
Advance Edited VersionDistr.: General
30 January 2020

Original: English

Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its eighty-sixth session, 18–22 November 2019****Opinion No. 79/2019 concerning Ercan Demir (Turkey)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 19 July 2019, the Working Group transmitted to the Government of Turkey a communication concerning Ercan Demir. The Government replied to the communication on 17 October 2019. 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. Ercan Demir is a citizen of Turkey, born in August 1965, who usually resides in Sinop, Turkey. Before his arrest, Mr. Demir was an English teacher.

(a) Arrest and detention

5. According to the source, Mr. Demir was arrested by the police at 3 a.m. on 25 July 2016 at his home. The source explains that the police had no arrest or search warrant and did not inform Mr. Demir about the reasons for his arrest. Reportedly, when he asked them, the police told him that it was a secret investigation and that they could only say that the case was related to the so-called “Fethullah terrorist organization/Parallel State Structure”, which is referred to as the Hizmet movement by followers.

6. The source explains that Mr. Demir was handcuffed and taken to the police station in Sinop, where he was questioned by the police without the presence of a lawyer. Mr. Demir was not allowed to contact any family members. He was reportedly detained in an underground, small and unsanitary cell at the police station without any information about why he had been arrested, and he could therefore not prepare for interrogation. He was subjected to severe sleep deprivation.

7. Allegedly, prior to the interrogation by the prosecutor, Mr. Demir was not permitted to meet with a lawyer, and he saw a lawyer only once he was in the room of the prosecutor who questioned him.

8. The source explains that Mr. Demir remained in custody until 28 July 2016. On that day, he was brought before a judge and was subsequently placed in detention, without any evidence against him or any grounds for keeping him in detention being presented. Mr. Demir was not allowed to present any information in his defence; he was solely questioned by a prosecutor asking about “his life story”. Mr. Demir was presented with allegations and general questions, including about where he worked, when he was married and why he worked in various places. No direct evidence against him was presented. All of the evidence referenced by the authorities was circumstantial and/or factually incorrect. The source claims that Mr. Demir was made to sign a document stating that he had been given enough time and the proper environment to meet with his attorney and that he had given the testimony set out in the document of his free will, even though he was not even given enough time to read the document.

9. The source adds that Mr. Demir was not allowed to choose his own lawyer. The Government provided him with a State-appointed attorney, but the attorney avoided meeting with him and tried to convince him to concede the charges, whereas his private attorney was deprived of basic information related to Mr. Demir. As mentioned previously, Mr. Demir could not meet with his lawyer before the questioning began, and, during the questioning, his lawyer’s ability to speak in his defence or to object to any questions or answers was limited.

10. The source claims that, after 10 months of detention, upon receipt of the casefile from Sinop Heavy Penal Court, Mr. Demir learned that he was accused of the following categories of offence: having a bank account at Bank Asya; being a teacher at a Hizmet movement-affiliated college; being a member of any Hizmet movement-affiliated associations; being a member of a teachers’ union; making donations to charity organizations; organizing fundraising for students in need; sharing or retweeting posts of any Hizmet movement-related social media account; subscribing to any Hizmet movement-affiliated newspaper, journal or magazine; sending his children to schools promoting the Hizmet movement ideology; working for Hizmet-movement affiliated institutions; and cancelling Digiturk subscriptions.

11. The source indicates that Mr. Demir was held in detention for 11 months and 26 days without any official indictment. He was released on 21 July 2017. On 24 May 2019, Mr. Demir was acquitted by the Sinop Heavy Penal Court on the basis of the fact that there was not enough proof to show guilt, pursuant to article 223 (2) (e) of the Code of Criminal Procedure. In addition, reportedly, the Extraordinary State Commission forbade him from returning to his employment, given that he had been employed by the State. The source also

reports repercussions affecting some of his family members, such as prohibition from applying for vacancies in State employment, dismissal from employment and arrest and detention owing to use of the encrypted messaging application software ByLock on a smartphone.

(b) Legal analysis

(i) Category I

12. The source indicates that Mr. Demir was arrested and detained without any legitimate legal basis, in violation of domestic law, article 9 of the International Covenant on Civil and Political Rights and article 9 of the Universal Declaration of Human Rights.

13. The source provides background information on the context of the attempted coup d'état of 15 July 2016 and the multiple arrests and detentions that have followed, even though the arrested individuals had no connection to it. In the present case, the source argues that Mr. Demir was arrested and detained without being shown any evidence about the aftermath of the events of 15 July 2016 and claims that the detention was carried out when there was no reasonable suspicion of his having committed the alleged crime.

14. According to the source, the reasons for arrest and detention of Mr. Demir concern legal activities and his fundamental human rights protected by articles 18, 19, 21, 22 and 25–27 of the Covenant.

15. The source submits that the Government has outlined a number of actions as general pretexts for the arrest and detention of certain individuals, even though they are not defined as crimes under the law, which is contrary to the principle of legality. They include: having subscriptions to the Hizmet movement-affiliated *Zaman* newspaper, journal or magazine; being a client of movement-affiliated institutions, such as Bank Asya; holding union membership; holding membership in a business association; volunteering for the Kimse Yok Mu charity; possessing books or other materials of Fethullah Gülen; cancelling Digiturk subscriptions; possessing \$1 bills; and using the criminalized encrypted messaging software application ByLock.

16. The source reports that Mr. Demir was arrested also contrary to domestic law, in particular article 91 (2) of the Code of Criminal Procedure, without there being reasonable suspicion of his having committed a crime. Furthermore, he was detained without solid evidence in the casefile to suggest strong criminal suspicion, contrary to articles 100 and 101 of the Code, and no justification for the detention was given. As noted above, all allegations against Mr. Demir were for legal activities and rights protected under the Covenant.

17. The source alleges that the arrest and detention warrants included no concrete facts or justifications for detention, nor did they indicate why judicial control would have been insufficient. Neither contained any evidence demonstrating a strong suspicion of the commission of a crime by Mr. Demir. Moreover, the source argues that none of the decisions for detention or for its continuation met the basic requirements enshrined in domestic law, but rather consisted of formulaic expressions showing the lack of solid evidence, facts and findings, and that therefore the authorities failed to justify the detention.

18. In addition, the source recalls that Mr. Demir was deprived of liberty for almost a year without an official indictment and notes that the authorities therefore did not prepare the official indictment in a speedy manner.

19. The source also argues that Mr. Demir was kept in detention in inhumane conditions for three days before the process began. The source claims that such a practice amounts to a violation of article 9 of the Covenant. That article was also breached by the fact that Mr. Demir was held in detention for a prolonged period, even though he had nothing to do with the coup attempt and there was no justification requiring the extension of his detention. Moreover, the source specifies that that measure is impossible to justify with the events that led to the state of emergency, given that the coup attempt failed and the Government announced before the end of July 2016 that any potential danger was over, which means that the detention cannot have been a measure required under the state of emergency.

(ii) Category II

20. The source submits that the accusations against Mr. Demir concern his fundamental rights, which are protected under articles 18, 19, 21, 22 and 25–27 of the Covenant, and that his arrest violates those rights as follows:

(a) With regard to the accusation related to the subscription to Hizmet movement-affiliated newspapers, journals, magazines or possession of Gülen's books or other written and visual materials, the source underlines that, before the coup attempt, such materials were legal and had been sold with the permission of the Ministry of Culture. Moreover, in a country where the rule of law is respected, newspapers, journals and magazines that do not promote terrorism or violence cannot be banned and people in possession of such items cannot be accused of being members of terrorist organizations. According to the source, therefore, those activities are protected under articles 18 and 19 of the Covenant;

(b) With regard to the accusations of being a member of, working for, and acquiring services from Hizmet movement-affiliated associations, unions, foundations and other institutions, the source indicates that, following the coup attempt, those associations were closed, from 23 July 2016 pursuant to Decree Law No. 667. Accordingly, before that day, they were officially registered, duly authorized and legitimate. The source notes that belonging to those groups was legal, as well as working for them or acquiring services from them, and such activities are protected under articles 8, 19, 21, 22, 25 and 26 of the Covenant;

(c) With regard to the accusation of participating in fundraising activities and making donations to Hizmet movement-related charity organizations, the source argues that, after the coup attempt, all such organizations, foundations, schools and institutions were shut down, on 23 July 2016, pursuant to Decree Law No. 667. Prior to that date, they were officially registered, duly authorized, legitimate and legal. Activities related to volunteering, fundraising and making donations are protected under articles 18, 21, 22 and 26 of the Covenant;

(d) With regard to the accusation of participating in social gatherings and other social activities, the source submits that mere participation in social gatherings or social activities without promoting terrorism or violence cannot be banned and that such activities are protected under articles 18, 19, 21 and 26 of the Covenant;

(e) With regard to the accusation of downloading and using encrypted messaging applications, the source indicates that that activity is protected under articles 19 and 26 of the Covenant;

(f) With regard to the accusation of having a bank account at Bank Asya, the source argues that that bank is a legal corporation and was confiscated by the Government on 29 May 2015. Having a bank account there is, according to the source, protected under articles 21 and 25–27 of the Covenant.

(iii) Category III

21. According to the source, Mr. Demir suffered serious violations of his right to a fair trial as prescribed in article 14 of the Covenant.

22. The source asserts that the Government failed to provide Mr. Demir with an independent and impartial tribunal. To support that argument, the source provides an explanation of the judicial context following the coup attempt. In that respect, the source underlines that the motivation for the creation of the special courts (i.e., the Criminal Judgeships of Peace) was to fight against the opposition, especially the Hizmet movement. The judges are reportedly exclusively authorized to carry out all investigatory processes, including with regard to detention, arrests, property seizures and search warrants, and they have allegedly been introduced to persecute members of the Hizmet movement, who are treated as opponents of the Government. Because appeals against decisions by a Criminal Judge of Peace can be filed only with another Criminal Judge of Peace, it reportedly creates a closed-circuit system.

23. The Government failed to provide Mr. Demir with a timely explanation of the reason for his arrest, given that he was not informed of the reasons therefor until his

interrogation by the police in the days following his arrest. Furthermore, he was held without having been charged.

24. In addition, the source argues that Mr. Demir's right to have the time and the opportunity to prepare his defence and to call and examine witnesses was violated. Indeed, the source affirms that Mr. Demir was never given time to prepare for interrogations. Instead, he was physically and psychologically pressured into accepting drafted statements by the police or induced by the prosecutor or the judge into agreeing with statements collected by the police.

25. Moreover, the source submits that Mr. Demir's right to access to counsel was violated. In that regard, the source cites provisions of domestic law, in particular, article 3 of Decree Law No. 668 of 25 July 2016, according to which detainees would be denied access to lawyers for the first five days of deprivation of liberty, under certain conditions. That ban on legal assistance was reportedly lifted by Decree Law No. 684 of 23 January 2017. Moreover, the source alleges that the meetings between Mr. Demir and his lawyer were recorded and monitored by prison officers.

26. The source further argues a violation of the principle of equality of arms. The source reports that Mr. Demir was denied access to his casefile, as a result of which he failed to object to the decisions effectively, having been unable to prepare for his defence adequately or to challenge the charges against him. The source also indicates that that is a general trend that has occurred in recent years.

27. The source reports that Mr. Demir was deprived of liberty for an extended period of time before he could appear in a court hearing. Moreover, allegedly, his objection against his arrest and detention was denied by the court without a reasoned decision.

28. With regard to the right to a defence, the source asserts that there has been a relentless campaign of arrests targeting lawyers across the country. Allegedly, in 77 of 81 provinces in Turkey, lawyers have been detained and arrested on trumped-up charges as part of criminal investigations orchestrated by the political authorities and conducted by provincial public prosecutors. At the time of the submission of the source, 523 lawyers had been arrested and 1,318 lawyers were being prosecuted. Moreover, lawyers have reportedly been stripped of valuable tools to defend their clients under the pretext of counter-terrorism efforts and face pressure or are forced to testify against their clients. Many suspects cannot find a lawyer to defend them. The situation therefore violates their right to a defence.

(iv) Category V

29. The source argues that Mr. Demir's detention is due to his social background and that it is discriminatory in nature and therefore arbitrary.

30. The source asserts that people who are charged with being a member of the Hizmet movement are faced with widespread discrimination. There is an emerging pattern in Turkey of the arbitrary deprivation of liberty of those who are accused of being followers of Gülen. The source underlines that it does not matter whether they accept or reject the connection with the movement.

31. In that context, the source argues that Mr. Demir has been arbitrarily deprived of his liberty according to category V because of discrimination against him as a Hizmet movement sympathizer. The source adds that the arrest and detention of more than 150,000 individuals have been motivated solely by their social background and political stance.

Response from the Government

32. On 19 July 2019, 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 17 September 2019, detailed information about the current situation of Mr. Demir and to clarify the legal provisions justifying his continued detention, as well as its compatibility with Turkey's obligations under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Turkey to ensure his physical and mental integrity.

33. On 17 September 2019, the Government requested an extension of the deadline, in accordance with paragraph 15 of Working Group's methods of work, which was granted the following day, with the new deadline of 17 October 2019. On 17 October 2019, the Government of Turkey submitted its reply.

34. The Government explains that, on 24 July 2016, on suspicion of being a member of an armed terrorist organization and attempting to overthrow the constitutional order, the Office of the Criminal Magistrate of Sinop issued a search warrant (No. 2016/858) authorizing the search of Mr. Demir's house, the copy, printing and analysis of his computer records and, if deemed necessary, the provisional seizure of the computer and relevant equipment to obtain hidden evidence. As a result of the search conducted with the presence of the Public Prosecutor on 25 July 2016, the computers, memory cards and more than 300 compact discs were seized.

35. According to the Government, upon arrest, Mr. Demir was notified of his legal rights and the charges against him. Prior to taking his statement, he was also reminded of the charges against him and of his rights to choose a defence lawyer and benefit from legal assistance, to have his lawyer present during the taking of his statement and interrogation and to ask for a defence lawyer to be appointed by the Bar Association to assist him if he could not afford one, as well as other rights such as to communication with his family, to provide evidence in his favour and to request that such evidence be collected. Subsequently, Mr. Demir gave his statement to the Public Prosecutor in the presence of his lawyer on 27 July 2016.

36. The Government explains that Mr. Demir declared in his statement that: he worked for Fethullah-affiliated schools for a long time; due to financial matters, he quit his position in 2010 to be hired as a public official to work for public schools; following the developments surrounding the coup attempt of 15 July, he began to think less of the Fethullah organization and described it as terrorist organization; he understood the provisions of "effective regret"; and the implementation of those provisions were not required in his case, however, since he had committed no crime.

37. Moreover, the Government reports that, on the same day, Mr. Demir was brought before the Office of the Criminal Magistrate of Sinop and was interrogated by the magistrate in the presence of his lawyer. He was detained on remand on 27 July 2016. In the detention on remand decision, evidence, qualifications and the nature of the attributed offences, which were classified under article 100 of the Code of Criminal Procedure, were taken into consideration. The decision also included a reasoning referring to the contents of the file and the presence of concrete evidence indicating the strong suspicion of a crime having been committed. In the evaluation, the assessment was that the detention measure was proportional to the penalty for the related offence and that solely applying judicial control measures would not be sufficient in the present case. Mr. Demir was informed that he had the right to appeal against the decision of detention.

38. In that regard, the Government emphasizes that Mr. Demir was swiftly brought before the judge after he was taken into custody and was informed of the accusations against him. Furthermore, all decisions of arrest, custody and detention were given by independent judges. The decisions contained detailed reasoning regarding the grounds for the measures taken and were therefore not arbitrary. In addition, the decisions were appealed by the detainee and his lawyer and duly reviewed by competent authorities.

39. The Government indicates that, on 21 April 2017, in the scope of investigation No. 2016/2451 conducted by the Office of the Chief Public Prosecutor of Sinop, an indictment was drawn up containing charges of being a member of an armed terrorist organization, under article 314 (2) of the Criminal Code. According to the Government, the indictment contained detailed evidence and findings, such as witness statements, bank account records, proof of membership in a Fethullah-affiliated union, the records of his employment by Fethullah-affiliated companies and content from his social media accounts on which he had shared posts in favour of the terrorist organization, which placed him under strong suspicion, and was submitted to the related court. In addition, it was indicated that, as a result of the examination of the digital materials seized during the search conducted on 25 July 2016, a large number of voice recordings and audio records of speeches given by the leader of the "Fethullah terrorist organization/Parallel State Structure" were detected.

40. On 21 July 2017, the court ordered Mr. Demir's release pending trial, taking into account the evidence obtained, the length of his detention and the particular circumstances of the case.

41. The Government reports that, following the completion of the judicial proceedings, the Court decided to render a judgment of acquittal in accordance with article 223 (2) (e) of the Code of Criminal Procedure, indicating that it has not been proven that the charged crime was committed by the accused. In its reasoning, the court assessed that Mr. Demir's participation in the meetings of the organization, his membership in the affiliated trade union and his being a deposit holder of the affiliated Bank Asya were direct and natural consequences of his employment at the time at an institution that was affiliated with Fethullah. Those actions and the few times he connected to the Fethullah-affiliated websites were not sufficient evidence to prove his membership in the terrorist organization.

42. On 29 May 2019, Mr. Demir's lawyer appealed for the acquittal judgment and requested that his client be acquitted in accordance with article 223 (2) (b) of the Code of Criminal Procedure, indicating that it has been proven that the charged crime was not committed by the accused. Consequently, the present case is pending before the Court of Appeals and has not been finalized yet.

43. The Government specifies that, on 28 September 2016, Mr. Demir lodged an individual application (No. 2016/74693) with the Constitutional Court. The Constitutional Court found the application inadmissible due to non-exhaustion of legal remedies on 7 November 2018.

44. The Government argues that Mr. Demir's detention was not arbitrary and that the period of his detention was reasonable, considering the evidence and findings, which raise a strong suspicion of his having committed the crime. Moreover, he was released pending trial as soon as his detention was no longer justified. Subsequently, he was acquitted by the Court on the grounds that it was not proven that the charged offence had been committed by him. The decisions of detention, release pending trial and acquittal were made on the basis of reasoned decisions given by an independent judiciary. They and all proceedings throughout the trial process were done in accordance with national legislation.

45. Furthermore, the Government recalls that, according to article 141 (1) (a) and (d) of the Code of Criminal Procedure, those who are unlawfully arrested or placed in pretrial detention or whose period of detention is unlawfully extended, and those who are lawfully placed in pretrial detention but are not brought before a judicial authority and a decision is not delivered within a reasonable time, may file an action for compensation. The Government claims that Mr. Demir has not brought an action for compensation with regard to his arrest, custody and detention.

46. With reference to the creation of special courts and the fact that they were created to fight the opposition, the Government recalls the legislation on the creation of offices of criminal magistrates and also recalls their independence and impartiality.

47. The Government concludes by stressing that the proceedings against Mr. Demir were carried out swiftly and in accordance with the international obligations of Turkey, even though, at the time of the proceedings, it was undergoing exceptional circumstances that led the Government to resort to the right to derogation from its obligations under the Covenant, given the grave threat to public security amounting to threat to the life of the nation posed by the coup attempt of 15 July.

Additional comments from the source

48. The Government's reply was sent to the source for further comment on 18 October 2019. The source submitted a reply on 29 October 2019.

49. The source explains that the Government declared and published a list of the names of the civil servants who had been dismissed for alleged connections with the coup, including 107,944 individuals named in lists attached to emergency decrees, and that most of them were also arrested. The source specifies that Mr. Demir's name was on the list. The source also specifies that those on the list were members of the teachers' union, which was legal.

50. The source claims that, at 3 a.m. on 25 July 2016, 12 police officers and a public prosecutor came to Mr. Demir's home and showed a search warrant for his home and for his arrest thereafter. The police did not show or read the reasons, but just showed very briefly the paper. The source specifies that the police officers seized some books. On 27 July 2016, the books were added to a list of the names of publishers that were banned from publishing. Mr. Demir was then accused of possessing and having read those books.

51. Upon arrest, Mr. Demir was taken to the police station. He was placed in a room full of teachers and other civil servants. The source reiterates that Mr. Demir did not have a lawyer. Three days later, Mr. Demir was taken to the hospital where he was seen by a doctor. He was then taken to court and to the prosecutor's office. During questioning, a lawyer appointed by the Bar Association was present, but Mr. Demir did not discuss his case with him prior to questioning. The source claims that Mr. Demir explained his employment in various schools but did not speak about Fethullah Gülen or his organization. The source claims that the prosecutor did not say or show any document stating the charges against Mr. Demir. After questioning, he was brought before a judge, to whom he stated that he was innocent and wanted to be released. The judge replied to the effect that Mr. Demir worked "for their schools" and ordered his detention. Mr. Demir then received a document stating that he was charged with "joining the coup and assisting in the coup attempt".

52. The source argues against the evidence presented in the indictment and claims that the witness statements were not referring to Mr. Demir and that the possession of the bank account and digital material and participation in a teachers' union were legal. With regard to the social medial activity, the source indicates that the only articles that Mr. Demir shared were actually criticizing Fethullah Gülen – however, that apparently constituted a crime.

53. The source then describes the poor conditions of Mr. Demir's detention.

Discussion

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

55. As a preliminary issue, the Working Group notes that Mr. Demir was released on 21 July 2017 and has not been detained since. However, the Working Group notes that, in accordance with paragraph 17 (a) of its methods of work, it reserves the right to render an opinion, on a case-by-case basis, on whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. In the present case, the Working Group considers that the allegations made by the source are serious and therefore shall proceed to consider the submissions.

56. As a further preliminary issue, the Working Group wishes to clarify that the procedural rules governing its consideration of communications on alleged cases of arbitrary detention are contained in its methods of work. There is no provision in the methods of work that prevents the Working Group from considering communications due to the lack of exhaustion of domestic remedies in the country concerned. The Working Group has also confirmed in its jurisprudence that there is no requirement for petitioners to exhaust domestic remedies in order for a communication to be considered admissible.¹

57. As a final preliminary issue, on 21 July 2016, the Government of Turkey informed the Secretary-General that it had declared a state of emergency, which lasted 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.² The Working Group notes that the situation of Mr. Demir falls within the time frame of the derogation that Turkey made under the Covenant.

¹ See, for example, opinions No. 19/2013 and No. 11/2000. See also opinion No. 41/2017, para. 73; opinion No. 38/2017, para. 67; opinion No. 11/2018, para. 66; opinion No. 20/2019, para. 81 and opinion No. 53/2019, para. 59, in which the Working Group clarified that it did not require the exhaustion of domestic remedies in order to be seized of the communication under its regular procedure.

² Depositary notification C.N.580.2016.TREATIES-IV.4.

58. While acknowledging the notification of the derogation, 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 alleged detention of Mr. Demir. As the Human Rights Committee has previously concluded, 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.³

59. In determining whether Mr. Demir's deprivation of liberty was arbitrary, the Working Group refers to the principles established in its jurisprudence on 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. The Government can meet the burden of proof by producing documentary evidence in support of its claims.⁴ Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut a source's allegations (A/HRC/19/57, para. 68).

60. Turning to the specific allegations, the Working Group notes that the source has argued that the detention of Mr. Demir was arbitrary, falling in categories I, II, III and V. The Government, although not addressing the categories of the Working Group separately, denies all allegations and submits that the arrest and detention of Mr. Demir was carried out following all international human rights obligations undertaken by Turkey. The Working Group shall proceed to examine the submissions under each of the categories in turn.

61. The source argued, in the initial submission that, at the time of the arrest, the police had no arrest warrant or search warrant, an allegation denied by the Government, which claims that the arrest was preceded by a duly authorized search warrant, and it provides the requisite identifying details of the warrant (see para. 34 above). The source explains that the police officers and a prosecutor who came to the house of Mr. Demir showed a search warrant for searching his house and his arrest. The source also specifies that they did not show or read the reasons developed in the warrant, whereas the Government indicates that, upon arrest, Mr. Demir was notified of his legal rights and the charges against him. Noting the inconsistencies in the source's submissions, the Working Group is unable to determine whether an arrest warrant was presented to Mr. Demir and whether the reasons for the arrest were invoked to him at the time of the arrest.

62. The source has further claimed that Mr. Demir was not notified of the charges and that he was kept without official indictment for 11 months and 26 days, until the day of his release by the court on 21 July 2017. The Government argues that Mr. Demir was informed of the charges at the time of the arrest and that they were reiterated repeatedly in the context of interrogations. It argues that Mr. Demir was formally indicted on 21 April 2017, presenting the official case number in its reply, which was 9 months after his arrest.

63. The Working Group is mindful of the earlier inconsistencies in the facts presented by the source and is therefore unable to conclude that Mr. Demir was not promptly informed of the charges. It is also unable to conclude that Mr. Demir was not presented with the indictment until the day he was in fact released by the court. The Working Group

³ CCPR/C/21/Rev.1/Add.11, para. 4; see also Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 6; general comment No. 34 (2011) on the freedoms of opinion and expression, para. 5; and general comment No. 35 (2014) on liberty and security of person, paras. 65–66.

⁴ See opinion No. 41/2013, in which the Working Group noted that the source of a communication and the Government did not always have equal access to the evidence and frequently the Government alone had the relevant information. In that case, the Working Group recalled that, where it was alleged that a person had not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden to prove the negative fact asserted by the applicant was on the public authority, because the latter was "generally able to demonstrate that it [had] followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out". See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, I.C.J. Reports 2010, p. 661, para. 55.

also wishes to remind the parties that article 9 requires that the arrested person be informed “promptly” of any charges, which does not necessarily mean “at the time of arrest”.⁵

64. Therefore, taking note of the foregoing, the Working Group concludes that the initial arrest and detention of Mr. Demir does not fall under category I.

65. The source has also claimed that the arrest and detention of Mr. Demir falls under category II, given that he was arrested purely for the peaceful exercise of his rights protected by the Covenant. The Government denies that allegation and argues that the arrest of Mr. Demir followed the reasonable suspicion of his being linked to the Hizmet movement, which the Government considers to be a terrorist organization.

66. The Working Group is mindful of the situation of the state of emergency that was declared in Turkey at the time. However, although the National Security Council of Turkey had designated the “Fethullah terrorist organization/Parallel State Structure” as a terrorist organization in 2015, the fact that the organization was ready to use violence had not become apparent to Turkish society at large until the coup attempt in July 2016. As noted by the Council of Europe Commissioner for Human Rights in her memorandum on the human rights implications of the measures taken under the state of emergency in Turkey:

Despite deep suspicions about its motivations and modus operandi from various segments of Turkish society, the Fethullah Gülen movement appears to have developed over decades and enjoyed, until fairly recently, considerable freedom to establish a pervasive and respectable presence in all sectors of Turkish society, including religious institutions, education, civil society and trade unions, media, finance and business. It is also beyond doubt that many organizations affiliated with the movement, which were closed after 15 July, were open and legally operating until that date. There seems to be general agreement that it would be rare for a Turkish citizen never to have had any contact or dealings with the movement in one way or another.⁶

67. The Council of Europe Commissioner for Human Rights also pointed out that there is therefore a need, when criminalizing membership and support of that 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.⁷

68. The Working Group observes that the core of the allegations against Mr. Demir was his alleged and perceived alliance with the Hizmet movement, which is said to have manifested mainly through such regular activities as subscriptions to newspapers, magazines and journals, the purchase of books and other publications, working for Hizmet movement-affiliated associations and unions, participating in social gatherings and other social activities, having downloaded the encrypted messaging software application ByLock and having a bank account at Bank Asya. The Working Group wishes to point out in particular that, in its reply, the Government simply stated that those regular activities were sufficient to justify reasonable suspicion that Mr. Demir had committed a criminal offence for which he was arrested and tried without actually explaining how it could arrive at such a conclusion.

69. The Working Group also notes the failure on behalf of the Government of Turkey to show any evidence that Mr. Demir was in fact a member of the “Fethullah terrorist organization/Parallel State Structure”. Indeed, noting the widespread reach of the Hizmet movement, as noted by 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 the movement in one way or another.⁸ The Working Group takes note of the report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his visit to Turkey, in November 2016, in which he recorded numerous cases of arrests based purely on the presence of ByLock on the accused’s computer and other

⁵ See Human Rights Committee, general comment No. 35, para. 30.

⁶ Commissioner for Human Rights, Council of Europe, “Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey”, 7 October 2016, para. 20.

⁷ *Ibid.*, para. 21.

⁸ *Ibid.*, para. 20.

ambiguous evidence (A/HRC/35/22/Add.3, para. 54). The Working Group also takes note of the recent findings of the Human Rights Committee in *Özçelik et al v. Turkey* (CCPR/C/125/D/2980/2017), in which it dismissed the mere use of ByLock as sufficient basis for the arrest and detention of an individual.

70. In the present case, it is clear to the Working Group that, even if Mr. Demir did use the ByLock application, an allegation which he denies, it would have been merely in exercise of his freedom of expression. The same is to be said about Mr. Demir's subscriptions to various newspapers, magazines and journals and his purchases of books and other publications. In that regard, the Working Group notes that freedom of opinion and freedom of expression, as defined in article 19 of the Covenant, are indispensable conditions for the full development of the person; they are essential for any society – and in fact constitute the foundation of every free and democratic society.⁹ According to the Human Rights Committee, no derogation can be made to article 19, including during a state of emergency.¹⁰

71. Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers, and the right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.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.¹²

72. The Working Group is mindful that the present case is not the first time it is examining the arrest and prosecution of Turkish nationals on the basis of alleged use of ByLock as one of the key manifestations of an alleged criminal activity.¹³ The Working Group recalls that, in those other instances, it concluded that, in the absence of a specific explanation of how the alleged mere use of ByLock constituted a criminal activity on behalf of the individual, their detention was arbitrary. The Working Group regrets that its views in those opinions have not been respected by the Turkish authorities. The Working Group therefore finds that the arrest of Mr. Demir was as a result of his peaceful exercise of his right to freedom of expression as enshrined in article 19 of the Covenant.

73. Moreover, the Government has failed to explain how attending various gatherings and meetings and working for organizations associated with the Hizmet movement amounts to a criminal activity. The Working Group once again wishes to underscore the deep entanglement of the Hizmet movement in Turkish society and the recognition by the international community that its criminal intentions were unknown to the population at large (see paras. 66–67 above). There has been no evidence presented by the Government that any actions of Mr. Demir have been anything but peaceful, and the Working Group therefore considers that his arrest was a direct result of his peaceful exercise of the freedom of assembly as enshrined in article 21 of the Covenant.

74. The Working Group concludes that the arrest and detention of Mr. Demir resulted from his exercise of the rights guaranteed by articles 19 and 21 of the Covenant and therefore falls under category II.

Category III

75. Given its finding that the deprivation of liberty of Mr. Demir is arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Demir 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, falling under category III. Nevertheless, on the basis of the information submitted to it, the Working Group is unable to arrive at any conclusions concerning the allegations made in relation to category III.

⁹ Human Rights Committee, general comment No. 34, para. 2.

¹⁰ *Ibid.*, para. 5.

¹¹ *Ibid.*, para. 11.

¹² *Ibid.*, para. 12.

¹³ See opinions No. 42/2018 and No. 44/2018; see also opinion No. 53/2019.

Category V

76. The source has alleged that the detention of Mr. Demir falls under category V, given that it constitutes discrimination on the basis of political or other opinion. The Government rejects the allegation, explaining that his detention was due to his alleged membership in a terrorist organization.

77. The present case is the eleventh case concerning individuals with alleged links to the Hizmet movement that has come before the Working Group in the past two years.¹⁴ In all such cases, the Working Group has found that the detention of the concerned individuals was arbitrary, and it appears that a pattern is emerging whereby those with alleged links to the Hizmet movement are being discriminated against by being targeted on the basis of their political or other opinion. Accordingly, the Working Group finds that the Government of Turkey detained Mr. Demir on the basis of a prohibited ground for discrimination and that the case falls within category V.

78. In the past two years, the Working Group has noted a significant increase in the number of cases brought to it concerning arbitrary detention in Turkey.¹⁵ The Working Group expresses its grave concern over the pattern that all of these cases follow and urges the Government to implement the opinions of the Working Group without further delay.

79. The Working Group welcomes the lifting of the state of emergency in Turkey in July 2018 and the revocation of the derogation made with regard to its obligations under the Covenant. However, the Working Group is aware that a large number of individuals were arrested following the attempted coup d'état of 15 July 2016, including judges and prosecutors, and that many remain in detention and are still undergoing trials. The Working Group urges the Government to resolve those cases as quickly as possible in accordance with its international human rights obligations.

80. The Working Group would welcome the opportunity to conduct a country visit to Turkey. Given that a significant period has passed since its previous 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 procedures 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

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

The deprivation of liberty of Ercan Demir, being in contravention of articles 2, 7, 19 and 20 of the Universal Declaration of Human Rights and articles 2, 19, 21 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II and V.

82. The Working Group requests the Government of Turkey to take the steps necessary to remedy the situation of Mr. Demir 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 Covenant.

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

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

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

¹⁴ See opinions No. 1/2017, No. 38/2017, No. 41/2017, No. 11/2018, No. 42/2018, No. 43/2018, No. 44/2018, No. 78/2018, No. 10/2019 and No. 53/2019.

¹⁵ *Ibid.*

Follow-up procedure

86. 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 compensation or other reparations have been made to Mr. Demir;
- (b) Whether an investigation has been conducted into the violation of Mr. Demir's rights and, if so, the outcome of the investigation;
- (c) 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;
- (d) Whether any other action has been taken to implement the present opinion.

87. 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.

88. 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.

89. 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.¹⁶

[Adopted on 21 November 2019]

¹⁶ Human Rights Council resolution 42/22, paras. 3 and 7.