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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020

Opinion No. 29/2020 concerning Akif Oruç (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 31 October 2019, the Working Group transmitted to the Government of Turkey a communication concerning Akif Oruç. The Government replied to the communication on 27 January 2020. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

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



Submissions

Communication from the source

4. Akif Oruç is a citizen of Turkey, born in 1976. Mr. Oruç was a physics teacher at a vocational school of the Ministry of National Education in Istanbul until he was suspended from duty on 25 June 2016. Subsequently, he was dismissed from his job pursuant to Decree Law No. 672 of 1 September 2016, under which about 50,000 people were dismissed. Both Mr. Oruç and his wife were fired without any investigation. After having had to empty their rental house, the family moved to Kütahya. Mr. Oruç then found a job in Istanbul and was able to see his family only once a month. After about a year, he began to earn a regular salary and was able to bring his family back to Istanbul.

a. Arrest, detention and trial proceedings

5. The source reports that on 17 November 2017, at about 4 a.m., five police officers knocked at the door of Mr. Oruç's home in Istanbul while the family was sleeping. The officers entered the house and took mobile telephones, telephone lines, a memory card and a tablet. They arrested Mr. Oruç without informing him of the reasons for his arrest and took him to Vatan police station in Istanbul. At the same time, officers from Kütahya police department went to his relatives' home, as Mr. Oruç's residence was registered at that address. They took two telephones and telephone lines and a laptop from there.

6. During his second day of detention, Mr. Oruç was taken to a room by three police officers. Since they said that it was for a conversation only, Mr. Oruç did not ask for a lawyer. The officers said that they knew everything about him and Mr. Oruç understood that it was in fact an interrogation. Reportedly, an individual had complained that Mr. Oruç was a member of the Fethullah terrorist organization; that he had used the encrypted messaging application software ByLock; that he had paid money into a Bank Asya account; and that he had spoken with one of the leaders of the organization and participated in a political meeting. The police wanted him to admit that those claims were accurate, supply names of others involved and confess. They said that his wife also used the ByLock application and that they would arrest her if Mr. Oruç did not admit being a member of the Fethullah terrorist organization.

7. Mr. Oruç stated that he was not a member of any terrorist organization and that only a judge could decide whether his wife would be arrested or not. The officers became angry and started insulting him. Thereafter, Mr. Oruç was able to see his lawyer on the fifth day of his detention. On his fourteenth day of detention, he was able to make a statement. On 30 November 2017, he was sent to Çağlayan courthouse. He was therefore detained for 14 days without a judicial decision. On 30 November, Mr. Oruç was presented before a judge at the twelfth criminal peace court in Istanbul; the judge ordered his detention. The source submits that the judge failed to show that Mr. Oruç had committed any illegal acts that could be construed as proving that he was a supporter of a criminal organization or any evidence that his conduct had resulted in any criminal acts. All of the accusations concerned action taken before the Fethullah Gülen movement, referred to as the Hizmet movement by followers, was designated a terrorist organization.

8. On 30 November 2017, Mr. Oruç was sent to Bakırköy Metris prison, where he spent one day. The next day, he was taken to Silivri prison in Istanbul. Three weeks after his arrest, Mr. Oruç was able to see his wife. Thereafter, he was able to call his wife for 10 minutes every two weeks, and to meet her in private once a week and in public every two months. He was able to see his lawyer on Fridays only.

9. On 2 April 2018, five and a half months after his arrest, Mr. Oruç was accused of being an assistant commander of soldiers in the military wing of the Fethullah terrorist organization, of using ByLock, of sending money to a Bank Asya account, and of talking on the telephone with one of the organization's top leaders. The time of guilt was entered as 15 July 2016, which was the day on which the Fethullah terrorist organization is alleged to have been responsible for a failed coup attempt against the Government. The prosecutor forbade Mr. Oruç to communicate in writing and as a result, he could not exchange letters with his family.

10. On 25 September 2018, 10 months after his arrest, Mr. Oruç was tried for the first time before the twenty-fifth criminal court for major cases in Istanbul. Reportedly, the judge did not allow Mr. Oruç to read out all of his defence, telling him to read quickly and to skip some text. Mr. Oruç denied knowing the witness who testified against him and the soldiers whom he had allegedly introduced to the witness. Both soldiers stated that they did not know Mr. Oruç and had never seen him before. The witness claimed to have met with Mr. Oruç in Istanbul after 19 July 2016, but Mr. Oruç was with his family in Kütahya during that period of time. When satellite signals were examined, there were no records of telephone conversations between the witness and Mr. Oruç. Mr. Oruç stated that he did not use the ByLock application, and that the signal reports contained many mistakes.

11. With regard to the claim that he had paid 54,000 Turkish liras into his Bank Asya account in 2014, Mr. Oruç clarified that he had saved that money, which his relatives had given him for a family celebration. He had first opened an account with Bank Asya in 2003, when it was legal; the bank was closed by the State in 2016. With regard to the claim that Mr. Oruç had spoken with one of the top leaders of the Fethullah terrorist organization in 2009, in two telephone calls lasting 76 seconds, he indicated that he did not know the leader in question and did not know who had spoken to him. The court failed to provide evidence of the content of the supposed conversation. Mr. Oruç was accused only on the basis that he had received the telephone calls. Mr. Oruç told the judge that he was not a terrorist and that he had never taken or given directions to anyone regarding any terrorist event or organizations. Having heard Mr. Oruç's statements, the judge decided to extend his detention and postponed the court hearing until 5 December 2018. After the first trial, Mr. Oruç experienced health problems, including deterioration of the state of his eyes and ears. He was not allowed to see a doctor.

12. On 5 December 2018, the second court hearing took place. The witness, who admitted to being a member of a terrorist organization, testified against Mr. Oruç. Reportedly, it was clear that the witness felt remorse because Mr. Oruç had been in prison for more than a year on the basis of the witness's claims. In response to the judge's question as to whether he knew Mr. Oruç, the witness replied that he did, without looking at Mr. Oruç to identify him. The source submits that this is unlawful because, according to the law, the judge has to make the witness look at the suspect and then ask whether he recognizes him or not. The witness spoke little and it was clear that the judge was directing him to speak.

13. During the hearing, Mr. Oruç stated that he had never been at a terrorist event; that no one could prove that he had ever been a member of a terrorist organization; that he had never had a gun and did not know how to shoot; that during his 16 years as an employee of the Ministry of National Education, he had never been subject to any disciplinary punishment; and that none of the many teachers and students who knew him could state that he was guilty of any such offence.

14. The source submits that, according to the criteria used by the courts to show whether a person is a Gülenist, Mr. Oruç is not a Gülenist as he did not attend Hizmet movement-affiliated schools, preparation courses or companies; he did not stay in any Hizmet movement-affiliated houses or dormitories; he did not join a Hizmet movement-affiliated labour union; he did not have a Dıgiturk subscription; nothing was obtained from the examination of his four telephone lines; he has not registered with any Hizmet movement-affiliated civil organizations; he has not subscribed to any Hizmet movement-affiliated newspapers or journals; he has never used the Eagle, Tango or Kakao communication applications; and he has never shared any positive posts about the Hizmet movement on social media.

15. According to the source, the judge never looked at Mr. Oruç or asked him any questions. Reportedly, there were no new documents presented at the second hearing that could prove that Mr. Oruç was a member of a so-called terrorist organization. The judge decided to extend Mr. Oruç's detention and postponed the court hearing until 5 March 2019. On 5 March 2019, the hearing took place and the trial was again postponed until 24 April 2019. On 18 June 2019, Mr. Oruç was sentenced to 10 years' imprisonment. He filed an application with a court of appeal.

16. The source submits that applications have been filed on a monthly basis for Mr. Oruç's release from detention. All the applications have been rejected, without any reason or justification being provided. On 19 March 2018, Mr. Oruç appealed to the Constitutional Court, which started to examine his case on 16 May 2018.

b. Conditions of custody and detention

17. Following his arrest, Mr. Oruç was kept in an overcrowded facility and could not sleep for the first 14 days of his custody. He was not allowed to go to the toilet, was unable to wash, as the water was cold and dirty, and the meals were inadequate. He was subjected to degrading treatment by the police officers, who behaved in a vulgar fashion and appeared to be constantly angry.

18. Furthermore, the source submits that while Mr. Oruç was detained in Istanbul Silivri Prison, he was also subjected to inadequate conditions, including overcrowded, cold cells, a lack of hygiene and insufficient meals. The guards behaved very harshly and subjected him to inhumane treatment. Mr. Oruç developed an eye infection and after 45 days, he was granted an appointment with an eye doctor who gave him medicine, but did not examine him.

c. Analysis of violations

i. Category I

19. The source reports that, according to article 100 of the Code of Criminal Procedure, the arresting authority has to prove the necessity and proportionality of an arrest. Moreover, according to article 109, arrest is to be resorted to only when the provisions of judicial control (parole) are not available or sufficient. Mr. Oruç was detained without any proof that he had committed an offence, and the prosecutor was unable to show that he was involved in any terrorist acts.

20. The source indicates that after the attempted coup of 15 July 2016, arrests were made without sufficient investigation or reasoning. According to article 108 (3) of the Code of Criminal Procedure, the situation of a suspect in detention should be evaluated each month. However, Mr. Oruç's detention has not been evaluated each month. While he was detained on 30 November 2017, his detention was first evaluated on 24 January 2018, about two months later. Mr. Oruç is still being kept in detention and his detention has now turned into a punishment, rather than a security measure.

21. Mr. Oruç was accused of being a member of a terrorist organization partly on the grounds that he had used the ByLock application. There are reportedly 100,000 ByLock users. It is not sufficient to refer to the use of an application in order to declare a person a terrorist. Moreover, the list of ByLock users could potentially be the result of hacking and the legality of the claim that Mr. Oruç used ByLock is questionable. The source submits that the judges took decisions on the basis of the inclusion of Mr. Oruç's name on the list of ByLock users. The source submits that the justice system in the country lacks independence.

ii. Category II

22. One of the grounds for Mr. Oruç's arrest was that, according to a witness, he was having religious discussions with some soldiers organized by the Hizmet movement in 2014. The source argues that Mr. Oruç has the right to manifest his beliefs in teaching and in practice, and that his arrest on that ground constitutes a breach of article 18 of the Universal Declaration of Human Rights and article 18 of the Covenant. Moreover, Mr. Oruç was accused of using the ByLock application in 2014, which was related to an attempted coup in July 2016. The source submits that this is highly illogical and that Mr. Oruç's right to freedom of expression has been violated, contrary to article 19 of the Universal Declaration of Human Rights and article 19 of Covenant.

23. The source reports that Mr. Oruç and his family were discriminated against because they were accused of belonging to the Fethullah terrorist organization. Mr. Oruç's daughter and son were branded "Fetoists" by their schoolmates. His wife could not find a job or even

rent a house in Kütahya because of this discrimination. Mr. Oruç did not have access to education in detention. He was not allowed to write letters to his family and the visits from his family were limited compared to other inmates.

24. The source therefore concludes that Mr. Oruç and his family were discriminated against on the grounds of their political and religious opinions, in violation of article 7 of the Universal Declaration of Human Rights and article 26 of Covenant.

25. The source submits that Mr. Oruç was accused of belonging to the Hizmet movement, which he denies. Like many persons in Turkey, he had some social contact with sympathizers of the movement. As such, the source concludes that article 20 of the Universal Declaration of Human Rights has also been violated.

iii. Category III

26. The source submits that articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant have been breached. The prosecutor decided to restrict the power of the defence counsel to examine the content of the case files and to take copies of them, pursuant to article 153 (2) of the Code of Criminal Procedure. The prosecutor claimed that the defence's examination of the files might hinder the investigation.

27. Mr. Oruç was in detention for more than 10 months before his first trial hearing. According to Turkish laws, strong evidence and likelihood that the detainee will escape are two conditions for arrest. The source refers to reports in the national media indicating that, since new judges appointed after the coup attempt were mostly members of the ruling party, the judiciary lacks independence, that pressure is put on judges not to release detainees, and that in several cases, the Board of Judges and Prosecutors has suddenly made changes regarding the appointment of judges after the judges made decisions to release detainees.

28. The source submits that Mr. Oruç was accused of using the ByLock application and of saving money in Bank Asya in 2014, despite the fact that such acts cannot be recognized as terrorist crimes. Mr. Oruç only learned that using ByLock and Bank Asya had been criminalized in 2016, while watching a television programme.

iv. Category V

29. The source submits that Mr. Oruç has been deprived of liberty owing to discrimination based on political and religion opinions. He was accused of having an account at Bank Asya, which was designated a "terrorism criterion" by the Government after the attempted coup in July 2015. He was also incorrectly accused of speaking twice in 2009 with a man who is claimed to be one of the top leaders of the Hizmet movement.

Response from the Government

30. On 31 October 2019, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. On 23 December 2019, the Government requested an extension, which was granted with the new deadline of 30 January 2020.

31. In its reply of 27 January 2020, the Government reaffirms that Turkey, as a democratic State governed by the rule of law and a founding member of the Council of Europe, upholds human rights, the rule of law and democracy. Turkey continues to combat several terrorist organizations within the framework of its Constitution and legislation and in compliance with its international obligations, including its national legal provisions on human rights.

32. The Government provides an overview of the terrorism threats faced by Turkey and the measures taken in response to the security challenges. The Government submits background information, especially regarding the alleged armed terrorist organization, the "Fetullah terrorist organization/Parallel State Structure". It notes that there are ongoing investigations into and trials pending of the organization's members in relation to the alleged attempt to overthrow the Government on 15 July 2016.

33. The Government argues that Mr. Oruç's deprivation of liberty is in accordance with the decisions of competent courts. All the proceedings that led to his arrest, detention and conviction were carried out in accordance with the relevant legislation and with the State's international obligations.

34. The Government argues that an arrest warrant was issued for Mr. Oruç by the second criminal magistrates' office of Istanbul, based on an investigation launched by the Istanbul Chief Public Prosecutor's Office resulting from the suspicion that Mr. Oruç was a member of an armed terrorist organization. Accordingly, he was arrested at his house on 17 November 2017 and taken into custody. When the police officers entered Mr. Oruç's house in Istanbul, his wife claimed that he was out of town. However, upon searching the house, the police officers noticed that the house had a fire escape and upon further investigation, they caught Mr. Oruç in the parking lot of the building. Mr. Oruç's family was notified on the same day that he was taken into custody.

35. After Mr. Oruç was taken into custody, he requested a lawyer to be appointed to him. He and his lawyer then met four times, on 19, 21, 25 and 29 November 2017. In line with article 10 of Decree Law No. 684, his detention in custody was extended for seven days from 24 November 2017 and he was notified that he would be in custody until 30 November 2017.

36. Before he made a statement, Mr. Oruç was notified of the charges against him. He was also notified of his right to choose a defence lawyer and benefit from legal assistance, to have his lawyer present while he made his statement and during interrogation, or to ask for a defence lawyer to be appointed by the Bar Association to assist him if he could not afford one. Furthermore, he was notified of his other rights, such as communicating with his family, providing evidence in his favour and demanding that evidence be collected. Subsequently, he gave his statement to the Chief Public Prosecutor in the presence of his lawyer on 29 November 2017.

37. On 30 November 2017, as he was suspected of "establishing and commanding a terrorist organization", he was brought before the twelfth criminal peace court in Istanbul, where he was questioned by the magistrate in the presence of his lawyer.

38. Before the questioning, the magistrate reminded Mr. Oruç that he had the right to remain silent, to make his defence in the presence of a lawyer, and to put forward all the facts in his favour. Mr. Oruç stated that he understood his rights, was aware of the accusations, would defend himself with his lawyer, and understood that he would be given the opportunity to deny the accusations against him.

39. In his statement, Mr. Oruç repeated the statement he had made earlier, in the presence of law enforcement officials, and pleaded not guilty. His lawyer also argued that his client was not guilty, and requested that Mr. Oruç be released or that a decision of judicial control be handed down.

40. Within the scope of the interrogation, the twelfth criminal peace court in Istanbul decided that Mr. Oruç would be detained, based on the evidence that he had committed offences including: being a member of the Fethullah terrorist organization under the title of "head", directing his "deputies" and military personnel attached to him, thus facilitating a separate hierarchical order within the armed forces; contacting the top leaders of the organization using the organization's encrypted messaging application software ByLock; and investing in the Hizmet-affiliated Bank Asya.

41. Along with the aforementioned grounds and the qualification and nature of the attributed offences and considering the flight risk, the twelfth criminal peace court in Istanbul decided that judicial control provisions would be insufficient. It therefore ordered Mr. Oruç's detention, in accordance with article 100 of the Code of Criminal Procedure.

42. On 2 April 2018, within the context of investigation No. 2017/169266 conducted by the Chief Public Prosecutor's Office of Istanbul, an indictment was drawn up containing charges of "establishing or commanding an armed terrorist organization" under article 314 (2) of the Penal Code. The indictment, evidence and findings, such as witness statements, bank account records and mobile telephone application data, which gave rise to a strong suspicion against Mr. Oruç, were detailed and submitted to the relevant court.

43. During the hearings, the court recorded Mr. Oruç's statements using the audiovisual information system SEGBIS. The SEGBIS records dated 26 September 2018 clearly show that the court allowed Mr. Oruç's testimony, which was nine pages long. When Mr. Oruç began to provide the court with details of his curriculum vitae, the head of the court requested him to skip that part of the testimony, as those details were already in the court file. The court did not, therefore, prevent Mr. Oruç from defending his case and did not request him to summarize his defence.

44. Following the completion of the judicial proceedings, the twenty-fifth criminal court for major cases in Istanbul convicted Mr. Oruç to 10 years' imprisonment on the grounds that he had been a member of an armed terrorist organization, pursuant to articles 314 (2) and 62 (1) of the Penal Code and articles 3 and 5 of the counter-terrorism law, No. 3713.

45. On 8 August 2019, Mr. Oruç's lawyer appealed that decision and demanded the acquittal and release of his client. The case is currently under review by the second penal chamber of the Istanbul Regional Court of Justice.

46. Mr. Oruç lodged two individual applications before the Constitutional Court, one for suspension from his teaching profession and one for his deprivation of liberty. The first application was found inadmissible by the Constitutional Court on 24 July 2017, due to non-exhaustion of domestic legal remedies. Despite the demand from the Constitutional Court to complete the documents for his second application, Mr. Oruç has not completed his file and therefore, his second application was rejected for administrative reasons.

47. Mr. Oruç was brought before the judge swiftly after he was taken into custody and was informed of the accusations against him. Furthermore, all the decisions concerning his arrest, custody and detention were handed down by independent judges. Those decisions contained detailed reasoning regarding the grounds on which the measures were taken, meaning that they were not arbitrary. The decisions were appealed by Mr. Oruç and his lawyer, and are being reviewed by the competent authorities.

48. In accordance with article 10 of Decree Law No. 684, Mr. Oruç's first custody period of seven days was extended for another seven days, with effect from 24 November 2017. He was notified that he would be in custody until 30 November 2017.

49. Regarding the legal grounds justifying detention, the Government points to the case law of the European Court of Human Rights, which requires there to be reasonable doubt that an offence has been committed in order for a person to be deprived of liberty. This condition should be present at every stage of the proceedings. Reasonable doubt requires the presence of an event or information sufficient to convince an objective observer that the accused person may have committed an offence, as in *Fox, Campbell and Hartley v. The United Kingdom*¹ and *O'Hara v. The United Kingdom*.²

50. The Government submits that a person's use of the ByLock application constitutes a reasonable doubt that he or she is or may have been a member of the Fethullah terrorist organization. According to various decisions rendered by national courts, the authorities assessed the ByLock application through technical means, including analysis of language, the location of Internet provider addresses and details of encryption, which the Government describes in its submission. Therefore, the Government argues that the detection of Mr. Oruç's use of the ByLock application constitutes a reasonable doubt concerning his membership of the Fethullah terrorist organization.

51. Furthermore, the Government submits that, pursuant to article 5 (1) (c) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the persistence of reasonable suspicion that the person arrested has committed an offence is a *sine qua non* condition for the lawfulness of the continued detention, but after a certain period of time, it no longer suffices. In such cases, it must be established whether genuine public interest continues to justify the deprivation of liberty.

¹ Application No. 12244/86, 12245/86 and 12383/86, judgment of 30 August 1990, para. 32.

² Application No. 37555/97, judgment of 16 October 2001.

52. The Government recalls that Mr. Oruç was charged with “establishing and commanding a terrorist organization” that orchestrated and carried out the coup attempt of 15 July 2016, which aimed to demolish the constitutional order in Turkey and overthrow the elected President, the parliament and the Government. The Fethullah terrorist organization killed 251 Turkish citizens during that coup attempt. Therefore, there is clearly a public interest for the courts to exercise judicial control measures over persons who are charged with being a member of that terrorist organization, which posed a threat to public order and security.

53. Furthermore, pursuant to article 141 (1) (a) and (d) of the Code of Criminal Procedure, anyone who has been unlawfully arrested or placed in pretrial detention or whose period of detention has been unlawfully extended, and anyone who was lawfully placed in pretrial detention but was not brought before a judicial authority within a reasonable time and in respect of whom a decision was not delivered within the same period, respectively, may file an action for compensation.

54. According to the Government, as of 4 December 2019, there is no information indicating that Mr. Oruç has brought an action for compensation due to his arrest, custody and detention in accordance with article 141 of the Code of Criminal Procedure.

55. The Government argues that guarantees regarding the independence of judges in the Turkish legal system are regulated at the highest level, in the Constitution itself. The Constitution states that the executive or the legislative branches of the State cannot give orders to judges in matters related to the exercise of judicial power. Moreover, article 139 of the Constitution regulates the guarantee of judgeship and prosecution. As such, the independence of judges and prosecutors is guaranteed in the Constitution and is included in national legislation. Therefore, the applicant’s claim in this regard should be considered groundless and unfounded.

56. The Government also notes that every objection raised by Mr. Oruç regarding the court’s decisions concerning the continuation of his detention was reviewed thoroughly by the respective court and every decision regarding the continuation of the detention was reached on a legal basis, based on concrete evidence.

57. The Government therefore argues that Mr. Oruç’s detention was not arbitrary and the period of his detention was reasonable, considering the evidence and findings, which raise a strong suspicion that he committed the crime of which he is accused. The decisions to detain and convict him were based on reasoned decisions handed down by the independent judiciary. Those decisions and all the proceedings throughout the trial process were conducted in accordance with national legislation.

58. Regarding the conditions of detention, the Government recalls that in accordance with the decision of detention rendered by the twenty-fifth criminal court for major cases in Istanbul dated 30 November 2017, Mr. Oruç was placed in Silivri Closed prison on 1 December 2017.

59. On 8 December 2017, he was examined by a doctor from the State hospital, who diagnosed him with conjunctivitis and provided the requisite medication. The medication was administered on 14 different occasions in total.

60. The Government submits that during Mr. Oruç’s medical examination on 30 May 2019, he was diagnosed with hypermetropia and prescribed eyeglasses, alongside the appropriate medication. On both 3 September 2019 and 18 November 2019, he was also administered eye drops and vitamins for upper respiratory infection.

61. Mr. Oruç was visited 31 times on open visit days and 64 times on closed visitation days. He and his lawyer have met 11 times while Mr. Oruç has been in a penal institution.

62. According to the Government, Mr. Oruç’s holding cell houses 37 inmates, which does not indicate overcrowding. There have been no general complaints about the quality or the quantity of the food. The Government argues that neither Mr. Oruç nor other inmates have filed a single complaint regarding harsh or inhumane treatment from the prison staff.

63. Given all the above, the Government considers that the allegations regarding Mr. Oruç’s deprivation of liberty are groundless and the claims concerning discrimination or

any ill-treatment towards him are unfounded. The criminal proceedings regarding Mr. Oruç were carried out in accordance with domestic law, and in line with the State's obligations under international human rights law, particularly the conventions to which Turkey is a party. The Government also emphasizes that Mr. Oruç has not yet exhausted domestic remedies and respectfully requests the Working Group to dismiss the allegations.

64. The reply of the Government was transmitted to the source for further comments on 28 January 2020.

Discussion

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

66. As a preliminary issue, the Working Group notes that the situation of Mr. Oruç falls within the time frame of the derogation that Turkey made under the Covenant. On 21 July 2016, the Government of Turkey informed the Secretary-General that it had declared a state of emergency, which lasted for three months, in response to the severe dangers to public security and order, amounting to a threat to the life of the nation within the meaning of article 4 of the Covenant.³

67. While acknowledging the notification of the derogation, the Working Group emphasizes that, in the discharge of its mandate, it is also empowered under paragraph 7 of its methods of work to refer to the relevant international standards set forth in the Universal Declaration of Human Rights and to customary international law, which do not afford States any option to derogate. Moreover, in the present case, articles 9 and 14 of the Covenant are the most relevant to the alleged detention of Mr. Oruç. As the Human Rights Committee has previously concluded, States parties derogating from articles 9 and 14 must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.⁴

68. As a further preliminary issue, the Working Group wishes to clarify that the procedural rules governing its consideration of communications on alleged cases of arbitrary detention are contained in its methods of work. There is no provision in the methods of work that prevents the Working Group from considering communications due to the lack of exhaustion of domestic remedies in the country concerned. The Working Group has also confirmed in its jurisprudence that there is no requirement for petitioners to exhaust domestic remedies in order for a communication to be considered admissible.⁵

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

70. In determining whether Mr. Oruç's detention is arbitrary, the Working Group refers to the principles established in its jurisprudence on evidentiary issues. If the source has presented a *prima facie* case for breach of international 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 (A/HRC/19/57, para. 68).

³ Depositary notification C.N.580.2016.TREATIES-IV.4.

⁴ Human Rights Committee, general comments No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 4; No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 6; No. 34 (2011) on the freedoms of opinion and expression, para. 5; and No. 35 (2014) on liberty and security of person, paras. 65–66.

⁵ In Opinion No. 53/2019, the Working Group clarified that it did not require the exhaustion of domestic remedies in order to be seized of the communication under its regular procedure. See also opinions No. 19/2013; No. 38/2017; No. 41/2017; No. 11/2018; and No. 46/2019.

Category I

71. The Working Group recalls that it considers a detention to be arbitrary and to fall under category I if it lacks a legal basis. In the present case, the Working Group notes that Mr. Oruç was arrested on 17 November 2017 at his home. The source submitted that no arrest warrant was presented to Mr. Oruç at that time. The Working Group observes that the Government does not contest that claim; although it argues that a warrant was issued, it has not clarified when the warrant was presented to Mr. Oruç. Even assuming that the arrest took place as described by the Government, with Mr. Oruç attempting to flee and being discovered in the parking lot of his home, it would still have been possible for the police to follow the prescribed arrest procedures by showing Mr. Oruç the warrant for his arrest at that time.

72. The Working Group recalls that article 9 (1) of the Covenant states that no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. Therefore, for deprivation of liberty to be considered lawful, the established legal procedure must be respected.⁶ That was not the case during the arrest of Mr. Oruç, in breach of article 9 (1) of the Covenant.

73. The source also submitted that Mr. Oruç did not appear before a judge until 30 November 2017. While the Government has not contested that allegation, it has explained that Mr. Oruç's initial detention was extended, pursuant to the procedure prescribed in national legislation, for the time period permitted by that legislation, and that Mr. Oruç was informed of the extension.

74. As the Working Group has consistently argued,⁷ in order to establish that a detention is legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged by article 9 (4) of the Covenant. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society (A/HRC/30/37, paras. 2–3). This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty (*ibid.*, para. 11), is applicable to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention and detention under counter-terrorism measures (*ibid.*, annex, para. 47 (a)).

75. Furthermore, the Working Group considers that judicial oversight of detention is a fundamental safeguard of personal liberty (*ibid.*, para. 3) and is essential in ensuring that detention has a legal basis. In the present case, Mr. Oruç was not presented before a judge until 13 days after his arrest. The Government has cited compliance with its national law as an explanation for this delay. The Working Group recalls that a derogation under article 4 of the Covenant cannot justify a deprivation of liberty that is unreasonable or unnecessary.⁸ Given that Mr. Oruç was not promptly presented before a judicial authority, it cannot be said that his detention was lawful, as it violated article 9 (3) and (4) of the Covenant.

76. Moreover, the source alleged that Mr. Oruç was prevented from seeing his lawyer for the first five days of his detention, while according to the Government, he first met his lawyer on 19 November, that is, two days after he was initially detained. Noting that the Government has failed to present any reasons as to why Mr. Oruç was not permitted to meet with his lawyer from the outset of his detention, the Working Group finds a further breach of article 9 (4) of the Covenant, as denial of legal assistance at that time prevented Mr. Oruç from effectively exercising his right to challenge the legality of his detention.

⁶ Human Rights Committee, general comment No. 35, para. 11.

⁷ See opinions No. 1/2017, No. 6/2017, No. 8/2017, No. 2/2018, No. 4/2018, No. 42/2018, No. 43/2018, No. 79/2018 and No. 49/2019.

⁸ Human Rights Committee, general comments No. 29, para. 3, and No. 35, para. 66.

77. Furthermore, since Mr. Oruç was not able to challenge his continued detention for those 13 days of detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was also violated.

78. The Working Group also observes that Mr. Oruç did not learn about the charges against him until he appeared before the magistrate on 30 November 2017. 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 the Human Rights Committee has explained, the obligation encapsulated in article 9 (2) has two elements: information about the reasons for arrest must be provided immediately upon arrest and there must be prompt information about the charges provided thereafter.⁹

79. The requirement to provide reasons for the arrest of an individual also has a qualitative element in that, as the Human Rights Committee has noted, the reasons must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.¹⁰ The Working Group notes that the Government has failed to prove how this requirement of article 9 (2) was met in the case of Mr. Oruç. 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. Oruç, at the time of his arrest or within days thereafter, with the factual specifics to indicate the substance of the crime he has allegedly committed.

80. According to the Government, the only evidence held against Mr. Oruç is his alleged use of the ByLock application and his alleged membership of the Hizmet movement. In these circumstances, the Working Group considers that the Government has not established that Mr. Oruç was promptly informed of the charges against him or the reason for his arrest at the time of arrest, or substantiated that his detention meets the criteria of reasonableness and necessity. The Working Group recalls that a derogation under article 4 of the Covenant cannot justify a deprivation of liberty that is unreasonable or unnecessary. The Working Group therefore finds that the arrest and detention of Mr. Oruç amounted to a violation of his rights under article 9 (1) and (2) of the Covenant.

81. The Working Group therefore concludes that the detention of Mr. Oruç was arbitrary and falls under category I.

Category II

82. The source alleged that Mr. Oruç was detained and tried for the peaceful exercise of his rights, especially those enshrined in articles 7, 18, 19 and 20 of the Universal Declaration of Human Rights and articles 18, 19 and 26 of the Covenant. The Government argued that Mr. Oruç was charged and tried for being a member of the Fethullah terrorist organization under the title of “head”, directing his “deputies” and military personnel attached to him, thus facilitating a separate hierarchical order within the armed forces; contacting the top leaders of the organization, using the organization’s encrypted messaging application software ByLock; and investing in the Hizmet-affiliated Bank Asya.

83. However, the Working Group observes that when listing these charges, the Government has not provided any evidence of the specific activities Mr. Oruç undertook in furtherance of them. The Government provided details of how the ByLock application was used by the “Fethullah terrorist organization/Parallel State Structure”. However, these broad explanations do not provide any information on how the alleged use of the application by Mr. Oruç could be equated with a criminal act. Nor has the Government presented any evidence that Mr. Oruç was in fact a member of that organization or how having a bank account amounted to a criminal activity.

⁹ Human Rights Committee, general comment No. 35, para. 24. See also 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.

¹⁰ Human Rights Committee, general comment No. 35, para. 25.

84. The Working Group takes note of the report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the impact of the state of emergency on human rights in Turkey. The report examined the impact of various decrees issued by the Government that served as grounds for the dismissal of large numbers of security, military and police officers, teachers, academics, civil servants and health sector personnel. In the report, OHCHR concluded that:

the decrees do not establish clear criteria used to assess links of the dismissed individuals to the Gülenist network. As a result, dismissals have been ordered on the basis of a combination of various elements, such as making monetary contributions to the Asya bank and other companies of the “Parallel State Organization”, being a member of a trade union or association linked to the Gülenist network, or using the messenger application ByLock and other encrypted messaging programmes. The dismissals may also be based on reports by the police or secret service about some individuals, analysis of social media contacts, donations, websites visited, or sending children to schools associated with the Gülenist network. Information received from colleagues or neighbours, or subscription to Gülenist periodicals could also be used as criteria for dismissals.¹¹

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

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

despite deep suspicions about its motivations and modus operandi from various segments of Turkish society, the Fethullah Gülen movement appears to have developed over decades and enjoyed, until fairly recently, considerable freedom to establish a pervasive and respectable presence in all sectors of Turkish society, including religious institutions, education, civil society and trade unions, media, finance and business. It is also beyond doubt that many organizations affiliated with this movement, which were closed after 15 July, were open and legally operating until that date. There seems to be general agreement that it would be rare for a Turkish citizen never to have had any contact or dealings with the movement in one way or another.¹²

87. The Council of Europe Commissioner for Human Rights also pointed out that there is therefore a need, when criminalizing membership and support of that organization, to distinguish between persons who engaged in illegal activities and those who were sympathizers or supporters of, or members of legally established entities affiliated with, the movement, without being aware of its readiness to engage in violence.¹³

88. The Working Group observes that the core of the allegations against Mr. Oruç was his alleged and perceived alliance with the Hizmet movement, which is said to have manifested mainly through the use of the encrypted messaging software application ByLock. The Working Group notes the failure on behalf of the Government to show how Mr. Oruç’s use of that software application constituted illegal criminal activity or to provide any evidence that he was in fact part of the “Fethullah terrorist organization/Parallel State Structure”. Indeed, given the widespread reach of the Hizmet

¹¹ OHCHR, “Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January–December 2017” (March 2018), para. 65.

¹² Commissioner for Human Rights, Council of Europe, “Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey”, 7 October 2016, para. 20.

¹³ *Ibid.*, para. 21.

movement, as noted by the Council of Europe Commissioner for Human Rights, it would be rare for a Turkish citizen never to have had any contact or dealings with the movement in one way or another. The Working Group takes note of the report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his visit to Turkey, in November 2016, in which he recorded numerous cases of arrests based purely on the presence of ByLock on the accused's computer and other ambiguous evidence (A/HCR/35/22/Add.3, para. 54). The Working Group also takes note of the findings of the Human Rights Committee in *Özçelik et al. v. Turkey* (CCPR/C/125/D/2980/2017), in which it dismissed the mere use of ByLock as sufficient basis for the arrest and detention of an individual.

89. In the present case, it is clear to the Working Group that, even if Mr. Oruç did use the ByLock application, it would have been merely in exercise of his freedom of opinion and expression. Those rights, as defined in article 19 of the Covenant, constitute the foundation of every free and democratic society.¹⁴ Equally protected is Mr. Oruç's right to freedom of religion. The Working Group notes that the Government has not presented any evidence that Mr. Oruç's actions could fall within the exceptions detailed in article 18 (3) of the Covenant, or that he was in fact a member of the "Fethullah terrorist organization/Parallel State Structure" and took part in its terrorist activities. Therefore, noting that article 4 of the Covenant does not permit any derogations to article 18, the Working Group finds a violation of article 18 of the Covenant.

90. 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 ByLock as one of the key manifestations of an alleged criminal activity.¹⁵ The Working Group also recalls that, in those other instances, it concluded that, in the absence of a specific explanation of how the alleged mere use of ByLock constituted a criminal activity on the part of the individual, their detention was arbitrary. The Working Group regrets that its views in those opinions have not been respected by the Turkish authorities and that the present case follows the same pattern. The Working Group concludes that the arrest and detention of Mr. Oruç was as a result of his exercise of the rights enshrined in articles 18 and 19 of the Covenant and falls under category II.

Category III

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

92. The source argued that the detention of Mr. Oruç is arbitrary under category III on the grounds that Mr. Oruç did not appear before a court until some 10 months after his detention; that there was no substantial evidence presented during his trial; that he did not have full access to all the evidence against him; that he was prevented from fully presenting his case to the court; that the witness statements were not coherent or reliable; and that the courts lacked independence. The Government denied those allegations.

93. The Working Group notes that, in principle, the delay of 10 months from the moment of arrest to the time of trial is not, per se, a breach of article 14 (3) (c) of the Covenant, as there could be legitimate reasons justifying such a delay. Nevertheless, in the present case, the Working Group notes that Mr. Oruç was detained and placed in pretrial detention purely for exercising his rights protected under the Covenant (see paras. 82–90 above). The Working Group therefore finds that the delay of 10 months between Mr. Oruç's arrest and his trial constituted a breach of article 14 (3) of the Covenant.¹⁶

¹⁴ Human Rights Committee, general comment No. 34, para. 2.

¹⁵ See opinions No. 42/2018, No. 44/2018 and No. 53/2019.

¹⁶ Human Rights Committee, general comments No. 32, para. 35, and No. 35, para. 37.

94. However, the Working Group recalls that the right to have adequate time and facilities for the preparation of one's defence, as enshrined in article 14 (3) (b), must include access to documents and other evidence. This must include all material¹⁷ that the prosecution plans to present in court against the accused or that is exculpatory, which should be understood as including not only material establishing innocence, but also other evidence that could assist the defence.¹⁸ The Government has provided no explanation as to why the defence was denied access to case materials. It has merely referred to the national legislation permitting such denial. The Working Group thus finds a breach of article 14 (3) (b) of the Covenant.

95. Moreover, the Government has not responded to the allegation made by the source that, following his arrest, Mr. Oruç was invited to have a "conversation" with the police, which in fact turned out to be an interrogation and was conducted without the presence of Mr. Oruç's lawyer. The Working Group also notes that the Government has not responded to the allegation that Mr. Oruç was allowed to meet with his lawyer on Fridays only. In the absence of any explanation from the Government, the Working Group finds a breach of article 14 (3) (b) and (d) of the Covenant.

96. As for the submission made by the source that Mr. Oruç was unable to present his defence to the court fully and that the court requested him to summarize and omit some parts, the Working Group takes note of the Government's rebuttal of that claim.

97. The Working Group notes that the source made only general allegations about the court's lack of independence, without specifying how that was manifested in the trials of Mr. Oruç. The Working Group is therefore unable to make any findings on that matter.

98. Nevertheless, the Working Group notes the specific allegation made by the source that during the 5 December 2018 court hearing, the judge gave the witnesses directions on what to say, which the Government did not contest. Equally, the court failed to provide any evidence of the content of the alleged discussions between Mr. Oruç and Hizmet leaders, with whom Mr. Oruç denied having communicated. The Working Group finds these elements to constitute *prima facie* violations of the principle of equality of arms and of the independence of the court and therefore finds a violation of article 14 (1) and (3) (e) of the Covenant.

99. In the view of the Working Group, those violations amounted to a breach of Mr. Oruç's right to a fair trial and were of such gravity as to give his detention an arbitrary character, falling under category III.

Category V

100. The source alleged that Mr. Oruç's detention falls under category V, since it constitutes discrimination on the basis of political or other opinion. The Government rejected that allegation, explaining that his detention is the result of his alleged membership of a terrorist organization.

101. The present case is the most recent case concerning individuals with alleged links to the Hizmet movement that has come before the Working Group in the past three years.¹⁹ In all such cases, the Working Group has found that the detention of the concerned individuals was arbitrary, and it appears that a pattern is emerging whereby those with alleged links to the Hizmet movement are being discriminated against by being targeted on the basis of their political or other opinion. Accordingly, the Working Group finds that the Government detained Mr. Oruç on the basis of a prohibited ground for discrimination and that the case falls within category V.

¹⁷ CCPR/C/CAN/CO/5, para. 13.

¹⁸ Opinions No. 50/2014, para. 77; No. 89/2017, para. 56; No. 18/2018, para. 53; No. 78/2018, paras. 78–79; and No. 70/2019, para 79. See also Human Rights Committee, general comment No. 32, para. 33.

¹⁹ See 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 and No. 2/2020.

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

103. In the past three years, the Working Group has noted a significant increase in the number of cases brought before it concerning arbitrary detention in Turkey.²⁰ The Working Group expresses its grave concern at the pattern that all of these cases follow and urges the Government to implement the opinions of the Working Group without further delay.

104. The Working Group would welcome the opportunity to conduct a country visit to Turkey. Given that a significant period has passed since its previous visit to Turkey, in October 2006, the Working Group considers that it is an appropriate time to conduct another visit.

Disposition

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

The deprivation of liberty of Akif Oruç, being in contravention of articles 2, 3, 8, 9, 10, 18 and 19 of the Universal Declaration of Human Rights and articles 2 (3), 9, 14, 18, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

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

107. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Oruç immediately and 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 to take urgent action to ensure the immediate release of Mr. Oruç.

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

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

Follow-up procedure

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

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

²⁰ Ibid.

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

111. 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.

112. 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.

113. 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.²¹

[Adopted on 1 May 2020]

²¹ Human Rights Council resolution 42/22, paras. 3 and 7.