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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. 84/2020 concerning Osman Karaca (Cambodia and 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 9 April 2020 the Working Group transmitted a communication concerning Osman Karaca to the Government of Turkey; it also transmitted a communication on Mr. Karaca to the Government of Cambodia, on 24 September 2020. While the Government of Turkey replied on 28 May 2020, the Government of Cambodia did not reply. Both States are parties 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. Osman Karaca is a dual citizen of Mexico and Turkey born in 1972. He is usually resident in Tlalnepantla, Mexico. Since 2018, he has been Managing Director of the Advanced Management and Trading Group in Phnom Penh. He previously served as Director of Zaman International School in Phnom Penh, until 2011. He moved to Mexico in 2011, where he served, until November 2018, as the Principal of the Raindrop College of Excellence in Tlalnepantla.

#### a. General context

5. According to the source, at least 30 individuals from different countries have allegedly been abducted and subjected to enforced disappearance at the request of Turkey. Many of them have been kidnapped off the streets, as Mr. Karaca was, or from their homes, sometimes with family members, including children. They have subsequently been illegally transferred to Turkey on private jets, charter flights or commercial flights. The source adds that most of these victims unlawfully transferred to Turkey are refugees or registered asylum seekers.

#### b. Background

6. The source explains that Mr. Karaca encouraged dialogue among various sectors of society and was engaged in philanthropic work in Mexico. He also promoted academic activities in Mexican institutions, such as the National Autonomous University of Mexico, where he participated in the organization of conferences and congresses on the Middle East and, on one occasion, organized a study trip for students to Turkey.

7. Following the attempted coup d'état in Turkey on 15 July 2016, Mr. Karaca was reportedly referred to by the Turkish authorities as the "Mexican imam" and as a member of the Fethullah terrorist organization/Parallel State Structure, also known as the Hizmet movement by the followers of Fethullah Gülen.

#### c. Arrest and detention in Cambodia

8. The source explains that Mr. Karaca was arrested on 14 October 2019 at around 2 p.m., while he was in Cambodia on a business trip, during which he had used his Mexican passport. His visit to Cambodia had apparently been "detected" by the Embassy of Turkey in Phnom Penh, which cooperates closely with the Cambodian authorities.

9. The source reports that Mr. Karaca was arrested at Aba Bank in Phnom Penh by eight agents acting on behalf of the Government of Cambodia, believed to be members of the Cambodian counter-terrorism police, at the request and at the behest of the Turkish authorities. According to the source, although the Turkish authorities have claimed that Mr. Karaca was arrested by the National Intelligence Organization of Turkey overseas, the available evidence points only to the presence of agents acting on behalf of the Government of Cambodia at the time of the arrest.

10. During the arrest, the agents involved allegedly restrained Mr. Karaca, who was with a friend. Both Mr. Karaca and his friend tried to resist. Mr. Karaca was forcibly taken by the agents, one of whom said that Mr. Karaca would be taken to the Ministry of the Interior. Mr. Karaca was reportedly not informed of his rights or of the charges against him at the time of arrest.

11. The source reports that Mr. Karaca was held until 18 October 2019 in a secret detention facility operated by the Government of Cambodia. The source adds that, by concealing Mr. Karaca's whereabouts or fate, the Cambodian authorities placed him outside the protection of the law and denied him the possibility of having his situation reviewed by the domestic courts.

12. Following the arrest of Mr. Karaca, one of his family members and a colleague requested the intervention of the Ministry of Foreign Affairs of Mexico and of the Mexican diplomatic missions in the region. The source explains that, in order to secure his release and prevent an attempted illegal transfer to Turkey, the Embassy of Mexico in Hanoi, accredited

to Cambodia, sent a note verbale to prove that Mr. Karaca was a citizen of Mexico and to request that he be provided with consular protection and assistance. The Embassy also requested the Cambodian authorities to provide information on the current legal situation of Mr. Karaca. There is no information as to whether the Cambodian authorities provided any such information.

13. According to the source, it appears that Mr. Karaca has been held *incommunicado* from the time of his arrest, that he has had no access to his colleagues, human rights organizations or the Mexican authorities and that no information has been provided to them.

d. Transfer to Turkey

14. The source reports that, on 18 October 2019, Mr. Karaca was handed over to the Turkish authorities, which enabled his illegal transfer to Turkey on a special flight that landed in Turkey on 19 October 2019.

15. The source explains that, on 25 October 2019, Mr. Karaca called his spouse in Mexico. During a short conversation, Mr. Karaca informed her that he was in Silivri prison in Turkey and would appear before a court, probably to be informed about the charges against him. Indeed, a preliminary hearing reportedly took place on 25 October 2019. After his statement was reportedly taken by the prosecutor, Mr. Karaca was sent to a magistrate with a request for his arrest and the interrogation process was completed. The sentencing judge ordered the arrest of Mr. Karaca on charges of leading an armed terrorist organization. The source argues that such charges cannot apply to Mr. Karaca, in particular because he has not lived in Turkey since 2002 and because he had no connection with the attempted coup d'état or its plotters.

16. On 21 October 2019, a spokesman for the Ministry of the Interior of Cambodia allegedly stated that Mr. Karaca's arrest and deportation had been made possible by the signing of a security cooperation agreement with Turkey on 30 July 2019. According to the source, the text of that agreement is particularly worrisome. Indeed, since 2013, security agreements signed by Turkey have reportedly included wording to the effect that, in the fight against terrorism, the parties to the agreement should prevent the use of visual media and writings of terrorist organizations and their representative institutions operating in their territory against one of the parties. Moreover, the parties to the agreement should consider such groups as illegal organizations, in respect of which they should take appropriate measures in accordance with their national legislation. Such security agreements have also contained wording targeting individuals and institutions affiliated with the Fethullah terrorist organization/Parallel State Structure (Hizmet movement) and requiring the parties to the agreement to develop and apply effective measures in relation to individuals and institutions that provide financial or other support, including shelter, accommodation, training, treatment and logistical support to terrorist organizations in their territories.

e. Analysis of violations

17. The source states that, under international human rights law, Cambodia had the obligation to guarantee to Mr. Karaca his right to liberty and security and his right to a fair trial in any civil or criminal proceedings against him. The authorities of Cambodia had the duty to provide Mr. Karaca unhindered access to a lawyer of his choice and to Mexican consular officers, who should have been informed without delay of any charges against Mr. Karaca, including the reasons for his arrest. In addition, Mr. Karaca did not understand the language used by the authorities and no legal counsel nor the Mexican authorities had any opportunity to familiarize themselves with any documentary evidence against Mr. Karaca.

18. Moreover, the source argues that the authorities of Cambodia had the obligation to release Mr. Karaca from custody and to allow him and his counsel to bring proceedings before a court of law in order to have a court decide on the lawfulness of his detention. Instead, the Cambodian authorities intentionally and unlawfully deprived Mr. Karaca of his right to due process.

19. The source asserts that the situation of Mr. Karaca in Cambodia was further exacerbated by the fact that none of the lawyers who had been contacted had agreed to take up the case for fear of reprisal and eventual harm to their careers. The lawyers were reportedly

of the view that the case was political and they could become future targets of the Government of Cambodia or the Government of Turkey, or both.

20. The source argues that the deprivation of liberty of Mr. Karaca is arbitrary under categories I, II, III and V of the Working Group.

i. Category I

21. According to the source, the deprivation of liberty of Mr. Karaca is arbitrary under category I because it is clearly impossible to invoke any legal basis justifying the deprivation of his liberty.

ii. Category II

22. The source contends that the deprivation of liberty of Mr. Karaca is arbitrary under category II because Mr. Karaca was denied his rights under articles 12 and 26 of the Covenant. Mr. Karaca was denied access to the consular officers of Mexico and denied the right to return to his home country, Mexico. In addition, because of his perceived affiliation with a terrorist organization, Mr. Karaca was not granted equal protection of the law.

iii. Category III

23. The source argues that the detention of Mr. Karaca is arbitrary under category III because the authorities failed to meet the minimum international standards of due process. Mr. Karaca was subjected to enforced disappearance by Cambodian State agents at the behest of the Government of Turkey. He was denied access to a lawyer and to consular officials and received no legal assistance. He was not allowed to challenge the lawfulness of his detention before a court of law.

iv. Category V

24. According to the source, the deprivation of liberty of Mr. Karaca is arbitrary under category V because it constitutes a violation of international law for reasons of discrimination based on political or other opinion and because it aims at and results in ignoring the equal application of human rights.

*Response from the Governments*

25. On 9 April 2020, the Working Group transmitted the allegations made by the source to the Government of Turkey through its regular communications procedure. The Working Group requested the Government to provide, by 8 June 2020, detailed information about the situation of Mr. Karaca and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure Mr. Karaca's physical and mental integrity. The Government of Turkey replied to the communication on 28 May 2020.

26. On 24 September 2020, the Working Group transmitted the allegations made by the source to the Government of Cambodia through its regular communications procedure. The Working Group requested the Government to provide, by 23 November 2020, detailed information about the situation of Mr. Karaca and any comments on the source's allegations. The Working Group regrets that it has not received a response from the Government to the communication and that the Government has not requested an extension of the time limit for its reply as provided for in paragraph 16 of the Working Group's methods of work.<sup>1</sup>

27. In its response of 28 May 2020, the Government of Turkey states that, on 15 July 2016, the Fethullah terrorist organization/Parallel State Structure, a clandestine terrorist organization that has insidiously infiltrated critical government posts, attempted to take over the democratically elected Government through a large-scale and brutal coup d'état without precedence and by attacking several key institutions representing the will of the Turkish

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<sup>1</sup> The Working Group notes that it received a response from the Government of Cambodia on 16 December 2020, after the adoption of the present opinion. The Working Group cannot accept the reply as if it had been presented within the time limit.

people, including the parliament. The attempted coup d'état cost the lives of 251 Turkish citizens and injured over 2,000.

28. The Government notes that, in order to restore democracy and protect the rights and freedoms of the Turkish people, thousands of individuals affiliated with the Fethullah terrorist organization/Parallel State Structure who had infiltrated all branches of government, the military and the judiciary have had to be rooted out. During the state of emergency that followed the attempted coup d'état, which was endorsed by the parliament on 21 July 2016 and ended on 19 July 2018, the Government of Turkey acted in line with its international human rights obligations while maintaining its close cooperation and dialogue with international organizations, including the United Nations and the Council of Europe.

29. According to the Government, effective domestic legal remedies, including individual applications before the Constitutional Court, which is recognized as an effective domestic remedy by the European Court of Human Rights, are available in Turkey. In addition, the Inquiry Commission on the State of Emergency Measures, which was established to receive applications relating to administrative acts taken pursuant to decree laws enacted during the state of emergency, is also recognized by the European Court of Human Rights as an effective domestic remedy. Furthermore, cases can be brought before the European Court of Human Rights after the exhaustion of domestic remedies.

30. The Government adds that, even before the attempted coup d'état on 15 July 2016, the Fethullah terrorist organization/Parallel State Structure had engaged in blackmailing politicians and bureaucrats, cheating on a massive scale in public exams to place members in key government posts, practising social engineering, manipulation and indoctrination and initiating judicial proceedings against its opponents with fabricated stories disseminated through its extensive network of media outlets, businesses, schools and non-governmental organizations.

31. In the Government's view, the Fethullah terrorist organization/Parallel State Structure is now employing the strategy of presenting itself as the victim of human rights violations to hide its crimes by deceiving and manipulating international public opinion with false allegations against Turkey, including unfounded claims of arbitrary arrest and detention, torture and even enforced disappearances of members who have instead gone into hiding on the orders of their leader.

32. The Government submits that it is in fact the Fethullah terrorist organization/Parallel State Structure that has perpetrated grave human rights violations, including through the cold-blooded killing of hundreds of innocent Turkish citizens, whose fundamental right to life has thus been violated.

33. Accordingly, the Government requests the Working Group to ensure that the Fethullah terrorist organization/Parallel State Structure and its members do not abuse the complaint mechanism and to dismiss their allegations. It assures the Working Group that Turkey will continue to expand human rights and freedoms and maintain its long-standing cooperation with international organizations.

## Discussion

34. In determining whether the deprivation of liberty of Mr. Karaca is 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 law 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.<sup>2</sup>

35. Before considering the substance of the allegations made by the source, the Working Group notes that Mr. Karaca was reportedly detained in Cambodia prior to his involuntary

<sup>2</sup> A/HRC/19/57, para. 68.

transfer to Turkey.<sup>3</sup> Noting that allegations have been made against the Government of Cambodia and the Government of Turkey, the Working Group shall proceed to examine these separately.

*Allegations against Cambodia*

36. The Working Group regrets that it has not received a response from the Government of Cambodia. In the absence of a response, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

i. Category I

37. According to the source, Mr. Karaca was arrested on 14 October 2019 at Aba Bank in Phnom Penh by eight agents acting on behalf of the Government of Cambodia, believed to be members of the Cambodian counter-terrorism police, at the request and at the behest of the Turkish authorities. The source submits, and the Government of Cambodia does not contest, that Mr. Karaca was not presented with an arrest warrant or informed of the reasons for his arrest at the time of arrest.

38. In order for deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not done in the present case.<sup>4</sup>

39. The Working Group finds that, in order to invoke a legal basis for deprivation of liberty, the Cambodian authorities should have informed Mr. Karaca of the reasons for his arrest, at the time of arrest, and should have promptly informed him of the charges against him.<sup>5</sup> Their failure to do so violates article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant, as well as principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and renders his arrest devoid of any legal basis.

40. In addition, the Government has not rebutted the allegations that Mr. Karaca has been subjected to incommunicado detention from the time of his arrest on 14 October 2019 until his handover to the Turkish authorities and forced boarding of a special flight to Turkey on 18 October 2019. By denying or concealing his whereabouts and fate, the Cambodian authorities placed Mr. Karaca outside the protection of the law, in breach of article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.

41. As the Working Group has consistently found, holding persons incommunicado also violates their right to be brought before a court and to challenge the lawfulness of their detention.<sup>6</sup> Judicial oversight of detention is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis. Given that Mr. Karaca was unable to personally challenge his detention or to do so through a lawyer of his choice, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) (a) of the Covenant was also violated.

<sup>3</sup> The Working Group has previously considered similar cases concerning individuals who are members of or are perceived by the Government of Turkey to be members of the Fethullah terrorist organization/Parallel State Structure (Hizmet movement). See, e.g., opinions No. 11/2018 (Pakistan and Turkey) and No. 51/2020 (Malaysia and Turkey). See also AL TUR 6/2018 of 18 May 2018 (available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23755>) and AL TUR 5/2020 of 5 May 2020 (available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25209>), as well as *Özçelik, Karaman and I.A. v. Turkey* (CCPR/C/125/D/2980/2017).

<sup>4</sup> See, e.g., opinions No. 93/2017, para. 44; No. 10/2018, paras. 45–46; No. 36/2018, para. 40; No. 46/2018, para. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; and No. 46/2019, para. 51.

<sup>5</sup> See, e.g., opinion No. 10/2015, para. 34. See also opinions No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; and No. 46/2019, para. 51.

<sup>6</sup> Opinions No. 11/2018, para. 47; No. 79/2017, para. 47; No. 46/2017, para. 22; and No. 45/2017, para. 29.

42. The Working Group further observes that Mr. Karaca was not afforded the right to take proceedings before a court in or by Cambodia so that it may decide without delay on the lawfulness of his detention in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (1) and (4) of the Covenant, as well as principles 11, 32 and 37 of the Body of Principles. In accordance with the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and is essential to preserve legality in a democratic society. That right, which is in fact a peremptory norm of international law, applies to all forms and situations of deprivation of liberty.<sup>7</sup> Judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.<sup>8</sup>

43. The Working Group also cannot help but note that Mr. Karaca was effectively deprived of his right to legal counsel and representation in and by Cambodia (a right that is procedurally inherent in the right to liberty and security and the prohibition of arbitrary detention), in violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, as well as principles 15, 17 and 18 of the Body of Principles and principles 1, 5, 7, 8, 21 and 22 of the Basic Principles on the Role of Lawyers. Moreover, in accordance with principle 9 and guideline 8 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and must be promptly informed of this right upon apprehension; nor should access to legal counsel be unlawfully or unreasonably restricted.<sup>9</sup> The Working Group reiterates that access to legal counsel from the outset of detention is an essential safeguard in ensuring that the detainee can challenge the legal basis for his or her detention.<sup>10</sup>

44. The Working Group therefore finds that the arrest and detention of Mr. Karaca is arbitrary, falling under category I, as he was arrested without an arrest warrant, he was not notified of the reasons for his arrest or the charges against him, he was held incommunicado and he was prevented from challenging the legality of his detention, in breach of article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant.

## ii. Category III

45. As already mentioned (see para. 19 above), according to the source, the situation of Mr. Karaca in Cambodia was further exacerbated by the fact that none of the lawyers who had been contacted had agreed to take up the case for fear of reprisal and eventual harm to their careers. The Working Group reiterates its concern at the various forms of retaliatory measures reportedly taken against lawyers solely for providing professional legal services to their clients. It is the legal and positive duty of the State to protect everyone on its territory or under its jurisdiction against any human rights violation and to provide remedy whenever a violation still occurs. The Working Group recalls that, according to principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings Before a Court, legal counsel are to be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment.<sup>11</sup> In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers.

46. The Working Group also notes the Government's failure to observe Mr. Karaca's rights, including the right to be informed of his right to consular assistance under article 36

<sup>7</sup> Opinion No. 39/2018, para. 35.

<sup>8</sup> Opinions No. 35/2018, para. 27; No. 83/2018, para. 47; No. 32/2019, para. 30; No. 33/2019, para. 50; No. 44/2019, para. 54; No. 45/2019, para. 53; No. 59/2019, para. 51; and No. 65/2019, para. 64.

<sup>9</sup> See also Human Rights Committee, general comment No. 32 (2007), para. 34.

<sup>10</sup> Opinion No. 40/2020, para. 29.

<sup>11</sup> See also A/HRC/45/16, paras. 50–55.

(1) (b) of the Vienna Convention on Consular Relations, without delay. This and other violations of the rights guaranteed under article 36 (1) of the Vienna Convention on Consular Relations constitute grave violations of the rights to due process and to a fair trial under articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 of the Covenant, as well as principle 16 (2) of the Body of Principles.

47. The Working Group notes that the General Assembly has emphatically reaffirmed the duty of States parties to ensure full respect for and observance of the Vienna Convention on Consular Relations, in particular with regard to the right of all foreign nationals, regardless of their migration status, to communicate with a consular official of the sending State in case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform the foreign national without delay of his or her rights under the Convention.<sup>12</sup>

48. Furthermore, the Body of Principles recognizes, in principle 16 (2), the importance of consular assistance for a detained or imprisoned foreign national by specifically mentioning his or her right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he or she is a national.<sup>13</sup> The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) also provide, in rule 62 (1), that prisoners who are foreign nationals are to be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.<sup>14</sup>

49. Given the limited availability of remedies for individuals in the international sphere, consular protection is invaluable for foreign nationals who are disadvantaged by their lack of familiarity with local laws, customs and languages. Furthermore, it should be noted that the institution of consular protection not only serves the interests of the detained foreign individual and of the State that espouses such interests, but also furthers the interests of the international community as a whole by facilitating international exchange and reducing the potential for friction between States over the treatment of their nationals.

50. The Working Group wishes to recall the international obligation of Cambodia concerning the principle of non-refoulement. Depriving persons of their liberty, including freedom of movement, in violation of the principle of non-refoulement is arbitrary as it lacks a legal basis under international law.

51. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Cambodia is a party, stipulates that no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture, and that the competent authorities should take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights, for the purpose of determining whether there are such grounds. Article 8 of the Declaration on the Protection of all Persons from Enforced Disappearance and article 16 (1) of the International Convention for the Protection of All Persons from Enforced Disappearance, to which Cambodia is a party, provide for an almost identical prohibition and obligation where the right not to be subjected to enforced disappearance is at stake.

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<sup>12</sup> See General Assembly resolutions 72/179, para. 4 (k), and 72/149, para. 32. The Assembly, in paragraph 7 (b) of its resolution 73/175, and the Human Rights Council, in paragraph 5 of its resolution 42/24, have also called upon States to comply with their obligations under article 36 of the Vienna Convention on Consular Relations, particularly the right to receive information on consular assistance in the context of the death penalty. See also Assembly resolutions 74/166, para. 17 (g), 74/167, para. 13, and 74/168, para. 6 (j), and Council resolution 40/20, para. 2 (j).

<sup>13</sup> See also article 10 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

<sup>14</sup> See also guideline 21 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court on permission of the monitoring of all places of immigration detention and public reporting by consular officials (conditional upon request by persons in immigration detention) to ensure that the exercise of the right to bring proceedings before court to challenge the lawfulness and arbitrariness of detention and to receive appropriate remedies is accessible and effective.



52. It is also incumbent upon Governments and authorities to respect, protect and fulfil the right to personal liberty by exercising due diligence with a view to preventing the expulsion, return or extradition of a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of liberty, and by taking into account all relevant considerations.<sup>15</sup>

53. While the institution of extradition originally developed as a means of orderly delivery by one jurisdiction of a person accused or convicted of committing a crime in another jurisdiction for international judicial cooperation in criminal matters, it has also come to serve human rights and justice, for instance, by excluding political offences, as well as obtaining assurances regarding the non-application of the death penalty, due process and fair trial guarantees or prison conditions from the requesting State. The court reviewing the extradition request may also reject it in order to uphold the principle of non-refoulement. Therefore, the forced exile of a foreigner lawfully within the territory of a State, without the benefit of a fair and public hearing by an independent and impartial tribunal to determine its legality, as in the present case, clearly violates the right to due process guarantees or a fair trial in a court of law.

54. As the Working Group has previously observed, international law regarding extradition provides procedures that must be observed by States in arresting, detaining and returning individuals to face criminal proceedings in another country and in ensuring that their right to a fair trial is protected.<sup>16</sup> The regular extradition procedure is also indispensable for judicial review and enforcement of the principle of non-refoulement in the international transfer of detainees. The Working Group wishes to emphasize that the responsibility for ensuring that breach of the prohibition of non-refoulement does not occur rests with the State that is contemplating the removal of the person in question.

55. Therefore, in the present case, Mr. Karaca's unlawful rendition to Turkey by Cambodia, which circumvented the regular extradition procedure, ipso facto violated the principle of non-refoulement. The Government of Cambodia violated its obligations under articles 5 and 9 of the Universal Declaration of Human Rights, articles 9 and 13 of the Covenant and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by returning Mr. Karaca to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or other ill-treatment and arbitrary detention. If the appropriate extradition procedures had been followed in the present case, the Cambodian authorities would have engaged in a proper assessment of whether removal of Mr. Karaca would breach the prohibition of non-refoulement.

56. In the Working Group's view, Cambodia cannot escape responsibility for aiding Turkey in violating Mr. Karaca's right to a fair trial, an internationally wrongful act. Cambodia knew or should have known the causes and consequences of his unlawful rendition to Turkey, and there is also no doubt that Cambodia would be internationally wrongful if it had committed the same violation. Furthermore, the Working Group notes that Cambodia did not avail itself of the option of resorting to the regular extradition procedure or obtaining credible assurances from Turkey regarding due process and fair trial guarantees or prevention of torture and enforced disappearance.

57. Given the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give Mr. Karaca's deprivation of liberty an arbitrary character, falling within category III.

### iii. Category V

58. The present case is the most recent case concerning individuals with alleged links to the Fethullah terrorist organization/Parallel State Structure (Hizmet movement) that has

<sup>15</sup> Opinions No. 53/2016, paras. 59–63; No. 56/2016, paras. 55–60; and No. 68/2018, para. 59. See also A/HRC/4/40, paras. 44–45.

<sup>16</sup> Opinions No. 57/2013, para. 54; No. 2/2015, para. 20; No. 11/2018, para. 53; No. 68/2018, para. 58; and No. 10/2019, para. 71.

come before the Working Group in the past three years.<sup>17</sup> In these 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 above-mentioned organization are being targeted on a discriminatory basis for their political or other opinion. Accordingly, the Working Group finds that the Government of Cambodia has, at the request of the Government of Turkey, arrested, detained and transferred Mr. Karaca on the basis of a prohibited ground of discrimination and that the case falls within category V.

59. Moreover, the Working Group considers that the Government of Cambodia is responsible for its own actions in the arrest, detention and deportation of Mr. Karaca, as well as the subsequent violations of his rights in Turkey. The Working Group calls upon the Government of Cambodia to take all the steps necessary to secure the immediate and unconditional release of Mr. Karaca. 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.

#### *Allegations against Turkey*

60. The Working Group thanks the source and the Government of Turkey for their timely submissions.

61. As a 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 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 in order for a communication to be considered admissible.<sup>18</sup>

62. As a further preliminary issue, the Working Group notes that the state of emergency – declared after the attempted coup d'état, endorsed by the parliament on 21 July 2016 and lifted on 19 July 2018 – was in place prior to the arrest and detention of Mr. Karaca. The Working Group wishes to address the Government's request to the special procedures not to allow the Fethullah terrorist organization/Parallel State Structure (Hizmet movement) 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 therefore makes no distinction as to who can or cannot bring allegations to its attention. The Working Group is also required 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 to them. The onus therefore rests upon the Government to engage constructively with the Working Group by addressing the specific allegations made and assisting it in reaching a conclusion on each communication brought to its attention.

63. Turning to the specific allegations made against the Government of Turkey, the Working Group observes that the source alleges that the detention of Mr. Karaca was arbitrary, while the Government of Turkey in its response does not provide any details concerning the specific situation of Mr. Karaca but sets out an explanation of the devastating impact of the Fethullah terrorist organization/Parallel State Structure (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 the case of Mr. Karaca and invites it to cooperate with the Working Group in a constructive manner, as it has done in the past.

<sup>17</sup> Opinions No. 1/2017, No. 38/2017, No. 41/2017, No. 11/2018, No. 42/2018, No. 43/2018, No. 78/2018, No. 10/2019, No. 53/2019, No. 79/2019, No. 2/2020, No. 29/2020, No. 30/2020 and No. 51/2020.

<sup>18</sup> Opinions No. 19/2013 and No. 11/2000. See also opinions No. 41/2017, para. 73; No. 38/2017, para. 67; No. 11/2018, para. 66; No. 20/2019, para. 81; and No. 53/2019, para. 59.

## i. Category I

64. With respect to Mr. Karaca's deprivation of liberty in and by Turkey following his handover to the Turkish authorities and forced transfer from Cambodia between 18 and 19 October 2019, the source submits, and the Government does not contest, that Mr. Karaca was not presented with an arrest warrant or informed of the reasons for his arrest by the Turkish authorities at the time of arrest. As already mentioned in reference to the Cambodian authorities (see para. 39 above), the Working Group finds that, in order to invoke a legal basis for deprivation of liberty, the Turkish authorities should have informed Mr. Karaca of the reasons for his arrest, at the time of arrest, and should have promptly informed him of the charges against him.<sup>19</sup> Their failure to do so violates article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant, as well as principle 10 of the Body of Principles, and renders his arrest devoid of any legal basis.<sup>20</sup>

65. The source submits, and again the Government of Turkey has chosen not to rebut, although it has had the opportunity to do so, that Mr. Karaca was subjected to incommunicado detention from the time of his handover to the Turkish authorities on 18 October 2019 to his preliminary hearing before a judge on 25 October 2019, when he also made a short telephone call from Silivri prison in Turkey to his spouse in Mexico. The Working Group reiterates that holding persons incommunicado also violates their right to be brought before a court and to challenge the lawfulness of their detention.<sup>21</sup> Judicial oversight of detention is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.<sup>22</sup>

66. The Working Group observes that Mr. Karaca was thus not brought promptly before a judge, within 48 hours of his arrest, barring absolutely exceptional circumstances, in accordance with the international standard.<sup>23</sup> Therefore, the Government of Turkey has also violated article 9 of the Universal Declaration of Human Rights and article 9 (1) and (3) of the Covenant, as well as principles 11, 37 and 38 of the Body of Principles.

67. With reference to the international standards referred to in paragraphs 42 and 43 above, the Working Group further observes that Mr. Karaca was not afforded the right to bring proceedings before a court in Turkey so that it may decide without delay on the lawfulness of his detention. Similarly, the Working Group notes with concern that Mr. Karaca was also categorically deprived of his right to legal counsel of his choice and to legal representation in Turkey during his period of incommunicado detention. The Working Group reiterates that access to legal counsel from the outset of detention is an essential safeguard in ensuring that the detainee can challenge the legal basis for his or her detention.<sup>24</sup>

68. For these reasons, the Working Group considers that Mr. Karaca's deprivation of liberty lacks a legal basis and is thus arbitrary, falling under category I.

## ii. Category III

69. In the Working Group's view, during and after Mr. Karaca's unlawful removal from Cambodia to Turkey, the Government of Turkey failed to respect his right to legal assistance at all times, which is inherent in the right to liberty and security of person, as well as the right

<sup>19</sup> See, e.g., opinion No. 10/2015, para. 34. See also opinions No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; and No. 46/2019, para. 51.

<sup>20</sup> See also article 5 (1)–(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

<sup>21</sup> Opinions No. 11/2018, para. 47; No. 79/2017, para. 47; No. 46/2017, para. 22; and No. 45/2017, para. 29.

<sup>22</sup> Opinions No. 35/2018, para. 27; No. 83/2018, para. 47; No. 32/2019, para. 30; No. 33/2019, para. 50; No. 44/2019, para. 54; No. 45/2019, para. 53; No. 59/2019, para. 51; and No. 65/2019, para. 64.

<sup>23</sup> Human Rights Committee, general comment No. 35 (2014), para. 33, citing *Kovsh v. Belarus* (CCPR/C/107/D/1787/2008), paras. 7.3–7.5. See also CCPR/C/79/Add.89, para. 17; CCPR/C/SLV/CO/6, para. 14; and CCPR/CO/70/GAB, para. 13. For the Working Group's jurisprudence, see opinions No. 57/2016, paras. 110–111; No. 2/2018, para. 49; No. 83/2018, para. 47; No. 11/2019, para. 63; No. 20/2019, para. 66; No. 26/2019, para. 89; No. 30/2019, para. 30; No. 36/2019, para. 36; No. 42/2019, para. 49; No. 51/2019, para. 59; No. 56/2019, para. 80; No. 76/2019, para. 38; and No. 82/2019, para. 76.

<sup>24</sup> Opinion No. 40/2020, para. 29.

to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and articles 9 (1) and 14 (1) and (3) (b) and (d) of the Covenant, as well as principles 15, 17 and 18 of the Body of Principles and principles 1, 5, 7, 8, 21 and 22 of the Basic Principles on the Role of Lawyers.<sup>25</sup> The Working Group considers that this violation substantially undermined and compromised Mr. Karaca's capacity to defend himself in any subsequent judicial proceedings.<sup>26</sup>

70. The Working Group notes the denial of Mr. Karaca's due process right to be visited by and to correspond with his family and to be given adequate contact with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations, in accordance with principles 15 and 19 of the Body of Principles and rules 43 (3) and 58 of the Nelson Mandela Rules.<sup>27</sup> As the Human Rights Committee has observed in paragraph 58 of its general comment No. 35 (2014), giving prompt and regular access to family members, as well as independent medical personnel and lawyers, is an essential and necessary safeguard for the prevention of torture and for protection against arbitrary detention and infringement of personal security.<sup>28</sup>

71. The Working Group considers that Mr. Karaca's arrest, detention and forced transfer from Cambodia to Turkey occurred at the latter State's request and as a result of close collaboration between the two States. On 21 October 2019, the Ministry of the Interior of Cambodia openly admitted that that was indeed the case and cited the security cooperation agreement between the two countries of 30 July 2019<sup>29</sup> as the legal basis. It is clear that the two Governments deliberately sidestepped the regular extradition procedure.

72. The Working Group has already established the responsibility of the Government of Cambodia for the extradition of Mr. Karaca from Cambodia. Therefore, and noting the disregard for accepted extradition procedures, which would have afforded Mr. Karaca his due process rights, and noting also the breach of article 14 of the Covenant, the Working Group finds Mr. Karaca's detention arbitrary, falling under category III also as regards Turkey.

### iii. Category V

73. The Working Group will now examine whether Mr. Karaca's deprivation of liberty constitutes discrimination under international law for the purpose of category V.

74. The source has alleged that the detention of Mr. Karaca falls under category V, since it constitutes discrimination based on political or other opinion, and the Government has chosen not to rebut this allegation. The Working Group notes that Mr. Karaca is allegedly affiliated with the Fethullah terrorist organization/Parallel State Structure (Hizmet movement), whose members have been detained at home and abroad by the Turkish authorities since the failed attempted coup d'état in July 2016, as detailed above.

75. The Working Group notes that the present case is the most recent case concerning individuals with alleged links to the Fethullah terrorist organization/Parallel State Structure (Hizmet movement) that has come before the Working Group in the past three years.<sup>30</sup> In all these cases, the Working Group has found that the detention of the individuals concerned was arbitrary. It notes a pattern of targeting those with alleged links to the Fethullah terrorist organization/Parallel State Structure (Hizmet movement) on the discriminatory basis of their political or other opinion. Accordingly, the Working Group finds that the Government of Turkey detained Mr. Karaca on the basis of a prohibited ground for discrimination, and that

<sup>25</sup> See also OL TUR 15/2018 of 22 October 2018 (available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24130>).

<sup>26</sup> See also Human Rights Committee, general comment No. 32 (2007), para. 34.

<sup>27</sup> See opinions No. 35/2018, para. 39; No. 44/2019, paras. 74–75; and No. 45/2019, para. 76.

<sup>28</sup> See also articles 14 (3) and 16 (2) of the Arab Charter on Human Rights.

<sup>29</sup> The Working Group notes that Turkey has signed numerous security cooperation agreements with States.

<sup>30</sup> Opinions No. 1/2017, No. 38/2017, No. 41/2017, No. 11/2018, No. 42/2018, No. 43/2018, No. 78/2018, No. 10/2019, No. 53/2019, No. 79/2019, No. 2/2020, No. 29/2020, No. 30/2020 and No. 51/2020.

the case falls within 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.

76. During 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>31</sup> The Working Group expresses its concern over 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 the rules of international law may constitute crimes against humanity.<sup>32</sup>

77. The Working Group would welcome the opportunity to conduct a country visit to Turkey. Given that a significant period has passed since its most recent visit to Turkey, in October 2006, and noting the Government's standing invitation 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**

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

#### **Regarding Cambodia**

The deprivation of liberty of Osman Karaca, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11 (1) and 13 (1)–(2) of the Universal Declaration of Human Rights and articles 2 (1) and (3); 9 (1), (2) and (4); 12 (1) and (2); 13; 14 (1) and (3) (b) and (d); 16; and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

#### **Regarding Turkey**

The deprivation of liberty of Osman Karaca, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11 (1) and 13 (1) and (2) of the Universal Declaration of Human Rights and articles 2 (1) and (3); 9 (1), (2), (3) and (4); 12 (1) and (2); 14 (1) and (3) (b) and (d); 16; and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

79. The Working Group requests the Government of Cambodia and the Government of Turkey to take the steps necessary to remedy the situation of Mr. Karaca 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.

80. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be for the Government of Turkey to release Mr. Karaca immediately and for both the Government of Turkey and the Government of Cambodia to accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government of Turkey to take urgent action to ensure his immediate release.

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

82. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in Cambodia, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism for appropriate action.

<sup>31</sup> Ibid.

<sup>32</sup> See, e.g., opinion No. 47/2012, para. 22.

83. The Working Group requests both Governments to disseminate the present opinion through all available means and as widely as possible.

**Follow-up procedure**

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

- (a) Whether Mr. Karaca has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Karaca;
- (c) Whether an investigation has been conducted into the violation of Mr. Karaca's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Cambodia and Turkey with their international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

85. The Governments are invited to inform the Working Group of any difficulties they 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.

86. The Working Group requests the source and the Governments 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.

87. 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>33</sup>

*[Adopted on 26 November 2020]*

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<sup>33</sup> Human Rights Council resolution 42/22, paras. 3 and 7.