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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. 42/2018 concerning Mestan Yayman (Turkey)**

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

2. In accordance with its methods of work (A/HRC/36/38), on 11 April 2018 the Working Group transmitted to the Government of Turkey a communication concerning Mestan Yayman. The Government replied to the communication on 7 June 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. Mestan Yayman, born in 1967, is a Turkish national. According to the source, Mr. Yayman used to be a Vice-Governor of the city of Antalya. He was suspended from his duty as a civil servant on 29 August 2016 and was subsequently dismissed from his job under Statutory Decree No. 672, issued on 1 September 2016, under which about 50,000 people were dismissed. Mr. Yayman used to reside in his private residence in Antalya. However, on the same day as his dismissal from public duty, he was taken into custody and his family had to move to another address in Antalya.

Arrest and detention

5. According to the source, Mr. Yayman was visiting his family in the city of Mugla on 1 September 2016 when he was taken into custody by officers from Mugla Police Department. The Department had reportedly been requested by Antalya Police Department to take Mr. Yayman into custody on the basis of a warrant issued by Antalya District Attorney's Office. However, the Mugla police did not show him a warrant when they took him into custody.

6. While Mr. Yayman was being taken into custody, Statutory Decree No. 672 dismissing him from public duty was reportedly issued. From Mugla, he was taken to Antalya police station. During his initial detention period, he was thus not aware of his sudden dismissal from duty. He was not provided with a reason for his detention until 7 September 2016, and he was not allowed to see anyone during his detention. When he was first taken into custody, he lost his sense of day and night as the lights were left on constantly for several days.

7. Mr. Yayman was reportedly not allowed to see his attorney for the first five days of his detention. When he was finally allowed to meet her, they could speak only in the presence of a police officer and in front of a voice recorder.

8. On 7 September 2016, Mr. Yayman was interrogated by a prosecutor and was informed of the reason for his detention. An individual had complained about him, stating that he was a member of the Fethullah terrorist organization. According to the source, the individual was angry with Mr. Yayman.

9. Following the interrogation, Mr. Yayman was subsequently released on parole, at around 8.30 p.m., as the only "crimes" attributed to him were the above-mentioned slander and the fact that one of his daughters attended a school that was legal, despite being affiliated with the Gülen movement. However, the following day, on 8 September 2016, Mr. Yayman was taken into custody again without being given any reason.

10. On 11 September 2016, Mr. Yayman was called for interrogation by another prosecutor, who did not wait for Mr. Yayman's attorney to be present. This time, Mr. Yayman was accused of attending religious talks given by members of the Gülen movement up until 2013, based on statements from one individual. The prosecutor was reportedly very aggressive in his questioning and forced Mr. Yayman to supply names and confess to the crime of attending religious talks. At the request of the prosecutor, Mr. Yayman was subsequently arrested by Antalya Second Criminal Court of Peace and sent to Antalya High Security Prison, where he is still being detained.

11. According to the source, in September 2016, Mr. Yayman was originally accused of membership of a terrorist organization because of his supposed attendance at religious talks in 2013, at a time when the Gülen movement was popular throughout Turkey. The source notes that the Gülen movement was not recognized as a terrorist organization at that time, and that the Turkish Criminal Code does not recognize attending religious talks as a crime. In addition, the "proof" of his affiliation with the Fethullah terrorist organization was reportedly based on statements from one individual.

12. On 2 June 2017, 10 months after his arrest, Mr. Yayman was again called by a prosecutor and interrogated about his supposed use of the encrypted messaging application ByLock. He was accused of using the ByLock application in December 2014, based on an

intelligence report. According to the source, such a report does not constitute proof under the Turkish Code of Criminal Procedure.

13. According to the source, Mr. Yayman is accused of membership of a terrorist organization, under article 314 of the Turkish Criminal Code. However, the minutes of the preliminary hearing reportedly do not mention this article, but rather cite the general reasons for arrest as stipulated in article 100 of the Turkish Code of Criminal Procedure.

14. In this context, the source notes that mass arrests and detentions continue to take place following the attempted coup of 15 July 2016. The source reports that, at the time of submission, there were 57,000 people in detention in Turkey who were charged with or were waiting to be charged with terrorism.

Trial proceedings

15. In September 2017, some 12 months after his arrest, Mr. Yayman was presented with the bill of indictment, and his first trial hearing took place on 7 November 2017. By that time, he had spent 14 months in detention. However, Mr. Yayman was not released. He was asked whether he had used the ByLock application. When the judge asked the main witness whether he had seen Mr. Yayman at any religious talks organized by the Gülen movement, the witness reportedly replied by saying “No”.

16. According to the source, Mr. Yayman’s second and last trial hearing took place on 3 January 2018. He was not informed that this hearing would be his last opportunity to plead. He was simply asked whether he used the ByLock application, to which he replied that he did not. However, as Mr. Yayman could not provide evidence to disprove the contents of the Excel file sent by the Turkish intelligence service, and given that the mere existence of people’s names in lists of “ByLock users” compiled by the intelligence service is sufficient to find people guilty of the crime of membership of a terrorist organization, he was found guilty and given a five-year prison sentence.

17. The source reports that one year was added to the sentence because Mr. Yayman was a “vice-governor who represented the executive branch of the State”, and the total of six years was multiplied by 1.5 pursuant to the Turkish Criminal Code, as the Fethullah terrorist organization is an “armed” terrorist organization. The final sentence of nine years was then reduced by a sixth pursuant to the Turkish Criminal Code, making his final sentence seven years and six months.

18. According to the source, the President of the Court reportedly denied Mr. Yayman’s request for another expert statement as to whether any ByLock communication content existed on his telephone. He also denied Mr. Yayman’s request for witnesses, who were waiting just outside the courtroom, to be heard. Furthermore, he constantly asked Mr. Yayman to keep his defence short. In the context of the second and final hearing, the Court reportedly heard the testimony of the main witness in the absence of Mr. Yayman and his attorney. This witness reportedly clearly stated that he was not complaining about Mr. Yayman, but Mr. Yayman and his defence were not able to cross-examine him.

19. The source reports that Mr. Yayman was not allowed to speak to his lawyer before either trial hearing. He was taken to court at 7 a.m., when it was very cold, and made to wait in a room for more than 10 hours for his trial to start.

20. According to the source, the list provided by the intelligence service, which allegedly proved that Mr. Yayman had used ByLock, merely contains Mr. Yayman’s telephone number. It does not contain a username or any of the content of the communication, or any indication of the people with whom he allegedly had contact through the application.

21. The source also reports that the media was present at Mr. Yayman’s second and final trial hearing. As soon as the verdict was announced, slanderous news reportedly spread all over the Internet, labelling, mocking and belittling Mr. Yayman.

22. The source states that, due to the principle of non-retroactivity, an application that Mr. Yayman was said to have used on 20 December 2014 cannot be linked to events that took place on 15 July 2016, notably an attempted coup about which Mr. Yayman did not

know. In the final verdict, his crime date was indicated as 2 September 2017, and the crime location as the city of Antalya. The source points to the dilemma in this respect, as Mr. Yayman did not commit any crime on that date, as he was already in custody. The source notes that terrorism is a specific crime for which concrete evidence must be provided. However, Mr. Yayman did not have any intention of committing a terrorist act, yet a simple WhatsApp-like decrypted application would appear to be sufficient to sentence people to at least six years and three months in prison, even when the content is non-existent.

23. The source also notes that, at that time, the ByLock application was not available to Gülen organization supporters or sympathizers only; it was available to everyone at both the Google Play and Apple stores. Even if that had not been the case, the Gülen movement was not recognized as a terrorist organization in 2014, which is when Mr. Yayman was said to have used the application. At the time of the submission by the source, there was no final verdict regarding perpetrators of the attempted coup. Therefore, in the Turkish Criminal Code, there is no such crime as “ByLock usage” (*nullum crimen, nulla poena sine lege praevia*).

Applications for release

24. According to the source, applications were filed for Mr. Yayman’s release each month. However, all the complaints were rejected without a reason being given. The source reports that Mr. Yayman’s bank accounts and assets were frozen for a year without any court decision having been taken.

25. On 29 December 2017, the Turkish Supreme Court responded to Mr. Yayman’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 Supreme Court decision referred to the bill of indictment, which was written 12 months after Mr. Yayman’s initial detention. The Supreme Court did not investigate Mr. Yayman’s period of detention prior to the bill of indictment at all.

26. The source notes that the same response was sent to several other people in Mr. Yayman’s prison cell with the same decision and reasoning, the only differences being the names, proving that the decision had been copied and pasted in each case. The source states that even if the Supreme Court had accepted Mr. Yayman’s requests, the first instance court would not have complied, as was seen in other cases.

Conditions of detention

27. According to the source, Mr. Yayman continues to be kept in a prison cell which was designed for 14 people. For most of the time, however, a total of 48 detainees have been kept in the cell. Mr. Yayman reportedly had to sleep on the floor for the first three months of his arrest.

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

Legal analysis

29. The source submits that the deprivation of liberty of Mr. Yayman 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. According to the source, article 100 of the Turkish Code of Criminal Procedure provides for the reasons for arrest. According to this article, 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 the provisions of judicial control (parole) are not available or sufficient.

31. To this end, the source notes that in respect of the detentions following the attempted coup of 15 July 2016, many individuals were released on parole without having been arrested, and thousands who were 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 refers to article 108 (3) of the Code of Criminal Procedure, according to which the situation of the accused in detention will be evaluated each month. However, tens of thousands of individuals who have reportedly been in detention for months remain in detention, and the number is still rising despite the fact that court proceedings, for some individuals, have begun. The source highlights that article 108 (3) was added to the Code of Criminal Procedure so that arrests do not turn into a punishment rather than being a security measure. However, thousands of individuals are still kept in detention in relation to the Turkish intelligence service's list of users of the ByLock application, which does not constitute a crime under the Turkish Criminal Code.

33. In relation to the present case, the source submits that other than the Turkish intelligence service's list of names, the so-called "arrest list", the court has failed to show the content of Mr. Yayman's supposed chats on ByLock. His deprivation of liberty is thus arbitrary. There are reportedly over 100,000 ByLock users, and the source submits that it is not sufficient to refer to the use of an application in order to declare a person a terrorist and to keep him or her in detention for a period ranging from 7 and a half to 22 and a half years. The source also reports that the IP addresses of ByLock are said to have been rented from Baltic Servers, a company that 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 in Turkish law. The source thus states that the legality of the so-called ByLock proof is questionable.

34. The source asserts that, had it not been for the fact that Turkey had declared a state of emergency, no independent judge would have found a legal basis to keep Mr. Yayman in detention.

Category II

35. The source submits that article 18 of the Universal Declaration of Human Rights and article 18 of the International Covenant on Civil and Political Rights have been breached, as Mr. Yayman was arrested for the supposed crime of having attended religious talks organized by the Gülen movement in 2013.

36. The source also submits that article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant have been breached. Mr. Yayman has been accused of using the ByLock communication application, the use of which was legal. Furthermore, he was reportedly accused of having used this application in December 2014. In this respect, the source notes that it is highly illogical for a supposed chat that took place in December 2014 to be related to an attempted coup in July 2016.

37. The source further submits that article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant have also been breached. All individuals, including Mr. Yayman, who were arrested on the basis that they were accused of belonging to the Fethullah terrorist organization are discriminated against. They do not have access to education in detention, they are not allowed to exchange letters, and the visit allowance allocated to them is limited compared to other inmates. The source also reports that they are constantly subjected to libellous media statements and, the minute they are taken into custody, immediately labelled as "Feotist", which is short for Fethullah terrorist organization member. The source also notes that individuals charged with terrorism have to wear a prison suit, whereas those charged with other crimes have no such obligation.

38. According to the source, article 13 of the Universal Declaration of Human Rights and article 12 of the Covenant have also been breached. When Mr. Yayman was taken into custody in relation to the Fethullah terrorist organization, his passport and those of his

entire family were reportedly confiscated, without any judicial decision having been handed down. In addition, article 21 of the Universal Declaration of Human Rights and article 25 of the Covenant have been breached, because Mr. Yayman lost his job as a civil servant, along with his right to social security.

Category III

39. The source submits that articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant have also been breached.

40. The source notes that for over a year, the arrests have continued in Turkey and, at the time of submission, approximately 60,000 people from all sectors of society had been arrested on suspicion of being affiliated with the Fethullah terrorist organization. Acts that cannot be counted as crimes are now reportedly regarded as crimes and retroactive crimes are being created. According to the source, it is now almost the rule in Turkey to arrest people and then make them wait for at least six months before they can plead their case before a judge. However, those who are lucky enough to stand trial after six months are outnumbered by those who are not. In the case of Mr. Yayman, he was in detention for more than a year before his trial.

41. The source reports that under Turkish law, there are two conditions for arrest, which must exist at the same time: strong evidence and the likelihood that the detainee will escape. In the case of Mr. Yayman, parole provisions could have been applied as all his assets are in Turkey and did not have any intention of escaping.

42. According to the source, following the attempted coup of 15 July 2016, a quarter of the judges and prosecutors in Turkey were dismissed and arrested. The source highlights that the judiciary is not independent in Turkey and is allegedly under threat from the Government, which is using the state of emergency for its own agenda. Members of the ruling party are almost always present at trials, making it even more difficult for judges to decide on cases independently. Judges who decide to release individuals accused of affiliation with the Fethullah terrorist organization reportedly face threats or have been indefinitely suspended following their decisions.

43. The source also reports that, until very recently, detainees at the Antalya High Security Prison, including Mr. Yayman, could see their attorneys only once a week for 20 minutes, and a guard with a voice recorder would be present during the meetings. Sometimes attorneys had to wait five hours before they could see their client. Mr. Yayman's attorney is based in another city and she cannot travel to Antalya every week. The source reports that one week, she went on a Monday and was denied the possibility of seeing her client as the attorney visiting day had been moved to Tuesday.

44. The source also submits that in order to become a member of a terrorist organization, there first needs to be a terrorist organization. However, in the present case, the Gülen movement was not recognized as a terrorist organization when Mr. Yayman supposedly committed the crime of attending a religious talk and subsequently, when he was accused of using the ByLock application. He was reportedly interrogated in June 2016 for supposedly having used that application back in 2014. Like thousands of other people, Mr. Yayman reportedly learned about the application on television.

Category V

45. Lastly, the source submits that Mr. Yayman was discriminated against for having a supposed affiliation to a religious group. One of his daughters was attending Toros Middle School, which he was asked about during his first interrogation and which is among the "terrorism criteria" designated by the Government following the attempted coup.

Response from the Government

46. On 11 April 2018, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 11 June 2018, detailed information about the current situation of Mr. Yayman 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, particularly with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government to ensure Mr. Yayman's physical and mental integrity.

47. In its reply of 7 June 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 attempted coup of 15 July 2016 and the measures taken. For reference, the Government submits background information with regard to the Fethullah terrorist organization and the measures taken against it, along with other terrorist organizations.¹

Circumstances of the case

48. In relation to the present case, the Government reports that Mr. Yayman was dismissed on 25 August 2016 by the decision of the General Directorate of Security of the Ministry of the Interior because of the link with the Fethullah terrorist organization, and placed in police custody on the orders of the Attorney General of Antalya. While in custody, all his rights were read to him, one by one, and he had the right to inform his relatives. In addition, while in custody, he met with his lawyer.

49. Mr. Yayman was detained by Antalya Police Court on the ground of membership of a terrorist organization. In its decision, the court took into account the following: there were concrete facts; the state of the evidence; the statements against the accused, which demonstrated the existence of a strong suspicion of commission of the offence; the court was continuing to collect evidence and analyse the digital evidence; the high likelihood that the evidence would be tainted; and the nature of the offence. The court therefore decided to detain Mr. Yayman.

50. The decision to detain Mr. Yayman was examined several times by Antalya Police Court, including on 12 October 2016, 10 November 2016, 9 December 2016, 9 January 2017, 9 February 2017, 8 March 2017, 7 April 2017, 6 May 2017, 9 June 2017, 3 July 2017 and 3 August 2017. Given the nature of the offence of which Mr. Yayman was accused; the documents and information in the file; the fact that the competent authorities had still to collect information; the ceiling of the penalty provided; the finding of use of ByLock; and since the offence was cited in article 101/3-a-11, the court decided to extend Mr. Yayman's detention.

51. The Government states that Mr. Yayman was given the opportunity to appeal to the competent courts to challenge the decisions to extend his period of detention, and his motions were not considered well founded in law and fact and were dismissed.

52. With regard to the allegations concerning Mr. Yayman's conditions of detention, the Government notes that he was detained in a unit for a total of 28 prisoners, including seven rooms of 12.45 m² each. These units comply with the criteria of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

53. Mr. Yayman reportedly requested an interview with the Deputy Director of the prison, which was granted to him on 19 February 2018. Since then, he has not sent any other request with regard to anything. In addition, he has benefited from the prison library and according to the library register, he has already borrowed 36 books.

54. The Government refers to the case law of the European Court of Human Rights, whereby a reasonable suspicion and plausible reasons are necessary in order to deprive a person suspected of having committed a crime of his or her freedom. This condition must exist at each extension of detention. The Government underlines that Mr. Yayman was

¹ For full background information, see, for example, opinions No. 38/2017, paras. 22–30, and No. 44/2018, paras. 42–49.

detained because there were strong and reasonable suspicions about the commission of the offence by him.

55. The Government also notes that, in accordance with the case law of the European Court of Human Rights concerning article 5 (1) (c) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), for the extension of the period of detention, it is necessary not only that a reasonable suspicion continues to exist at the time of the decision to extend, but there should also be a public interest justifying the deprivation of liberty. In the present case, there was sufficiently tangible evidence to trigger a public action, which resulted in a conviction on 3 January 2018 by the Tenth Chamber of the Assize Court of Antalya.

56. As a result, given the existence of reasonable suspicions, hard evidence and the declaration of a state of emergency in Turkey, the decision to arrest and detain Mr. Yayman is fully in line with the jurisprudence of the European Court of Human Rights and the obligations of Turkey under the human rights conventions to which it is a party.

57. The Government notes the allegations made by the source that Mr. Yayman was not informed that the second hearing on 3 January 2018 was the last one, in order to make his final argument, and that he was sentenced to five years' imprisonment simply on the basis of the fact that his name was on the ByLock user list established by the Turkish intelligence service. In this respect, the Government reports that Mr. Yayman was sentenced following hearings held on 7 November 2017 and 3 January 2018. However, contrary to the allegations, the Tenth Chamber of the Assize Court of Antalya not only took into account the claims of the various parties, including Mr. Yayman, but also all the evidence submitted by the Attorney General and obtained by judicial means. This included the record of the accused's conversations through the ByLock system, which is a secret and coded communication system that was used exclusively by and between members of the Fethullah terrorist organization.

58. After evaluating the documents and evidence obtained and hearing the witnesses, the court first sentenced him to six years in prison based on the fact that the offence was a terrorist offence pursuant to article 5 (1) of Law No. 3113. His sentence was increased by half and he was sentenced to nine years in prison. Given his conduct during the trial and the effects of the sentence on the future of the defendant, a reduction of a sixth of the sentence was applied. He was finally sentenced to seven and a half years' imprisonment with the deduction of time spent in prison.

59. According to the Government, Mr. Yayman appealed this decision before the Appeal Court of Antalya, where his petition is registered under number 2018/815 of the Second Criminal Chamber of Antalya.

60. The Government underlines that, in view of the information provided by the authorities, it is clear that Mr. Yayman has submitted his case to the Working Group without having used his right to apply to the Turkish courts and exhausted existing and effective remedies in Turkey.

61. The Government refers to a number of effective legal remedies available in Turkey to annul or rectify any judicial or administrative decisions which have or may violate the rights of persons within its territory. These include articles 91 (5) and 141 of the Code of Criminal Procedure, the Law on Administrative Procedure No. 2577 and article 48 of the Constitution, following its amendment in 2010.

62. In relation to Mr. Yayman's appeal, the Government reports that the Second Criminal Chamber of Antalya, as the Appeals Court in his case, has the possibility either to judge the case in fact and in law, to confirm the decision of the Assize Court or to overturn that decision and to remit the case to the courts of first instance. Moreover, in case of rejection of his appeal and confirmation of the decision by the Assize Court, Mr. Yayman still has the cassation route to enforce his right. However, he preferred to address the Working Group without exhausting the existing and effective remedies.

63. In conclusion, the Government considers that Mr. Yayman's allegations are unfounded and that Turkey has acted in accordance with its domestic law and the human rights conventions to which it is a party. It also considers that there are effective remedies

in the country and that Mr. Yayman should have exhausted those remedies before referring the case to the Working Group, in the event that he did not obtain satisfaction for the alleged violations of his rights.

64. In view of the foregoing, the Government requests the Working Group to reject Mr. Yayman's unfounded allegations and to dismiss them on the basis of non-exhaustion of domestic remedies and non-violation of his rights.

Further comments from the source

65. On 12 June 2018, the Working Group sent the Government's reply to the source for any further comments. The source did not provide further comments.

Discussion

66. 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.

67. At the outset, the Working Group would like to stress that the procedural rules to handle communications from sources and 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 that impedes the consideration of communications due 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.²

68. As a further preliminary issue, the Working Group notes that the Government of Turkey argues that the situation of Mr. Yayman 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.³

69. While acknowledging the notification of those derogations, the Working Group emphasizes that, in the discharge of its mandate, it is empowered under paragraph 7 of its methods of work to refer to the relevant international standards set forth in the Universal Declaration of Human Rights, and to customary international law. Moreover, in the present case, articles 9 and 14 of the Covenant are most relevant to the case of Mr. Yayman. 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.

70. The source has submitted that the detention of Mr. Yayman is arbitrary and falls under categories I, II, III and V, while the Government denies these allegations. The Working Group shall proceed to examine each of the categories in turn.

71. The source has submitted that the arrest and subsequent detention of Mr. Yayman is arbitrary and falls under category I. The court noted that Mr. Yayman was included on the Turkish intelligence service's list of names, the so-called arrest list, but it failed to show the content of his supposed chats on ByLock. The source submits that ByLock is reportedly said to have over 100,000 users, and it is thus not sufficient to refer to the use of an

² See opinions Nos. 11/2000, 19/2013, 38/2017, 8/2018, 43/2018 and 44/2018.

³ 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>.

application in order to declare a person a terrorist and to keep him or her in detention for a period ranging from 7 and a half to 22 and a half years.

72. The Working Group recalls that it considers a detention to be arbitrary under category I if the detention lacks legal basis. In the present case, the Working Group must therefore examine the circumstances of Mr. Yayman's arrest. The Working Group notes that Mr. Yayman was first arrested on 1 September 2016. While there was allegedly a warrant issued for his arrest, he was not shown the warrant and he was in fact not provided with any reasons for his arrest until 7 September 2016. He was released on 7 September, but then rearrested on 8 September 2016 and no reasons for this were given by the authorities until he was presented before a prosecutor on 11 September 2016. Mr. Yayman has remained in custody since 8 September 2016.

73. The Government argues that while in custody, Mr. Yayman was read his rights, one by one, and advised of his right to inform his relatives. However, the Government has not specified the date on which Mr. Yayman was taken into custody, only that he was dismissed on 25 August 2016 and taken into custody thereafter.

74. The Working Group recalls that article 9 (2) of the Covenant requires that anyone who is arrested is not only informed of the reasons for arrest at that time but also promptly informed of any charges against them. The right to be promptly informed of charges concerns notice of criminal charges; as the Human Rights Committee has noted in its general comment No. 35, this right applies in connection with ordinary criminal prosecutions and also in connection with military prosecutions or other special regimes directed at criminal punishment (para. 29).

75. The Working Group observes that six days passed between Mr. Yayman's first arrest and the day he was notified of the reasons for his arrest; and in the case of the second arrest, four days passed before he received the notification. The Government argues that while in custody, Mr. Yayman was read his rights, one by one. However, the Working Group finds that a recital of rights is not the same as informing the person of the reasons for his or her arrest and/or of the charges against him or her.

76. While it appears that a warrant had been issued at least for the first arrest, it was not shown to Mr. Yayman, who was thus unaware of the reasons for his arrest. Equally, when Mr. Yayman was arrested for the second time, no reasons for that second arrest were provided. In other words, the Turkish authorities failed twice to formally invoke a legal basis justifying the detention of Mr. Yayman. The Working Group therefore concludes that there has been a breach of article 9 (2) of the Covenant.

77. Furthermore, in order to establish that a detention is indeed legal, anyone who is detained has the right to challenge the legality of his or her detention before a court, as enshrined in article 9 (4) of the Covenant. The Working Group wishes to recall that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society (paras. 2–3). This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty (para. 11) and all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes (guideline 1, para. 47 (a)). Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary (*ibid.*, para. 47 (b)).

78. The Working Group underlines that, in order to ensure the effective exercise of this right, detained persons should have access, from the moment of arrest, to legal assistance by counsel of their choice, as stipulated in the above-mentioned Principles and Guidelines (principle 9, paras. 12–15). The Government argues that Mr. Yayman met with his lawyer

while in custody, but it has not provided the date of that meeting. The Working Group thus concludes that the right to have access to a lawyer was denied to Mr. Yayman for at least the first five days of his detention. This had a serious and adverse effect on his ability to effectively exercise his right to challenge the legality of his detention, denying his rights under article 9 (4) of the Covenant.

79. The Working Group therefore concludes that, since the arrest and detention of Mr. Yayman took place without presenting him with an arrest warrant on two occasions, since no formal charges were brought against him for six days (in relation to the first arrest) and four days (in relation to the second arrest), and since he was effectively prevented from exercising his right to challenge the legality of detention, his arrest and detention are arbitrary and fall under category I.

80. The source has further argued that the detention of Mr. Yayman is arbitrary and falls under category II as he has been arrested and tried for having attended religious talks organized by the Gülen movement in 2013 and for having used the ByLock communication application.

81. The Government in turn has argued that Mr. Yayman was sentenced following hearings held on 7 November 2017 and 3 January 2018, noting that the Tenth Chamber of the Assize Court of Antalya not only took into account the claims of the various parties, including Mr. Yayman, but also all the evidence submitted by the Attorney General and obtained by judicial means. In relation to the latter, the Government has argued that the tribunal requested and obtained the record of the accused's conversations through the ByLock system.

82. The Working Group is puzzled by the Government's submission that the tribunal was able to hear and assess all this complex evidence and these submissions from all the parties cited by the Government and to produce a reasoned judgment, given that Mr. Yayman was sentenced during the second of the two hearings, on 3 January 2018, to a rather lengthy prison term of seven and a half years.

83. The Working Group takes note of the report of the Office of the United Nations High Commissioner on Human Rights (OHCHR) on the impact of the state of emergency on human rights in Turkey, including an update on the south-east: January–December 2017. In the report, OHCHR 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. It concluded that:

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 (para. 65).

84. The Working Group notes that the case of Mr. Yayman appears to follow the pattern described in that report.

85. 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 the Fethullah terrorist organization a terrorist organization in 2015, the fact that this organization is prepared to use violence had not become apparent to Turkish society at large until the attempted coup in July 2016. In this respect, the Working Group refers to a

memorandum of the Council of Europe Commissioner for Human Rights.⁴ The Commissioner pointed out that there is a need “when criminalising membership and support of this organisation, to distinguish between persons who engaged in illegal activities and those who were sympathisers or supporters of, or members of legally established entities affiliated with the movement, without being aware of its readiness to engage in violence”.⁵

86. The Working Group observes that the core of the allegations against Mr. Yayman is his alleged alliance with the Gülen group in 2013, which is said to have manifested itself through his attendance at meetings of the group at that time and his use of the ByLock communications application. However, the Government has failed to show any illegal actions in Mr. Yayman’s conduct which could be construed as Mr. Yayman being a supporter of a criminal organization. His attendance at the talks organized by the Gülen group in 2013 took place well before this organization was designated as a terrorist organization by the Turkish authorities some two years later, and the Government has not shown any evidence that Mr. Yayman’s attendance led to any criminal actions.

87. The Working Group also notes the failure on behalf of the Government to show how the mere use of such a regular communication application as ByLock by Mr. Yayman constituted an illegal criminal activity. While the Government has argued that the tribunal requested and obtained the record of the accused’s conversations through the Bylock system, it failed to specify how these conversations could have been construed as criminal activity. Noting the widespread reach of the Gülen movement, as documented in the report of the Council of Europe Commissioner for Human Rights, “it would be rare for a Turkish citizen never to have had any contact or dealings with this movement in one way or another”.⁶

88. In fact, it appears to the Working Group that even if Mr. Yayman did use the ByLock application, an allegation that he denies, it would have merely constituted exercise of his right to freedom of opinion and freedom of expression. The Working Group notes that, as stated by the Human Rights Committee in its general comment No. 34 (2011) on the freedoms of opinion and expression, freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society (para. 2). No derogations can be made to freedom of opinion simply because it can never become necessary to derogate from it during a state of emergency (para. 5).

89. The Working Group notes that freedom of expression includes both the right to seek, receive and impart information and ideas of all kinds regardless of frontiers, and the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions (para. 11). Moreover, article 19 (2) of the Covenant protects all forms of expression and the means of their dissemination, including all forms of audiovisual, electronic and Internet-based modes of expression (para. 12).

90. In addition, the Working Group notes that the Government cannot claim the restriction to freedom of expression provided for in article 19 (3) of the Covenant. When a State party imposes restrictions on the exercise of freedom of expression, the restrictions may not put in jeopardy the right itself (para. 21). Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated (para. 4).

⁴ Council of Europe, Commissioner for Human Rights, “Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey”, CommDH(2016)35, 7 October 2016, p. 4.

⁵ Ibid, para. 21.

⁶ Ibid., para. 20.

91. The Working Group observes that the Government has failed to explain how the restrictions to the freedom of expression imposed upon Mr. Yayman comply with the provisions of article 19 (3).

92. In relation to Mr. Yayman's attendance of the meetings of the Gülen group in 2013, the Working Group once again observes the failure on behalf of the Government to specify how mere attendance at peaceful and, at that time, legitimate meetings breached the right to freedom of peaceful assembly and association and was contrary to articles 21 and 22 of the Covenant.

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

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

95. The source has submitted that the detention of Mr. Yayman is arbitrary and falls under category III since he was charged and convicted retroactively; since his trial was unduly delayed; since the courts that examine cases concerning individuals with alleged links to the Gülen group are not independent; and since Mr. Yayman was denied the opportunity to communicate privately with his lawyer. The Government denies these allegations.

96. The Working Group notes the allegation made by the source that the court examining the case of Mr. Yayman lacked the requisite degree of independence. However, the source has not furnished any specific examples that would substantiate this claim, but rather has made broad allegations of a general nature that since the attempted coup of 15 July 2016, a quarter of judges and prosecutors in Turkey have been dismissed and arrested and that since then, the judiciary has lacked independence. The Working Group is unable to accept such a sweeping statement. In the absence of specific information from the source as to how the lack of independence manifested itself in the court that examined the case of Mr. Yayman, the Working Group is unable to reach any conclusions on the matter.

97. The Working Group is also unable to reach any conclusion on the submission regarding the retroactive application of the law in the case of Mr. Yayman as, by the source's own submission, no new crime of using the ByLock application has been introduced in the Criminal Code of Turkey. Mr. Yayman has rather been charged for alleged terrorist activities, which is part of the criminal law in Turkey.

98. The Working Group notes the allegation by the source that during Mr. Yayman's trial, the judge denied his request for another expert statement as to whether the ByLock application was found on his telephone. The judge also allegedly denied witnesses on behalf of Mr. Yayman the right to be heard. The Government did not address these allegations directly, although it had the opportunity to do so.

99. At the outset, the Working Group notes that prior to the trial proceedings, Mr. Yayman was denied the possibility to meet with his lawyer in private, as a guard with a tape recorder was always present during those meetings. In this respect, the Working Group notes that, as indicated by the Human Rights Committee in its general comment No. 32, the right to communicate with counsel, as enshrined in article 14 (3) (b) of the Covenant, entails the requirement that legal counsels 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 (para. 34).⁷ That right was denied to Mr. Yayman. Moreover, the meetings with his lawyer were restricted to a mere 20 minutes, a time period so short that it cannot be

⁷ See also *Khomidov v. Tajikistan* (CCPR/C/81/D/1117/2002), para. 6.4; *Siragev v. Uzbekistan* (CCPR/C/85/D/907/2000) para. 6.3; and *Gridin v. Russian Federation* (CCPR/C/69/D/770/1997 and Corr.1), para. 8.5.

said to satisfy the requirements of article 14 (3) (b). In addition, once the trial proceedings commenced, Mr. Yayman was prevented from speaking to his lawyer before both trial hearings, which is a further violation of article 14 (3) (b) of the Covenant.

100. The Working Group also recalls that, as the Human Rights Committee stated in its general comment No. 32, article 14 (3) (e) of the Covenant provides for the right to have witnesses admitted that are relevant for the defence and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings (para. 39). The Working Group thus considers that there have been serious prima facie breaches of Mr. Yayman's rights under article 14 (3) (e) of the Covenant as well.

101. In addition, the Working Group observes that the trial judge made requests for the defence to keep defence short and that the court heard the testimony from a key witness in the absence of both Mr. Yayman and his lawyer. The Working Group especially notes that the Government has failed to provide any reasons as to why the key witness was heard without the presence of Mr. Yayman and his lawyer. This is a further serious denial of Mr. Yayman's rights under article 14 (3) (e) of the Covenant.

102. The Working Group also notes that the submissions made by the source in relation to the fair trial rights violations in the case of Mr. Yayman appear to closely follow a general pattern as evidenced by the Commissioner for Human Rights of the Council of Europe, who noted that "the persons in question [those dismissed under the decrees ordering the dismissals] were not provided with evidence against them and were unable to defend themselves in an adversarial manner in many cases".⁸

103. The Working Group therefore concludes that there has been partial non-observance of the international norms relating to the right to a fair trial in the case of Mr. Yayman, as he was denied the right to adequate time and facilities to prepare for his defence and was prevented from presenting evidence and examining witnesses on his behalf. The Working Group finds that this partial non-observance was of such gravity as to give his deprivation of liberty an arbitrary character (category III).

104. Lastly, the source has submitted that the detention of Mr. Yayman 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. Yayman were indeed due to his affiliation with the Gülen group, this was not discriminatory as the group is a terrorist organization.

105. The Working Group notes that Mr. Yayman himself had not previously been prosecuted due to his links with the Gülen group or with any other religious organization. However, the Working Group is mindful of the large number of cases being brought before it in relation to Turkey.⁹ It is also mindful of the pattern that these cases follow, which corresponds to the pattern documented in the above-mentioned reports of OHCHR and the Commissioner for Human Rights of the Council of Europe.

106. 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, in association with other United Nations human rights experts, sent a joint urgent appeal¹⁰ and subsequently issued a press release on the same date.¹¹ The experts noted that, since the attempted coup on 15 July, and in particular since the declaration of a state of emergency on 20 July, Turkish society had seen an escalation of detentions and purges, particularly in

⁸ Council of Europe, Commissioner for Human Rights, "Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey", paras. 23–24 and 26.

⁹ See opinions Nos. 1/2017, 38/2017, 41/2017, 43/2018 and 44/2018. 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>.

¹⁰ See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=3314>.

¹¹ See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20285&LangID=E. On 17 January 2018, the experts issued another press release in relation to the state of emergency, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22592&LangID=E.

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 affected core human rights. The experts, while understanding the sense of crisis in Turkey, urged the Government to uphold its obligations under international human rights law, even during the declared emergency following the attempted coup.

107. 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 have come before it in the past 18 months.¹² 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 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 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 criminal activities. The Working Group therefore considers that the detention of Mr. Yayman was arbitrary since it constitutes discrimination on the basis of political or other opinion or status and falls under category V.

108. 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”.¹⁴ The Working Group notes that this position is echoed in the recent, above-mentioned OHCHR report.

109. 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 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

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

The deprivation of liberty of Mestan Yayman, being in contravention of articles 3, 9, 10, 19 and 20 of the Universal Declaration of Human Rights and of articles 9, 14, 19, 21, 22 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

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

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

¹² See opinions Nos. 1/2017, 38/2017, 41/2017, 43/2018 and 44/2018. See also the joint urgent appeal of 4 May 2018 on behalf of 13 individuals (UA TUR 7/2018).

¹³ Council of Europe, Commissioner for Human Rights, “Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey”, p. 4.

¹⁴ *Ibid.*, p. 10.

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

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

Follow-up procedure

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

116. 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.

117. 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.

118. 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.¹⁵

[Adopted on 21 August 2018]

¹⁵ See Human Rights Council resolution 33/30, paras. 3 and 7.