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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, 20–24 August 2018

#### Opinion No. 44/2018 concerning Muharrem Gençtürk (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 Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 9 February 2018 the Working Group transmitted to the Government of Turkey a communication concerning Muharrem Gençtürk. The Government replied to the communication on 10 April 2018. 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. Muharrem Gençtürk, born in 1968, is a Turkish national, who usually resides with his family in Antalya. According to the source, Mr. Gençtürk was an Associate Professor of Commercial Law at Akdeniz University in Antalya. As public employees, both Mr. Gençtürk and his wife were dismissed from their jobs under Statutory Decree No. 672 issued on 1 September 2016, which resulted in the dismissal of around 50,000 people.

### *Arrest and detention*

5. The source reports that, following the coup attempt of 15 July 2016, Mr. Gençtürk was taken into custody on 29 July 2016. Mr. Gençtürk's house was reportedly raided by three police officers from the Antalya Police Department at around 5.30 a.m. with the whole family present. The officers said that he was to be taken into custody because of his affiliation with the Fetullahist Terrorist Organization (FETÖ), and they also showed a warrant issued by the Antalya District Attorney's Office. Two hours later, the officers had reportedly confiscated all his computers and phones, and they took Mr. Gençtürk to Akdeniz University to search his office. There were no further explanations. The police officers did not allow him to take any clothes or money with him.

6. The source reports that Mr. Gençtürk was initially held at Serik Police Station in Antalya for 18 days. During the first five days of his detention he was not allowed to talk to anyone, including his lawyer. When he was finally allowed to meet his lawyer, they could reportedly only speak in the presence of a police officer and in front of a voice recorder.

7. According to the source, Mr. Gençtürk was only able to receive clothes on the tenth day of his detention. He and the other detainees were allegedly insulted by the police and not given proper or sufficient food. Due to the overcrowding in the facility, the detainees reportedly abstained from drinking water so they would not need to use the restroom due to the queues. They did not see any daylight during the initial 18 days, and as the lights were kept on all the time, Mr. Gençtürk was unable to sleep.

8. On 15 August 2016, a prosecutor reportedly interrogated Mr. Gençtürk, and he was released on parole. However, after less than half an hour, he was suddenly taken back into custody, and this time he was arrested by the Antalya Fifth Criminal Court of Peace. Since then, he has been held at Antalya High Security Prison.

9. According to the source, Mr. Gençtürk's bill of indictment, which was written approximately nine months later, says that FETÖ has a policy of placing its people inside public institutions, and the source adds that his hard work in becoming an academic is thus almost presented as a crime. He was also accused of sending his children to Toros schools, or Gülen-affiliated schools, and of having a Bank Asya account. However, the source notes that both were perfectly legal in Turkey prior to 15 July 2016.

10. The source also reports that Mr. Gençtürk is charged with membership of a terrorist organization under article 314 of the Turkish Criminal Code due to his supposed use of the ByLock application and due to the fact that his children attended schools related to the Gülen organization.

### *Trial proceedings*

11. Mr. Gençtürk had his first trial hearing in June 2017, after having spent 11 months in detention. However, he was not released. He subsequently had two other hearings, in November 2017 and January 2018 respectively. At both trial hearings, because he was the last person on the list, reportedly Mr. Gençtürk was not allowed enough time to defend himself and the judges would constantly make remarks such as "Are you going to say something different from the others? I am really curious" or "There is another trial after yours. Do you expect us to keep going until morning?" According to the source, the prosecutor, who was sitting next to the judges, was literally sleeping during the first trial. The source notes that because the presence of the prosecutor is an obligatory element of trials under Turkish law, this is a breach of law. The source also reports that Mr. Gençtürk

was not allowed to speak to his lawyer before or during his trials, due to the design of the court room.

12. During the trial hearings, Mr. Gençtürk was reportedly accused of the following:
  - (i) His children had attended Gülen-related schools;
  - (ii) His brother had worked in a company where a trustee was later appointed by the Government;
  - (iii) His wife had a bank balance at Bank Asya;
  - (iv) Secret witness statements had indicated that Mr. Gençtürk was a consultant for the rector of an educational institution after 2012;
  - (v) An individual had stated that Mr. Gençtürk had downloaded the ByLock application onto his phone.
  
13. In relation to these accusations, the source makes the following comments:
  - (i) The Gülen schools were operating legally under the auspices of the National Education Ministry (*nulla poena sine lege certa*);
  - (ii) The brother of Mr. Gençtürk was simply carrying out design work for the said company (*nulla poena sine lege*);
  - (iii) Bank Asya was legal and was paying taxes. The wife of Mr. Gençtürk reportedly stated that she had used the funds to repair a village house, and this was proven during the trial (*nulla poena sine lege*);
  - (iv) Mr. Gençtürk's consulting work for the rector was actually carried out between 2010 and 2012. The court and the prosecutor did not ask for this claim to be investigated and they accepted this statement as being true, although they had had 11 months to investigate the matter. They only provided such investigation following the request by Mr. Gençtürk at the first trial hearing. The source recalls that, according to Turkish law, the prosecutor must collect evidence both in favour of and against the defendant;
  - (v) This individual later changed his statement and said that he was under heavy psychological pressure and continued to be on medication. He also noted that Mr. Gençtürk had not downloaded ByLock on his phone, but that he had done so himself.
  
14. According to the source, Mr. Gençtürk was asked whether he used the ByLock communication application. In this respect, the source states that the trials continue as if there were evidence, when there is none. A ByLock report created by Turkish intelligence has reportedly been sent to the court, but there is no explanation about how the list was found or who prepared it. According to the source, it is definitely not an expert report, and the signature at the end belongs to the police officer who printed the report. It also refers to "the company" but there is no clarity as to which company.
  
15. Although it is reportedly stated in the report itself that it contains a retroactive evaluation, Mr. Gençtürk, along with tens of thousands of people who are charged with using ByLock, did not have his phone intercepted. Mr. Gençtürk is said to have used the application in 2014, when no decisions regarding interception had been made by any court. The source notes that the ByLock report merely says that Mr. Gençtürk used the application, but it does not show any content of communications, any username or password, or any individuals with whom Mr. Gençtürk supposedly communicated through the application.
  
16. The source also indicates that Mr. Gençtürk's first trial took place in June 2017, during the month of Ramadan. As a pious person, he was fasting, and he had to wait with several other defendants on the overcrowded floor of the court room for his hearing to start. In relation to his second and third trial hearings, Mr. Gençtürk was taken to court at 7 o'clock in the morning when it was very cold and he had to wait for 12 hours in a single room of the court for his trial hearing to start. The hearing started very late and the defendants were not given any food while they waited. In the end, they were very hungry

but they could only eat when they returned to the prison at midnight. The source also indicates that individuals charged with terrorism have to wear a prison suit at trial hearings, whereas those charged with other crimes have no such obligation, which is discriminatory and degrading.

17. The source states that due to the principle of non-retroactivity and the principle of *nulla poena sine lege praevia*, an application which Mr. Gençtürk was said to have used in 2014 cannot be linked to events that took place on 15 July 2016, notably a coup attempt that he did not know about. The source submits that terrorism is a concrete crime that needs concrete evidence. However, Mr. Gençtürk did not have any intention to commit terrorist acts.

18. The source also indicates that the Internet Protocol (IP) addresses of ByLock are said to have been rented from Baltic Servers (which later changed its name to Cherry Servers) in Lithuania. According to the latter, the ByLock lists could potentially be the result of hacking, which is inadmissible under Turkish law. The source thus states that the legality of the so-called “ByLock proof” is questionable.

19. The source also notes that ByLock is not an application that could only be downloaded by supporters and sympathizers of the Gülen organization. It was available to everyone on both the Google Play Store and the Apple Store. Even if this were not the case, the Gülen organization was not recognized as a terrorist organization in 2014, which is when Mr. Gençtürk was said to have used the application. At the time of the submission by the source, no final verdict had been passed regarding perpetrators of the coup attempt.

#### *Applications for release*

20. The source reports that under Turkish law there are two reasons for arrests to be made, and they have to occur at the same time: strong evidence and the possibility of escape. In the case of Mr. Gençtürk, parole provisions could have been applied, as he has all his belongings in Turkey and he has nowhere to go.

21. According to the source, applications were filed for Mr. Gençtürk’s release each month. However, all the complaints were rejected without a reason being given.

22. In January 2018, the Court of Cassation responded to Mr. Gençtürk’s application in respect of his prolonged arbitrary arrest. According to the source, the application for the case to be heard was denied because “usage of ByLock cannot be assessed as prolonged arbitrary arrest and there is no breach of personal rights”. The source notes that the decision of the Court of Cassation referred to the bill of indictment, which had been written approximately nine months after Mr. Gençtürk’s initial detention. However, the Court of Cassation did not investigate his detention period prior to the bill of indictment at all.

23. The source notes that the same response was sent to a few other people in Mr. Gençtürk’s prison cell, with the same decision and reasoning, just with different names, proving that this was a copy-and-paste decision. The source states that even if the Court of Cassation had accepted Mr. Gençtürk’s requests, the first instance court would not have complied, as was seen in other cases.

#### *Mr. Gençtürk’s state of health*

24. According to the source, Mr. Gençtürk has a very serious medical problem with both ears. On 29 July 2016, the day on which he was taken into custody, he had a doctor’s appointment which he was not allowed to attend. During his detention, his ears kept giving him troublesome pain, which he mentioned to the court at his very first trial. He could not hear the judges, but they behaved as if he was faking this. Despite the fact that both he and his family kept filing petitions for him to see a doctor, he was only allowed to finally see a doctor in December 2017. He then learned that he had lost his hearing in one ear completely and treatment was no longer possible, and that in his other ear, although not completely, his hearing had almost gone. He was told that he needed a hearing aid, but nothing is reportedly being done to provide him with such a device. In the meantime, due to this situation, he reportedly cannot establish contact or communicate with the other people in his prison cell, which is turning him into a very lonely, depressed and tense person.

25. The source also reports that because Mr. Gençtürk was not taken to an otolaryngologist, the prison's general doctor merely provided him with cortisone. However this medication was not provided to him regularly, which kept his treatment interrupted. In addition, as cortisone is a serious medicine that requires regular blood tests and carries the risk of causing serious health problems, Mr. Gençtürk eventually decided to stop taking the cortisone as he had started to have adverse side effects from the medicine, namely insomnia.

26. The source further reports that due to his hearing impairment, Mr. Gençtürk could not understand the judge when he asked him at his first trial hearing whether he agreed with the so-called police questioning statements. He subsequently learned that the judge had simply reported that he had agreed with the statements, although Mr. Gençtürk does not even know their content.

#### *Conditions of detention*

27. According to the source, Mr. Gençtürk continues to be kept in a prison cell that is designed for 14 people. For most of the time, however, a total of 48 detainees have been kept in the cell. Mr. Gençtürk reportedly had to sleep on the floor for the first four months of his arrest. The cell was so crowded that detainees even had to sleep in the corridor for many nights and not inside the cell.

28. For over a year, Mr. Gençtürk, as a FETÖ detainee, was denied the right to speak to his relatives over the phone. Now he can call his wife for 10 minutes every two weeks. Also, FETÖ detainees can only receive one visit by their relatives every two months, whereas other detainees can receive a family visit once a month.

#### *Analysis of violations*

29. In the light of the foregoing, the source submits that the deprivation of liberty of Mr. Gençtürk is arbitrary, falling within categories I, II, III and V of the categories applicable to the consideration of cases by the Working Group.

#### *Category I*

30. The source refers to article 100 of the Turkish Criminal Procedure Code, under which the arresting authority has to prove the necessity and proportionality of an arrest. Moreover, according to article 109 of the same law, arrest is to be resorted to only when judicial control (parole) provisions are not available or not sufficient.

31. The source notes that in respect of the detentions following the coup attempt of 15 July 2016, many individuals were released on parole without being arrested, and thousands who had been arrested were later released on parole. This situation reportedly shows that the arrests are being made without sufficient investigation and reasoning.

32. The source also notes that the majority of the 60,000 individuals who were arrested following the coup attempt were not involved in the coup attempt. They simply fulfilled one or two of the "criteria of terrorism" created by the Government. Such criteria include children going to legal private schools, membership of associations that is in accordance with the law, subscribing legally to newspapers, and so on.

33. According to the source, the Government is currently in control of the judiciary. If the judges were independent, they would not put 60,000 people, from 18-year-olds to 70-year-olds, in detention. The source emphasizes that a group was declared overnight to be a terrorist group, and retroactive crimes were created. The source also states that it is illogical that 60,000 people (or over 100,000 if those who were released on parole are included) could have known about and been involved in a coup. The source reiterates that Mr. Gençtürk is simply an academic who sent his children to schools operating legally.

34. The source thus submits that the basis for the deprivation of liberty of Mr. Gençtürk is not authorized by the Constitution of Turkey or by domestic law and that there is no legal basis for his detention.

*Category II*

35. The source also submits that article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant have been breached. Mr. Gençtürk has been accused of using the ByLock communication application, the use of which was legal. The source notes that Mr. Gençtürk has not been shown any communication that he supposedly had using that application, and that the use of such a phone application cannot constitute a crime in itself. Furthermore, he was said to have used the application in November 2014, which is almost two years before the coup attempt.

*Category III*

36. The source further submits that article 10 of the Universal Declaration of Human Rights and article 14 of the Covenant have been breached in the present case.

37. According to article 10 of the Universal Declaration of Human Rights, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. However, the source submits that no single court in Turkey can act in an independent manner and that judges who do not decide in the way that the Government wants are either banished or dismissed. In such an environment, no judge can make decisions independently, thus causing prolonged periods of arrest. The source also notes that, at present, in order for an individual to become a judge, he or she needs to possess the approval of the Government.

38. In the present case, Mr. Gençtürk was held in a high-security prison for more than nine months before he first had the chance to plead his case before a court. The source reiterates that Mr. Gençtürk has lost his hearing in one ear. In this time since his arrest, he is now about to lose the hearing in his second ear as well, and he could thus not hear the judge properly during the trial hearing, but no one paid any attention to this.

39. The source also reports that, until very recently, detainees at Antalya High Security Prison, including Mr. Gençtürk, could only see their attorneys once per week for 20 minutes, and a guard would be present during the meetings, with a voice recorder. At times, attorneys had to wait for five hours before they could see their client. The source also reports that only one member of Mr. Gençtürk's family could attend his trial hearing, due to lack of space.

*Category V*

40. Finally, the source submits that Mr. Gençtürk was discriminated against for having a supposed affiliation to a religious group. His children attended Toros schools, which he was asked about during his interrogation and which is among the "terrorism criteria" created by the Government following the coup attempt.

*Response from the Government*

41. On 9 February 2018, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government, by 10 April 2018, to provide detailed information about the current situation of Mr. Gençtürk and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Turkey under international human rights law, and in particular with regard to the treaties ratified by Turkey. Moreover, the Working Group called upon the Government to ensure his physical and mental integrity.

*Background*

42. In its reply of 10 April 2018, the Government refers to its previous responses to communications from the Working Group and underlines the terrorism threats faced by Turkey, the grave nature of the coup attempt of 15 July 2016 and the measures taken. For reference, the Government submits background information regarding the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY), as well as on the measures

taken against it, along with other terrorist organizations. The Government explains that FETÖ/PDY is an armed terrorist organization established by Fetullah Gülen which aims to suppress, debilitate and direct all the constitutional institutions, to overthrow the elected President and Government of Turkey, and, by dismantling the constitutional order, to establish an oppressive and totalitarian system by means of force, violence, threats, blackmailing and other unlawful means.

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

44. The Government notes that, with a view to ensuring continuity of the effective implementation of measures for the protection of Turkish democracy, of the principle of the rule of law and of the rights and freedoms of citizens, the Council of Ministers decided to extend the state of emergency on several occasions, and each decision was upheld by the Grand National Assembly of Turkey.

45. 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 (European Convention on Human Rights) and the Covenant. Notification of derogation from those obligations was submitted to the Council of Europe in accordance with article 15 of the European Convention on Human Rights and to the Secretariat of the United Nations in accordance with article 4 of the Covenant.

46. 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 sensitively complied with as regards the measures taken under the state of emergency in the aftermath of the attempted coup.

47. 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 of 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.

48. The Government also emphasizes that persons in custody, their defendants, or their legal representatives, spouses or blood relatives of the first or second degree, can apply to the Criminal Magistrates' Office against the order of the Public Prosecutor, to request immediate release, in accordance with article 91 (5) of the Code of Criminal Procedure. The maximum period of detention is reserved for offences against State security, constitutional order, national defence, State secrets and to terror and collective violence offences. However, the 30-day upper limit for the custody period has never been applied in full and the vast majority of suspects have remained in custody for four or five days. In addition, legal assistance is provided during police custody and health reports are obtained upon entry into and release from custody.

49. Given changing circumstances, the length 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 a public prosecutor, taking into account difficulties in collecting evidence, or a large number of suspects.

#### *Circumstances of the case*

50. In relation to the present case, the Government submits that an investigation was initiated by the Antalya Chief Public Prosecutor's Office against Mr. Gençtürk on the charge of "being member of a terrorist organization", in accordance with article 314 of the

Criminal Code (Law No. 5237). Mr. Gençtürk was taken into custody on 29 July 2016 by order of the Antalya Chief Public Prosecutor's Office. During the custody, he was informed about the charges against him and his rights under the current legislation. He also benefited from the right to inform his relatives that he had been taken into custody. He met with his defence counsel during the custody. He gave a statement in the presence of his defence counsel at Antalya Police Headquarters on 8 August 2016. In his statement, he denied the accusations.

51. On 15 August 2016, Mr. Gençtürk was taken into custody on the charge of membership of an armed terrorist organization, by the Fifth Criminal Magistrate of Antalya. The arrest warrant contained the reasons for the arrest, such as the availability of concrete facts leading to strong suspicion that the suspect had committed the crime of being a member of a terrorist organization, the status of the available evidence and the existence of strong suspicion regarding possible escape by the defendant.

52. The Government indicates that the detention of Mr. Gençtürk was reconsidered by the Antalya Criminal Magistrates' Office multiple times, namely on 10 September 2016, 7 October 2016, 4 November 2016, 1 December 2016, 29 December 2016, 26 January 2017, 15 February 2017 and 14 March 2017, and continuation of his detention was decided upon, taking into account the existence of a strong suspicion that the suspect had committed the crime as the information and documents contained in the file indicated, and the nature and the type of the crime he had been charged with, as well as the lower and upper limits of the sentences provided by law for such crimes.

53. On 15 March 2017, a criminal case against Mr. Gençtürk was initiated by the Antalya Eighth Assize Court, with investigation No. 2017/18665 and case No. 2017/230. It is stated in the indictment that Mr. Gençtürk is suspected of committing the crime of being a member of an armed terrorist organization indicated in article 314/2 of the Criminal Code. The indictment also included detailed information on the FETÖ/PDY terrorist organization, as well as the finding that Mr. Gençtürk used the ByLock communication application which was used by FETÖ/PDY members to contact each other.

54. According to the Government, the indictment regarding Mr. Gençtürk was accepted by the Antalya Eighth Assize Court on 31 March 2017. The confidentiality during the investigation period was thus automatically removed.

55. During the trial process, which started after the acceptance of the indictment, hearings took place on 13 June 2017, 14 November 2017, 9 February 2018, 20 February 2018 and 19 April 2018.

56. Mr. Gençtürk's lawyer reportedly participated in all hearings in which Mr. Gençtürk appeared, so Mr. Gençtürk benefited from legal assistance in those hearings. During the period of prosecution, Mr. Gençtürk objected to the decisions rendered by the court regarding detention. The Ninth Assize Court assessed such objections and dismissed them on 7 August 2017, 25 August 2017, 30 October 2017 and 13 December 2017.

57. In respect of the allegation that the detention of Mr. Gençtürk and the subsequent proceedings were unlawful or arbitrary, the Government emphasizes that, during the investigation period, no objection was raised by Mr. Gençtürk or his lawyer against the decisions about him being arrested or taken into custody or about the custody period being extended, and Mr. Gençtürk has not filed a compensation claim under article 141 and subsequent articles of the Criminal Procedure Code relating to the legality of the detention.

58. The Government argues that Mr. Gençtürk made an individual application to the Constitutional Court, claiming that the criteria in the legislation for implementation of the measure of arrest were not met, decisions regarding detention and review of detention were taken without reasoning being provided, his properties were seized in an unfair manner and his right of defence was restricted.

59. The Constitutional Court assessed the application on 29 December 2017 and found the application inadmissible, on the grounds that the allegation regarding violation of the right of personal liberty and security did not have a basis and legal remedies had not been exhausted in terms of the claims of violations of other rights.



60. In terms of the allegation regarding violation of the right of personal liberty and security, in its decision the Constitutional Court took into account that, according to the indictment, Mr. Gençtürk was a user of the ByLock application and the features of that application, and underlined that using or downloading the “ByLock” application may be assessed by the investigating authorities as an indication of a relationship with FETÖ/PDY.

61. The Government further submits that Mr. Gençtürk remained in custody for 18 days from 29 July to 15 August 2016. Immediately after the coup attempt, due to the unforeseeable increase in the number of people taken into custody, the custody period was extended for up to 30 days, by the relevant decree law. In the present case, although the specific conditions were taken into account, it is evident that a shorter custody period was implemented. Mr. Gençtürk did not lodge an appeal, although he had the legal right to appeal before the judge against the custody. Considering the fact that there were a large number of people from the FETÖ/PDY terrorist organization against whom investigations were conducted, the fact that many people were taken into custody within the scope of the same investigation, as well as the seriousness and complex nature of the offences they were charged with, it was assessed that the period of custody was proportional and in accordance with international conventions.

62. Mr. Gençtürk was reportedly notified of the charges against him. He gave a statement in the presence of his lawyer and he was therefore able to exercise his rights of defence and legal assistance while in custody.

63. In this context, the Government underlines that all decisions regarding arrest, custody and detention in respect of Mr. Gençtürk were given with reasoning by independent judges. These decisions are not arbitrary and do not contain any explicit failures of discretion. Furthermore, Mr. Gençtürk did have the right to appeal against those decisions.

64. The Government especially emphasizes the findings in the indictment regarding Mr. Gençtürk, including the finding that he had used the ByLock communication application, which was used by FETÖ/PDY members to contact each other. In this respect, the Government submits information about the ByLock programme and the intensive use of this application as a communication tool by the members of the FETÖ/PDY terrorist organization, and it refers to various verdicts passed by national courts.

65. Taking into account all the elements specified above, the Government submits that it was concluded that the ByLock application was available particularly for the members of the FETÖ/PDY terrorist organization. Use of the application constitutes strong suspicion of membership, connection or affiliation with the FETÖ/PDY terrorist organization.

66. Regarding the present allegations, the Government submits that a criminal case has been initiated against Mr. Gençtürk, and that the charges against him are based on concrete evidence. Furthermore, the Government insists that considering the conditions of the state of emergency, the duration for which Mr. Gençtürk was in custody and detention should be accepted as reasonable. Taking into account the declaration of derogation, it is assessed that the process through which Mr. Gençtürk was arrested and taken into custody is not ungrounded or arbitrary.

67. Finally, the Government submits that the Constitutional Court assessed Mr. Gençtürk’s allegations. The court examined Mr. Gençtürk’s similar complaints and decided that they were manifestly ill-founded. This decision was issued with justified reasoning. In this context, the decisions of the national authorities are not arbitrary and do not contain any failures of discretion.

68. The Government thus concludes that the investigation regarding Mr. Gençtürk is based on concrete accusations and evidence. The allegation that he was taken into custody and detained on account of his opposing views is aimed at misleading the Working Group, and it is accordingly manifestly ill-founded.

*Further information from the source*

69. On 11 April 2018, the response from the Government was transmitted to the source for further comments. The source provided its response on 18 April 2018.

**Discussion**

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

71. At the outset, the Working Group would like to stress that the procedural rules to handle communications from sources and the responses of Governments are contained in its methods of work (A/HRC/36/38) 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 consideration of communications due to a lack of exhaustion of domestic remedies in the country concerned. Sources thus have no obligation to exhaust domestic remedies before sending a communication to the Working Group.<sup>1</sup>

72. As a further preliminary issue, the Working Group notes that the Government of Turkey argues that the situation of Mr. Gençtürk falls within the scope of the derogations that it has made under the Covenant. On 21 July 2016, the Government of Turkey informed the Secretary-General that it had declared a state of emergency for three months, in response to the severe dangers to public security and order, amounting to a threat to the life of the nation within the meaning of article 4 of the Covenant. The Government of Turkey stated that the measures taken might involve derogation from its obligations under articles 2 (3), 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27 of the Covenant.<sup>2</sup>

73. While acknowledging the notification of those derogations, the Working Group emphasizes that, in the discharge of its mandate, it is also empowered under paragraph 7 of its methods of work to refer to the relevant international standards set forth in the Universal Declaration of Human Rights, and to customary international law. Moreover, in the present case, articles 9 and 14 of the Covenant are the most relevant to the case of Mr. Gençtürk. As the Human Rights Committee has stated in its general comments No. 35 (2014) on liberty and security of person and No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, 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.

74. The source has submitted that the detention of Mr. Gençtürk is arbitrary and falls under categories I, II, III and V of the Working Group. While not specifically addressing the categories, the Government denies these submissions and argues that the detention of Mr. Gençtürk was not arbitrary. The Working Group shall proceed to examine the submissions under each of the categories in turn.

75. The Working Group recalls that it considers a detention to be arbitrary and falling under category I if the detention lacks legal basis. In the present case, the Working Group must therefore examine the circumstances of Mr. Gençtürk's arrest. To this end, the Working Group notes that he was arrested on 29 July 2016 and both the source and the Government have advised that an arrest warrant was presented at the time of arrest. However, the source has submitted that Mr. Gençtürk was held at the police station for 18 days and that for the first five days he was not allowed to talk to anyone, not even his lawyer. The Working Group observes that, while not mentioning specific dates, the Government has argued that Mr. Gençtürk was informed of the charges against him, was able to inform his family of his whereabouts and met with his lawyer.

76. The Working Group observes that the submissions by the source appear to reveal a prima facie case of incommunicado detention for the first five days of Mr. Gençtürk's detention. The Working Group is mindful that the Government has chosen not to address these allegations specifically.

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<sup>1</sup> See also opinions Nos. 11/2000, 19/2013, 38/2017, 8/2018, 42/2018 and 43/2018.

<sup>2</sup> See depositary notification C.N.580.2016.TREATIES-IV.4 of 11 August 2016 (notification under article 4 (3): Turkey), available at <https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf>.

77. As the Working Group has consistently found, holding persons incommunicado violates their right to be brought before a court under article 9 (3) of the Covenant and to challenge the lawfulness of their detention before a court under article 9 (4) of the Covenant.<sup>3</sup> This view is consistent with that of the Human Rights Committee, which in its general comment No. 35 has argued that “incommunicado detention that prevents prompt presentation before a judge inherently violates paragraph 3” (of article 9).<sup>4</sup> The Working Group recalls that judicial oversight of detention is a fundamental safeguard of personal liberty<sup>5</sup> and is essential in ensuring that detention has a legal basis. Given that Mr. Gençtürk was unable to contact anyone and especially his lawyer, which is an essential safeguard to ensure the ability of any detainee to personally challenge their detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was also violated.

78. The Working Group notes the apparent dispute between the source and the Government as to whether Mr. Gençtürk was allowed to meet with his lawyer during the first five days of his detention. In determining whether Mr. Gençtürk’s deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source’s allegations (see A/HRC/19/57, para. 68).

79. In the present case, the Working Group observes that not only has the Government failed to specifically respond to the allegations submitted by the source regarding the initial days of Mr. Gençtürk’s detention, but it has also failed to produce any documentary evidence confirming the contacts of Mr. Gençtürk with his lawyer from the outset of his detention. The Working Group is mindful that the Government should have had possession of such documents. On that basis, the Working Group must conclude that the detention of Mr. Gençtürk for the first five days was arbitrary, as he was denied the right to challenge the legality of his detention in breach of article 9 (3) of the Covenant, and that his detention for the said period therefore falls under category I.

80. The source has further argued that the detention of Mr. Gençtürk falls under category II, as his arrest and detention were a result of his exercise of his rights under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. The Government denies these allegations, arguing that the arrest and detention of Mr. Gençtürk were based solely on his criminal activity as a member of the FETÖ/PDY terrorist organization.

81. In the present case, the Working Group observes that the core of the allegations against Mr. Gençtürk is his alleged alliance with the Gülen group, which, according to the Government, stems from him having downloaded and used the ByLock application on his phone. The Government has made detailed submissions about how this application was used by the FETÖ/PDY terrorist organization. However, the Working Group observes that while these explanations are rather broad and relate to the general usage of ByLock by FETÖ/PDY, they do not provide any detailed explanation as to how the alleged use of this application by Mr. Gençtürk could be equated with a criminal act.

82. The Working Group takes note of the report by the Office of the United Nations High Commissioner for Human Rights on the impact of the state of emergency on human rights in Turkey. This report examined the impact of various decrees issued by the Government of Turkey which served as a basis for the dismissal of large numbers of security, military and police officers, teachers, academics, civil servants and health sector personnel, and concluded that:

<sup>3</sup> See, for example, opinions Nos. 45/2017, 46/2017, 79/2017, 11/2018 and 35/2018.

<sup>4</sup> See para. 35.

<sup>5</sup> See para. 3 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.

The decrees do not establish clear criteria used to assess links of the dismissed individuals to the Gülenist network. As a result, dismissals have been ordered on the basis of a combination of various elements, such as making monetary contributions to the Asya bank and other companies of the “Parallel State Organization”, being a member of a trade union or association linked to the Gülenist network, or using the messenger application ByLock and other encrypted messaging programmes. The dismissals may also be based on reports by the police or secret service about some individuals, analysis of social media contacts, donations, websites visited, or sending children to schools associated with the Gülenist network. Information received from colleagues or neighbours, or subscription to Gülenist periodicals, could also be used as criteria for dismissals.<sup>6</sup>

83. The Working Group notes that the case of Mr. Gençtürk appears to follow the pattern described in this report.

84. The Working Group is mindful of the state of emergency that was declared in Turkey. However, while the National Security Council of Turkey had already designated FETÖ/PDY (the Gülen group) as a terrorist organization in 2015, the fact that this organization was ready to use violence had not become apparent to Turkish society at large until the coup attempt of July 2016. In this respect, the Working Group refers to a memorandum by the Council of Europe Commissioner for Human Rights.<sup>7</sup> The Commissioner also pointed out that there was a need, “when criminalizing membership and support of this organization, to distinguish between persons who engaged in illegal activities and those who were sympathizers or supporters of or members of legally established entities affiliated with the movement, without being aware of its readiness to engage in violence”.<sup>8</sup>

85. The Working Group observes that the core of the allegations against Mr. Gençtürk is his alleged alliance with the Gülen group in 2013 which is said to have been manifested mainly through the use of the ByLock application. The Working Group notes the failure on the part of the Government of Turkey to show how the mere use of such a regular communication application as ByLock by Mr. Gençtürk constituted an illegal criminal activity. Noting the widespread reach of the Fethullah Gülen movement, as documented in the report of the Council of Europe Commissioner for Human Rights cited, “it would be rare for a Turkish citizen never to have had any contact or dealings with this movement in one way or another”.<sup>9</sup> The Working Group also takes note of the report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, who visited Turkey in November 2016 and recorded numerous cases of arrests based purely on the presence of ByLock on the accused’s computer and on ambiguous evidence.<sup>10</sup>

86. In fact, it appears to the Working Group that even if Mr. Gençtürk did use the ByLock application, an allegation that he denies, it would have been mere exercise of his right to freedom of expression. To this end, the Working Group notes that freedom of opinion and freedom of expression as expressed in article 19 of the Covenant are indispensable conditions for the full development of the person; they are essential for any society, and indeed, constitute the foundation stone for every free and democratic society.<sup>11</sup> According to the Human Rights Committee, no derogations can be made to freedom of

<sup>6</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), “Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East”, January–December 2017 (March 2018).

<sup>7</sup> Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, CommDH(2016)35 (7 October 2016).

<sup>8</sup> *Ibid.*, para. 21.

<sup>9</sup> *Ibid.*, para. 20.

<sup>10</sup> A/HCR/35/22/Add.3, para. 54.

<sup>11</sup> Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 2.

opinion because “it can never become necessary to derogate from it during a state of emergency”.<sup>12</sup>

87. The Working Group notes that freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and that this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.<sup>13</sup> Moreover, article 19 (2) of the Covenant protects all forms of expression and the means of their dissemination, including all forms of audiovisual as well as electronic and Internet-based modes of expression.<sup>14</sup>

88. The Working Group therefore concludes that the arrest and detention of Mr. Gençtürk resulted from his exercise of the rights guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, falling under category II.

89. Given its finding that the deprivation of liberty of Mr. Gençtürk is arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Gençtürk should have taken place. However, the trial did take place and the source has submitted that there were severe violations of his fair trial rights and that his subsequent detention therefore falls under category III.

90. The source has argued that Mr. Gençtürk’s detention is arbitrary and falls under category III as, since the coup attempt, not a single court in Turkey has been able to act in an independent manner, and judges who do not decide in the way that the Government wants are either banished or dismissed. This allegedly creates an environment in which no judge can decide independently, leading to prolonged periods of detention. Moreover, Mr. Gençtürk was held in a high-security prison for more than nine months before he first had the chance to plead his case before a court. The source also submits that Mr. Gençtürk has a serious hearing impairment, and he could thus not hear the judge properly during the trial hearing, but no one paid any attention to this. Finally, the source reports that, until very recently, detainees at Antalya High Security Prison, including Mr. Gençtürk, could only see their attorneys once per week for 20 minutes, and that a guard would be present during the meetings, with a voice recorder. The Working Group observes that the Government, in its reply, has failed to address any of these allegations.

91. In relation to the allegation made by the source that since the coup attempt in July 2016 no courts in Turkey have been independent and impartial, the Working Group notes the sweeping and general nature of these allegations. There is a failure on the part of the source to identify specific actions of the court that would amount to violations of the requirements of independence and impartiality in relation to the trial of Mr. Gençtürk. However, the Working Group points out that there was a strong appearance of lack of impartiality and independence on the part of the court, as it put questions to Mr. Gençtürk such as “Are you going to say something different from the others?” and the prosecutor reportedly fell asleep during the trial.

92. The Working Group also takes note of the allegation that, as Mr. Gençtürk had lost the hearing in one of his ears and the hearing in his other ear was deteriorating, he was prevented from hearing the proceedings. The Working Group observes that the Government has failed to provide any response to this allegation. The Working Group therefore finds that there was a breach of article 14 (1) of the Covenant, as the inability of Mr. Gençtürk to hear the proceedings and the failure by the court to take appropriate action to remedy the situation deprived him of a fair opportunity to participate in his trial.

93. Moreover, the Working Group also notes that the loss of hearing allegedly occurred due to denial of medical assistance while in detention, yet another allegation which the Government has failed to address. The Working Group feels obliged to remind the Government that, in accordance with article 10 of the Covenant, all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the

<sup>12</sup> Ibid., para. 5.

<sup>13</sup> Ibid., para. 11.

<sup>14</sup> Ibid., para. 12.

human person, and that denial of medical assistance constitutes a violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), and in particular rules 24, 25, 27 and 30.

94. The Working Group notes that the Government has also not addressed the allegations made by the source that Mr. Gençtürk and his lawyer were denied access to the full case file and that evidence from secret witnesses was heard during the trial, in the absence of Mr. Gençtürk.

95. The Working Group therefore considers that the failure of the Government to allow Mr. Gençtürk and his lawyer access to his case file, which had been declared as classified, is a serious violation of the principle of equality of arms as guaranteed by article 10 of the Universal Declaration of Human Rights and articles 14 (1) and 14 (3) (b) of the Covenant — to have a fair hearing and to have adequate time and facilities for the preparation of his defence “in full equality”.<sup>15</sup> Moreover, the Government did not submit any information in response to this allegation made by the source, and it has therefore not demonstrated why restricting access to classified information was necessary and proportionate in pursuing a legitimate aim, such as national security. It has also failed to demonstrate that less restrictive means, such as redacted summaries, providing copies of documents to Mr. Gençtürk for use within the detention facility, or other means of accommodation, would be unable to achieve the same result.

96. The Working Group also notes that the failure to allow the defence to examine the secret witnesses bears the hallmarks of a serious denial of equality of arms in the proceedings and is in fact a violation of article 14 (3) (e) of the Covenant.

97. The Government has also made no submissions in relation to the allegation made by the source that Mr. Gençtürk could only see his lawyer once a week for 20 minutes, and that a guard would be present during the meetings, with a voice recorder. The Working Group emphasizes that the right to communicate with counsel as encapsulated in article 14 (3) (b) of the Covenant entails the requirement that the counsel should be able to meet his or her client in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.<sup>16</sup> Moreover, weekly meetings of a mere 20 minutes’ duration cannot be said to provide an opportunity to adequately prepare for a defence in such a complex case as terrorism charges. The Working Group therefore considers that there has been a serious breach of article 14 (3) (b) of the Covenant.

98. Finally, the Working Group also notes the submission by the source that in response to the application for release made on behalf of Mr. Gençtürk, the decision delivered by the judge was a copy-and-paste decision with exactly the same decision and reasoning as was delivered to other defendants, with only the names being different. The Government had the opportunity, but has failed, to address this allegation. The Working Group notes that a failure to provide a reasoned judgment in the case of Mr. Gençtürk constitutes a breach of article 14 (5) of the Covenant, as it effectively prevents prospective appellants from enjoying the effective exercise of the right to appeal.<sup>17</sup>

<sup>15</sup> See, for example, opinions No. 89/2017, para. 56; No. 50/2014, para. 77; and No. 19/2005, para. 28 (b), in which the Working Group reached a similar conclusion on the violation of the principle of equality of arms when classified information is withheld from the defendant. See also opinions No. 18/2018 and No. 2/2018.

<sup>16</sup> Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 34. See also *Khomidova v. Tajikistan* (CCPR/C/81/D/1117/2002), para. 6.4; *Siragev v. Uzbekistan* (CCPR/C/85/D/907/2000), para. 6.3; and No. 770/1997, *Gridin v. Russian Federation* (CCPR/C/69/D/770/1997), para. 8.5.

<sup>17</sup> See opinions Nos. 70/2017 and 2/2018. See also Human Rights Committee, general comment No. 32, para. 49; and *Kennedy v. Trinidad and Tobago* (CCPR/C/74/D/845/1998), para. 7.5; *Sextus v. Trinidad and Tobago* (CCPR/C/72/D/818/1998), para. 7.3; *Daley v. Jamaica* (CCPR/C/63/D/750/1997), para. 7.4; *Brown and Parish v. Jamaica* (CCPR/C/66/D/665/1995), para. 9.5; *Thomas v. Jamaica* (CCPR/C/65/D/614/1995), para. 9.5; and *Bennett v. Jamaica* (CCPR/C/65/D/590/1994), para. 10.5.

99. The Working Group therefore concludes that the non-observance of the international norms relating to the right to a fair trial in the case of Mr. Gençtürk is of such gravity as to give his deprivation of liberty an arbitrary character (category III).

100. Finally, the source has submitted that the detention of Mr. Gençtürk is arbitrary and falls under category V, as his detention and trial were due to his alleged links with the Gülen group. The Government contests this, arguing that while the detention and trial of Mr. Gençtürk were indeed due to his affiliation with the Gülen group, this was not discriminatory as the group is a terrorist organization.

101. The Working Group notes that Mr. Gençtürk himself had not previously been prosecuted due to his links with the Gülen group nor with any other religious organization. However, the Working Group is mindful of the large number of cases that is emerging before it in relation to Turkey.<sup>18</sup> It is also mindful of the pattern that these cases follow, which in turn corresponds to the pattern documented in the report by the Office of the United Nations High Commissioner on Human Rights on the impact of the state of emergency on human rights in Turkey<sup>19</sup> as well as that observed by the Council of Europe Commissioner for Human Rights.<sup>20</sup>

102. The Working Group is aware that a large number of individuals were arrested following the attempted coup in July 2016. On 19 August 2016, the Working Group, together with other United Nations human rights experts, sent a joint urgent appeal,<sup>21</sup> and subsequently issued a press release on the same date.<sup>22</sup> The experts noted that, since the attempted coup of 15 July 2016, and in particular since the declaration of state of emergency on 20 July 2016, 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 had enabled wide and indiscriminate administrative powers affecting core human rights. The experts added that, while they understood the sense of crisis in Turkey, they urged the Government to uphold its obligations under international human rights law, even in the current time of declared emergency following an attempted coup.

103. The Working Group notes that the present case is but one of a number of cases concerning individuals with alleged links to the Gülen group that has come before it in the past 18 months.<sup>23</sup> In all these cases, the connection between the individuals concerned and the Gülen group has not been one of active membership and support of the group and its criminal activities but rather, as described by the Council of Europe Commissioner for Human Rights, activities of “those who were sympathizers or supporters of or members of legally established entities affiliated with the movement, without being aware of its readiness to engage in violence”.<sup>24</sup> In all those cases, the Working Group has found the detention of the individuals concerned to be arbitrary, and it thus appears to the Working Group that a pattern is emerging whereby those who have been linked to the group are being targeted despite never having been active members of the group or supporters of its

<sup>18</sup> See opinions Nos. 1/2017, 38/2017, 41/2017, 42/2018 and 43/2018. See also the joint urgent appeal of 4 May 2018 on behalf of 13 individuals (UA TUR 7/2018), available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23766>.

<sup>19</sup> OHCHR, “Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East”.

<sup>20</sup> Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey.

<sup>21</sup> See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=3314>.

<sup>22</sup> See [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20285&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20285&LangID=E). On 17 January 2018, the experts issued another press release relating to the state of emergency, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22592&LangID=E>.

<sup>23</sup> See opinions Nos. 1/2017, 38/2017, 41/2017, 42/2018 and 43/2018. See also the joint urgent appeal of 4 May 2018 on behalf of 13 individuals (UA TUR 7/2018), available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23766>.

<sup>24</sup> Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, para. 21.

criminal activities. The Working Group therefore considers that the detention of Mr. Gençtürk is arbitrary, since it constitutes discrimination on the basis of political or other opinion or status and falls under category V.

104. The Working Group wishes to reiterate the position of the Council of Europe Commissioner for Human Rights on the need for Turkey to urgently revert “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.”<sup>25</sup> The Working Group notes that this position is echoed in the recent report by the Office of the United Nations High Commissioner for Human Rights.<sup>26</sup>

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

### **Disposition**

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

The deprivation of liberty of Muharrem Gençtürk, being in contravention of articles 8, 10 and 19 of the Universal Declaration of Human Rights and of articles 2 (3), 9 (3), 14, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

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

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

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

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

### **Follow-up procedure**

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

- (a) Whether Mr. Gençtürk has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Gençtürk;
- (c) Whether an investigation has been conducted into the violation of Mr. Gençtürk’s rights and, if so, the outcome of the investigation;

<sup>25</sup> Ibid., para. 50.

<sup>26</sup> OHCHR, “Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East”.



(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.

112. 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.

113. 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.

114. 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>27</sup>

*[Adopted on 21 August 2018]*

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<sup>27</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.