

OPINION No. 36/1999 (TURKEY)

Communication addressed to the Government on 24 July 1998

Concerning Osman Murat Ülke

The State is not a party to the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.
2. The Working Group expresses its appreciation to the Government for providing timely information.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);
 - (ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (iii) When the complete or partial non-observance of the international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).
4. In the light of the allegations made, the Working Group welcomes the Government's cooperation. It transmitted the Government's reply to the source of the communication, which has not yet made known its comments thereon.
5. According to the source of the communication, Osman Murat Ülke publicly declared himself to be a conscientious objector ("I am not a deserter, I am a conscientious objector.") because, to use his words, he did "not want to kill people". Having burned his call-up papers, he was questioned, arrested and detained by the military authorities on several occasions, beginning on 7 October 1996, for refusal to perform military service. He received seven sentences of imprisonment of a few months each. On 4 May 1998, he was sentenced to seven months' imprisonment, bringing the total duration of the sentences to 43 months. With the exception of the period from December 1996 to 28 January 1997, Mr. Ülke has been in continuous detention since 7 October 1996.

6. According to the source, Mr. Ülke expects to be tried again for the same reason. The source maintains that Mr. Ülke's detention is contrary to article 18 of the Universal Declaration of Human Rights. Military service is compulsory in Turkey and the authorities do not recognize civilian service as a legitimate alternative in the case of conscientious objectors.

7. The Government of Turkey explains that Turkey is among the countries in the Council of Europe that do not recognize civilian service as a substitute for military service. It refers to article 3 of the European Convention on Human Rights, to which Turkey is a party and which has become an integral part of Turkish law. In the Government's view, the fact that military service is compulsory in Turkey is consistent with international law. Mr. Ülke was prosecuted not only for unwillingness to perform military service, but also for having publicly urged Turkish citizens to shun military service, which the Government describes as being "morally considered as a sacred duty to the homeland". It acknowledges that Mr. Ülke refuses to wear a uniform and to obey orders. It acknowledges that he has been tried on several occasions by a military tribunal, with his most recent sentence - to seven months and 15 days' imprisonment - dating from 11 June 1998. Mr. Ülke is detained at Eskisehir military prison.

8. The question before the Working Group is whether, after an initial conviction, each subsequent refusal to obey a summons to perform military service does or does not constitute a new offence capable of giving rise to a fresh conviction. If it does, deprivation of liberty, when applied to a conscientious objector, is not arbitrary, providing the rules on the right to a fair trial are respected. If it does not, detention must be considered as arbitrary for being in breach of the principle non bis in idem, a fundamental principle in a country where the rule of law prevails, as borne out by article 14, paragraph 7, of the International Covenant on Civil and Political Rights and, in the case of Europe, by article 4, paragraph 1, of Protocol No. 7 to the European Convention, which state that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted. It is generally acknowledged that this principle, which is the corollary of the principle of res judicata, presupposes the meeting of three conditions: identity of the parties, identity of the purpose and identity of the subject-matter. In the case in question, the condition of the identity of the defendant (the conscientious objector) may be presumed to have been met. The same applies to the condition of identity of the purpose, since in criminal cases, unlike civil cases, the purpose is always the same: to establish guilt and fix a penalty. It remains, therefore, to determine whether there is identity of subject-matter.

9. The Working Group is of the opinion that there is, since, after the initial conviction, the person exhibits, for reasons of conscience, a constant resolve not to obey the subsequent summons, so that there is "one and the same action entailing the same consequences and, therefore, the offence is the same and not a new one" (see Decision of the Constitutional Court of the Czech Republic, 18 September 1999, No. 2, No. 130/95). Systematically to interpret such a refusal as being perhaps provisional (selective) would, in a country where the rule of law prevails, be tantamount to compelling someone to change his mind for fear of being deprived of his liberty if not for life, at least until the date at which citizens cease to be liable to military service.

10. It follows that the Working Group considers that Mr. Ülke's detention from 7 October to December 1996 was not arbitrary. Regarding the other periods, and in view of the foregoing, the Working Group considers that Mr. Ülke's detention is arbitrary, it having been ordered in violation of the fundamental principle non bis in idem, a principle generally recognized in countries where the rule of law prevails as being one of the most essential guarantees of the right to a fair trial.

11. In the light of the foregoing, the Working Group expresses the following opinion:

The deprivation of liberty of Mr. Osman Murat Ülke from October to December 1996 was not arbitrary. His detention since 28 January 1997 is, however, arbitrary, being contrary to article 10 of the Universal Declaration of Human Rights, and it falls within category III of the principles applicable in the consideration of the cases submitted to the Working Group.

12. The Working Group therefore requests the Government to take the necessary steps to remedy the situation so as to bring it into line with the principles set forth in the Universal Declaration of Human Rights.

Adopted on 2 December 1999