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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-ninth session, 23–27 November 2020

#### Opinion No. 66/2020 concerning Levent Kart (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 30 July 2020 the Working Group transmitted to the Government of Turkey a communication concerning Levent Kart. The Government replied to the communication on 28 September 2020. 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. Levent Kart is a national of Turkey born in 1970. He works as the Dean of the Medical Faculty at Fatih University. The university is reportedly linked to the Hizmet movement, which is led by Fethullah Gülen and is referred to as the “Fethullah terrorist organization/Parallel State Structure” by the Government of Turkey.

#### a. Arrest and detention

5. According to the source, Mr. Kart was arrested on 27 December 2017 at 6 a.m. The source explains that five police officers came to his place of residence, showed their identification and searched the house. The source states that the authorities showed a warrant issued by the Istanbul Office of the Chief Public Prosecutor. Mr. Kart was accused of being a member of the “Fethullah terrorist organization”. They reportedly took his digital devices (computers, smartphones and tablets) and Mr. Kart was then put in a car with other police officers.

6. The source explains that, from 27 December 2017 to 10 January 2018, Mr. Kart was held for questioning in a custody room in Istanbul Courthouse), under inadequate conditions. In particular, the source states that Mr. Kart was held in a small underground room, on the seventh floor underground, with more than 20 people. He did not have enough space for sitting or for lying down to sleep, he did not have enough food and he was not able to bathe or shave for 15 days.

7. On 10 January 2018, the twenty-second Heavy Penal Court of Istanbul ordered the detention of Mr. Kart (file No. 2018/172, decree No. 2019/8). The source states that he had access to legal assistance. Mr. Kart was subsequently transferred to Silivri L-type Closed Prison.

8. The source reports that Mr. Kart has been accused of being a member of the Fethullah terrorist organization, owing to the fact that he is an academic staff member at Fatih University, specifically the Dean of the Medical Faculty, and that he used the ByLock application and had a bank account at Bank Asya.

9. According to the source, Mr. Kart’s trial started on 10 October 2018. There were also hearings on 25 December 2018 and 16 January 2019. Mr. Kart was sentenced to six years and three months of imprisonment. The Court of Appeal confirmed the conviction. According to the source, at the time of initial submission, the sentence had not been confirmed by the Court of Cassation.

10. The source explains that Mr. Kart was found guilty of being a member of the Fethullah terrorist organization based on the fact that he worked as the Dean of the Medical Faculty at Fatih University, which is reportedly linked to that organization, and that there were two signals of connection to the server of the ByLock application, according to the Information Technologies and Communication Authority. Mr. Kart also reportedly had WhatsApp messages related to Fethullah Gülen and information about the organization from 2015 on his laptop and tablets as he had downloaded videos of Fethullah Gülen from a website. He also had other applications on his tablets, notably the applications of *Zaman* newspaper, Bank Asya and *Sizinti* magazine and, inter alia, KakaoTalk and Bylock.

11. The source explains that at the time of submission, Mr. Kart was being held in detention alongside 40 other people, in a seven-person ward, under inadequate conditions. He was allowed a 40-minute visit with no contact and a 40-minute phone call every week, and visits during which contact was allowed, under control, once a month.

#### b. Legal analysis

12. According to the source, Mr. Kart’s deprivation of liberty constitutes a violation of articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant.

13. The source contests the accusation regarding Mr. Kart's membership of the Fethullah terrorist organization and states that he has had no connection with this organization during his education or academic career.

14. The source reports that the alleged links with the Fethullah terrorist organization, and the basis for the finding that Mr. Kart was a member of it, are based on his profession. The source explains that Mr. Kart is specialized mainly in pulmonology. He is a professor and a doctor who succeeded as a result of his individual efforts and became one of the best specialists in his area. He dealt with medical searches, treatment processes and hospital administration, and established and managed intensive care units and sleep laboratories.

15. In this context, the source explains that the reason why Mr. Kart accepted the offer of employment at Fatih University was because of its high standing, as it is recognized among international and national universities for its scientific research, laboratory equipment, investments and projects. It is also attended by international students. Although Fatih University is reportedly linked to the Fethullah terrorist organization, there were no political issues, and it simply took a contemporary approach to science. The source states that there was no kind of pressure or imposition from anyone or any group. Mr. Kart never attended any activities of the Fethullah terrorist organization and was not aware of its internal structure. Moreover, the source states that since Fatih University was founded and supervised by the Government, his link to it cannot be a legal basis for detention.

16. The source states that Mr. Kart never downloaded or used the ByLock application. Two formal reports apparently offer proof that Mr. Kart did not use it: only two signals of connection are referred to in a report by the Information Technologies and Communication Authority and in another official report. No reference is made to any identification details, password, username, content or added lists.

17. In this context, the source argues that the Court of Cassation issued a decision, on 17 September 2018 (basis No. 2018/2608 and decree No. 2018/2629), in which it stated that an individual cannot be accused of being a member of the organization unless there is content in the ByLock application. Yet one of the reasons for the detention of Mr. Kart is his presence on the ByLock users list. This, to the source, is in contradiction of the Court of Cassation's decision.

18. The source further reports that, during the police questioning, Mr. Kart was accused of having downloaded the ByLock application twice, on two different mobile phones. However, according to the two official reports, there seemed to be only one mobile phone. The reports shows two signals of connection to an Internet Protocol Address (46.166.164.177) that is usually used for camouflaging the real ByLock connection. The source states that it is impossible to download this application on a mobile phone with two signals. Other programs or Internet sites could reportedly have led Mr. Kart to this application.

19. The source also explains that the ByLock application was present on Mr. Kart's tablet, which had been a gift to him in 2015. The application had been downloaded from the applications store Google Play. Yet the bill of indictment states that it cannot be legally downloaded from applications stores, and that it can be downloaded by members of the Fetullah terrorist organization only. In the official reports, it is stated that the application can be loaded manually only, because it has been unavailable through Google Play since 2014. The source states that this application was therefore not deliberately downloaded by Mr. Kart.

20. With regard to the digital devices that were seized, the source states that one computer was a gift used by some work colleagues and that the videos may have been downloaded by them. Moreover, the only videos that were found on the laptop were from December 2015, which shows that Mr. Kart could not have watched them regularly. The source states that Mr. Kart may have watched videos as he was following the news, but did not watch or share them at regular intervals.

21. With regard to the message exchanges, the source states that the messages mentioning Fethullah Gülen by name had been sent from others to him through the WhatsApp application. Moreover, the source states that the messages were received through a WhatsApp chat group of the Akciğer Sağlığı ve Yoğun Bakım Derneği (Lung Health and Intensive Care

Association), consisting of multiple colleagues of Mr. Kart from different places. The source states that they shared professional messages. Mr. Kart does not know of, did not send and did not share contentious messages.

22. The source explains that Mr. Kart used the KakaoTalk application for videoconference calls when he was working with a firm for a short period at the end of 2014. One of the partners of the firm downloaded this application on his mobile phone from Google Play. It was then deleted.

23. The source further acknowledges that Mr. Kart did download general applications such as those of *Zaman* and Bank Asya, and that because of these two applications, the others (such as ByLock and KakaoTalk) could have been downloaded from the list of recommended applications.

24. According to the source, the indictment was issued only nine months after Mr. Kart's arrest, and the first trial hearing occurred 11 months after his deprivation of liberty. During the trial, the court reportedly ignored an expert report showing that Mr. Kart was not a ByLock user and refused to assign a formal expert on the matter. Moreover, the source reiterates that Mr. Kart has been convicted on the basis of findings that the Court of Cassation has previously determined cannot constitute proof for the purposes of conviction.

25. The source argues that the prosecution gathered findings that were not *corpus delicti* in themselves and considered them as evidence of Mr. Kart's membership of the Fethullah terrorist organization. In particular, the source states that working at a university founded and monitored by the Government cannot be constitutive of a crime. The source also specifies that Mr. Kart does not have a criminal history.

26. The source further challenges the broad and vague character of the relevant law in the case at hand and its lack of predictability.

27. Lastly, the source reports that Mr. Kart has been suffering from depression since his deprivation of liberty began.

#### *Response from the Government*

28. On 30 July 2020, the Working Group transmitted the allegations made by the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 28 September 2020, detailed information about Mr. Kart's current situation and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Turkey under international human rights law and, in particular, with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Turkey to ensure Mr. Kart's physical and mental integrity.

29. On 28 September 2020, the Government of Turkey submitted its response, in which it referred to the large-scale, brutal and unprecedented coup attempt perpetrated by the Fethullahist terrorist organization on 15 July 2016. In order to restore democracy and protect the rights and freedoms of Turkish citizens, thousands of the organization's members, who for decades had infiltrated all branches of government, the military and the judiciary, needed to be completely rooted out. A state of emergency was declared shortly after the attempted coup, which was endorsed by parliament on 21 July 2016.

30. The Government adds that throughout the state of emergency, Turkey acted in accordance with its human rights obligations while maintaining its close cooperation and dialogue with international organizations, including the United Nations and the Council of Europe. The state of emergency was terminated on 19 July 2018.

31. The Government notes that effective domestic legal remedies are available in Turkey, and include the right to lodge individual applications with the Constitutional Court, which is recognized as an effective domestic remedy by the European Court of Human Rights. In addition to existing domestic remedies, the Inquiry Commission on State of Emergency Measures was established with a view to receiving applications regarding administrative acts carried out pursuant to decree laws enacted during the state of emergency. Further remedies are available against the decisions of the Inquiry Commission, and the European Court of

Human Rights has recognized the Inquiry Commission as a domestic remedy. Applications may be lodged with the European Court of Human Rights itself after the exhaustion of domestic remedies.

32. According to the Government, even before the attempted coup, the Fethullah terrorist organization had been known to employ complex strategies to advance its agenda. These strategies reportedly included blackmailing politicians and bureaucrats, cheating on a mass scale in public examinations to place its members in key government posts, practising social engineering, manipulation and indoctrination, and initiating judicial proceedings against its opponents with fabricated stories through its extensive network of media outlets, businesses, schools and non-governmental organizations.

33. The Government adds that the Fethullah terrorist organization is now employing the strategy of presenting itself as the victim of human rights violations to hide its crimes. Its members deliberately try to deceive and manipulate international public opinion by spreading false allegations against Turkey, including unfounded claims of arbitrary arrest and detention, torture and even enforced disappearance while its members go in hiding on the orders of their leader. In fact, it is the Fethullah terrorist organization itself that has perpetrated grave human rights violations in Turkey, including the cold-blooded killing of hundreds of innocent Turkish citizens in violation of their fundamental right to life. Accordingly, the Government requests the special procedures, including the Working Group, not to allow the Fethullah terrorist organization and its members to abuse those mechanisms, and to dismiss their allegations. The Government affirms that Turkey will continue to expand human rights and freedoms and maintain its long-standing cooperation with international organizations.

34. The Government provides supplementary information regarding measures taken by the relevant authorities with respect to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic. In accordance with the Pandemic Influenza National Preparation Plan, published in the Official Gazette as Presidential Circular No. 2019/5, the Coronavirus Scientific Board has been formed and pandemic coordination boards have been established at the national and provincial levels.

35. Regarding the treatment of persons deprived of their liberty in the context of the pandemic, Law No. 7742 was adopted in line with the recommendations of the Coronavirus Scientific Board. Approximately 95,000 prisoners who met the requirements of the law were released. The Government also provides detailed information about the amendments introduced by that law, notably: (a) the periods to be spent in correctional facilities in order to benefit from conditional release have been redefined; (b) provisional measures have been introduced with regard to the probation system; (c) the scope of the special procedures of enforcement has been broadened; (d) assessment of good behaviour of convicts will be effected at each stage of the enforcement process and renewed every six months; (e) services and support provided to convicts placed in correctional facilities have been further improved; (f) health control procedures are performed during the initial admission of newly arrived detainees and convicts; (g) disinfection and cleaning procedures are routinely performed in the institutions; (h) phone privileges have been increased to twice a week; and (i) staff members in the institutions are isolated in private living areas after their shift ends.

*Additional comments from the source*

36. On 28 September 2020, the Working Group transmitted the Government's reply to the source for additional comments. In its reply of 8 October 2020, the source states that the Court of Cassation reversed the judgment and sent Mr. Kart's case back to the first-instance local court. The 33-month detention period was deemed sufficient at the local court hearing on 17 September 2020, and Mr. Kart's detention was terminated on that same day. In further proceedings, a verdict was handed down on 25 September 2020 by which Mr. Kart was found guilty of membership of a terrorist organization. However, no custodial sentence was imposed upon Mr. Kart. Currently, the appeal is pending with the Court of Cassation.

37. The source reiterates that Mr. Kart has no connection or concern with the alleged illegal activities of the Fethullah terrorist organization/Parallel State Structure. It was considered a crime to be a dean at a university with which this organization is affiliated and some Internet data and programs on Mr. Kart's computer were considered as evidence for

the attributed crime, and he was charged with membership of a terrorist organization. The source submits that Mr. Kart has no direct or indirect involvement with any illegal activities of the organization.

### **Discussion**

38. The Working Group thanks the source and the Government for their timely submissions.

39. In determining whether Mr. Kart's deprivation of liberty was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).

40. As a preliminary matter, the Working Group notes that Mr. Kart was released on 17 September 2020. However, in accordance with paragraph 17 (a) of its methods of work, the Working Group reserves the right to render an opinion, on a case-by-case basis, 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 although Mr. Kart has been released, he spent nearly three years in detention. The Working Group shall therefore proceed to consider the communication and deliver its opinion.

41. In addition, the Working Group notes that Mr. Kart's situation falls within the scope of the derogations that Turkey 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, which amounted to a threat to the life of the nation within the meaning of article 4 of the Covenant.<sup>1</sup>

42. While acknowledging the notification concerning the 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 the provisions that are the most relevant to the alleged arbitrary detention of Mr. Kart. As the Human Rights Committee has stated, 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.<sup>2</sup> The Working Group welcomes the lifting of the state of emergency on 19 July 2018 and the subsequent revocation of derogations by Turkey.

43. 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 preventing the Working Group from considering communications owing 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 for a communication to be considered admissible.<sup>3</sup>

44. Furthermore, the Working Group wishes to address the Government's request to the special procedures not to allow the Fethullah terrorist organization and its members to abuse those mechanisms, and to dismiss their allegations. The Working Group recalls that the Human Rights Council has mandated it to receive and consider allegations of arbitrary detention from anyone around the world. The Working Group thus makes no distinction as to who can or cannot bring allegations to its attention. The Working Group is also required

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<sup>1</sup> Depositary notification C.N.580.2016.TREATIES-IV.4.

<sup>2</sup> General comment No. 29 (2001), para. 4. See also general comment No. 32 (2007), para. 6; general comment No. 34 (2011), para. 5; and general comment No. 35 (2014), paras. 65–66.

<sup>3</sup> See, for example, opinions No. 19/2013, No. 38/2017, No. 41/2017, No. 11/2018, No. 46/2019, No. 53/2019 and No. 30/2020.

to act impartially and independently. It therefore treats all submissions made to it equally and accepts them as allegations, inviting the Government concerned to respond. The onus therefore rests upon the Government to engage with the Working Group constructively by addressing the specific allegations made to assist the Working Group with reaching a conclusion in each communication brought to its attention.

45. Turning to the specific allegations made against the Government of Turkey, the Working Group observes that the source has alleged that the detention of Mr. Kart was arbitrary. The Government, in its response, provides no details concerning the specific situation of Mr. Kart, but sets out an explanation of the devastating impact of the Hizmet movement in Turkey. The Working Group regrets that the Government has not availed itself of the opportunity to respond to the specific allegations concerning Mr. Kart's case, and invites it to cooperate with the Working Group in a constructive manner as it has done in the past.

*i. Category I*

46. The Working Group notes the unchallenged allegations that Mr. Kart was arrested on 27 December 2017 and initially detained until 10 January 2018, when he was brought before a judicial authority for the first time. The Government has not commented on these allegations.

47. The Working Group recalls that article 9 (3) of the Covenant requires anyone arrested or detained on a criminal charge to be brought promptly before a judicial authority. As the Human Rights Committee explains, while the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.<sup>4</sup>

48. In the present case, the Working Group observes that Mr. Kart was detained for some two weeks before he was first presented before a judicial authority. The Government has presented no reasons for this delay, although it had the opportunity to do so. The Working Group therefore finds a violation of article 9 (3) of the Covenant.

49. Moreover, in order to establish that a detention is indeed legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged by article 9 (4) of the Covenant. The Working Group recalls that according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights 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.<sup>5</sup> This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty,<sup>6</sup> and to 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.<sup>7</sup> Moreover, the right also applies irrespective of the place of detention or the legal terminology used in the legislation, and any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.<sup>8</sup>

50. The right to take proceedings before a court in order that that court may decide on the lawfulness of detention also must be afforded without delay, as specified in article 9 (4) of the Covenant, and, as the Human Rights Committee has specified, the adjudication of the

<sup>4</sup> General comment No. 35 (2014), para. 33.

<sup>5</sup> A/HRC/30/37, paras. 2–3.

<sup>6</sup> Ibid., para. 11.

<sup>7</sup> Ibid., annex, para. 47 (a).

<sup>8</sup> Ibid., annex, para. 47 (b).

case should take place as expeditiously as possible.<sup>9</sup> In the present case, Mr. Kart was not given the opportunity to exercise his right to challenge the legality of his detention until some 14 days after his arrest, and the Government has presented no explanation for this delay. The Working Group therefore finds a breach of article 9 (4) of the Covenant.

51. Noting the violations of Mr. Kart's rights under article 9 (3) and (4) of the Covenant, the Working Group therefore concludes that his arrest and subsequent detention were arbitrary, falling under category I.

*ii. Category II*

52. The source has further argued that Mr. Kart was arrested, charged, tried and sentenced on the basis of his alleged alliance with the Hizmet movement. The source, however, denies these alleged links and argues that they have been inferred by the Turkish authorities from the mere exercise by Mr. Kart of his rights as protected by the Covenant. The Working Group observes that while the Government of Turkey had the opportunity, it has not presented any reasons for Mr. Kart's arrest or indeed for the subsequent proceedings against him.

53. In the present case, as in many others,<sup>10</sup> the Working Group observes that the essence of the allegations against Mr. Kart is his alleged alliance with the Hizmet movement which, according to the Government, is evidenced by such regular daily activities as working in a university, having a bank account and using a communication application. However, the Working Group notes the Government's failure to explain how any of these three alleged activities amounted to a criminal act.

54. 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 (the Hizmet movement) 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:

Despite deep suspicions about its motivations and modus operandi from various segments of the Turkish society, the Fethullah Gülen movement appears to have developed over decades and enjoyed, until fairly recently, considerable freedom to establish a pervasive and respectable presence in all sectors of Turkish society, including religious institutions, education, civil society and trade unions, media, finance and business. It is also beyond doubt that many organizations affiliated to this movement, which were closed after 15 July, were open and legally operating until that date. There seems to be general agreement that it would be rare for a Turkish citizen never to have had any contact or dealings with this movement in one way or another.<sup>11</sup>

55. Furthermore, the Council of Europe Commissioner for Human Rights pointed out that there was 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".<sup>12</sup>

56. The Working Group notes that the present case follows the pattern that it has observed over the past three years concerning the arrest and detention in Turkey and abroad of individuals with alleged links to the Hizmet movement.<sup>13</sup> In all those cases, the Government has alleged criminal activity by individuals on the basis of their engagement in regular

<sup>9</sup> General comment No. 35 (2014), para. 47.

<sup>10</sup> See, for example, opinions No. 42/2018, No. 44/2018, No. 29/2020, No. 30/2020 and No. 47/2020.

<sup>11</sup> Council of Europe Commissioner for Human Rights, "Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey" (7 October 2016), para. 20. Available from <https://rm.coe.int/16806db6f1>.

<sup>12</sup> *Ibid.*, para. 21.

<sup>13</sup> See, for example, 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. 84/2018, No. 10/2019, No. 53/2019, No. 79/2019, No. 2/2020, No. 29/2020, No. 30/2020, No. 47/2020 and No. 51/2020.

activities without any specification as to how such activities amounted to criminal acts. However, noting the widespread reach of the Hizmet movement, as documented in the report of the Council of Europe High 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”.<sup>14</sup> Mr. Kart was a dean at a university, an activity which is entirely regular. No evidence whatsoever has been presented to the Working Group that his acting in this capacity could have been equated with being a member of the Fethullah terrorist organization.

57. The Working Group specifically notes 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 noted that there had been several cases of arrests based merely on the basis of the existence of the ByLock application on a person’s computer and that the evidence presented was often ambiguous.<sup>15</sup> The Working Group also notes the findings of the Human Rights Committee in *Özçelik et al. v. Turkey* (CCPR/C/125/D/2980/2017), in which the Committee dismissed the mere use of the ByLock application as sufficient basis for the arrest and detention of an individual. In relation to the allegations concerning the bank account with Bank Asya, the Working Group recalls its own jurisprudence concerning cases in which it had concluded that merely having an account with that bank had been equated with terrorist activity without any clear evidence.<sup>16</sup>

58. In the present case, it is clear to the Working Group that even if Mr. Kart had used the ByLock application or any other communication application, such use would have been merely in exercise of his rights to freedom of opinion and expression. Those rights, protected under article 19 of the Covenant, constitute the foundation of every free and democratic society.<sup>17</sup> Equally, the Government has presented no evidence that Mr. Kart’s actions justify the restrictions detailed in article 19 (3) of the Covenant, or that he was in fact a member of the Fethullah terrorist organization and took part in its alleged terrorist activities. The Working Group therefore finds a violation of article 19 of the Covenant. The Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for appropriate action.

59. The Working Group therefore concludes that Mr. Kart’s arrest and detention resulted from his peaceful exercise of rights guaranteed by article 19 of the Covenant, and were therefore arbitrary, falling under category II.

### iii. Category III

60. Given its finding that Mr. Kart’s deprivation of liberty was arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Kart should have taken place. However, the trial did take place, and the source has alleged that the indictment was issued only nine months after Mr. Kart’s arrest, and the first trial hearing occurred 11 months after his deprivation of liberty. Furthermore, the source has argued that during the trial, the court reportedly ignored an expert report showing that Mr. Kart was not a ByLock user and refused to assign a formal expert on the matter. Although the Government has had the opportunity to respond to these allegations, it has chosen not to do so. Before turning to the examination of these allegations, the Working Group notes the evidentiary arguments presented by the source (paras. 15–25 above). In this connection, the Working Group recalls that it does not act as a domestic tribunal or appellate body and does not assess the sufficiency of the evidence presented at trial. The evidentiary irregularities referred to by the source were matters for domestic tribunals, and the Working Group cannot therefore conclude whether, in this case, there was any irregularity that amounted to a violation of international human rights norms.<sup>18</sup>

61. Turning to the allegations, the Working Group observes that, in principle, the delay of 11 months from the moment of arrest to the time of trial is not automatically a breach of article 14 (3) (c) of the Covenant, as there can be legitimate reasons justifying such a delay.

<sup>14</sup> Council of Europe Commissioner for Human Rights, “Memorandum”, para. 20.

<sup>15</sup> A/HRC/35/22/Add.3, at para. 54.

<sup>16</sup> See, for example, opinions No. 2/2020 and No. 29/2020.

<sup>17</sup> Human Rights Committee, general comment No. 34 (2011), para. 2.

<sup>18</sup> Opinion No. 64/2019, para. 89.

In the present case, however, the Working Group notes that Mr. Kart was arrested and placed in pretrial detention purely for exercising his rights as protected by the Covenant (as discussed in paras. 52–59 above). The Working Group therefore finds that the delay of 11 months between the arrest and trial of Mr. Kart constituted a breach of article 14 (3) of the Covenant.<sup>19</sup>

62. Regarding the allegations by the source that the court repeatedly ignored an expert report showing that Mr. Kart was not a ByLock user, the Working Group recalls that the Human Rights Committee has argued that the requirement of competence, independence and impartiality of a tribunal in the sense of article 14 (1) is an absolute right that is not subject to any exception.<sup>20</sup> The Committee has further observed the following:

The requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.<sup>21</sup>

63. In the present case, the source has alleged, and the Government has not rebutted the allegation, that the court repeatedly refused to examine an expert view that Mr. Kart was not a user of the ByLock application. There is no doubt that this point was central to the allegations against Mr. Kart. The Working Group therefore finds that the court acted in a manner that promoted the interests of the prosecution, and that the court thus failed to act in an impartial manner, in breach of the principle of equality of arms and article 14 (1) of the Covenant.

64. Accordingly, the Working Group finds that the violations of Mr. Kart's right to a fair trial were of such gravity as to give his detention an arbitrary character, falling under category III.

*iv. Category V*

65. The present case is the latest in a series of cases concerning individuals with alleged links to the Hizmet movement that has come before the Working Group in the past three years.<sup>22</sup> In all these cases, the Working Group has found that the detention of the concerned individuals was arbitrary. A pattern is emerging whereby those with alleged links to the Hizmet movement are being targeted on the basis of their political or other opinion, in violation of article 26 of the Covenant. Accordingly, the Working Group finds that the Government of Turkey detained Mr. Kart based on prohibited grounds for discrimination, and that his detention was thus arbitrary, falling under category V. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

66. The Working Group also notes the un rebutted allegations by the source concerning the conditions of Mr. Kart's detention, his treatment while in detention and his health (paras. 6, 11 and 27 above). The Working Group takes this opportunity to remind the Government of its obligation under article 10 (1) of the Covenant to ensure that all persons deprived of their liberty are treated with humanity and with respect for the inherent dignity of the human person.<sup>23</sup>

<sup>19</sup> See opinions No. 29/2020, No. 36/2020 and No. 51/2020. See also Human Rights Committee, general comment No. 32 (2007), para. 35; and general comment No. 35 (2014), para. 37.

<sup>20</sup> General comment No. 32 (2007), para. 19.

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

<sup>22</sup> For example, 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. 84/2018, No. 10/2019, No. 53/2019, No. 79/2019, No. 2/2020, No. 29/2020, No. 30/2020 and No. 51/2020.

<sup>23</sup> For example, opinion No. 46/2020, para. 64.

67. In the past three years, the Working Group has noted a significant increase in the number of cases brought to it concerning arbitrary detention in Turkey.<sup>24</sup> The Working Group expresses grave concern about the pattern that all these cases follow, and recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law may constitute crimes against humanity.<sup>25</sup>

68. The Working Group would welcome the opportunity to conduct a country visit to Turkey. Given that a significant period has passed since its last visit to Turkey, in October 2006, and noting the standing invitation by Turkey to all special procedures, the Working Group considers that it is an appropriate time to conduct another visit in accordance with the Working Group's methods of work.

### **Disposition**

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

The deprivation of liberty of Levent Kart, being in contravention of articles 2, 3, 8, 9, 10 and 19 of the Universal Declaration of Human Rights and articles 9, 10 (1), 14, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

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

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

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

73. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for appropriate action and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

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

### **Follow-up procedure**

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

<sup>24</sup> See, for example, 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. 84/2018, No. 10/2019, No. 53/2019, No. 79/2019, No. 2/2020, No. 29/2020, No. 30/2020, No. 47/2020, No. 48/2020 and No. 51/2020.

<sup>25</sup> For example, opinion No. 47/2012, para. 22.

(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.

76. 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.

77. 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.

78. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>26</sup>

*[Adopted on 24 November 2020]*

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<sup>26</sup> Human Rights Council resolution 42/22, paras. 3 and 7.