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Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017****Opinion No. 41/2017 concerning 10 individuals associated with the newspaper *Cumhuriyet* (Turkey)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 2 February 2017 the Working Group transmitted to the Government of Turkey a communication concerning 10 individuals associated with the newspaper *Cumhuriyet*. The Government replied to the communication on 11 April 2017. 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. On 31 October 2016, the following individuals associated with *Cumhuriyet*, including the editor-in-chief, the former editor-in-chief and a number of executive board members, were reportedly apprehended by the police:

- Önder Çelik, executive board member
- Turhan Günay, book supplement editor-in-chief
- Mustafa Kemal Güngör, executive board member and attorney
- Kadri Gürsel, journalist
- Hakan Kara, columnist
- Hacı Musa Kart, cartoonist
- Murat Sabuncu, editor-in-chief
- Bülent Utku, executive board member
- Güray Tekin Öz, cartoonist

5. The source reports that the above-mentioned individuals were apprehended early in the morning at their apartments on the basis of arrest warrants that all contained similar wording. They were brought to the Vatan police station in Istanbul, where they were kept for four days without access to their lawyers. On 5 November 2016, they were formally arrested after being brought before the Ninth Penal Court of Peace in Istanbul. They were subsequently transferred to the Sillivri High Security Prison under pretrial detention.

6. According to the source, Mr. Akin Atalay, Chief Executive Officer of *Cumhuriyet*, was apprehended on 11 November 2016 upon arrival at Istanbul airport and brought to police headquarters. He was formally arrested on 12 November 2016 before the Ninth Penal Court of Peace and subsequently transferred to the Sillivri High Security Prison under pretrial detention.

7. According to the source, *Cumhuriyet* is the most important independent public interest newspaper in Turkey. For nearly a hundred years since its establishment, *Cumhuriyet* — which means “republic” in Turkish — has been considered to be one of the most important symbols of the Turkish republic. Since 1924, it has been committed to upholding the principle of freedom of the press in a climate of adversity. It draws its inspiration from the Universal Declaration of Human Rights and has struggled for human rights and a more democratic Turkey.

8. The source states that the newspaper’s staff have taken personal risks and have suffered attacks and imprisonment to remain outspoken in reporting on issues relating to human rights, gender equality, secularism and protection of the environment. Furthermore, the source notes that the investigative journalism of *Cumhuriyet* has ensured that several important matters received public scrutiny.

9. As independence is paramount for *Cumhuriyet*, the newspaper has reportedly been registered as a foundation since 1993 and is mostly supported through its readership. According to the source, being a *Cumhuriyet* reader has become synonymous with embracing democratic values and a pluralistic society. Today, the newspaper has a daily circulation of 53,000.

10. The source reports that, under the current state of emergency in Turkey, which was imposed in July 2016, the Government can deny lawyers permission to visit detainees for up to five days after their detention. The authorities reportedly prevented all the above-mentioned individuals, except Mr. Atalay, from seeing a lawyer for four days. Consequently, the detainees met with their lawyers on 5 November 2016 and only then could they have access to the prosecution files. All of the individuals are reportedly now allowed to see their lawyers once a week, for one hour, which the source alleges is a

violation of their right to a fair trial. The source alleges that the individuals have extremely limited visitation rights.

11. According to the source, all of the individuals were arrested and are being prosecuted under anti-terrorism law, notably the Law on the Fight against Terrorism in Turkey (Act No. 3713), as amended, which provides for the punishment of life imprisonment for those found guilty of terrorism-related offences under the Law.

12. According to information received from the source, the individuals have not been formally charged with any offence. The Ninth Penal Court of Peace has passed orders placing them in pretrial detention under article 100 (3) (a) and 100 (2) (b) of the Turkish Code of Criminal Procedure, noting that they had been carrying out activities in the name of an organization (*Cumhuriyet*) that is under investigation for “continuous advertisement and propaganda activities of ... terrorist organizations”.

13. According to the source, the lawyers for the individuals have attempted to challenge the lawfulness of their detention. The source is not aware of the exact dates but has reported that such attempts have not been successful.

14. The source notes that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression visited several of the individuals in detention during his recent country visit to Turkey from 14 to 18 November 2016 and made pertinent observations about their detention conditions.¹

15. The source highlights that the individuals had been carrying out their professional duties as journalists. The source submits that they have been deprived of their liberty in an arbitrary manner solely for exercising their rights to freedom of opinion and expression, in accordance with international law, notably the Universal Declaration of Human Rights, the Covenant and customary international law.

16. On the basis of the foregoing, the source submits that the detention of the above-mentioned individuals constitutes an arbitrary deprivation of their liberty under category II.

Response from the Government

17. On 2 February 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 4 April 2017 about the current situation of Messrs. Çelik, Günay, Güngör, Gürsel, Kara, Kart, Sabuncu, Utku, Öz and Atalay and any comment on the source’s allegations. The Working Group also requested the Government to clarify the facts and legal grounds justifying their detention and its compatibility with the obligations of the Government under international human rights law, particularly those treaties that Turkey has ratified.

18. On 21 March 2017, the Government sought an extension of the deadline to submit its response. In conformity with paragraph 16 of its methods of work, the Working Group granted an extension of one week for the Government to submit its response by 11 April 2017. The Government submitted its response to the regular communication on 11 April 2017.

Background

19. The Government provides an overview of the threats from various terrorist organizations faced by Turkey in recent years and of the legal measures taken in the face of the grave security challenges posed by those terrorist organizations. In that context, the Government submitted background information, especially with regard to alleged terrorist organizations, including the Kurdistan Workers’ Party/Kurdistan Communities Union (PKK/KCK) and the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY), and the measures taken against them and other organizations. The Government also refers to the attempted coup of 15 July 2016.

¹ See www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20891&LangID=E.

20. The Government explains that, in order to combat effectively FETÖ/PDY, and in line with the recommendation of the National Security Council, a nationwide state of emergency was declared by the Council of Ministers from 21 July 2016 for three months, pursuant to article 120 of the Constitution and article 3/1-b of Law No. 2935.

21. The Government notes that, with a view to ensuring continuity of the effective implementation of measures for the protection of Turkish democracy, the principle of the rule of law and the rights and freedoms of citizens, the Council of Ministers decided to extend the state of emergency for another three months from 19 October 2016 and for a further three months from 19 January 2017.

22. In that context, the Government of Turkey resorts to the right of derogation from the obligations in the Convention for the Protection of Human Rights and Fundamental Freedoms and the Covenant. Notification of derogation from those obligations was submitted to the Council of Europe in accordance with article 15 of the Convention and to the Secretariat of the United Nations in accordance with article 4 of the Covenant.

23. The Government emphasizes that it is fully aware of its obligations under international conventions and is acting in full respect for democracy, human rights and the principle of the rule of law; that due respect is being shown for fundamental rights and freedoms; and that the rule of law is being strictly observed. The principles of necessity, proportionality and legality have been complied in a sensitive manner with as regards the measures taken under the state of emergency in the aftermath of the attempted coup. Furthermore, it wishes to emphasize that, while taking measures under article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms, States Parties naturally continue to be subject to the supervision of the European Court of Human Rights.

24. The Government notes that a decree with the force of law (decree law) is a legal measure permissible in the context of the state of emergency in Turkey. By the decree laws issued within the scope of the state of emergency, measures have been taken in proportion to the current situation facing the administrative authorities, to the extent necessitated by the situation and in pursuit of a legitimate aim, namely, national security. Legal remedies are available. It also notes that the scope of the decree laws issued in that respect has been limited to terrorist organizations in order not to interfere with the rights and freedoms of others.

25. The Government notes that the general provisions of the Code of Criminal Procedure remain in effect. In that respect, taking into consideration the large number of those involved in the attempted coup and members of terrorist organizations, the maximum duration of police custody has been raised to 30 days by decree law, which will be limited to the duration of the state of emergency. The purpose of this measure is to allow statements to be taken in a proper manner and to collect evidence for and against the suspects, thus fulfilling the obligation of the State to conduct effective investigations.

26. The Government reports that persons in custody, their lawyers or legal representatives, spouses or first- or second-degree relatives may appeal against the written order of the public prosecutor, in accordance with article 91 (5) of the Code of Criminal Procedure, before a magistrate entitled to hear criminal cases. The maximum period of detention is limited to offences against State security, constitutional order and national defence or offences in regard to State secrets, terror or collective offences. The 30-day custody period has never been applied in full and the vast majority of the suspects have remained in custody for four or five days. During the custody period, the order of detention can be appealed against and release requested at all stages. The magistrates' office dealing with criminal offences decides upon such appeals. Legal assistance is provided during police custody and health reports are obtained upon entry into and release from custody.

27. Given changing circumstances, the measure of the extended custody period has been reviewed. Under Decree Law No. 684, the maximum duration of police custody has been reduced to seven days. It can be extended for another seven days only by a decision of the public prosecutor, taking into account difficulties in collecting evidence or a large number of suspects. Furthermore, the provision enabling public prosecutors to impose restrictions for up to five days on meetings between detainees and their lawyers has been abolished.

28. The Government states that, for the purpose of justifying its actions, FETÖ/PDY attached special importance to its structure within the print and broadcast media. The Government underlines that it is a well-known fact that, prior to the operations conducted through its established formation within the bureaucracy of the State, the organization had carried out propaganda activities to manipulate the public opinion through its network of numerous national and local media outlets.

29. Furthermore, the Government notes that, in order to achieve public acknowledgement of its actions and to set up a wider area of influence which extends to different sections of the society, FETÖ/PDY has carried out its activities with members from different walks of life rather than only with its known members.

Circumstances of the case

30. With regard to *Cumhuriyet*, on 18 August 2016, the Press Section of the Istanbul Chief Public Prosecutor's Office has reportedly launched an investigation in respect of certain claims (No. 2016/97293) under article 220 (6) of the Criminal Code, charging certain individuals with aiding FETÖ/PDY and PKK/KCK, both armed terrorist organizations, in accordance with their organizational aims, without being a member. The Government notes that, in the context of the investigation, and according to the Financial Crimes Investigation Board database, a number of financial relationships were established between the individuals and the companies, in respect of which persons connected with FETÖ/PDY and other suspected persons were appointed as trustees.

31. The Government indicates that the investigation also looked into the allegation that the newspaper had acted in accordance with the objectives of the armed terror organizations FETÖ/PDY and PKK/KCK by attempting to instigate domestic disorder and to render the country ungovernable immediately before and after the foiled coup of 15 July; and whether it had followed an editorial policy accordingly.

Arrest and detention

32. According to the Government, in the context of the investigation, the domiciles of Messrs. Çelik, Günay, Güngör Gürsel, Kara, Kart, Sabuncu, Utku and Öz were searched on 31 October 2016 when they were taken into custody. Mr. Atalay was subsequently taken into custody on 11 November 2016. Although the individuals were entitled to appeal against their arrest, detention and search orders before the judge, they did not use that opportunity.

33. On 4 November 2016, Messrs. Çelik, Günay, Güngör, Gürsel, Kara, Kart, Sabuncu, Utku and Öz gave their depositions before the public prosecutor. They were informed in detail, with their lawyers present, of the evidence obtained, which constituted the basis of the accusations against them. The individuals and their legal representatives submitted defence statements and opinions on the allegations.

34. On 12 November 2016, Mr. Atalay gave his statement to the public prosecutor in the presence of his lawyers. The lawyers submitted their defence statements and opinions that they deemed necessary.

35. The Government notes that, after statements were taken by the Istanbul Office of the Chief Public Prosecutor, Messrs. Çelik, Günay, Güngör Gürsel, Kara, Kart, Sabuncu, Utku and Öz were referred on 4 November 2016 to the Ninth Criminal Magistrate's Office of Istanbul on the charge of "carrying out activity on behalf of an armed terrorist organization without being a member". Mr. Atalay was referred to the same Court for the same offence on 12 November 2016. The public prosecutor asked for the individuals to be detained on remand.

36. The individuals reportedly submitted their defence statements separately before the Ninth Criminal Magistrate's Office of Istanbul. Their lawyers also submitted defence statements and observations that they deemed necessary. The Magistrate, having considered all allegations, defence submissions, complainant and witness statements and the expert report, ordered on 5 November 2016 that Messrs. Çelik, Günay, Güngör Gürsel, Kara, Kart,

Sabuncu, Utku and Öz be detained on remand. The same order was made for Mr. Atalay on 12 November 2016.

37. According to the Government, the Magistrate found that Messrs. Öz, Kara, Kart and Güngör were executive members of the Cumhuriyet Foundation. Mr. Utku was an executive member of the Cumhuriyet Foundation and second degree authorized signatory of the Yeni Gün News Agency. Mr. Çelik was an executive member of the Cumhuriyet Foundation and of the news agency. Mr. Gürsel was the editorial advisor of the newspaper and Mr. Günay was an executive member of the news agency. Yeni Gün News Agency was reportedly the title of the commercial company that published *Cumhuriyet* and held its trade name and publishing rights. The Cumhuriyet Foundation had leased the name “Cumhuriyet” to that agency. Under the current status, the news and articles published in *Cumhuriyet* were under the liability of the executive members of the Cumhuriyet Foundation and the Yeni Gün News Agency. Reference was also made to a number of articles and headlines by *Cumhuriyet* “in favor of terrorist organizations”.

38. In the light of those findings, the court ruled that the newspaper where the individuals worked had acted in line with the purposes of the terrorist organizations FETÖ/PDY and PKK/KCK, as they had been responsible for making continuous propaganda for the organizations. Taking into account the fact that there was a strong suspicion that the individuals had committed the offence of carrying out activities on behalf of an armed terrorist organization without being a member, that the investigation had not been concluded, that the statements of several aggrieved persons and complainants had not yet been taken and that there had been the risk of escape, and taking into account also the lower and upper sentencing limits laid down in the Criminal Code, the individuals were detained on remand.

39. The Government indicates that the complaints relating to alleged arbitrary custody and detention and to the non-communication of the reasons for arrest can be reviewed in domestic law by first instance courts under article 141 (entitled “compensation claims”) et seq. of the Criminal Code of Procedure. However, no action for compensation has been initiated by the above-mentioned individuals under article 141 et seq. of the Criminal Code of Procedure based on their claims.

40. The Government notes that Messrs. Çelik, Günay, Güngör Gürsel, Kara, Kart, Sabuncu, Utku, Öz and Atalay submitted their complaints, which were also reported to the Working Group, to the Constitutional Court on 26 December 2016. At the time of the response from the Government, the applications were pending before the Constitutional Court.

41. The Government indicates that, although the maximum length of police custody was set to 30 days by a decree law, a shorter period was imposed given the particular circumstances of the case. However, despite having the right to challenge their detention in police custody before a judge, the individuals have not done so. Taking into account the large number of the accused, mostly from FETÖ/PDY-related charges, the large number of those taken into custody within the scope of the same investigation, the extent of the investigation, the gravity and complexity of the charges and the financial aspect of the events, the length of police custody was proportionate and in line with international conventions.

42. Furthermore, the above-mentioned individuals were reportedly informed of the charges in detail. They all gave their depositions in the presence of multiple lawyers of their choosing. Their right to defence and access to a lawyer during police custody were respected.

43. According to the Government, all arrest and detention orders in respect of the individuals had been issued by independent judges and through reasoned decisions. In other words, the orders were not arbitrary and did not contain noticeable errors of judgment. The individuals had the right to challenge decisions ordering detention on remand or an extension of it. In fact, they challenged their detention on 14 November 2016 through their lawyers. The Tenth Criminal Magistrate’s Office of Istanbul, which assessed the appeal, found on 18 November 2016 that their detention was justified and rejected the claim. Furthermore, on 2 December 2016, the individuals challenged their continued detention. On

2 December 2016, the Seventh Criminal Magistrate's Office of Istanbul found their continued detention to be justified and rejected the request.

44. The Government notes that the individuals were able to avail themselves of the effective remedies at the national level regarding the damage they had allegedly suffered during the process. Indeed, taking into consideration the magnitude of the threat and the legal safeguards available, it can be observed that the preventive measures in respect of the individuals were in line with international obligations and not contrary to the principle of proportionality.

45. In the light of the foregoing, as the complaints and allegations raised in the present case fall within the scope of the derogation, the Government considers that the Working Group should dismiss them.

Access to lawyer while in police custody

46. The source has alleged that, during their four days in police custody, the individuals were not allowed to meet their lawyers and were currently allowed to meet with them once per week, which was in violation of their right to a fair trial.

47. The Government refers to article 3 (entitled "Investigation and prosecution procedures") of Decree Law No. 668 of 27 July 2016, whereby the right of the suspect in custody to see a defence counsel may be restricted for five days by the decision of the public prosecutor. However, no statement should be taken during that time. The Government notes that, while the individuals were not able see a lawyer, their statements were not taken in the absence of their lawyers and they did not make any submissions that could incriminate them. They were actively accompanied by their defence lawyers while they gave statements before the public prosecutor and judge. Moreover, when the statements were taken, the individuals and their lawyers stated expressly that their submissions before the public prosecutor were true and that they confirmed the statements. Consequently, the individuals and their lawyers were able to express the legal defence and observations they deemed necessary, in detail, both before the public prosecutor and the court.

48. Therefore, taking into account the fact that no allegations corroborated by concrete evidence were submitted to indicate that the restriction to access to a lawyer, imposed under the Decree Law, had led them to be in a disadvantaged position in the present case as regards defence rights, the allegation is manifestly ill-founded.

49. The Government also provides information dated 25 March 2017. According to correspondence with the Silivri Prison authorities, each of the individuals had received a high number of visits by various lawyers and members of Parliament. In addition, they had all received numerous visits, including private visits, from family members. They have thus not been put in any disadvantaged position.

Allegations of arbitrary detention

50. The Government refers to the allegation by the source that the individuals were taken into custody and detained on remand in an unlawful and arbitrary manner. The Government states that investigations were under way into all aspects of the case. At the time of the response, the investigation was based on allegations that the newspaper where the individuals worked had acted in accordance with the objectives of the armed terrorist organizations FETÖ/PDY and PKK/KCK and had attempted to instigate domestic disorder and to render the country ungovernable immediately before and after the attempted coup of July 15. The investigation was also being led into whether the newspaper had followed an editorial policy accordingly. Reportedly, the investigation relied on corroborating witness and complainant statements, the expert examination and the contents of the material published in the newspaper.

51. The Government notes that, according to judgments by the European Court of Human Rights, the existence of reasonable suspicion or plausible reasons that the person(s) concerned have committed the offence in question is a necessary condition for deprivation of liberty. It is an essential requirement for the imposition of pretrial detention that

reasonable suspicion must be present at every stage of detention and that the suspect must be released upon dissipation of that reasonable suspicion.

52. With regard to the present case, the Ninth Criminal Magistrate's Office of Istanbul, having examined statements by the witnesses, complainants and suspects, along with the expert report, concluded that there had been a strong suspicion that the individuals had committed the crime in question. Moreover, the judicial authorities provided a reasoned decision on the detention of the individuals in police custody and on remand. They were able to object to the orders. They had access to the assistance of a lawyer. Their right to defence was respected.

53. When the extent of the investigation, the number of suspects and state of emergency conditions are considered together, the length of pretrial detention should be regarded reasonable.

54. In the light of the considerations above, and taking into account the notice of derogation, the proceedings involving the taking into custody and detention of the individuals should not be seen as ill-founded or arbitrary.

Assessment as regards freedom of expression

55. The Government refers to the allegation by the source that the individuals had been carrying out their professional duties as journalists and were deprived of their liberty in an arbitrary manner as they had merely exercised their right to opinion and freedom of expression.

56. According to the Government, the investigation launched by the Istanbul Office of the Chief Public Prosecutor in respect of the allegations (No. 2016/97293) concerns the offence of "aiding FETÖ/PDY and PKK/KCK, both armed terrorist organizations, in accordance with their organizational aims, without being a member". The Ninth Criminal Magistrate's Office of Istanbul, having examined the evidence collected, granted the request of the prosecutor for detention.

57. In that context, complaints concerning the freedom of expression should be regarded in essence as an allegation that the individuals were detained without any strong suspicion of guilt. In fact, the subject of the investigation is not the critical nature of the articles written by the individuals in a newspaper, but whether the individuals had aided the armed terrorist organizations of FETÖ/PDY and PKK/KCK in accordance with their organizational aims, without being members, based on certain evidence referred to above, supporting the accusations. The findings obtained in the course of the investigation were assessed by the investigating judge and the conclusion was reached that there was strong suspicion that the individuals had committed the offence.

Conclusion

58. The Government considers that the allegations, which have not been submitted at the national level, or which were raised at the national level and whose examination has not been completed, should be rejected in accordance with article 41 (1) (c) of the Covenant owing to the non-exhaustion of domestic remedies, in the light of the principle of the subsidiarity of the Covenant. Regarding the merits of the claims, the Government considers that there is no violation of the Covenant.

Further comments from the source

59. On 13 April 2017, the response from the Government was sent to the source for further comments. The source responded on 20 April 2017.

60. At the outset, the source notes that it fully appreciated the assertion by the Government that it had "the legitimate right and duty to take necessary measures to protect its citizens against terrorism ... in line with its constitutional order and international norms". However, the source submits that any measures taken by the Government to counter terrorism must adhere to the resolutions of the Security Council on the subject. In particular, in its resolution 1456 (2003), the Security Council stated that States must "ensure that any measure taken to combat terrorism comply with all their obligations under

international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law”.

61. The source states that the arrest of the *Cumhuriyet* journalists on the charge of “carrying out activity on behalf of an armed terrorist organization without being a member” and their continued pretrial detention on the grounds that there was a “risk of escape” do not meet the standards of proportionality, necessity and legality required for such a countermeasure to meet obligations of Turkey under international law, including resolution 1456 (2003).

62. The source notes the notification of derogation communicated by the Government of Turkey under article 4 of the Covenant. However, the source refers to the joint statement dated 19 August 2016 by 18 special procedures mandate holders, including the Working Group on Arbitrary Detention, with regard to the legality and applicability of that derogation.²

63. In the context of evaluating whether the deprivation of liberty of the *Cumhuriyet* journalists is necessary, proportionate and legitimate, the source refers to relevant preliminary conclusions and observations of the Special Rapporteur on freedom of opinion and expression, on his visit to Turkey in November 2016 (A/HRC/35/22/Add.6).

Circumstances of the case

64. The source notes the payments made to *Cumhuriyet* between 2014 and 2016 and the financial relationships mentioned in the Government response (see para. 30 above). According to the Prosecutor and the Government, following an allegation by the Financial Crimes Investigation Board, the payments were received from or sent to companies or people associated with FETÖ/PDY. The source asserts that the companies that the payments were received from or sent to were legal institutions operating under Turkish law and were not under suspicion during that time. In Turkey, the Cihan News Agency and Anadolu Agency are in charge of following the elections and providing information. Not only *Cumhuriyet*, but all serious media and broadcasting organizations, benefit from their services. It is a completely normal working relationship and the service charge was paid against invoice. The source submits that it is discriminatory and illegal that only *Cumhuriyet* faces this accusation.

65. The source asserts that *Cumhuriyet* was the first newspaper to make publications about the fact that the Fethullah Gülen Community, now called FETÖ/PDY, is a terrorist organization. For that reason, hundreds of lawsuits have been filed against *Cumhuriyet* and its writers.

66. The source notes the assertion by the Government of Turkey that lawyers representing the *Cumhuriyet* journalists should have appealed against their arrest, detention and search orders, and that the judiciary acted in accordance with the law. The source reports that all the suspects and their lawyers responded to every question during the interrogation. However, the responses were reportedly not taken into account by the prosecutor and arrest judge. In reality, there are few concrete allegations against the suspects. The suspects were asked to account for certain news stories that had not attracted the attention of the Prosecutor at an earlier stage.

67. The source also responds to the allegation made by the Government of Turkey that the *Cumhuriyet* journalists have not faced any illegal restrictions in prison, as they have been visited by several lawyers. According to the source, the meetings between the journalists and their lawyers have been restricted to one hour, one day per week. During those meetings, during which the detainees are accompanied by prison staff, the meetings are recorded with technical devices. Moreover, documents of the lawyer and his or her clients are reportedly seized. The documents, after being examined (and potentially copied) are delivered back if they are allowed. The source submits that the aforementioned practices constitute an illegal restriction of the defence rights of the detainees. In this respect, the source notes that the visits of multiple lawyers are deceptive, given that they

² See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394&LangID=E.

only last one hour per week (for example, if there are 20 lawyers visiting the detainees, each of them can see the detainees for 3 minutes and can only express their solidarity).

68. In addition, detainees should be able to meet with their family members once per month, but this has been restricted to once every two months, and their right to communicate via telephone has been restricted to once every 15 days for a maximum of 10 minutes.

69. The detainees reportedly live in complete isolation. They are kept in four different wards and are not allowed to see each other. The restriction on visits, as well as preclusion of letters and books, is a harsh punishment for the detainees, who spend their lives mostly by reading and writing, and the source submits that all of those practices are inhumane.

70. The source asserts that the *Cumhuriyet* journalists have been detained arbitrarily for over 150 days, and that the laws under which the individuals have been detained have been applied in a sweeping and overbroad fashion. The links, established by the prosecution and reiterated by the Government of Turkey in its response, between the journalists and terrorist organizations have been demonstrated above to be tenuous and largely unsubstantiated, and the case against the journalists is evidently political. The source notes that, even though the circulation of *Cumhuriyet* is not high (approximately 4,000 copies per day), the aim of the arbitrary detention is to silence the most effective opposition newspaper within Turkey.

71. The source notes that it has consistently affirmed in its comments that the use of counter-terrorism legislation to detain the *Cumhuriyet* journalists for an extended period of pretrial detention is disproportionate and inconsistent with the obligations of Turkey under the Covenant and international law. Furthermore, the pretrial detention is unnecessary as several of the journalists have reportedly presented themselves for questioning at police stations, and one has even returned to Turkey from abroad while being under investigation, so the question of being an escape risk does not arise.

72. The source reiterates that the victims in the present case had been carrying out their professional duties as journalists. They have been deprived of their liberty arbitrarily and solely for exercising their rights to freedom of opinion and expression, in accordance with international law, namely, the Universal Declaration of Human Rights, the Covenant and customary international law.

Discussion

Preliminary issues

73. At the outset, the Working Group thanks the source and the Government for their comprehensive submissions in relation to the arrest and detention of Messrs. Çelik, Günay, Güngör, Gürsel, Kara, Kart, Sabuncu, Utku, Öz and Atalay, as well as the information they provided on the political and legal context, which has raised relevant issues in the case. That has allowed the Working Group to consider the case with the sound understanding of the matter in dispute between the parties. The Working Group would like to underline that the procedural rules to handle communications from sources and responses of Governments are contained in its methods of work (A/HRC/33/66) and in no other international instrument that the parties might consider applicable. In that regard, the Working Group would like to clarify that in its methods of work there is no rule applicable that impedes the consideration of communications owing to the lack of exhaustion of domestic remedies in the country concerned. Sources have no obligation therefore to exhaust domestic remedies before sending a communication to the Working Group.³

74. Furthermore, the Working Group would like to emphasize that, in the discharge of its mandate, it refers to the relevant international standards set forth in the Universal Declaration on Human Rights and to the relevant instruments ratified by the State concerned, including the Covenant.

³ See, for example, opinions No. 19/2013 and No. 11/2000.

75. With respect to the request by the Government of Turkey to the Working Group not to address the present case for the sole reason that the case has some links to the law on the state of emergency in Turkey adopted in 2016, 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 through the receipt of large amounts of cases derived 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. In that respect, the Working Group wishes to emphasize that it has a universal mandate to promote and protect the right of every individual not to be detained arbitrarily.

76. Furthermore, the Working Group would like to remind the Government of Turkey that the right to challenge the legality of detention before a court is a rule of customary international law and has in fact acquired a status of *jus cogens*,⁴ which does not permit derogations.⁵ Moreover, in accordance with the international law applicable to situations of emergency, the domestic legislative framework should not allow for any restriction on the safeguards of persons deprived of their liberty concerning the right to bring proceedings before a court,⁶ including the right to be informed of the reasons for arrest, the right to be informed of the legal basis and of the judicial order for detention and the right to legal counsel. In addition, persons deprived of their liberty must have sufficient time to prepare their defence.

Background

77. In the present case, the Working Group notes with grave concern that the attempted coup d'état of 15 July 2016 in Turkey had disastrous consequences, as hundreds of its citizens and the members of the armed forces consequently lost their lives, while thousands more were injured. In that respect, the Working Group notes that, on 21 July 2016, the Government informed the Secretary-General that it had declared a state of emergency for a duration of 90 days, in accordance with article 120 of the Constitution of Turkey and article 3/1b of its Law No. 2935 on State of Emergency, in response to the severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of article 4 of the Covenant.⁷ The Government stated that it was taking the required measures as prescribed by law, in line with the national legislation and its international obligations, and that the measures taken may involve derogation from obligations under the Covenant regarding articles 2 (3), 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27, as permissible under article 4 of the Covenant. The Government has continued to inform the Secretary-General of the three-month extensions to the state of emergency.⁸

78. On 19 August 2016, the Working Group, in association with other United Nations human rights experts, sent a joint urgent appeal⁹ and subsequently issued a press release on

⁴ See 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, para. 11.

⁵ *Ibid.*, principle 4.

⁶ *Ibid.*, principles 4 and 16 and guidelines 3 and 17.

⁷ Depositary notification C.N.580.2016.TREATIES-IV.4 of 11 August 2016 (notification under article 4 (3): Turkey), 21 July 2016, available from <https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf>.

⁸ Depositary notification C.N.775.2016.TREATIES-IV.4 of 21 October 2016 (Notification under article 4 (3): Turkey), 14 October 2016. <https://treaties.un.org/doc/Publication/CN/2016/CN.775.2016-Eng.pdf>; Depositary notifications C.N.4.2017.TREATIES-IV.4 of 10 January 2017 (Notifications under article 4 (3): Turkey), 9 January 2017. <https://treaties.un.org/doc/Publication/CN/2017/CN.4.2017-Eng.pdf>; Depositary notification C.N.241.2017.TREATIES-IV.4 of 20 April 2017 (Notification under article 4 (3): Turkey), 19 April 2017. <https://treaties.un.org/doc/Publication/CN/2017/CN.241.2017-Eng.pdf>.

⁹ See

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=3314>.

the same date.¹⁰ The experts noted that, since the attempted coup on 15 July, and in particular since the declaration of state of emergency on 20 July, Turkish society had seen an escalation of detentions and purges, in particular in the education, media, military and justice sectors. In addition, allegations of torture and poor detention conditions had been raised following legislative provisions that enabled wide and indiscriminate administrative powers that affect core human rights. The experts added that, while they understood the sense of crisis in Turkey, they urged the Government of Turkey to uphold its obligations under international human rights law, even in the current time of declared emergency following an attempted coup.

Category III

79. The Working Group will now consider whether there have been violations of the right to a fair trial of the individuals that would fall within category III.

80. In the present case, the Working Group notes that, on 31 October 2016, Messrs. Çelik, Günay, Güngör, Gürsel, Kara, Kart, Sabuncu, Utku and Öz were apprehended at their homes on the basis of arrest warrants and kept for four days without access to their lawyers. They were subsequently presented before the court on 5 November 2016. Mr. Atalay was arrested at the airport in Istanbul on 11 November 2016 and presented to the court on 12 November 2016.

81. The restriction of access to lawyers is of particular concern to the Working Group. As stated in principle 9 of 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, everyone deprived of their liberty has the right to legal assistance by counsel, including immediately after the moment of apprehension. This is an important requirement to enable the effective exercise of the right to challenge the legality of detention before a court, which is a non-derogable right under customary law.

82. The Working Group notes that the individuals were denied access to lawyers for the first four days of their detention. The Government has argued that this was justified under article 3 (entitled “Investigation and prosecution procedures”) of Decree Law No. 668 of 27 July 2016, under which the right of the suspect in custody to see a defence counsel may be restricted for five days upon the decision of the public prosecutor, noting that no statement should be taken during that time. The Working Group, however, notes that the Government has provided no explanation of the legitimacy of that restriction and has failed to present any reasonable justification that would show the proportionality of the need for the restriction in the present case.

83. Moreover, the Working Group notes that the lawyers could subsequently only visit their clients for one hour, one day per week. According to article 14 (3) (b) of the Covenant, accused persons must have “adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing”. The Human Rights Committee, in paragraph 32 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, states that “[T]his provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms”, and adds in paragraph 34 that “the right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications”.

84. With regard to the derogation of the Government of Turkey from article 14 of the Covenant, the Working Group refers to paragraph 6 of general comment No. 32, in which the Committee provides that “[w]hile article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation”.

¹⁰ See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20285&LangID=E.

85. In the present case, the Government of Turkey has provided no specific explanation as to why the imposed restrictions in communications with the lawyers were necessary. The Working Group is not convinced that meeting with a lawyer for one hour per week is a time frame that could constitute adequate time for the preparation of a defence in order to enjoy a fair trial. Worse yet, the recording of the conversations and seizure of documents make the undisturbed access to legal counsel and a fair trial impossible.

86. The Working Group therefore finds that the imposed restrictions upon access to lawyers cannot be considered proportionate. In applying its four-prong test of proportionality from its jurisprudence,¹¹ the Working Group is of the view that the protection of public security and order in the aftermath of a coup attempt may be a legitimate aim and the restrictions upon access to lawyers may be rationally connected to that aim, but there must be a less intrusive measure available and, even if not, the balance must be struck in favour of a criminal defendant's right to a lawyer.

87. With reference to its opinions No. 1/2017 and No. 38/2017, and as noted above, the Working Group is mindful of the state of emergency declared in Turkey. While the National Security Council of Turkey designated FETÖ/PDY as a terrorist organization in 2015, the fact that that organization was ready to use violence had not become apparent to Turkish society at large until the attempted coup in July 2016. As noted by the Council of Europe Commissioner for Human Rights:

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 organizations 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.¹²

88. In the light of the above, the Council of Europe Commissioner for Human Rights pointed out that there was therefore a need "when criminalizing membership and support of this organization, 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".¹³

89. The Working Group wishes to reiterate the position of the Commissioner on the "urgency of reverting to ordinary procedures and safeguards, by ending the state of emergency as soon as possible. Until then, the authorities should start rolling back the deviations from such procedures and safeguards as quickly as possible, through a nuanced, sector-by-sector and case-by-case approach".¹⁴

90. The Working Group consequently finds that the non-observance of the international norms relating to the right to a fair trial, being in contravention of articles 10 and 11 (1) of the Universal Declaration of Human Rights, articles 14 (1) and (3) (b) of the Covenant and principle 17.1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment is of such gravity as to give the deprivation of liberty of Messrs. Celik, Günay, al Güngör, Gürsel, Kara, Kart, Sabuncu, Utku, Öz and Atalay an arbitrary character, under category III.

¹¹ See opinion No. 54/2015, para. 89.

¹² See Council of Europe Commissioner for Human Rights, "Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey" (7 October 2016), para. 20. Available from <https://rm.coe.int/16806db6f1>.

¹³ *Ibid.*, para. 21.

¹⁴ *Ibid.*, para. 50.

Category II

91. The Working Group will now consider if the detention of the individuals resulted from the legitimate exercise of their fundamental rights and freedoms. It is a crucial element that they had been arrested for their reporting work for *Cumhuriyet*, which, according to the Government, amounted to the criminal offence of aiding terrorist organizations.

92. The Working Group notes that the use by the Government of emergency decree laws to silence dissent in the press has come under international criticism.¹⁵ In the light of that context, the Working Group observes that some of the claims made by the State prosecutors would appear to support the contention that the individuals have been deprived of their liberty for exercising their right to freedom of expression as journalists. Although the Government refers to the failure of *Cumhuriyet* to refer to the FETÖ/PDY as a “terrorist organization” and cites that as one of the elements of proof of its terrorist sympathies, the Working notes, however that the term “Gülen movement” has been used and considered as a general expression with no indication of preference.

93. The Working Group is concerned that the use of emergency decree laws may exert serious chilling effects on the legitimate exercise of the right to freedom of opinion and expression. According to a recent report by the Special Rapporteur on freedom of opinion and expression following his visit to Turkey in November 2016,¹⁶ more than 100 media outlets were reportedly closed on the basis of emergency decrees during the first six weeks of the state of emergency. Since 15 July 2016, reports indicate that at least 177 media outlets have been closed; 231 journalists have been arrested (more than 150 journalists are in prison); nearly 10,000 journalists and media workers have been dismissed; and the press cards of at least 778 journalists have been cancelled. Publications taking seriously investigative journalism and their role as a public watchdog frequently face harsh penalties under anti-terrorism, insult and state-of-emergency laws. The Special Rapporteur adds that, while the situation has intensified in the period since the coup attempt, the assault on the press began well before July 2016. He further states that the intense pressure and harassment of journalists of the oldest newspaper in Turkey, *Cumhuriyet*, stands out as one prominent example. In that respect, the Working Group notes that the Special Rapporteur met with a number of detained individuals affiliated with *Cumhuriyet* who are the subject of the present opinion.

94. With regard to the derogation by the Government from article 19 of the Covenant, the Working Group considers that there is no plausible link between the stated aim of rooting out the coup plotters and the suppression of the press.

95. The Working Group reiterates that it applies a heightened review standard in cases where the freedom of expression and opinion is restricted or where human rights defenders are involved.¹⁷

96. The Working Group also notes that the investigation and prosecution for “aiding terrorist organizations, in accordance with the organizational aims of these organizations, without being a member” under article 220 (6) of the Criminal Code for publications raises concerns due to the vagueness of the provision.

97. Based on the foregoing, the Working Group concludes that the deprivation of liberty of Messrs. Celik, Günay, al Güngör, Gürsel, Kara, Kart, Sabuncu, Utku, Öz and Atalay resulted from the exercise of their rights and freedoms under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, and that their detention falls under category II.

¹⁵ See European Commission for Democracy through Law (Venice Commission), “Turkey: Opinion on the Measures provided in the Recent Emergency Decree Laws with respect to Freedom of the Media” (No. 872/2016), 13 March 2017. Available from [www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)007-e).

¹⁶ See A/HRC/35/22/Add.3, paras. 31-37. See also www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20891&LangID=E.

¹⁷ See opinion No. 64/2011, para. 20.

98. The Working Group recalls that one of the fundamental guarantees of due process in criminal procedure is the principle of legality, including the principle of *nullum crimen sine lege certa*. Vaguely and broadly worded laws have a chilling effect on the exercise of the right to freedom of expression with its potentials for abuse as they violate the principle of legality as codified in article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant. In that respect, the Working Group notes that the Government has made no derogation from article 15 of the Covenant as this is one of the non-derogable rights stipulated in article 4 (2).

99. The Working Group has warned from its early years that anti-terrorism laws “by using an extremely vague and broad definition of terrorism, bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention” with the consequence that “[l]egitimate democratic opposition, as distinct from violent opposition, becomes a victim in the application of such laws”.¹⁸ Notably, with regard to article 15 (1) of the Covenant, the prohibition of terrorist conduct must be framed in such a way that: (a) the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and (b) the law is formulated with sufficient precision so that the individual can regulate his or her conduct.¹⁹

100. In addition, the Working Group has set up a list of principles concerning the compatibility of anti-terrorism measures with articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.²⁰ Those principles include a requirement that the detention of persons who are suspected of terrorist activities be accompanied by concrete charges, and that the accused persons enjoy the necessary guarantees of a fair trial such as access to legal counsel and representation.

101. The Working Group thus concludes that the violation of the principle of legality as enshrined in article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant adds weight to the determination that the deprivation of liberty of Messrs. Celik, Günay, al Güngör, Gürsel, Kara, Kart, Sabuncu, Utku, Öz and Atalay falls within category II.²¹

102. The Working Group is aware that a large number of individuals were arrested following the attempted coup in July 2016. With reference to the joint urgent appeal of 19 August 2016 and subsequent press release referred to in paragraph 78 above, the Working Group urges the Government of Turkey to adhere to its human rights obligations, including the fundamental elements of due process, even under the state of emergency. In that respect, the Working Group wishes to reiterate its request for a country visit.

Disposition

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

The deprivation of liberty of Messrs. Önder Çelik, Turhan Günay, Mustafa Kemal Güngör, Kadri Gürsel, Hakan Kara, Hacı Musa Kart, Murat Sabuncu, Bülent Utku, Güray Tekin Öz and Akin Atalay, being in contravention of articles 10, 11 and 19 of the Universal Declaration of Human Rights and of articles 14, 15 and 19 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II and III.

104. Consequent upon the opinion rendered, the Working Group requests the Government of Turkey to take the steps necessary to remedy the situation of Messrs. Önder Çelik, Turhan Günay, Mustafa Kemal Güngör, Kadri Gürsel, Hakan Kara, Hacı Musa Kart, Murat Sabuncu, Bülent Utku, Güray Tekin Öz and Akin Atalay 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.

¹⁸ See E/CN.4/1995/31, para. 25 (d).

¹⁹ See E/CN.4/2006/98, para. 46.

²⁰ See A/HRC/10/21, paras. 50-55.

²¹ Opinion No. 9/2016 (Jordan), paras. 39-46.

105. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Messrs. Önder Çelik, Turhan Günay, Mustafa Kemal Güngör, Kadri Gürsel, Hakan Kara, Hacı Musa Kart, Murat Sabuncu, Bülent Utku, Güray Tekin Öz and Akin Atalay immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

Follow-up procedure

106. 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 Messrs. Çelik, Günay, Güngör, Gürsel, Kara, Kart, Sabuncu, Utku, Öz and Atalay have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Messrs. Çelik, Günay, Güngör, Gürsel, Kara, Kart, Sabuncu, Utku, Öz and Atalay;

(c) Whether an investigation has been conducted into the violation of Messrs. Çelik, Günay, Güngör, Gürsel, Kara, Kart, Sabuncu, Utku, Öz and Atalay'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.

107. 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.

108. The Working Group requests the source and the Government to provide the above information within six months of the date of the 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.

109. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and 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.²²

[Adopted on 28 April 2017]

²² See Human Rights Council resolution 33/30, paras. 3 and 7.