. The source further argues that the list of users of the application changed during the course of the proceedings.

31. The source concludes that, upon evaluation of statements, it appears that the judgment against Ms. Yasar is related not to any terrorist action but rather to her support for the Hizmet movement.

(iv) Category V

32. The source argues that another reason for Ms. Yasar's arrest is her social background. There is allegedly systematic discrimination against dissident individuals who are tagged as Hizmet supporters. Moreover, the source recalls that more than 150,000 individuals have been arrested for supporting the Hizmet movement.

*Response from the Government*

33. On 8 April 2020, the Working Group transmitted the allegations made by the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 8 June 2020, detailed information about Ms. Yasar's situation and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure Ms. Yasar's physical and mental integrity.

34. In its response of 28 May 2020, the Government states that, on 15 July 2016, the Fethullah terrorist organization, a clandestine terrorist organization that insidiously infiltrated critical government posts, attempted to take over the democratically elected Government in a large-scale, brutal and unprecedented coup against several key institutions representing the will of the Turkish people, including the Turkish parliament. The attempted coup cost the lives of 251 Turkish citizens and more than 2,000 were injured.

35. The Government claims that in order to restore democracy and protect the rights and freedoms of the Turkish people, thousands of Fethullah terrorist organization infiltrators in all branches of the Government, the military and the judiciary had to be rooted out. Throughout the post-coup state of emergency, which was endorsed by parliament on 21 July 2016 and was terminated on 19 July 2018, Turkey acted in accordance with its international human rights obligations while maintaining its close cooperation and dialogue with international organizations, including the United Nations and the Council of Europe.

36. According to the Government, effective domestic legal remedies are available in Turkey, and include the right to lodge individual applications with the Constitutional Court, which is recognized as an effective domestic remedy by the European Court of Human Rights. In addition, the Inquiry Commission on State of Emergency Measures, established with a view to receiving applications regarding administrative acts carried out pursuant to decree laws enacted during the state of emergency, was also recognized by the European Court of Human Rights as a domestic remedy. Cases may be lodged with the European Court of Human Rights itself after the exhaustion of domestic remedies.

37. The Government adds that even before the attempted coup on 15 July 2016, the Fethullah terrorist organization had employed strategies such as blackmailing politicians and bureaucrats, cheating on a mass scale in public examinations to place its members in key government posts, practising social engineering, manipulation and indoctrination, and initiating judicial proceedings against its opponents with fabricated stories through its extensive network of media outlets, businesses, schools and non-governmental organizations.

38. In the Government's view, the Fethullah terrorist organization is now employing the strategy of presenting itself as the victim of human rights violations to hide its crimes by deceiving and manipulating international public opinion with false allegations against Turkey, including unfounded claims of arbitrary arrest and detention, torture and even enforced disappearance of its members who have gone into hiding on the orders of their leader.

39. The Government submits that it is in fact the Fethullah terrorist organization that has perpetrated grave human rights violations, including through the cold-blooded killing of hundreds of innocent Turkish citizens in violation of their fundamental right to life.

40. Accordingly, the Government requests the Working Group not to allow the Fethullah terrorist organization and its members to abuse the complaints mechanism, and to dismiss their allegations. It assures the Working Group that Turkey will continue to expand human rights and freedoms and maintain its long-standing cooperation with international organizations.

*Additional comments from the source*

41. On 29 May 2020, the response of the Government was transmitted to the source for additional comments. In its response of 15 June 2020, the source states that the criminal accusation against Ms. Yasar for her membership of a legally established association, eight years prior to its post-coup criminalization, violates the elementary principle of *nulla poena sine lege*. Acts such as attending social activities and trips and using a mobile application

were not defined as criminal offences by law. Furthermore, it is difficult to understand how such non-violent activities justify Ms. Yasar's detention.

42. The source adds that Ms. Yasar is an ordinary 52-year-old woman who had been working as a contract teacher and had never tried to escape or hide from justice. In court, she clearly stated her opposition to any coup attempt and rejected any anti-democratic or illegal activities.

43. Lastly, the source submits that in the light of Ms. Yasar's health issues, which require continuous care, and of the coronavirus disease (COVID-19) pandemic, her imprisonment could be converted to house arrest.

### Discussion

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

45. As a preliminary matter, the Working Group will address the Government's arguments that Ms. Yasar has yet to exhaust local remedies available to her. In this respect, 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 preventing the Working Group from considering communications owing 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.<sup>1</sup>

46. As a second preliminary matter, the Working Group notes that Ms. Yasar's situation falls within the scope of the derogations that Turkey made under the Covenant following the attempted coup. 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, which amounted to a threat to the life of the nation within the meaning of article 4 of the Covenant.<sup>2</sup>

47. The Working Group would like to stress that, in conformity with its methods of work, there is no rule that impedes the treatment of any communication related to an arbitrary detention submitted by a source when a state of emergency has been declared. The Working Group considers that, on some occasions, owing to the security concerns of a given country and to the judicial system being overwhelmed by a deluge of cases deriving from such an emergency situation, the communications procedure of the Working Group is one of the few international mechanisms of redress for people who are held under any form of arbitrary deprivation of liberty. The Working Group wishes to emphasize that it has a universal mandate to promote and protect human rights and fundamental freedoms of every individual subjected to arbitrary deprivation of liberty, under the five categories applicable to the consideration of cases.<sup>3</sup>

48. The Working Group further emphasizes that, in the discharge of its mandate, it is 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 the provisions that are the most relevant to the alleged arbitrary detention of Ms. Yasar. 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.<sup>4</sup>

<sup>1</sup> See, for example, opinions No. 19/2013, No. 38/2017, No. 41/2017, No. 11/2018, No. 46/2019, No. 53/2019 and No. 30/2020.

<sup>2</sup> Depository notification C.N.580.2016.TREATIES-IV.4.

<sup>3</sup> Opinion No. 41/2017, para. 75.

<sup>4</sup> General comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 4. See also 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

49. Furthermore, the Working Group wishes to address the Government's request to the Working Group not to allow the Fethullah terrorist organization and its members to abuse the complaints mechanism, and to dismiss their allegations. The Working Group recalls that the Human Rights Council has mandated it to receive and consider allegations of arbitrary detention from anyone around the world. The Working Group thus makes no distinction as to who can or cannot bring allegations to its attention. The Working Group is also required to act impartially and independently. It therefore treats all submissions made to it equally and accepts them as allegations, inviting the Government concerned to respond. The onus therefore rests upon the Government to engage with the Working Group constructively by addressing the specific allegations made to assist the Working Group with reaching a conclusion in each communication brought to its attention.

50. Turning to the specific allegations, the Working Group observes that the source has argued that the detention of Ms. Yasar was arbitrary, falling under categories I, II, III and V. The Government, in its response, provides no details concerning the specific situation of Ms. Yasar, but sets out an explanation of the devastating impact of the Hizmet movement in Turkey. The Working Group regrets that the Government has not availed itself of the opportunity to respond to the specific allegations concerning Ms. Yasar's case, and invites it to cooperate with the Working Group in a constructive manner as it has done in the past.

51. In determining whether Ms. Yasar's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established 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. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).

*i. Category I*

52. The Working Group will first consider whether there have been violations under category I, which concerns deprivation of liberty without any legal basis being invoked.

53. The source submits, and the Government does not contest, that Ms. Yasar was not presented with an arrest warrant or informed of the reasons for her arrest at the time of arrest on 28 October 2016.

54. In order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not done in the present case.<sup>5</sup> The Working Group also notes that Ms. Yasar was not arrested in *flagrante delicto*. In its jurisprudence, the Working Group has consistently found that an arrest is considered to have been made in *flagrante delicto* if the accused is either apprehended during the commission of a crime or immediately thereafter, or is arrested in hot pursuit shortly after a crime has been committed.<sup>6</sup>

55. Furthermore, the Government has failed to explain how Ms. Yasar's arrest without a warrant was strictly required by the exigencies of the security situation, other than asserting that throughout its two-year state of emergency, it acted in accordance with its international human rights obligations and maintained its close cooperation and dialogue with international organizations, including the United Nations and the Council of Europe.

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and expression, para. 5; general comment No. 35 (2014) on liberty and security of person, paras. 65–66; and *Özcelik et al. v. Turkey* (CCPR/C/125/D/2980/2017), para. 8.8.

<sup>5</sup> For example, opinions No. 93/2017, para. 44; No. 10/2018, paras. 45–46; No. 36/2018, para. 40; No. 46/2018, para. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; and No. 46/2019, para. 51.

<sup>6</sup> Opinion No. 9/2018, para. 38. See also opinions No. 61/2011, paras. 48–49; No. 67/2011, para. 30; No. 46/2012, para. 30; No. 53/2014, para. 42; and No. 36/2017, para. 85; and E/CN.4/2003/8/Add.3, paras. 39 and 72 (a).

56. The Working Group finds that, in order to invoke a legal basis for the deprivation of liberty, the authorities should have informed Ms. Yasar of the reasons for her arrest, at the time of arrest, and informed her promptly of the charges against her.<sup>7</sup> Their failure to do so violates article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant, as well as principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and renders her arrest devoid of any legal basis. Again, the Government has provided no explanation as to how its failure to inform Ms. Yasar of the reasons for her arrest, at the time of arrest, and to inform her promptly of the charges against her was strictly required by the exigencies of the security situation.

57. The Working Group observes that Ms. Yasar was not brought promptly before a judge, within 48 hours of her arrest, barring absolutely exceptional circumstances, in accordance with the international standard.<sup>8</sup> The Government has therefore violated article 9 of the Universal Declaration of Human Rights and article 9 (1) and (3) of the Covenant, as well as principles 11, 37 and 38 of the Body of Principles.

58. The Working Group further observes that Ms. Yasar was not afforded the right to take proceedings before a court so that it may decide without delay on the lawfulness of her detention, in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights, articles 2 (3) and 9 (1) and (4) of the Covenant and principles 11, 32 and 37 of the Body of Principles. According to the 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 (A/HRC/30/37), the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and which is essential to preserve legality in a democratic society (*ibid.*, paras. 2–3). This right, which is in fact a peremptory norm of international law, applies to all forms and situations of deprivation of liberty, as clarified in guideline 1 of the Basic Principles and Guidelines (*ibid.*, annex, para. 47 (a)).<sup>9</sup> Judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.<sup>10</sup>

59. According to the source, Ms. Yasar's right to legal assistance has also been violated, and the Working Group notes that the Government has chosen not to rebut this allegation. The Working Group emphasizes that the right to legal assistance is procedurally inherent in the right to liberty and security and the prohibition of arbitrary detention. According to principle 9 and guideline 8 of the Basic Principles and Guidelines, persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and must be promptly informed of this right upon apprehension; and access to legal counsel should not be unlawfully or unreasonably restricted.<sup>11</sup> Access to legal counsel from the outset of detention is an essential safeguard to enable the detainee to challenge the legal basis for his or her detention.<sup>12</sup>

60. In light of the above, the Working Group concludes that Ms. Yasar's deprivation of liberty lacks a legal basis and is thus arbitrary, falling under category I.

<sup>7</sup> For example, opinion No. 10/2015, para. 34. See also opinions No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; and No. 46/2019, para. 51.

<sup>8</sup> Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 33, citing *Kovsh v. Belarus* (CCPR/C/107/D/1787/2008), paras. 7.3–7.5. See also CCPR/C/79/Add.89, para. 17; CCPR/C/SLV/CO/6, para. 14; and CCPR/CO/70/GAB, para. 13. For the Working Group's jurisprudence, see opinions No. 57/2016, paras. 110–111; No. 2/2018, para. 49; No. 83/2018, para. 47; No. 11/2019, para. 63; No. 20/2019, para. 66; No. 26/2019, para. 89; No. 30/2019, para. 30; No. 36/2019, para. 36; No. 42/2019, para. 49; No. 51/2019, para. 59; No. 56/2019, para. 80; No. 76/2019, para. 38; and No. 82/2019, para. 76.

<sup>9</sup> Opinion No. 39/2018, para. 35.

<sup>10</sup> Opinions No. 35/2018, para. 27; No. 83/2018, para. 47; No. 32/2019, para. 30; No. 33/2019, para. 50; No. 44/2019, para. 54; No. 45/2019, para. 53; No. 59/2019, para. 51; and No. 65/2019, para. 64.

<sup>11</sup> See also Human Rights Committee, general comment No. 32 (2007), para. 34.

<sup>12</sup> Opinion No. 40/2020, para. 29.



ii. *Category II*

61. The source alleges, and the Government does not refute, that Ms. Yasar has been arrested, tried and imprisoned for being a member of Empati Kadın ve İş Derneği (Empathy Women and Business Association), attending social events and trips organized by the Hizmet movement and installing and using the ByLock mobile application for communication.

62. The source also submits that Ms. Yasar has been deprived of her liberty owing to these alleged activities that tie her to the Hizmet movement, but that none of these actually proves her criminal responsibility for taking part in or aiding or abetting the attempted coup of 15 July 2016.

63. The Working Group notes the observation by the Human Rights Committee, in paragraph 8 of its general comment No. 25 (1996) on participation in public affairs and the right to vote, that citizens take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves, and that this participation is supported by ensuring freedom of expression, assembly and association.

64. Although freedom of opinion and expression is not without limitation, article 29 (2) of the Universal Declaration of Human Rights provides that in the exercise of one's rights and freedoms, everyone is subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. The Covenant similarly lists the few legitimate restrictions in articles 12 (3), 18 (3), 19 (3), 21 and 22 (2).

65. With respect to Turkey's derogation from obligations under the Covenant regarding articles 19, 22 and 25 and in view of the standard described above, the Working Group finds that the Government has failed to produce any credible evidence to reasonably implicate Ms. Yasar in specific violent or criminal acts that pose threats to the rights and freedoms of others, morality, public order and the general welfare. The Working Group finds no legitimate aim or objective in a free and democratic society to justify her deprivation of liberty for her exercise of freedom of opinion and expression, freedom of association and freedom to take part in the conduct of public affairs. Her detention was therefore neither necessary nor proportionate. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

66. The source further argues that the arrest and detention of Ms. Yasar were also based on the allegation that she had downloaded and used the ByLock mobile application, which is not a crime, but rather a legal activity protected by articles 19 and 26 of the Covenant. The Working Group recalls that this is not the first time that it has examined a case involving the arrest and prosecution of a Turkish national for the alleged use of ByLock as one of the key manifestations of an alleged criminal activity.<sup>13</sup> The Working Group recalls that in those other instances it concluded that, in the absence of a specific explanation of how the alleged mere use of ByLock constituted a criminal activity by the individual concerned, the detention was arbitrary. The Working Group regrets that its views in those opinions have not been respected by the Turkish authorities and that the present case follows the same pattern.

67. The Working Group therefore finds that Ms. Yasar's deprivation of liberty is arbitrary, falling under category II, as it resulted from her legitimate exercise of the rights and freedoms under articles 19, 20 (1) and 21 (1) of the Universal Declaration of Human Rights and articles 19 (1) and (2), 22 (1) and 25 (a) of the Covenant.

iii. *Category III*

68. Given its finding that Ms. Yasar's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that no trial of Ms. Yasar should have taken place.

<sup>13</sup> See, for example, opinions No. 42/2018, No. 44/2018, No. 29/2020 and No. 30/2020.

However, the trial did take place, and the source submits that there were grave violations of her fair trial rights and that her subsequent detention therefore falls within category III.

69. According to the source, prior to her official interrogation, Ms. Yasar was allowed to meet with her lawyer. However, their conversation was recorded and filmed. During her subsequent meetings with her lawyer, the conversations were similarly restricted, monitored and recorded by prison officials, making it impossible for them to discuss mistreatment in the prison or any details about her legal case. Moreover, her lawyer was subjected to full body searches before the visits and was unable to bring in any legal documents or leave any reading materials or notes with her.

70. In the Working Group's view, the Government failed to respect Ms. Yasar's right to legal assistance at all times, which is inherent in the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and articles 9 (1) and 14 (1) and (3) (b) and (d) of the Covenant, as well as principles 15, 17 and 18 of the Body of Principles and paragraphs 1, 5, 7, 8, 21 and 22 of the Basic Principles on the Role of Lawyers.<sup>14</sup>

71. The Working Group considers that this violation substantially undermined and compromised Ms. Yasar's capacity to defend herself in any subsequent judicial proceedings. As the Working Group has stated in principle 9 and guideline 8 of its Basic Principles and Guidelines, persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and must be promptly informed of this right upon apprehension; and access to legal counsel should not be unlawfully or unreasonably restricted. The Working Group has also stated in principle 9 that authorities must respect the privacy and confidentiality of legal counsel-detainee communications.<sup>15</sup>

72. According to the source, Ms. Yasar was denied access to the case file (related to the detention and presented to the court), in violation of article 153 of the Criminal Procedure Code. The Government has not rebutted this allegation. The Working Group recalls that access to the case file must, in principle, be granted to the detained person from the outset.<sup>16</sup> In the present case, the Working Group considers that the principle of equality of arms has been violated as Ms. Yasar was denied access to the case file and to evidence supporting her use of the ByLock mobile application, making it impossible to prepare her defence adequately and to challenge the charges against her, in violation of articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (1) and (3) (b) of the Covenant.

73. The Working Group expresses its grave concern at the prima facie allegation of ill-treatment against Ms. Yasar, including detention in an overcrowded cell, sleep deprivation, lack of clean drinking water and lack of access to a shower. The Working Group notes that the Government has not rebutted that allegation. Accordingly, the Working Group considers that the source has established a credible prima facie case of violation of articles 5 and 25 of the Universal Declaration of Human Rights, articles 7 and 10 (1) of the Covenant and article 16 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as principle 6 of the Body of Principles and rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). The Government's failure to take remedial measures under articles 12 and 13 of the

<sup>14</sup> See also the letter dated 22 October 2018 from the Working Group, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, addressed to the Permanent Representative of Turkey to the United Nations Office and other international organizations in Geneva. Available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24130>.

<sup>15</sup> See also Human Rights Committee, general comment No. 32 (2007), para. 34; rule 61 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules); and principle 18 of the Body of Principles.

<sup>16</sup> Opinions No. 78/2018, para. 79, and No. 30/2020, para. 95. See also guidelines 5 and 11 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

Convention against Torture (which apply to other forms of cruel, inhuman or degrading treatment or punishment by virtue of article 16 of the Convention) and principle 33 of the Body of Principles compels the Working Group to refer the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

74. In the Working Group's view, not only is such ill-treatment a grave violation of human rights per se, but it seriously undermines the ability of persons to defend themselves and hinders their exercise of the right to a fair trial, especially in the light of the right to be presumed innocent until proved guilty under article 11 (1) of the Universal Declaration of Human Rights and the right not to be compelled to testify against oneself or to confess guilt under article 14 (3) (g) of the Covenant.

75. The Working Group further notes the denial of Ms. Yasar's due process right to be visited by and to correspond with her family and with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations, in accordance with principles 15 and 19 of the Body of Principles and rules 43 (3) and 58 of the Nelson Mandela Rules.<sup>17</sup> As the Human Rights Committee has observed in paragraph 58 of its general comment No. 35 (2014) on liberty and security of person, prompt and regular access to family members, as well as to independent medical personnel and lawyers, is an essential safeguard for the prevention of torture and necessary for protection against arbitrary detention and infringement of personal security.<sup>18</sup>

76. With respect to the derogation by Turkey from its obligations under the Covenant, the Government has provided no explanation as to how the violations of Ms. Yasar's due process and fair trial rights were strictly required by the exigencies of the security situation. In any case, the Government cannot and has not derogated from its obligations to respect the prohibition of cruel, inhuman or degrading treatment or punishment under article 7 of the Covenant.

77. Given the above, the Working Group concludes that the violations of Ms. Yasar's right to a fair trial and due process are of such gravity as to give her deprivation of liberty an arbitrary character, falling under category III.

*iv. Category V*

78. The Working Group will now examine whether Ms. Yasar's deprivation of liberty constitutes discrimination under international law for the purpose of category V. The Working Group notes that Ms. Yasar has alleged affiliations with the Hizmet movement, whose members have been detained at home and abroad by the authorities since the failed coup in July 2016.

79. The present case is the latest in a series of cases concerning individuals with alleged links to the Hizmet movement that has come before the Working Group during the past three years.<sup>19</sup> 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 Hizmet movement are being targeted on the basis of their political or other opinion.

80. For these reasons, the Working Group considers that the Government of Turkey detained Ms. Yasar on the basis of her political or other opinion, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. Her deprivation of liberty therefore falls under category V. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

<sup>17</sup> Opinions No. 35/2018, para. 39; No. 44/2019, paras. 74–75; and No. 45/2019, para. 76.

<sup>18</sup> See also articles 14 (3) and 16 (2) of the Arab Charter on Human Rights.

<sup>19</sup> See, for example, 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. 84/2018, No. 10/2019, No. 53/2019, No. 79/2019, No. 2/2020, No. 29/2020, No. 30/2020 and No. 51/2020.

81. 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 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.

82. 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.<sup>20</sup> The Working Group expresses grave concern about the pattern that all these cases follow and urges the Government to implement the opinions of the Working Group without further delay.

83. 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, and noting the standing invitation by Turkey to all special procedures, the Working Group considers that it is an appropriate time to conduct another visit in accordance with the Working Group's methods of work.

### **Disposition**

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

The deprivation of liberty of Nermin Yasar, being in contravention of articles 2, 3, 5, 7, 8, 9, 10, 11 (1), 19, 20 (1), 21 (1) and 25 of the Universal Declaration of Human Rights and articles 2 (1) and (3), 7, 9 (1), (2), (3) and (4), 10 (1), 14 (1) and (3) (b), (d) and (g), 19 (1) and (2), 22 (1), 25 (a) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

85. The Working Group requests the Government of Turkey to take the steps necessary to remedy the situation of Ms. Yasar 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.

86. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. Yasar immediately and accord her an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global COVID-19 pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Ms. Yasar.

87. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Yasar and to take appropriate measures against those responsible for the violation of her rights.

88. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for appropriate action.

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

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<sup>20</sup> Ibid.

**Follow-up procedure**

90. 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 Ms. Yasar has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Ms. Yasar;
- (c) Whether an investigation has been conducted into the violation of Ms. Yasar'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.

91. 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.

92. 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.

93. 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.<sup>21</sup>

*[Adopted on 25 November 2020]*

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<sup>21</sup> Human Rights Council resolution 42/22, paras. 3 and 7.