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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its ninety-sixth session, 27 March–5 April 2023

#### Opinion No. 3/2023 concerning Ali Ünal (Türkiye)

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 51/8.
2. In accordance with its methods of work,<sup>1</sup> on 29 November 2022 the Working Group transmitted to the Government of Türkiye a communication concerning Ali Ünal. The Government replied to the communication on 27 January 2023. 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).

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<sup>1</sup> [A/HRC/36/38](#).



## Submissions

### *Communication from the source*

4. Ali Ünal is a Turkish national born on 19 January 1955. He holds a Turkish national identity card issued in Üsküdar. He works as a journalist and writer and usually resides in Uşak, Türkiye.

#### a. Context

5. The source explains that, in 2013, an investigation was launched into corruption allegations against high-ranking government officials. Reportedly, those officials claimed their innocence and the Government claimed that the investigation was a civilian coup perpetrated by the Gülen movement, a movement politically opposed to the Government. The source notes that the Gülen movement was depicted as a clandestine parallel organization aimed at obstructing the country's progress.

6. According to the source, the executive began labelling the Gülen movement as a terrorist organization in 2015. The terminology became official when the National Security Council adopted a decision to include the concept of "parallel State structure" in the national security policy document, on 2 January 2015, and culminated in 30 May 2016, when the National Security Council adopted an advisory resolution defining the Gülen movement as the Fethullahist terrorist organization. The source notes that the Gülen movement was framed as and labelled a terrorist organization with no evidence. Allegedly, the Government also claimed that the Gülen movement was responsible for the attempted coup d'état on 15 July 2016.

7. Reportedly, although the executive labelled the movement as a terrorist organization in 2015, it was only on 24 April 2017 that the judiciary did the same, when the Sixteenth Chamber of the Court of Cassation ruled that it constituted an armed terrorist organization.

8. The source reports that, following the declaration of a state of emergency in 2016, many media outlets, press organizations and publishing houses were shut down and a number of journalists were arrested and/or convicted.

#### b. Arrest and detention

9. According to the source, during the night of 10 to 11 August 2016, members of the gendarmerie forces arrested Mr. Ünal in the house of a relative. The security forces that carried out the arrest reportedly mentioned that an arrest warrant had been issued against Mr. Ünal, but no document was shown to him. The warrant was reportedly issued by the Second Penal Court of Peace in Uşak.

10. The source explains that, although Mr. Ünal did not flee or attempt to do so while he was being detained, his hands were handcuffed behind his back, contrary to usual practice. The source submits that this was done to humiliate Mr. Ünal in front of people who knew him in his home village.

11. Reportedly, the authorities conducted a search and seizure of Mr. Ünal's home and office, on the basis of articles 116, 119, 127 and 134 of the Criminal Procedure Act. The source notes that the authorities presented a search warrant and that, following the search, they proceeded to arrest Mr. Ünal on the basis of article 91 of the same act.

12. During the house search, the officers allegedly found some money belonging to Mr. Ünal's relative and confiscated it, although it appeared clear that the money did not constitute criminal evidence. Reportedly, although Mr. Ünal alerted the authorities that the money was meant for the care of a relative with disabilities, his demands and objections were dismissed.

13. The source also reports that the police seized Mr. Ünal's personal mobile telephone and digital materials, even though they contained no inaccessible or cryptic data, and that the authorities failed to make any copies of the seized property, contrary to article 134 of the Criminal Procedure Act.

14. According to the source, Mr. Ünal was arrested for establishing and leading a terrorist organization (Fethullahist terrorist organization), on the basis of article 314 (1) of the Penal Code.

15. Reportedly, Mr. Ünal was brought to the police department in Uşak on 11 August 2016, where he was detained until 15 August 2016, on the order of the Uşak Chief Prosecutor's Office. The source adds that, while the investigation proceedings against Mr. Ünal were under way, inaccurate, defamatory and humiliating news reports were published and aired on national media outlets in an effort to wear away at his family's spirit.

16. On the evening of 15 August 2016, Mr. Ünal was reportedly brought before a judge of the Penal Court of Peace and was asked whether he accepted the charges against him. According to the source, Mr. Ünal was not informed of the charges against him before that date. The source explains that Mr. Ünal refused to accept the charges and asked for the evidence against him, but was unable to disprove allegations against him as his personal mobile telephone had been confiscated and no copy was made, contrary to article 134 of the Criminal Procedure Act. The source also notes that, at the time of his questioning, Mr. Ünal was asked about articles he had written in his column, his books and interviews he had given on television programmes. Reportedly, these were also mentioned in the indictment against Mr. Ünal, which was not issued until 28 September 2016, and were used as evidence in the decision by the Second Uşak Serious Crimes Court dated 14 November 2018.

17. On 16 August 2016, the Penal Court of Peace in Uşak ordered the detention of Mr. Ünal and he was transferred to Uşak Prison, in Uşak, where he was detained until 19 August 2016. The source submits that the judge ordered Mr. Ünal's detention on the basis of a strong suspicion that he had established and led a terrorist organization, despite the lack of credible and compelling evidence and the unlawful circumstances in which his mobile telephone had been obtained.

18. On 20 August 2016, Mr. Ünal was reportedly transferred to Izmir Prison, in Izmir, where he is currently detained. The source notes that Mr. Ünal was held in solitary confinement for two months in Izmir Prison, despite the lack of any court decision. It adds that authorities frequently and arbitrarily transfer detainees and keep them in overcrowded wards and solitary confinement, without any court decision, as a punishment measure.

19. It is also reported that Mr. Ünal was not provided with several of the decisions ordering the continuation of his detention and was therefore deprived of the right to challenge those decisions.

20. On 14 November 2018, the Second Uşak Serious Crimes Court reportedly sentenced Mr. Ünal to 19 years and six months in prison. According to the court's decision,<sup>2</sup> Mr. Ünal was accused of working as a columnist at the *Zaman* daily newspaper for several years, appearing on a programme aired on Samanyolu TV, giving an interview to *Büyük* TV in front of the Istanbul Courthouse concerning executives of the media outlets against whom legal proceedings had been launched, writing two books and being linked to the Gülen movement. The source submits that this was sufficient to establish that he belonged to the movement. He was charged with establishing or leading an armed terrorist organization and attempting to overthrow the constitutional order.

21. Reportedly, on 5 July 2019, the Izmir District Court of Justice rejected Mr. Ünal's appeal. Mr. Ünal then filed an appeal before the Supreme Court, which upheld the decision and sentence on 12 July 2021. On 26 July 2021, Mr. Ünal filed an application before the Constitutional Court to challenge the lower court's decision. On 21 September 2022, the Constitutional Court found the request manifestly ill-founded and rejected Mr. Ünal's claims regarding his right to a fair trial, the principle of legality, his right to freedom of expression and other rights.<sup>3</sup>

22. The source indicates that Mr. Ünal made another application to the Constitutional Court, complaining about his prolonged time in detention and the authorities' failure to

<sup>2</sup> The source refers to file No. 2017/435 and decision No. 2018/237 of the Second Uşak Serious Crimes Court, dated 14 November 2018, pp. 39 and 40.

<sup>3</sup> The source refers to decision No. 2021/37057.

prepare the indictment within a reasonable time. On 29 June 2020, the Constitutional Court decided that there had been no violation of Mr. Ünal's right to liberty and security.

c. Legal analysis

23. The source alleges that the arrest and detention of Mr. Ünal are arbitrary under categories I, II, III and V of the methods of work of the Working Group on Arbitrary Detention.

i. Category I

24. The source recalls that, under article 9 (1) of the Covenant, no one shall be subjected to arbitrary arrest or detention and no one shall be deprived of liberty, except on such grounds and in accordance with such procedures as are established by law. Accordingly, the source submits that any deprivation of liberty must be compatible with substantive and procedural domestic laws and failure to comply with domestic law entails a breach of article 9 (1) of the Covenant.

25. The source contends that Mr. Ünal's arrest and detention are not compatible with substantive domestic law and basic principles of law. It explains that the Constitution, the Penal Code and the Criminal Procedure Act define the circumstances under which deprivations of liberty are authorized. Allegedly, while the authorities ordered the arrest and detention of Mr. Ünal on the basis of provisions of the Constitution and national laws, his arrest and detention are unlawful insofar as articles 100 and 101 of the Criminal Code require that a court detaining an individual indicate the grounds for the arrest and the reasons for a strong suspicion of a crime. In the case at hand, Mr. Ünal was asked about articles he had written in his column and his books, as well as interviews he had given on television programmes, all of which the source submits constitute legal acts protected by the Constitution and national laws.

26. The source adds that the Gülen movement was only labelled a terrorist organization in 2017. It submits that, under the principle of non-retroactivity, individuals can only be held accountable for connections made with the movement after it was labelled a terrorist organization and, therefore, membership in the Gülen movement cannot be considered as the basis of crimes committed before that date.

27. The source notes that guilt by association is widely used by the authorities to arrest or detain individuals.

28. According to the source, domestic law requires that any detention be based on a strong suspicion of a crime, that solid evidence of such suspicion be shown at the time of detention, and that concrete facts exist that suggest that judicial control would not be an appropriate measure. The source argues that such requirements were not fulfilled as the decisions to detain Mr. Ünal largely consisted of templated formulations with no real efforts of individualization, omitted any concrete facts or findings and failed to justify why an alternative measure to detention was insufficient. The source submits that Mr. Ünal was arrested without any reasonable suspicion of having committed a crime or sufficient evidence to convince an objective observer, as required under domestic law.

29. Finally, the source contends that the authorities did not prepare the indictment speedily and that the detention period of Mr. Ünal was thus unreasonably long.

ii. Category II

30. The source submits that Mr. Ünal's arrest and detention violate his rights under articles 19 and 26 of the Covenant.

31. According to the source, the indictment and court decision make reference to Mr. Ünal's articles, books, comments made on television programmes, activities and gatherings, all of which are legal and protected under the Covenant, and make no effort to personally link Mr. Ünal to criminal activities. The source contends that the charges against him were based on these activities and that, therefore, the detention of Mr. Ünal stems from his exercise of his right to freedom of expression.

32. It is recalled that article 26 of the Constitution protects freedom of expression and opinion through speech, writing, pictures or other media, while article 28 of the Constitution requires the State not to censure the press and to take necessary measures to protect freedom of the press.

33. Allegedly, neither Mr. Ünal's articles and books nor the comments he made on television programmes related to the attempted coup d'état or incited or provoked any violent act. The source contends that these were written and made long before the attempted coup d'état, contained religious content and had a peaceful purpose. According to the source, Mr. Ünal was charged with a terrorism offence solely because of his political and dissident opinions.

34. The source submits that the authorities could not legitimately restrict Mr. Ünal's freedom of speech insofar as, although his articles and comments may offend the Government and constitute harsh criticism, they do not incite or provoke any violent act and constitute political speech.

35. As a result, the source concludes that Mr. Ünal's arrest and detention violate articles 19 and 26 of the Covenant.

### iii. Category III

36. The source alleges that Mr. Ünal's right to an independent and impartial tribunal under article 14 of the Covenant was violated. It argues that special courts were created mainly to serve the fight against the Gülen movement and that penal courts of peace and their judges are instrumentalized by the authorities as a tool to arrest and detain members of the Gülen movement. It is explained that appeals against decisions by a penal judge of peace can only be filed before another penal judge of peace, which creates a "closed circuit" system. Allegedly, Mr. Ünal's arrest and detention were ordered by these courts and judges.

37. The source submits that multiple factors make clear these courts' lack of independence and impartiality, including: (a) the fact that the courts are staffed by partisans and loyalists of the current Government and that all penal judges of peace assigned by the High Council of Judges and prosecutors are members of the Government-established Unity in the Judiciary platform; (b) the reassignment or removal from office of judges and prosecutors who have failed to perform satisfactorily in the fight against the Gülen movement, or who have released or failed to order the arrest of individuals who the Government intended to have arrested; and (c) the widespread dismissals, arrests and coercion of judges and prosecutors and the ensuing atmosphere of pressure. In particular, the source alleges that judges have been forced to detain their colleagues, following lists sent by the Government, or risk being arrested themselves. Reportedly, all judges and prosecutors who have been assigned to investigations and lawsuits against the Gülen movement and have passed judgments in favour of the defendants, in line with the requirement of the law, have been, with no exceptions, laid off, displaced, subject to investigation, dismissed or arrested, with allegations of being members of an armed terrorist organization. They include first-level judges, military judges, members of the State Council and Supreme Court of Appeal and members of the Supreme Constitutional Court.

38. The source explains that the impartiality of peace judgeships is crucial insofar as they are responsible for supervising criminal investigations, deciding upon an individual's detention and following the entirety of the investigation. According to the source, dismissed judges and prosecutors represent more than 30 per cent of all members of the judiciary and those who were arrested represent 17.6 per cent of all judges and prosecutors employed in the country. Reportedly, in order to replace them and subordinate the judiciary to the Government, 3,940 judges and prosecutors were freshly appointed in a fast-tracked training programme with partisan criteria that allowed lawyers siding with the Government to be appointed as judges or prosecutors without any proper training or education. The source points to the statement of the European Court of Human Rights that a court whose lack of independence and impartiality has been established cannot, in any circumstances, guarantee a fair trial to the persons subject to its jurisdiction.<sup>4</sup>

<sup>4</sup> *Çıraklar v. Turkey*, Application No. 19601/92, Judgment, 28 October 1998, para. 44.

39. Further, the source recalls that the equality of arms principle requires that all parties to the proceedings be guaranteed the right to present their full case and to have access to all material related to the detention or presented to the court by State authorities. Allegedly, Mr. Ünal, like many political prisoners, has been denied access to his case file and was therefore unable to prepare his defence adequately or to disprove the charges against him, in violation of the equality of arms principle. The source explains that, in the past few years, almost every individual charged in a case with a political or public dimension has been automatically denied access to the case file on the grounds of article 153 of the Criminal Procedure Act.

40. Further, the source recalls that article 141 of the Constitution and articles 224, 230 and 232 of the Criminal Procedure Act require judges to reason their decisions. The source argues that the objections raised by Mr. Ünal were rejected by the court without evidence to the contrary and with insufficient and irrelevant reasoning. Consequently, the court's conviction judgment was allegedly not properly reasoned, thereby impeding Mr. Ünal's ability to challenge the detention decisions against him.

41. The source also alleges that there are systematic violations of the right to a defence in Türkiye. It submits that authorities have targeted lawyers and accused them of various crimes under the pretext of counter-terrorism efforts, and that some lawyers have been forced to testify against their clients. The source further contends that it is routine practice for lawyers to be beaten in prisons when they visit their clients and/or forced to wait for hours before being allowed to see their clients, even for a brief period of time.

42. Reportedly, meetings between lawyers and detainees are not private and authorities are allowed to record meetings and ensure that an official watches them. According to the source, thousands of individuals arrested in connection with the attempted coup do not benefit from their right to a defence and a significant proportion of lawyers registered with bar associations have lost their membership, leaving defendants without a lawyer during trial.

43. The source further submits that the right to seek legal counsel is subject to numerous other restrictions: defence counsels are no longer allowed to examine and retrieve copies of case files, individuals in custody can be prevented from seeing their lawyer for five days and, upon arrest, individuals can be prohibited from seeing their lawyer for six months and banned from hiring a lawyer of their choice.

44. The source notes that lawyers are subject to pressure and an intimidation campaign, and refers to an October 2016 statement in which the Commissioner for Human Rights of the Council of Europe condemned the restrictions on access to lawyers as well as the limitations on the confidentiality of the client-attorney relationship in Türkiye.

#### iv. Category V

45. The source contends that Mr. Ünal was arrested and detained on the basis of his social background and that his detention is therefore discriminatory in nature, and arbitrary.

46. The source explains that individuals charged with being a member of the so-called Fethullahist terrorist organization face widespread discrimination. It adds that there is an emerging pattern of arbitrarily detaining people who are accused of being Fethullah Gülen followers, regardless of whether they accept the connection with the movement. Reportedly, there are widespread and systematic human rights violations against individuals associated with the Gülen movement and mass arbitrary arrests and detention of individuals, including of more than 150,000 individuals solely on the basis of their social background and political stance. Most of the individuals arrested were allegedly placed in pretrial detention on trumped-up charges of terror and coup plotting. There have also allegedly been extrajudicial killings, resulting from physical and psychological torture and described by the Government as suicides, enforced disappearances of individuals associated with the Gülen movement,<sup>5</sup> and the persecution and collective punishment of government employees, private companies offering employment to these individuals, and professionals such as teachers, doctors and

<sup>5</sup> The source submits that the Working Group on Arbitrary Detention recognized the existence of such a pattern in its opinion No. 47/2020.

academics. The source alleges that the Government publicizes the names of such individuals in the official gazette and labels them as terrorists without any trial or conviction.

47. The source argues that, like many others, Mr. Ünal was targeted and detained as a sympathizer of the Gülen movement. It contends that all organizations and institutions that Mr. Ünal has worked with were legal and duly accredited. The source notes that Mr. Ünal's arrest and detention should be understood in the context of a pattern<sup>6</sup> of arbitrary arrests and detentions, extrajudicial killings, enforced disappearances and persecutions of individuals associated with the Gülen movement by authorities. It explains that the authorities use pretrial detention as a tool to punish alleged members, members and sympathizers of the Gülen movement.

48. The source adds that, since July 2016, the Government has used the following factors to identify Gülen movement sympathizers: subscribing to the *Zaman* newspaper, being a client of Bank Asya, being a member of the Aksiyon-İş union, being a member of the Tukson business association, volunteering for the Kimse Yok Mu charity, being a doctor associated with the movement, being the lawyer of a supporter of the movement, owning books by Fethullah Gülen and using a smartphone application called ByLock. The source argues that these are all legal activities protected under the various provisions of the Covenant.

#### *Response from the Government*

49. On 29 November 2022, 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 30 January 2023, detailed information about the current situation of Mr. Ünal and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the country's obligations under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Türkiye to ensure his physical and mental integrity.

50. On 27 January 2023, the Government submitted its reply, in which it refers to the large-scale, brutal and unprecedented coup attempt perpetrated by the Fethullahist terrorist organization, which it considers to constitute a clandestine terrorist organization that had insidiously infiltrated critical government posts and attempted to destroy democracy and take over the democratically elected Government on 15 July 2016.

51. It submits that, in order to restore democracy and protect the rights and freedoms of Turkish citizens, the Fethullahist terrorist organization needed to be completely rooted out of all branches of Government, as well as the military and the judiciary, which thousands of its members had infiltrated over decades. A state of emergency was declared shortly after the attempted coup. That declaration was endorsed by the parliament on 21 July 2016. The Government contends that, throughout the state of emergency, it acted in line with its international human rights obligations while maintaining close cooperation and dialogue with international organizations. The state of emergency was terminated on 19 July 2018.

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

53. According to the Government, even before the attempted coup, the Fethullahist terrorist organization was known to employ complex strategies to advance its agenda. Those strategies included blackmailing politicians and bureaucrats, cheating on a mass scale in public exams

<sup>6</sup> The source submits that the Working Group on Arbitrary Detention recognized the existence of a pattern of targeting those with alleged links to the Gülen movement in its opinion No. 8/2022.

in order to place its members in key government posts, practising social engineering, manipulation and indoctrination, and presenting fabricated stories to spark judicial proceedings against its opponents through its extensive network of media outlets, businesses, schools and non-governmental organizations. The Government contends that the Fethullahist terrorist organization is now employing the strategy of presenting itself as the victim of human rights violations to hide its crimes. The Government alleges that its members deliberately try to deceive and manipulate international public opinion by spreading false allegations about Türkiye, including unfounded claims of arbitrary arrest and detention, torture and even enforced disappearances while its members go into hiding on the orders of their leader. Allegedly, the organization itself is the one perpetrating grave human rights violations in Türkiye, including murders of innocent civilians, thus violating the very fundamental right to life of hundreds of Turkish citizens.

54. In line with the explanations provided above, the Government requests the Working Group on Arbitrary Detention to dismiss allegations made by the Fethullahist terrorist organization and its members. It reiterates its commitment to upholding human rights and fundamental freedoms and maintaining its cooperation with international organizations.

*Further comments from the source*

55. The reply of the Government was submitted to the source for further comments, which were provided on 15 February 2023. The source strongly deplores the lack of any meaningful reply from the Government, and in particular that the name of Mr. Ünal is not mentioned even once in the Government's reply and that the allegations made by the source have not been addressed at all.

56. The source insists that the Government provided false information on the activities of the Gülen movement (Fethullahist organization) in general. It stresses that only the Government considers the Gülen movement as a terrorist organization. It further submits that the information related to the state of emergency is irrelevant to the assessment of the present case and points out that the absence of any information personally linking Mr. Ünal to any alleged terrorist, criminal or plotting activity demonstrates the widespread practice of using guilt by association in Türkiye.

57. The Working Group received information that, on 21 September 2022, the Constitutional Court declared Mr. Ünal's complaints about violations of his rights to a fair trial and freedom of expression, the principle of legality and other rights manifestly ill-founded and rejected them.

## Discussion

58. The Working Group thanks the source and the Government for their submissions, although it agrees with the source that the Government's failure to address the personal situation of Mr. Ünal is regrettable. It invites the Government to cooperate with the Working Group in a constructive manner, as it has done in the past.

59. In determining whether the deprivation of liberty of Mr. Ünal 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 law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.<sup>7</sup>

60. As a preliminary matter, the Working Group notes that Mr. Ünal's situation falls partially within the scope of the derogations that Türkiye made under the Covenant. On 21 July 2016, the Government of Türkiye informed the Secretary-General that it had declared a state of emergency for three months in response to the severe dangers to public security and order, which amounted to a threat to the life of the nation within the meaning of article 4 of the Covenant.<sup>8</sup>

<sup>7</sup> A/HRC/19/57, para. 68.

<sup>8</sup> Depositary notification C.N.580.2016.TREATIES-IV.4.



61. While acknowledging the notification concerning the derogations, the Working Group emphasizes that, in the discharge of its mandate, it is empowered under paragraph 7 of its methods of work to refer to the relevant international standards set forth in the Universal Declaration of Human Rights and to customary international law. Moreover, in the present case, articles 9 and 14 of the Covenant are the provisions that are the most relevant to the alleged arbitrary detention of Mr. Ünal. As the Human Rights Committee has stated, States parties derogating from articles 9 and 14 must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.<sup>9</sup> The Working Group welcomes the lifting of the state of emergency on 19 July 2018 and the subsequent revocation of derogations by Türkiye.

62. Although the Constitutional Court gave its final ruling in Mr. Ünal's case, the Working Group, in reply to the Government's non-exhaustion plea, wishes to clarify that the procedural rules governing its consideration of communications on alleged cases of arbitrary detention are contained in its methods of work. There is no provision in the methods of work preventing the Working Group from considering communications owing to the lack of exhaustion of domestic remedies in the country concerned. The Working Group has also confirmed in its jurisprudence that there is no requirement for petitioners to exhaust domestic remedies for a communication to be considered admissible.<sup>10</sup>

63. Furthermore, the Working Group, addressing the Government's request to the special procedures not to allow the Fethullahist terrorist organization and its members to abuse those mechanisms, and to dismiss their allegations, wishes to recall that the Human Rights Council has mandated it to receive and consider allegations of arbitrary detention from anyone around the world. The Working Group thus makes no distinction as to who can or cannot bring allegations to its attention. The Working Group is also required to act impartially and independently. It therefore treats all submissions made to it equally and accepts them as allegations, inviting the Government concerned to respond. The onus is therefore on the Government to engage with the Working Group constructively by addressing the specific allegations made to assist the Working Group in reaching a conclusion in each communication brought to its attention.

64. Finally, the Working Group also wishes to reiterate that it applies a heightened standard of review in cases where the rights to freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities, are restricted, or where human rights defenders are involved.<sup>11</sup> Mr. Ünal's role as an independent journalist requires the Working Group to undertake this kind of scrutiny.

#### Category I

65. According to the information provided by the source, the security forces who arrested Mr. Ünal mentioned that an arrest warrant had been issued against him but failed to present him with any such warrant at the time of his arrest. The source also argues that Mr. Ünal was not informed of the charges against him until he was brought before a judge, in the evening of 15 August 2016. The Government has chosen not to contest these allegations although it was provided the opportunity to do so.

66. Article 9 (2) of the Covenant provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for the arrest and shall be promptly informed of any charges. The Working Group has previously stated that, for a deprivation of liberty to have a

<sup>9</sup> 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; general comment No. 34 (2011) on the freedoms of opinion and expression, para. 5; general comment No. 35 (2014) on liberty and security of person, paras. 65–66; and *Özcelik et al. v. Turkey* (CCPR/C/125/D/2980/2017), para. 8.8.

<sup>10</sup> See, for example, opinions No. 19/2013, No. 38/2017, No. 41/2017, No. 11/2018, No. 46/2019, No. 53/2019 and No. 30/2020.

<sup>11</sup> Opinions No. 21/2011, para. 29; No. 47/2018, para. 54; No. 51/2018, para. 77; No. 55/2018, para. 62; No. 61/2018, para. 45; and No. 82/2018, para. 26.

legal basis, it is not sufficient that there is a law which may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case. This is typically<sup>12</sup> done through an arrest warrant or arrest order (or equivalent document).<sup>13</sup> The reasons for arrest must be provided immediately upon arrest and 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.<sup>14</sup> The Working Group notes that Mr. Ünal was not arrested in flagrante delicto, when the opportunity to obtain a warrant would not be typically available.

67. The Government has also failed to explain how Mr. Ünal's arrest without a warrant was strictly required by the exigencies of the security situation, other than asserting that, throughout its two-year state of emergency, it acted in accordance with its own code of criminal procedure and international human rights obligations and maintained its close cooperation and dialogue with international organizations.

68. The Working Group finds that, in order to invoke a legal basis for the deprivation of liberty, the authorities should have presented an arrest warrant or equivalent document to Mr. Ünal, informed him of the reasons for his arrest, at the time of arrest, and informed him promptly of the charges against him. Their failure to do so violates articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant, as well as principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and renders his arrest devoid of any legal basis.

69. The Working Group observes the source's allegation that, following his arrest, Mr. Ünal was brought to the police department on 11 August 2016, where he was detained until 15 August 2016. Mr. Ünal was reportedly only brought before a judge on the evening of 15 August 2016. The Government has chosen not to contest these allegations.

70. The Working Group notes that Mr. Ünal was not brought promptly before a judge, within 48 hours of his arrest, in accordance with the international standard<sup>15</sup> and the Government failed to address this delay. The authorities therefore violated article 9 of the Universal Declaration of Human Rights and article 9 (1) and (3) of the Covenant, as well as principles 11, 37 and 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

71. The Working Group concludes that the detention of Mr. Ünal is arbitrary under category I. This finding is not altered by the derogation discussed above. The Working Group considers that the guarantees of the right to liberty and security would be meaningless if it were accepted that people could be placed in pretrial detention without any respect to the procedure established by law. The Working Group finds that Mr. Ünal's deprivation of liberty is disproportionate to the strict exigencies of the situation, and that the Government failed to submit any proof to the contrary.

## i Category II

72. The source submits that Mr. Ünal was arrested, charged, tried and sentenced on the basis of his alleged alliance with the Fethullahist terrorist organization, in breach of articles 19 and 26 of the Covenant. In the present case, as in many others,<sup>16</sup> the Working Group observes

<sup>12</sup> Human Rights Committee, general comment No. 35 (2014), para. 23; see also opinions No. 88/2017, para. 27; No. 3/2018, para. 43; and No. 30/2018, para. 39. See also article 14 (1) of the Arab Charter on Human Rights.

<sup>13</sup> Human Rights Committee, general comment No. 35 (2014), para. 27; and opinion No. 30/2017, paras. 58 and 59.

<sup>14</sup> Opinion No. 2021/85, para. 69.

<sup>15</sup> Human Rights Committee, general comment No. 35 (2014), para. 33. See also [CCPR/C/79/Add.89](#), para. 17; [CCPR/C/SLV/CO/6](#), para. 14; and [CCPR/CO/70/GAB](#), para. 13. For the Working Group's jurisprudence, see opinions No. 57/2016, paras. 110 and 111; No. 2/2018, para. 49; No. 83/2018, para. 47; No. 11/2019, para. 63; No. 20/2019, para. 66; No. 26/2019, para. 89; No. 30/2019, para. 30; No. 36/2019, para. 36; No. 42/2019, para. 49; No. 51/2019, para. 59; No. 56/2019, para. 80; No. 76/2019, para. 38; and No. 82/2019, para. 76.

<sup>16</sup> See, for example, opinions No. 42/2018, No. 44/2018, No. 29/2020, No. 30/2020 and No. 47/2020.

that the essence of the allegations against Mr. Ünal is his alleged alliance with the Gülen movement, which, according to the Government, is known to employ complex strategies to advance its agenda. However, the Working Group notes that the Government failed to explain what kind of activities Mr. Ünal was alleged to have committed and how any of these alleged activities amounted to a criminal act. Nothing in the materials before it allows the Working Group to conclude that these activities can be regarded as capable of generating a reasonable suspicion that he had committed the alleged criminal offences.

73. In particular, referring to the charges against the petitioner (see para. 20 above), the Working Group finds no elements demonstrating that Mr. Ünal's activities did not remain within the limits of freedom of speech and freedom of assembly, insofar as they cannot be construed as a call for violence. The fact that the Mr. Ünal wrote columns, appeared on television and wrote two books related to the Gülen movement cannot justify his pretrial detention.

74. The Working Group is mindful of the state of emergency that was declared in Türkiye. However, while the National Security Council designated the Fethullah organization as a terrorist organization in 2016, 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 Commissioner for Human Rights of the Council of Europe: "Despite deep suspicions about its motivations and modus operandi from various segments of the Turkish society, the Fethullah Gülen movement appears to have developed over decades and enjoyed, until fairly recently, considerable freedom to establish a pervasive and respectable presence in all sectors of Turkish society, including religious institutions, education, civil society and trade unions, media, finance and business. It is also beyond doubt that many organizations affiliated to this movement, which were closed after 15 July, were open and legally operating until that date. There seems to be general agreement that it would be rare for a Turkish citizen never to have had any contact or dealings with this movement in one way or another." Furthermore, the Commissioner pointed out that there was a need, "when criminalizing membership and support of this 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".<sup>17</sup>

75. The Working Group has found a pattern over the past six years concerning the arrest and detention in Türkiye and abroad of individuals with alleged links to the Gülen movement.<sup>18</sup> In all those cases, the Government has alleged criminal activity by individuals on the basis of their engagement in regular activities without any specification as to how such activities amounted to criminal acts. The Working Group finds that the present case follows the same pattern. No evidence whatsoever has been presented to the Working Group that the journalistic activities of Mr. Ünal, described above, could have been equated with being engaged in any kind of violent or terrorism-related activity.

76. Therefore, the Working Group considers that the basis for the arrest and detention of Mr. Ünal was the exercise of his freedom of expression and freedom of association. Based on the information available, and having particular regard to the context in which the alleged crimes occurred, the Working Group is of the view that the Government failed to demonstrate that any of the permitted restrictions on freedom of expression found in article 19 (3) and on freedom of assembly found in article 21 of the Covenant applied in Mr. Ünal's case.

77. The Working Group thus finds that Mr. Ünal's deprivation of liberty is arbitrary, falling within category II, as it resulted from his exercise of the rights and freedoms guaranteed under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant.

78. The Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

<sup>17</sup> "Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey", document CommDH(2016)35, paras. 20 and 21.

<sup>18</sup> See, for example, opinions No. 10/2019, No. 53/2019, No. 79/2019, No. 2/2020, No. 29/2020, No. 30/2020, No. 51/2020, No. 66/2020 and No. 74/2020.

## Category III

79. Given its finding that Mr. Ünal's deprivation of liberty was arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Ünal should have taken place. However, the trial did take place, and Mr. Ünal was convicted and sentenced to 19 years and six months in prison. The source has alleged the lack of impartiality of judges and prosecutors, violation of the equality of arms principle, lack of access to the case file, unreasoned judgment and a violation of defence rights.

80. In particular, according to the source, Mr. Ünal was unable to disprove allegations against him as his personal mobile telephone had been confiscated and no copy was made, contrary to article 134 of the Criminal Procedure Act. He was reportedly denied access to his case file and therefore unable to prepare his defence adequately or to disprove the charges against him. The source also argues that the indictment referring to his books and articles was issued very shortly before the court pronounced the judgment in his case.

81. Although the Government has had the opportunity to respond to these allegations, it has chosen not to do so. The Working Group thus cannot but conclude that articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (1) and (3) (b) of the Covenant were violated.

82. Accordingly, the Working Group finds that the violations of Mr. Ünal's right to a fair trial were of such gravity as to give his detention an arbitrary character. His deprivation of liberty thus falls under category III.

## Category V

83. The present case joins a series of cases concerning individuals with alleged links to the Gülen movement that has come before the Working Group in the past few years.<sup>19</sup> In all these cases, the Working Group has found that the detention of the concerned individuals was arbitrary. A pattern is emerging whereby those with alleged links to the movement are being targeted on the basis of their political or other opinion, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. Accordingly, the Working Group finds that the Government detained Mr. Ünal based on prohibited grounds of discrimination, and that his detention was thus arbitrary, falling under category V. The Working Group refers the present case to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

## Concluding remarks

84. The Working Group wishes to record its concern at the source's un rebutted allegation that Mr. Ünal was held in solitary confinement for two months in Izmir Prison, despite the lack of any court decision. As the Working Group has held,<sup>20</sup> according to rule 45 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), the imposition of solitary confinement must be accompanied by certain safeguards. Solitary confinement must only be used in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and authorized by a competent authority. Prolonged solitary confinement in excess of 15 consecutive days is prohibited under rules 43 (1) (b) and 44 of the Mandela Rules. The Working Group feels obliged to remind the Government of its obligation, under article 10 of the Covenant, to treat all persons deprived of their liberty with humanity and with respect for the inherent dignity of the human person.

85. In the past six years, the Working Group has noted a significant increase in the number of cases brought to it concerning arbitrary detention in Türkiye. It expresses grave concern about the pattern that all these cases follow and recalls that, under certain circumstances,

<sup>19</sup> See, for example, opinions No. 1/2017, No. 38/2017, No. 41/2017, No. 11/2018, No. 42/2018, No. 43/2018, No. 44/2018, No. 78/2018, No. 84/2018, No. 10/2019, No. 53/2019, No. 79/2019, No. 2/2020, No. 29/2020, No. 30/2020, No. 51/2020, No. 66/2020, No. 74/2020 and No. 8/2022.

<sup>20</sup> See, for example, opinion No. 83/2018.

widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law may constitute crimes against humanity.<sup>21</sup>

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

### **Disposition**

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

The deprivation of liberty of Ali Ünal, being in contravention of articles 2, 3, 7, 9, 10, 11, 19, and 20 of the Universal Declaration of Human Rights and articles 2, 9, 14, 19, 21 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

88. The Working Group requests the Government of Türkiye to take the steps necessary to remedy the situation of Mr. Ünal 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.

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

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

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

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

### **Follow-up procedure**

93. 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. Ünal has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Ünal;
- (c) Whether an investigation has been conducted into the violation of Mr. Ünal'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 Türkiye with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

94. 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

<sup>21</sup> For example, opinions No. 66/2020, para. 67; No. 67/2020, para. 96; and No. 84/2020, para. 76.

whether further technical assistance is required, for example through a visit by the Working Group.

95. 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.

96. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>22</sup>

*[Adopted on 27 March 2023]*

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<sup>22</sup> Human Rights Council resolution 51/8, paras. 6 and 9.