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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fifth session, 12–16 August 2019

Opinion No. 53/2019 concerning Melike Göksan and Mehmet Fatih Göksan (Turkey)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 15 May 2019 the Working Group transmitted to the Government of Turkey a communication concerning Melike Göksan and Mehmet Fatih Göksan. The Government replied to the communication on 15 July 2019. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);



(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Melike Göksan is a Turkish national, born in 1990. She is a judge at one of the High Criminal Courts in Adana, Turkey. Mehmet Fatih Göksan is a Turkish national, born in 1990. He is also a judge at one of the High Criminal Courts in Adana, Turkey. After his first arrest, he was suspended from his official functions. Melike Göksan and Mehmet Fatih Göksan are married.

(a) Contextual background

5. The source explains that, just after the attempted coup d'état in July 2016, over 4,200 judges and prosecutors were dismissed through executive orders of the High Council of Judges and Prosecutors.¹ Following another order of the High Council of Judges and Prosecutors, 189 judges and prosecutors were dismissed in October 2016. After that, an order dated 13 October 2016 was issued by the Ankara Prosecutor's Office to arrest and detain those 189 judges and prosecutors for their alleged membership of an armed terrorist group (Fethullah terrorist organization (FETÖ)).

(b) Arrest and detention

6. According to the source, on 14 October 2016 at about 2 a.m., following a search of her apartment in Adana, Ms. Göksan was arrested at her apartment by police forces on the basis of an arrest warrant. On the same day, following a judgment of the Second Peace Judgeship Court of Adana, Ms. Göksan was transferred to Tarsus Prison.

7. With regard to Mr. Göksan, the source reports that he was arrested a first time on 19 July 2016. He was released the next day but was ordered to report to a police station once a week. On 5 September 2016, at about 9 a.m., while he was driving home, he was arrested for a second time. A judgment was issued for his detention on the same day. He was immediately transferred to the Osmaniye Prison. The cases of Mr. and Ms. Göksan were merged together at a later stage.

8. The source explains that, after the arrest, the only reason provided to Mr. and Ms. Göksan for their detention was that they were members of FETÖ.

9. The source notes that the arrest and detention of judges are specifically regulated by article 88 of Turkish Law 2802. However, the authorities contended that, as members of a terrorist organization, Mr. and Ms. Göksan were, all the time, committing an aggravated felony and, accordingly, they were in flagrante delicto at the time of their arrests. The source contests the legality of the detention.

10. The source also claims that, contrary to article 84 of Turkish Law 2802, Mr. and Ms. Göksan were not given an opportunity to respond to the allegations against them. In addition, contrary to article 85 of that law, the Second Peace Judgeship Court of Adana did not have jurisdiction to adjudicate over the arrest and detention of a judge and it follows that the arrest and detention of Mr and Ms. Göksan are unlawful and arbitrary. The source further claims that they were not informed about the charges against them within five days, as required in article 89 of this law. Instead, the indictment against Mr. and Ms. Göksan was only finalized by the Prosecutor on 18 July 2017, more than nine months after their arrest.

¹ The source refers to Office of the United Nations High Commissioner for Human Rights, "Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East" (March 2018), para. 8.

11. The source explains that, in the vast majority of the indictment, there is nothing explaining the charges brought against Mr. and Ms. Göksan. The Prosecutor refers only to an Excel sheet, unavailable to both of them, containing a list of users of the ByLock messaging application, which allegedly indicates that Mr. and Ms. Göksan's phone numbers were associated with a ByLock account. It was also indicated in the indictment that, other than the alleged association of Mr. and Ms. Göksan's phone numbers with a ByLock account, no messages or mail sent or received by them through the ByLock application were found. Therefore, according to the source, there is no evidence regarding how the alleged use of this application could be equated with a criminal act. In addition, the source specifies that they both denied that they used such an application.

12. According to the source, reference is made in the indictment to two witnesses who allegedly remember Mr. and Ms. Göksan from the time of their studies at the university during the period 2008–2012 and also from the time that they were trainee judges and prosecutors, in 2014.

13. On the basis of those witness statements, Ms. Göksan was formally charged with the following acts: (a) use of ByLock; (b) residing at the Fethullah Gülen group's student houses while studying at the university (2008–2012); (c) being the person in charge of one of the Gülen group's student houses while studying at the university (2008–2012); (d) being the person in charge of more than one of the Gülen group's student houses while studying at the university (2008–2012); (e) being the person in charge of the Gülen group's members at the faculty while studying at the university (2008–2012); (f) being the person in charge of the Gülen group's student houses and its members at the faculty while studying at the university (2008–2012); (g) being the person elected to the committee for the preparation of the yearbook during her traineeship to be a judge and prosecutor (2014); and (h) having executive functions in the Gülen group while studying at the university (2008–2012) and during her traineeship to be judge and prosecutor (2014).

14. With regard to Mr. Göksan, the source indicates that the charges against him are: (a) use of ByLock; (b) being present at the Gülen group's student houses for meetings, called "sohbet" (2008–2012); and (c) residing at the Gülen group's houses for candidates for judges and prosecutors during his preparations for the examination and competition to be a judge and prosecutor (2013).

15. The source notes that Mr and Ms. Göksan's alleged involvement with the Gülen group dates back to their time at university or during their traineeships. All these events occurred before 2015, before the time that the Gülen group was designated as a terrorist organization.

16. In addition, the source states that the witness alleging the presence of Mr. Göksan at meetings ("sohbet") in the Gülen group's student houses mentioned that all the men in their class at the law faculty participated in those meetings. Therefore, there is nothing in the Prosecutor's indictment demonstrating any credible evidence of Mr. and Ms. Göksan's membership of an armed terrorist organization or of any tangible or specific criminal act committed by them.

17. The source indicates that, after having received the indictment, Mr. and Ms. Göksan were able to appear for an oral hearing before the Eleventh High Criminal Court of Adana on 22 January 2018, more than 16 and 15 months, respectively, after their detention. They were also heard before that court on 30 March 2018, 11 May 2018 and 6 June 2018. They underlined, during the hearings, that they had not been provided with any tangible evidence about their use of ByLock and they noted that the witness statements were hearsay, given under duress or given in the hope of avoiding similar accusations or of keeping a job. In addition, the source reports that neither of the witnesses were present during the hearings for cross-examination. In this regard, the source alleges that due process was not observed and that the detention of Mr. and Ms. Göksan is arbitrary.

18. In addition, according to the source, Ms. Göksan indicated during the hearings that, despite her precarious health condition resulting from severe migraines, she had not had access to a medical doctor for more than four months. The source explains furthermore that, given the high number of detainees in the cell, they are obliged to sleep in turns and a bed is used by two or three persons.

19. The source reports that, on 6 June 2018, Ms. Göksan was sentenced to nine years and nine months of imprisonment and Mr. Göksan was sentenced to seven years and six months of imprisonment. The source specifies that, according to the judgment, with respect to the use of ByLock, other than the alleged association of Mr. and Ms. Göksan's phone numbers with a ByLock account, no messages or mail were sent or received by them through the ByLock messaging application. On 25 February 2019, Mr. and Ms. Göksan's appeal to the Regional Court of Justice was rejected and the judgment of the Eleventh High Criminal Court of Adana was upheld.

20. Mr. and Ms. Göksan appealed to the Supreme Court of Cassation on 28 February 2019; the appeal is still pending.

(c) Legal analysis

(i) Deprivation of liberty under category I

21. According to the source, Mr. and Ms. Göksan's deprivation of liberty falls under category I, given that many articles of Turkish Law 2802 have been violated and their status as judges has been completely ignored. The argument contending that, as members of a terrorist organization, Mr. and Ms. Göksan were committing an aggravated felony and were thus in flagrante delicto is without merit. In addition, the procedural requirements with respect to the investigation process, arrest, detention and sentencing of a judge were not respected by the authorities.

22. In particular, regarding the arrest in flagrante delicto, the source argues that Mr. and Ms. Göksan were not committing a crime at the time of their respective arrests. Nothing is alleged in this regard other than that, as a member of a terrorist organization, Mr. and Ms. Göksan were committing an aggravated felony all the time and they were thus in flagrante delicto. As explained before, such an argument is without merit. Legally basing the arrest and detention on such reasoning is evidence of the arbitrariness of the arrest and detention of Mr. and Ms. Göksan.

(ii) Deprivation of liberty under category II

23. The source claims that Mr. and Ms. Göksan's deprivation of liberty also falls under category II as employed by the Working Group. They both deny the allegation that they downloaded and used the ByLock application, which is the main reason for their deprivation of liberty. The source argues that, even if Mr. and Ms. Göksan did use the ByLock application, it would have been merely an exercise of their right to freedom of expression.

(iii) Deprivation of liberty under category III

24. The source considers that their deprivation of liberty also falls under category III as employed by the Working Group. The source claims that the status of Mr. and Ms. Göksan as judges has been completely ignored at every step of the proceedings and trial. All related provisions of Turkish Law 2802 were violated under the pretext of the two individuals being arrested in flagrante delicto.²

25. In addition, the source recalls that Mr. Göksan was only able to appear before a court more than 16 months after his detention. Moreover, the source contends that the witness statements in this case were not substantiated by any piece of evidence. The statements were either hearsay, given under duress or given in the hope of avoiding similar accusations or of keeping a job. Neither of the two witnesses were present at any of the hearings for cross-examination.

² The source notes that such an interpretation of the concept of flagrante delicto has been recently found inadmissible by the European Court of Human Rights, in *Alparslan Altan v. Turkey*, Case No. 12778/17, judgment dated 16 April 2019.

(iv) Deprivation of liberty under category V

26. Finally, the source claims that Mr. and Ms. Göksan's deprivation of liberty is arbitrary, since it constitutes discrimination on the basis of political or other opinion or status.

Response from the Government

27. On 15 May 2019, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 15 July 2019, detailed information about the current situation of Mr. and Ms. Göksan and to clarify the legal provisions justifying their detention, as well as its compatibility with the obligations of Turkey under international human rights law, in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Turkey to ensure the physical and mental integrity of Mr. and Ms. Göksan.

28. On 15 July 2019, the Government of Turkey submitted its reply.

29. The Government explains that an arrest warrant was issued for Mr. Göksan on the basis of an investigation launched by the Adana Chief Public Prosecutor's Office, charging him with membership of an armed terrorist organization and attempting to overthrow the constitutional order. Accordingly, he was taken into custody on 19 July 2016 at his house. He was informed of his legal rights and the charges against him. He gave his testimony in the presence of a lawyer. He was brought before a judge on 20 July 2016. Adana Sixth Magistrates' Office, after listening to Mr. Göksan in the presence of his lawyer and evaluating the evidence collected thus far, decided that the grounds that would justify his detention were not met and therefore ruled on his release in accordance with article 109/3-b of the Code of Criminal Procedure. New evidence was collected as the investigation continued, and Mr. Göksan was called again by the Adana Chief Public Prosecutor's Office. However, according to the Government, he did not present himself and could not be reached. Accordingly, Adana Sixth Magistrates' Office issued a warrant for his arrest, in accordance with article 94 of the Code of Criminal Procedure.

30. The Government reports that, on 5 September 2016, Mr. Göksan was identified during a routine highway control by law enforcement officials and was taken into custody in pursuance of the arrest warrant noted above. On the same day, he was brought before a judge and he gave his testimony in the presence of his lawyer. The Court, considering the gravity of the crime he is charged with and the detection of his use of the ByLock application, which is commonly used by members of FETÖ as a platform for communication, ordered his detention in accordance with articles 100 and 101 of the Code of Criminal Procedure.

31. According to the Government, the indictment against Mr. Göksan was issued on 18 July 2017. He was sentenced to seven years and six months of imprisonment for being a member of an armed terrorist organization. His lawyer contested the decision and appealed to the Regional Court of Justice on 1 October 2018. On 25 February 2019, the Regional Court of Justice upheld the decision of imprisonment. He therefore appealed to the Supreme Court of Cassation on 28 March 2019. The case is currently before the Supreme Court of Cassation.

32. With regard to Ms. Göksan, the Government submits that she was taken into custody on 14 October 2016 on the basis of an arrest warrant issued by Adana Sixth Magistrates' Office. She was charged with membership of an armed terrorist organization. She was also informed of her legal rights and the charges against her and gave her testimony in the presence of a lawyer. The Adana Second Magistrates' Office took her testimony in the presence of her lawyer on the same day. It ruled on her detention in accordance with articles 100 and 101 of the Code of Criminal Procedure, considering the gravity of the crime she is charged with and the detection of her use of the ByLock application.

33. The Government reports that the indictment concerning Ms. Göksan was issued on 18 July 2017. She was sentenced to nine years and nine months of imprisonment for being a member of an armed terrorist organization. Her lawyer contested the decision and appealed

to the Regional Court of Justice on 1 October 2018. On 25 February 2019, the Regional Court of Justice upheld the decision of imprisonment. She therefore appealed to the Supreme Court of Cassation on 28 March 2019. The case is currently before the Supreme Court of Cassation.

34. The Government therefore submits that all proceedings of arrest, custody and detention were carried out by independent courts based on reasoned decisions. Furthermore, reasoned decisions of the courts of first instance were also examined and upheld by higher courts upon the appeals made by Mr. and Ms. Göksan.

35. The Government adds that Mr. and Ms. Göksan have lodged multiple applications before the Constitutional Court, which found them inadmissible (in some cases on the basis of the non-exhaustion of other domestic remedies).

36. Regarding the allegations of arbitrary detention of Mr. and Ms. Göksan prior to their conviction, the Government stressed that the relevant courts ruled on their detention during the investigation and prosecution stages because of the gravity of the crime of being a member of a terrorist organization, as well as the detection of their use of the ByLock application.

37. On the issue of the legal grounds justifying their detention, the Government argues that it must determine whether there is reasonable doubt that an offence has been committed in order for a person to be deprived of liberty. Furthermore, the Government recalls that there should also be a requirement of public interest which can justify the deprivation of liberty.

38. The Government consequently submits that a person's use of ByLock constitutes a reasonable doubt that he or she is or may have been a member of FETÖ for a number of reasons, as confirmed by various decisions rendered by national courts: (a) the ByLock application was assessed through technical procedures such as reverse engineering, analysis of encryption, analysis of network behaviour and the codes of the servers connected; and (b) it was observed that the ByLock application was designed to encrypt each message sent with a different encryption in order to ensure highly encrypted communication over an Internet connection.

39. The Government further submits that the proof supporting the fact that the ByLock application was made available for FETÖ members under the disguise of a global application is as follows: (a) there are some Turkish expressions in the source codes of the application; (b) user names, group names and most of the codes that have been decrypted comprise Turkish expressions; (c) almost all of the contents that have been decrypted are in Turkish; (d) although the administrator of the application's server claimed that they blocked access to the application with IP addresses from the Middle East, almost all blocks were aimed at IP addresses from Turkey; and (e) those wishing to download the application were obliged to access it over a virtual private network in order to disguise the identities of the users accessing it from Turkey and to disguise the communication. In addition, almost all the searches for ByLock using the Internet search engine Google were made by users from Turkey and there has been an increase in Google searches for the application as of the date of blocking access to the application by those with IP addresses in Turkey. Moreover, posts were shared promoting FETÖ, mostly through ByLock-related online media (social media, web sites, etc.) using fake accounts and ByLock, which had more than 200,000 users but was known by neither the Turkish public nor the international community before the attempted coup d'état in Turkey on 15 July 2016.

40. The Government further argues that it was established that signing up to the application was not enough to initiate contact with other users of the system: user names or codes, provided mostly face to face or through an intermediary (courier, existing ByLock user, etc.), needed to be added by both sides in order to communicate with each other. It was designed in a way that would allow communication only after both users added each other.

41. Moreover, according to the Government, voice calls, instant messaging, email delivery and file transfer could be carried out with the application. It was also assessed that the organizational and communication needs of the users were met by the application and

they did not need any other communication tool. As all communications were transmitted over the server, the groups created and the contents of the communications could be monitored and controlled by the administrator of the application. Furthermore, correspondence was deleted automatically from the device after specific periods without requiring a manual process. This, the Government submits, indicates that the system was designed in a way to maintain communication security, even if users forgot to delete the data. Therefore, it has been established that the ByLock application was designed in a way to prevent access to the past data and correspondence of the users if the device was seized as a result of a probable judicial proceeding. In addition, the server and communication data of the application were encrypted in the application's database; this is regarded as an additional security measure in order to prevent the identification of users and ensure the security of communications.

42. The Government submits that, in order to disguise themselves, the users set unique and very long passwords. According to analysis, more than half of the passwords consisted of 9 or more digits and some consisted of 38 digits. Instead of downloading the application from online application stores, after a certain date the application was uploaded manually to the devices of users. It was also observed that almost all of the messages obtained and analysed included organizational contacts and activities that corresponded to the jargon of the organization.

43. Finally, the Government argues that it was understood from the statements of FETÖ members who were under judicial control proceedings (custody, arrest, apprehension, etc.) after the attempted coup d'état on 15 July that ByLock was used as an organizational communication tool by members of FETÖ.

44. Consequently, the Government submits that the detection of Mr. and Ms. Göksan's use of ByLock constitutes a reasonable doubt concerning their membership of FETÖ. In relation to the presence of public interest, which is the second requirement for detention exceeding a certain period, the Government emphasizes that Mr. and Ms. Göksan were charged with being a member of an armed terrorist organization that orchestrated and carried out the attempted coup d'état on 15 July 2016, which was aimed at demolishing the constitutional order in Turkey and overthrowing the elected President, the Parliament and the Government. FETÖ killed 251 Turkish citizens during that attempted coup d'état. Therefore, there is clearly a public interest for the courts to exercise judicial control measures against persons who are charged with being a member of such a terrorist organization, which posed a threat to public order and security.

45. Furthermore, the Government claims that, in their decisions on the continued detention of Mr and Ms. Göksan, the relevant courts took into consideration that the gravity of the crime they were charged with, the evidence collected against them and the fact that the crime of being a member of an armed terrorist organization is among the crimes stipulated in article 100 of the Code of Criminal Procedure, regarding which a ground for detention is deemed to exist, constituted legal grounds for their detention before they were convicted.

46. The Government also rebuts the allegations made by the source regarding the periods of detention and argues that both Mr. and Ms. Göksan were brought before a judge on the day of their arrest or the following day, despite the fact that they were arrested during the state of emergency which would have justified much longer periods for custody. Both of their indictments were prepared in due course, despite the tremendous amount of cases before the judiciary.

47. The Government argues that the proceedings against them were carried out swiftly and in accordance with the international obligations of Turkey, despite the fact that Turkey, during much of the time they were in detention, had resorted to the right of derogation from its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights and had already submitted notifications of derogation to the Council of Europe in accordance with article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and to the Secretariat of the United Nations in accordance with

article 4 of the International Covenant on Civil and Political Rights, concerning the rights prescribed therein.

48. With regard to the lawfulness of the detention after their conviction, the Government submits that Mr. and Ms. Göksan were convicted by competent courts based on reasoned judgments. These judgments by the independent judiciary, as well as all proceedings throughout the trial processes, were in accordance with the national legislation of Turkey. The conformity of national legislation with the international obligations of Turkey, particularly those concerning human rights, is guaranteed in the Constitution of Turkey (in its article 90).

49. The Government particularly emphasizes that the judgments regarding Mr. and Ms. Göksan are not yet finalized as both are currently before the Supreme Court of Cassation.

50. The Government therefore dismisses the source's allegations of arbitrary detention after Mr. and Ms. Göksan were convicted and sentenced as unsubstantiated since both convictions were upheld by competent courts on the basis of reasoned decisions. Equally, the investigation and the prosecution phases that led to the convictions were carried out in accordance with the relevant legislation and international obligations of Turkey.

51. With regard to the conditions of detention, the Government submits that Ms. Göksan was first taken to Tarsus Penal Institution for Women on 14 October 2016. She was transferred to Tarsus Campus of Penal Institutions on 21 June 2017, where she remains. The ward where she is located houses 17 persons; it has a separate yard measuring 33 square metres, doors to which are opened every day at 6.30 a.m. and closed at 7.30 p.m. The ward is two-storied. The lower floor, which measures 37 square metres, houses the main living space, toilets, a bathroom, two sinks and a kitchen with a separate sink. The upper floor also measures 37 square metres and is used as a dormitory.

52. The Government argues that Ms. Göksan attended sports events and volleyball games using the shuttle of the facility on 18, 24 and 25 September and 2 October 2018. She is also currently attending a sewing class for home textiles which she started taking on 20 December 2018. She makes weekly phone calls and is visited often by her family.

53. The Government also argues that all sentenced and pretrial detainees in the Tarsus Campus of Penal Institutions receive physical examinations from the facility's doctor upon written request. They are transferred to hospitals for further examination or treatment upon the approval of the facility's doctor.

54. The Government adds that, according to Ms. Göksan's file at the Tarsus Campus of Penal Institutions, she has received physical examinations and treatment from the facility's doctor 31 times since her detention in the facility. She was transferred to the dermatological ward of the Tarsus State Hospital five times. On one occasion, she submitted a written request not to be transferred for treatment. Reports also show that she has received a physical examination and treatment once at the emergency ward, once at the cardiology ward, once at the ward for internal diseases and once at the eye ward of the Tarsus State Hospital.

55. In relation to Mr. Göksan, the Government submits that he is serving his sentence in Osmaniye No. 1 T-Type Penal Institution. Mr. Göksan has been occupying a room built for eight people with seven other persons in this facility. The room has all necessary amenities such as an electric fan, a kettle, a fridge, a television, an electric razor and a hair dryer. The Government argues that Mr. Göksan benefits from all the rights of a sentenced person, including food, bed, bath, telephone calls, health services and basic supplies from the facility's canteen. He makes weekly phone calls to his family and to his wife. According to his file at the Osmaniye No. 1 T-Type Penal Institution, he has had various complaints regarding his health, for all of which he received a physical examination and was prescribed the necessary medication by the facility's doctor.

56. In the light of the explanations provided above, the Government argues that the allegations communicated by the source to the Working Group on Arbitrary Detention are unfounded and should therefore be dismissed.

Further comments from the source

57. The reply of the Government of Turkey was sent to the source for further comments on 15 July 2019 and the source submitted such further comments on 18 July 2019. In those further comments, the source rejects the submissions made by the Government as superficial and lacking in detail and repeats the initial allegations.

Discussion

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

59. 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 that prevents 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.³

60. As a further preliminary issue, the Working Group notes that the situation of Mr. and Ms. Göksan falls within the scope of the derogations that the Government made under the International Covenant on Civil and Political Rights. On 21 July 2016, the Government of Turkey informed the Secretary-General that it had declared a state of emergency for three months in response to the severe dangers to public security and order, amounting to a threat to the life of the nation within the meaning of article 4 of the Covenant.⁴

61. While acknowledging the notification of those derogations, the Working Group emphasizes that, in the discharge of its mandate, it is also empowered under paragraph 7 of its methods of work to refer to the relevant international standards set forth in the Universal Declaration of Human Rights and to customary international law. Moreover, in the present case, articles 9 and 14 of the Covenant are most relevant to the alleged detention of Mr. and Ms. Göksan. 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 situation.⁵

62. In determining whether Mr. and Ms. Göksan's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. The Government can meet this burden of proof by producing documentary evidence in support of its claims.⁶ 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).

³ See, for example, opinions No. 19/2013 and No. 11/2000. See also opinions No. 41/2017, para. 73, No. 38/2017, para. 67, and No. 11/2018, para. 66.

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

⁵ Human Rights Committee general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 4. See also general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 6; and general comment No. 35 (2014) on liberty and security of person, paras. 65–66.

⁶ See opinion No. 41/2013, in which the Working Group noted that the source of a communication and the State party did not always have equal access to the evidence and frequently the State party alone had the relevant information. In that opinion, the Working Group also recalled that, where it was alleged that a person had not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden to prove the negative fact asserted by the applicant was on the public authority, because the latter was generally able to demonstrate that it had followed the appropriate procedures and applied the guarantees required by law by producing documentary evidence of the actions that were carried out (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, I.C.J. Reports 2010, p. 661, para. 55).

63. Turning to the specific allegations, the Working Group notes that the source has argued that the detention of Mr. and Ms. Göksan is arbitrary, falling into categories I, II, III and V of the Working Group. The Government, while not addressing the categories of the Working Group separately, denies all allegations and submits that the arrest and detention of Mr. and Ms. Göksan were carried out in accordance with all international human rights obligations undertaken by Turkey. The Working Group shall proceed to examine the submissions made by the source in turn.

64. The source argues that the detention of Mr. and Ms. Göksan falls under category I given that many articles of Turkish Law 2802 have been violated and their status as judges was completely ignored. The Government argues that the arrests of both Mr. and Ms. Göksan were carried out in accordance with a duly issued arrest warrant which legitimized the deprivation of liberty of both individuals.

65. The Working Group recalls that it considers detention as arbitrary and falling under category I if such detention lacks legal basis. In the present case, the Working Group notes that it appears that Mr. and Ms. Göksan were both arrested in pursuance of an arrest warrant.

66. Further to that, the Working Group must examine whether Mr. and Ms. Göksan were promptly notified of the reasons of their arrest and of the charges against them. In this regard, the Government contends that Mr. Göksan was informed of the charges on the date of his initial arrest, on 19 July 2016. According to the Government, he was charged with membership of an armed terrorist organization and attempting to overthrow the constitutional order. Similarly, Ms. Göksan was informed of the reasons for her arrest and charges against her on the day of her arrest, namely 14 October 2016. The Government argues that she was charged with being a member of an armed terrorist organization. The source, on the other hand, alleges that neither Mr. nor Ms. Göksan were given any specific information concerning the reasons for the arrest or the charges against them and that the authorities only accused them of being members of FETÖ.

67. The Working Group recalls that article 9 (2) of the Covenant requires that anyone who is arrested is not only informed of the reasons for arrest at the time of arrest but also promptly informed of any charges against them. As explained by the Human Rights Committee in its general comment No. 35 (2014) on liberty and security of person, the obligation encapsulated in article 9 (2) has two elements: (a) information about the reasons for arrest must be provided immediately upon arrest; and (b) there must be prompt information about the charges provided thereafter (para. 24).⁷

68. The requirement to provide reasons for the arrest of an individual also has a qualitative element in that, as noted by the Human Rights Committee, the reasons must include not only the general legal basis of the arrest, but also enough factual information to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.⁸ The Working Group considers that the Government has failed to prove how this requirement of article 9 (2) was met in the case of either Mr. or Ms. Göksan. The Working Group accepts that the full indictment against a person would take time to provide but the Turkish authorities should have been able to provide Mr. and Ms. Göksan, at the time of their respective arrests, with the factual specifics to indicate the substance of the crime they had allegedly committed.

69. In fact, the Working Group notes that the Government has not provided any information on the evidence against Mr. and Ms. Göksan that would justify their detention and that the only evidence against them is their alleged use of the ByLock application. In these circumstances, the Working Group considers that the Government has not established that Mr. and Ms. Göksan were promptly informed of the charges against them nor the reason for their arrest at the time of arrest, nor substantiated that their detention meets the criteria of reasonableness and necessity. The Working Group recalls that a derogation under

⁷ See also, for example, opinions No. 1/2017, No. 6/2017, No. 30/2017, No. 2/2018, No. 4/2018, No. 42/2018, No. 43/2018 and No. 79/2018.

⁸ Human Rights Committee general comment No. 35 (2014) on liberty and security of person, para. 25.

article 4 of the Covenant cannot justify a deprivation of liberty that is unreasonable or unnecessary.⁹ The Working Group therefore concludes that the arrest and detention of Mr. and Ms. Göksan amounted to a violation of their rights under articles 3 and 9 of the Universal Declaration of Human Rights and articles 9 (1) and 9 (2) of the Covenant and thus fall under category I of the Working Group.

70. The source has further argued that the detention of Mr. and Ms. Göksan falls under category II since their arrest and detention are based on the allegation that they downloaded and used the application ByLock. The source argues that, even if Mr. and Ms. Göksan did use the ByLock application, it would have been merely an exercise of their right to freedom of expression.

71. The Government denies these allegations, arguing that Mr. and Ms. Göksan were arrested and detained as a result of their engagement in criminal activity, namely being part of a terrorist organization, and cites the usage of the ByLock application by Mr. and Ms. Göksan as evidence of such criminal activity.

72. In the present case, the Working Group observes that the core of the allegations against Mr. and Ms. Göksan, as presented by the Government, is their alleged alliance with the Gülen group, which, according to the Government, stems from them having downloaded and used the ByLock application on their telephones. The Government has made detailed submissions on how the ByLock application was used by FETÖ. However, the Working Group observes that these explanations are rather broad and concern how the ByLock application was used by the Gülen group in general, but do not provide any detailed explanation as to how the alleged use of the application by either Mr. or Ms. Göksan could be equated with a criminal act. Nor has the Government presented any evidence that either Mr. or Ms. Göksan were indeed members of FETÖ.

73. The Working Group takes note of the report on the impact of the state of emergency on human rights in Turkey of the Office of the United Nations High Commissioner on Human Rights (OHCHR). This report contains an examination of the impact of various decrees issued by the Government of Turkey, which served as a basis for the dismissal of large numbers of security, military and police officers, teachers, academics, civil servants and health sector personnel. Paragraph 65 of the report contains the following conclusion:

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

74. In paragraph 48 of that report, it is stated that:

Based on credible reports from a variety of sources, OHCHR documented increased executive control over, and interference with the judiciary and prosecution service; the arrest, dismissal and arbitrary transfer of judges and prosecutors to other courts; and recurring instances of threats against lawyers.

75. The Working Group notes that the cases of Mr. and Ms. Göksan appear to follow the pattern described in the report.

76. The Working Group is mindful of the state of emergency situation which was declared in Turkey at the time. However, while the National Security Council of Turkey had already designated FETÖ as a terrorist organisation in 2015, the fact that the

⁹ Ibid., para. 66; see also general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency.

organization was ready to use violence had not become apparent to Turkish society until the attempted coup d'état in July 2016. As noted by the Council of Europe High 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 organisations affiliated to this movement, which were closed after 15 July, were open and legally operating until that date.¹⁰

77. In the light of this, the Council of Europe Commissioner for Human Rights pointed out that there was therefore a need, when criminalizing membership and support of that organization, to distinguish between persons who engaged in illegal activities and those who were sympathizers or supporters of, or members of legally established entities affiliated with the movement, without being aware of its readiness to engage in violence.¹¹

78. The Working Group observes that the core of the allegations against Mr. and Ms. Göksan is their alleged perceived alliance with the Fethullah Gülen group about 10 years ago, which is said to have manifested mainly through the use of the ByLock communications application. The Working Group notes the failure by the Government of Turkey to show how the mere use of a regular communications application such as ByLock by Mr. and Ms. Göksan constituted an illegal criminal activity, as well as the absence of any evidence that they were in fact part of FETÖ. Noting the widespread reach of the Fethullah Gülen movement, the Council of Europe High Commissioner for Human Rights noted 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.¹² The Working Group takes note of the report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, who visited Turkey in November 2016. Several examples were brought to the attention of the Special Rapporteur of people arrested based purely on the presence of ByLock on their computer and ambiguous evidence.¹³ The Working Group also notes the recent findings of the Human Rights Committee concerning communication No. 2980/2017, in which it considered that detention on the basis of evidence of the use of the ByLock application did not meet the criteria of reasonableness and necessity.¹⁴

79. In the present case, it is clear to the Working Group that, even if Mr. and Ms. Göksan did use the ByLock application, which is an allegation denied by them, it would have been merely an exercise of their freedom of expression. To this end, the Working Group notes that freedom of opinion and freedom of expression as expressed in article 19 of the Covenant are indispensable conditions for the full development of the person; they are essential for any society and in fact they constitute the foundation stone for every free and democratic society.¹⁵ According to the Human Rights Committee, it can never become necessary to derogate from article 19 during a state of emergency.¹⁶

80. Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.¹⁷ Moreover, article 19 (2) of the Covenant protects all forms of

¹⁰ Council of Europe, memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, document CommDH(2016)35, para. 20.

¹¹ Ibid., para. 21.

¹² Ibid., para. 20.

¹³ A/HRC/35/22/Add.3, para. 54.

¹⁴ CCPR/C/125/D/2980/2017.

¹⁵ Human Rights Committee general comment No. 35 (2014) on liberty and security of person, para. 2.

¹⁶ Ibid., para. 5.

¹⁷ Ibid., para. 11.

expression and the means of their dissemination, including all forms of audiovisual as well as electronic and Internet-based modes of expression.¹⁸

81. The Working Group recalls that this is not the first time it is examining the arrest and prosecution of Turkish nationals on the basis of alleged use of the ByLock application as the key manifestation of an alleged criminal activity.¹⁹ The Working Group recalls that, in those instances, it concluded that, in the absence of a specific explanation of how the alleged mere use of the ByLock application constituted a criminal activity by the individual, their detention was arbitrary. The Working Group regrets that its views in those opinions have not been respected by the Turkish authorities and that the present case follows the same pattern.

82. The Working Group concludes that the arrest and detention of Mr. and Ms. Göksan resulted from their exercise of the rights guaranteed by article 19 of the Universal Declaration of Human Rights and of the Covenant and fall under category II.

83. Given its finding that the deprivation of liberty of Mr. and Ms. Göksan is arbitrary under category II, the Working Group wishes to emphasize that no trial of either Mr. or Ms. Göksan should have taken place. However, the trials did take place and the source has submitted that there were severe violations of their right to a fair trial and that their subsequent detention therefore falls under category III of the Working Group.

84. The source argued that the detention of Mr. and Ms. Göksan is arbitrary under category III because they did not appear before the court until 16 and 15 months, respectively, after their detention; that there was no substantial evidence presented during the trial; that they did not have full access to all the evidence against them and that the witnesses for the prosecution were not present during the trial for cross-examination. The Government denies these allegations.

85. The Working Group initially observes that, in principle, a delay of 16 months from the moment of arrest to the time of trial is not automatically a breach of article 14 (3) of the Covenant as there can be legitimate reasons justifying such a delay. As the Human Rights Committee noted in paragraph 35 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, what is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. The Working Group is thus unable to conclude that the delay of 16 and 15 months between the arrests and trials of Mr. and Ms. Göksan, respectively, constituted a breach of article 14 (3) of the Covenant.

86. However, the Working Group recalls that the right to have adequate time and facilities for the preparation of defence pursuant to article 14 (3) (b) must include access to documents and other evidence; this access must include all materials²⁰ that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence.²¹ The Government has provided no explanation as to why the defence was denied access to materials, including Excel sheets, used by the prosecution against Mr. and Ms. Göksan. The Working Group thus finds a breach of article 14 (3) (b) of the Covenant.

87. Moreover, the Government failed to respond to the allegation that the two witnesses who were key to the case of the prosecution were not present during the trials of Mr. and Ms. Göksan, thus preventing the defence from cross-examining those witnesses. The Working Group recalls Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, in paragraph 39 of which the Committee stated that article 4 (3) (e) of the Covenant guaranteed the right to have

¹⁸ Ibid., para. 12.

¹⁹ See, for example, opinions No. 42/2018 and No. 44/2018.

²⁰ CCPR/C/CAN/CO/5, para. 13.

²¹ Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 33.

witnesses admitted that were relevant for the defence and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.

88. The Government has provided no explanation as to why the two witnesses were not present during the proceedings and what efforts were made to ensure that the defence was able to cross-examine those witnesses through other means, if their presence was not possible for some legitimate reason. The Working Group therefore finds a breach of the principle of equality of arms in the proceedings and a violation of article 10 of the Universal Declaration of Human Rights and article 14 (3) (e) of the Covenant.

89. In the view of the Working Group, these two breaches of the principle of equality of arms amounted to a serious breach of the right of Mr. and Ms. Göksan to a fair trial and were of such gravity as to give their detention an arbitrary character, falling under category III.

90. Finally, the source alleged that the detention of Mr. and Ms. Göksan falls under category V since it constitutes discrimination on the basis of political or other opinion. The Government rejects this allegation, explaining that their detention was due to their alleged membership of a terrorist organization.

91. The present case is the tenth case concerning individuals with alleged links to the Gülen movement that has come before the Working Group in the past two years.²² In all the cases, the Working Group 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 Gülen movement are being targeted on the basis of their political or other opinion. Accordingly, the Working Group finds that the Government of Turkey detained Mr. and Ms. Göksan on the basis of a prohibited ground for discrimination, and that the case falls within category V.

92. Noting that Mr. and Ms. Göksan were both judges prior to their arrests, 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.

93. The Working Group notes the allegation made by the source that Ms. Göksan was denied access to doctor for her health conditions and that she was being held in overcrowded conditions. While the Working Group notes the denial of these allegations by the Government, it nevertheless wishes to remind the Government that, in accordance with article 10 of the Covenant, all persons deprived of their liberty must be treated with humanity and with respect to the inherent dignity of the human person and that denial of medical assistance constitutes a violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), in particular, rules 24, 25, 27 and 30 thereof.

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

95. The Working Group also notes a significant increase in the number of cases brought to it in the last two years concerning arbitrary detention in Turkey.²³

96. 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, which took place in October 2006, the Working Group considers that it is an appropriate time to conduct another visit. The Working Group recalls that the Government of Turkey issued a standing invitation to all thematic special procedure mandate holders in March 2001, and

²² See also 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 and No. 10/2019.

²³ Ibid.

looks forward to a positive response to its country visit requests of 15 November 2016 and 8 November 2017.

Disposition

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

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

98. The Working Group requests the Government of Turkey to take the steps necessary to remedy the situation of Melike Göksan and Mehmet Fatih Göksan 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.

99. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Melike Göksan and Mehmet Fatih Göksan immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

100. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Melike Göksan and Mehmet Fatih Göksan and to take appropriate measures against those responsible for the violation of their rights.

101. 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.

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

Follow-up procedure

103. 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 Melike Göksan and Mehmet Fatih Göksan have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Melike Göksan and Mehmet Fatih Göksan;

(c) Whether an investigation has been conducted into the violation of Melike Göksan and Mehmet Fatih Göksan's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Turkey with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

104. 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.

105. 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.

106. 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.²⁴

[Adopted on 16 August 2019]

²⁴ Human Rights Council resolution 33/30, paras. 3 and 7.