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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018

Opinion No. 78/2018 concerning Hamza Yaman (Turkey)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 15 August 2018, the Working Group transmitted to the Government of Turkey a communication concerning Hamza Yaman. The Government replied to the communication on 26 October 2018. Turkey 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. Mr. Yaman is a 51-year-old Turkish national who usually lives in Kirikkale, Turkey, in a residence allocated to him by the State. Mr. Yaman graduated from the Ankara Faculty of Law in 1987. He has been a judge for 28 years, including since 2011 as a member of the Court of Cassation, where he dealt with cases involving terrorism and organized crime.

Arrest and detention

5. The source reports that, following the attempted coup d'état in Turkey on 15 July 2016, 160,000 people were taken into custody, 60,000 people were detained and more than 100,000 civil servants were dismissed from their positions. In addition, 4,500 judges and prosecutors were dismissed, 3,000 of whom were detained.

6. On 18 July 2016, at around 3.45 a.m., Mr. Yaman was arrested at his residence by the Ankara Security Directorate. According to the source, Mr. Yaman was told that his arrest had been carried out on the instruction of the Ankara Chief Public Prosecutor's Office, and that he had been suspected of having violated articles 309, 311, 313 and 314 of the Turkish Criminal Code. However, he was not provided with written notification of the instruction. The source alleges that Mr. Yaman was taken into custody without having been shown the instruction of the Public Prosecutor, which in fact was only issued after the fact. The instruction was made following an investigation initiated by the Public Prosecutor that resulted in "search, warrant, arrest, custody decisions" being made in relation to 140 members of the Court of Cassation and almost 40 members of the Council of State.

7. The source further alleges that an indictment against Mr. Yaman was prepared by the prosecutors and filed 17 months after his arrest. Mr. Yaman's first trial hearing took place on 16 April 2018. According to the source, the legal basis for his detention is article 46 (1) of Law 2797 on the Court of Cassation, article 100 of the Turkish Criminal Procedure Code and article 314 (2) of the Turkish Criminal Code (membership of a terrorist organization). Mr. Yaman's lawyer has filed appeals on a monthly basis against his detention, but the applications have been rejected without any justification. Mr. Yaman has been detained since 20 July 2016.

Conditions of custody and detention

8. The source claims that, following his arrest on 18 July 2016, Mr. Yaman was held in inhumane conditions in a basement cell at a police station that was overcrowded and had no windows or air conditioning. He had limited access to toilet facilities owing to overcrowded conditions. Later that day, Mr. Yaman and other members of the supreme judiciary were handcuffed with their hands behind their backs and driven to the Ankara Security Directorate by a long route, in order to expose the detainees to the public. For almost 24 hours, Mr. Yaman was kept in an overcrowded, hot cell in which he had difficulty breathing. He could not sleep and waited in a standing or crouched position for most of the time. In the cell, almost 120 people had to share only two toilets. Mr. Yaman was not provided with his medications for his kidney and blood pressure conditions, and was subjected to degrading treatment.

9. After a medical examination, Mr. Yaman was brought to the courthouse at about 5 p.m. the following day. The source alleges that he was again unnecessarily handcuffed with his hands behind his back. Almost 200 members of the supreme judiciary were made to stand in a corridor without seating. After one hour, Mr. Yaman met with a defence lawyer for 2 to 3 minutes while supervised by the police. After giving his statement, Mr. Yaman was returned to the corridor, where he lay on the floor on a newspaper. The source alleges that Mr. Yaman was held in inhumane conditions until 2 a.m., when he was taken to a prayer room at the courthouse together with about 400 people.

10. On 20 July 2016 at around 10 a.m., Mr. Yaman was brought to a corridor of the Magistrates' Court, where he was kept waiting for most of the day. There, he saw his spouse for the first time since his arrest, but could not talk to her as she was not allowed to pass the police barricade. Mr. Yaman gave his statement at 7 p.m. and was detained, taken past his

spouse in handcuffs with his hands behind his back, and brought to Sincan T-Type Prison in Ankara.

11. The source reports that, from 20 July to 8 October 2016, Mr. Yaman was detained at Sincan T-Type Prison. He was placed with 30 people in a cell that was designed for 8 people and had to sleep on the floor for the first three months. Minimum standards of hygiene were not met in the prison.

12. On 9 October 2016, Mr. Yaman was transferred without any notification or explanation to single-cell isolation at Kirikkale Keskin T-Type Closed Prison. The source claims that, while a single-cell penalty may be imposed pursuant to an investigation and approval by a judge, Mr. Yaman has been arbitrarily subjected to this disciplinary measure. The only activity possible at the cell is cleaning. Mr. Yaman is allowed to make a 10-minute telephone call every 15 days. According to the source, Mr. Yaman has been subjected to inhuman treatment and psychological torture owing to this ongoing isolation without any justification. As a result, his health is deteriorating.

Submissions

13. The source submits that Mr. Yaman's deprivation of liberty is arbitrary according to categories I, II, III and V.

Category I: lack of legal basis for the detention

14. In relation to category I, the source recalls that Mr. Yaman was taken into custody and detained for investigation following the attempted coup d'état on 15 July 2016, and that his house was searched. The source emphasizes that Mr. Yaman is a member of the supreme judiciary who respects the rule of law and the Constitution. He did not contribute to the attempted coup, and no evidence has been presented to that effect. Mr. Yaman was not detained on suspicion of any offence relating to the attempted coup.

15. At the time of the investigation, Mr. Yaman was a member of the Court of Cassation. However, the investigation was not conducted in accordance with the Law 2797 on the Court of Cassation. Judges are subject to certain guarantees provided by that Law,[1] as well as guarantees contained in various international and regional instruments. Furthermore, the investigative bodies lacked competence and their jurisdiction was in conflict with the Law.[2] The Board of the First Presidency of the Court of Cassation has the power to initiate an investigation, and the entire process must take place within the Court of Cassation. Any investigating member of the Court of Cassation may employ temporary protection measures, such as arrest and detention. The procedures of the Court of Cassation represent a higher-level guarantee. The source submits that Law 2797 on the Court of Cassation is of a specific nature and should prevail over laws of a general nature. The provisions of the Criminal Procedure Code and Decree Law No. 667 on measures taken within the scope of state of emergency are general in nature and do not apply to Mr. Yaman.

16. The source argues that removing the tenure of a member of the supreme judicial body cannot reverse the effects of an attempted coup d'état and is therefore a disproportionate penalty. In addition, members of the Court of Cassation were taken into custody before Decree Law No. 677 was published. The Office of the Magistrates' Judge, which decides on detention and considers appeals, does not have competence in the present case. As a result, Mr. Yaman was not detained by a competent court established by law, in violation of article 19 of the Turkish Constitution, articles 8, 9 and 10 of the Universal Declaration of Human Rights, and articles 9, 10 and 14 of the Covenant.

17. The source refers to the investigation procedure set out in Law 2797 on the Court of Cassation, which applies unless the offender was apprehended in flagrante delicto or the offence involves a heavy penalty. In the present case, Mr. Yaman learned about the attempted coup from the news and had no connection to it. He was not arrested in flagrante delicto after

[1] The source states that those guarantees are provided in articles 2, 5, 9–11, 14, 17, 19–22, 24–26, 35–40, 138–140 and 154 of Law 2797 on the Court of Cassation.

[2] The source refers to articles 18 (4) (Duties of the Board of the First Presidency of the Court of Cassation) and 46 of Law 2797 on the Court of Cassation.

participating in the attempted coup, nor was he arrested in possession of a weapon or any evidence that would indicate that he had taken part in the attempted coup. Instead, Mr. Yaman was taken into custody at his residence, which was allocated to him by the President of the Court of Cassation. Accordingly, the police, Public Prosecutor and Magistrate Judge were not competent and did not have jurisdiction to order the search, detention and investigation. In addition, the law enforcement authorities did not take any action over the two-day custody period during which they are required to gather evidence and submit it to the President of the Court of Cassation.

18. According to the source, the actions and decisions of the authorities should be considered as having been made unlawfully and in bad faith because Decree Law No. 667 only entered into force on 23 July 2016, after Mr. Yaman had been taken into custody. Moreover, Mr. Yaman had been taken into custody before the instruction of the Public Prosecutor was issued. The State has a responsibility to ensure the independence of the judiciary through the security of tenure of judges and by not interfering with the performance of their duties.

19. In addition, the search at Mr. Yaman's office and home was contrary to the required procedures. The source alleges that the search was conducted on 20 July 2016 at 3 a.m., when Mr. Yaman was already in custody, and pursuant to an approval of seizure, not a search warrant. Any evidence obtained was done so illegally and must not form the basis of a decision to detain Mr. Yaman. The search was not conducted in the presence of an investigator assigned by the Board of the First Presidency of the Court of Cassation, as required by law.

20. Furthermore, Mr. Yaman's deprivation of liberty was not predictable and did not comply with the principle of legal certainty. The detention of a member of the Court of Cassation must be ordered by the First President of the Court of Cassation, yet the detention of Mr. Yaman did not follow the law. According to the source, in the 150-year history of the Court, the methods employed in the present case had never previously been used, including under a monarchy, autocracy, occupation, single party rule, martial law and military administration.

21. The source recalls that the Office of the Magistrates' Judge referred to the need to detain suspects owing to the flight risk following the attempted coup, but submits that there is no evidence of such a risk in the present case. Mr. Yaman has not attempted to flee and has no connections abroad. Moreover, Mr. Yaman's detention was ordered at the start of the investigation, when there was no evidence that would allow an assessment of the case.

22. Finally, the source alleges that, following Mr. Yaman's detention, the trial authority was changed to the Criminal Chamber of the Court of Cassation under Decree Law No. 690, dated 29 April 2017. The General Assembly of the Criminal Chambers of the Court of Cassation will serve as the appellate court.

Category II: exercise of rights

23. In relation to category II, the source recalls that, as a member of the Court of Cassation, Mr. Yaman conducted proceedings involving alleged terrorist organizations. Until his detention, he had been protected by the State against the threats of separatist and terrorist organizations, which target and threaten others through digital media. In 2014, an essay had been shared through a social media account that had a possible connection with Islamic State in Iraq and the Levant, claiming that 140 members of the Court of Cassation were members of terrorist groups, including Mr. Yaman. According to the source, the unofficial list was used as the basis for their dismissal from service and detention.

24. The source details various structural changes within the judiciary and the Court of Cassation from 2010 to 2016. The source alleges that the Government exerted pressure on the judiciary, including by enacting Law No. 6545 to amend the structure of the Court of Cassation and on 18 June 2014 by putting an end to the term of the Board of the First Presidency, as well as the term of Secretary-General and Deputy Secretaries-General of the Court. Between 2011 and 2015, the Board of the First Presidency was revised four times. As a further example, the source notes that the "Platform for Unity in the Judiciary" was established as an association within the Court of Cassation with the support of the

Government, in order to exert pressure on judges and prosecutors. According to the source, 4,500 judges and prosecutors who did not support the Platform were dismissed, and 3,000 were still detained.

25. Furthermore, the new Board of the First Presidency changed Mr. Yaman's duty station, as well as the duty stations of more than 100 members of the Court of Cassation. The new Board also initiated investigations into members of the Court of Cassation. The source alleges that Mr. Yaman was investigated owing to his dissenting opinions. He was subjected to discrimination, including the rejection of his participation in seminars, scientific conferences and international meetings. On 16 July 2016 at 8 a.m., the Court of Cassation management used the attempted coup as a pretext to investigate 140 members of the Court who had not supported the Platform for Unity in the Judiciary and whose names had been published on a website operated by groups targeting the judiciary. Mr. Yaman learned about the decision to take him into custody from the television news at midnight while the attempted coup was ongoing. The source claims that Mr. Yaman had no partisan government affiliation and was targeted by government-run media and terrorist websites.

26. The source reports that, in accordance with decision No. 2016/426 of the High Council for Judges and Prosecutors dated 24 August 2016 and article 3 of Decree Law No. 667, Mr. Yaman and others were dismissed from public service, with no possibility to return, to appeal or to seek the re-examination of the dismissal. The source alleges that the Government has successfully eliminated the Council of State, the Court of Cassation and the administrative and ordinary court jurisdictions, thereby achieving a complete dominance of the judiciary.

Category III: right to a fair trial

27. In relation to category III, the source submits that Mr. Yaman's rights under articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant have been violated. Mr. Yaman was denied an effective remedy and the equality of arms because his lawyers were denied access to the evidence against him. A confidentiality order was placed on Mr. Yaman's file and his defence counsel was unable to challenge his detention without seeing the fundamental evidence that was supposedly the basis for the detention.

28. All decisions in the present case have been taken in the absence of Mr. Yaman, who has been unable to defend himself. The source alleges that Mr. Yaman has been detained for at least 12 months without being brought before a judge. Article 3 (1) of Decree Law No. 668 has been used as an excuse to violate the right to a fair trial, including the right to appear in person.

29. Furthermore, decisions in relation to Mr. Yaman's detention have been made without the appropriate justification and individual evaluation, including the analysis of Mr. Yaman's file and consideration of his health status. The detention of 150 judges has been justified in brief two-line dispositions by the courts, in violation of articles 34 and 230 of the Criminal Procedure Code and article 141 (3) of the Turkish Constitution, which set out the justification required to detain an individual. Mr. Yaman has submitted more than 15 petitions to the courts, none of which has reached its destination, and there has been no record of the petitions.

30. In addition, other than the Turkish Criminal Code, there are no law books at the prison where Mr. Yaman is being held, and his family is prevented from providing him with law books. A court decision on this matter in favour of Mr. Yaman has not been applied, and the circular dated 26 July 2016 of the Ministry of Justice on Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY) detainees has been used as the justification.

31. The source submits that the legal advice provided to Mr. Yaman is restricted by law and is monitored by the prison staff and recorded audiovisually. Documents exchanged with legal representatives are checked and audited, and the privacy of communications with his defence counsel has been violated. Furthermore, family visits are restricted by the Decree Law. While other detainees can participate in a telephone call with their families once a week, Mr. Yaman is only allowed to do so once every two weeks. Other detainees are entitled to a one-hour visit per month, but Mr. Yaman can only receive a visit for 30 minutes every two

months. The source alleges that Mr. Yaman has been placed in a prison 150 kilometres away from his place of trial, and that this decision was made in order to prevent or make difficult the provision of legal advice and family visits.

32. The source emphasizes that Mr. Yaman does not pose a flight risk. He has been a judge for 28 years and is a member of the supreme judiciary. He resides in a home allocated by the State and is married with four children. Although he knew that he would be taken into custody, he waited at his residence for two days for the police to come to him. As a result, articles 100 and 101 of the Criminal Procedure Code, article 19 (3) of the Turkish Constitution, as well as articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant, have been violated.

33. According to the source, the process for examining Mr. Yaman's detention was confused. The decisions regarding the continuation of Mr. Yaman's detention have been systematically notified immediately after the date of examination, thereby effectively preventing him from challenging his detention. Moreover, the judge who considers appeals against detention orders is the same judge who decides on the continuation of detention. The source claims that, even if a judge is prepared to release Mr. Yaman, he or she will not do so given that the detention has been extended several times. The source alleges that this amounts to a violation of articles 9 and 10 of the Universal Declaration of Human Rights and article 9 and 14 of the Covenant.

34. In addition, the source submits that Mr. Yaman's right to fair trial and the presumption of innocence has been violated. Mr. Yaman has requested that judges recuse themselves from considering his appeals against ongoing detention orders. However, Mr. Yaman's requests have not been processed, in violation of article 26 of the Criminal Procedure Code. The judges who have heard Mr. Yaman's matter have revealed their opinions on the case, cannot act impartially and do not conclude hearings within a reasonable time.

35. Finally, the source stresses that Mr. Yaman suffers from serious health problems, including kidney disease and high blood pressure. He has been detained without receiving treatment for these problems and risks losing his kidney. The source argues that this constitutes a violation of article 5 of the Universal Declaration of Human Rights.

Category V: discrimination

36. In relation to category V, the source submits that Mr. Yaman was targeted owing to his judgments and decisions, which were not in line with government expectations. Mr. Yaman was dismissed without the possibility of being able to continue his profession as a judge or lawyer. His properties and bank accounts were seized, including retirement savings, and he was removed from the residence allocated to him by the State.

Response from the Government

37. On 15 August 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 15 October 2018 about the current situation of Mr. Yaman. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention, as well as its compatibility with Turkey's obligations under international human rights law. Moreover, the Working Group called upon the Government to ensure Mr. Yaman's physical and mental integrity.

38. On 24 September 2018, the Government requested an extension of the deadline for response. The extension was granted until 29 October 2018. The Government submitted its response on 26 October 2018.

Background information

39. In its response, the Government provides an overview of the terrorism threats faced by Turkey, particularly from FETÖ/PDY, prior to and after the attempted coup d'état of 15

July 2016.[3] The Government recalls that a nationwide state of emergency was declared by the Council of Ministers from 21 July 2016 for three months, pursuant to article 120 of the Constitution and article 3 (1) (b) of Law No. 2935. The Council of Ministers extended the state of emergency seven times.

40. Following the declaration of the state of emergency, the Government derogated from some of its obligations under the Covenant. Notification of that derogation was submitted to the United Nations under article 4 of the Covenant. The measures taken were strictly required by the exigencies of the situation, proportionate to the crisis and necessary to eliminate the influence of terrorist organizations. Since the measures taken were based on decrees that have since been adopted by the Grand National Assembly, the principle of legality is satisfied.

41. According to the Government, the state of emergency ended on 19 July 2018. The Government has revoked the notification of derogation. The revocation was communicated to the United Nations on 8 August 2018.

Circumstances of the present case

42. According to the Government, Mr. Yaman was taken into custody on 18 July 2016 by the Ankara Chief Public Prosecutor's Office. He was informed of the charges against him and his legal rights. He exercised his right to inform his family that he had been taken into custody.

43. On 19 July 2016, Mr. Yaman gave his statement at the Ankara Public Prosecutor's Office and denied the allegations against him. He was referred to the Criminal Court of Peace on a charge of "being a member of an armed terrorist organization". Mr. Yaman consulted with a lawyer while he was questioned by the Court, which subsequently ordered his detention.

44. The Court considered that judicial control measures would be insufficient in Mr. Yaman's case, having taken into account: (a) the seriousness of the charge; (b) the evidence against Mr. Yaman; (c) the existence of a tangible and imminent threat; (d) the verdict dated 17 July 2016 of the Board of First Presidency of the Court of Cassation; (e) the strong possibility that Mr. Yaman would hide or flee, noting that many members of the judiciary who had been prosecuted for the same offence had escaped justice; (f) the prescribed punishment for the crime; (g) the fact that the crime was included in article 100 (3) of the Code of Criminal Procedure;[4] and (h) the fact that the conditions of article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) had been met.

45. The Government emphasizes that Mr. Yaman's detention has been reviewed by the Criminal Courts of Peace and the Criminal Chambers of the Court of Cassation on 29 occasions since he was taken into custody.[5] During each review, the courts gave detailed reasons to support continuation of his detention. The reviews are judicial decisions and are subject to the supervision of higher courts.

46. On 17 July 2016, the Board of First Presidency of the Court of Cassation abolished the competence of members of the Court of Cassation by decision number 244 (a). Given that FETÖ/PDY was suspected to have created its own structure within the judiciary, the membership of all Court of Cassation members was terminated in order to hold fresh elections under provisional article 15 of Law No. 6723 of 1 July 2016. Mr. Yaman was employed as an "examining magistrate" until he was dismissed owing to his affiliation with FETÖ/PDY, in accordance with decision 2016/426 of the Council of Judges and Prosecutors dated 24 August 2016. Action to annul that decision can be taken before the Council of State.

[3] A full summary of the background information submitted by the Government is set out in opinion No. 11/2018, paras. 20–26.

[4] Article 100 (3) provides that, for certain crimes, the grounds for detention are deemed to exist if there is a strong reason for suspicion that the crime has been committed.

[5] The Government states that Mr. Yaman's detention was reviewed 5 times in 2016, 15 times in 2017 and 9 times in 2018. The Government provided the dates of each review.

47. On 6 November 2017, the Ankara Chief Public Prosecutor's Office referred the case to the Chief Public Prosecutor's Office of the Court of Cassation. By an indictment dated 5 January 2018, the Chief Public Prosecutor's Office of the Court of Cassation brought the case before the 9th Criminal Chamber of the Court of Cassation. Mr. Yaman was accused of "being a member of an armed terrorist organization" in the indictment, which stated:

> [It] is understood that the suspect was engaged in the illegal activities of FETÖ/PDY, considering: the content of other users' correspondences on [the communication application] Bylock and witness statements; that he had taken part in the Organization's meetings; that he had been among other FETÖ/PDY members who had been chosen to be selected as members of the Court of Cassation after the Organization had seized the majority in the Council of Judges and Prosecutors in 2010; that he had been a member of the FETÖ/PDY cell within the Court of Cassation and in that context had carried out activities on behalf of the Organization, such as staffing and collecting "charity"; that other FETÖ/PDY members had mentioned him in their correspondences on Bylock; that he had consistently saved and shared information with other members of FETÖ/PDY and had ensured that said information was used to develop new strategies for the Organization; that [an individual], who is one of the "imams" of the Organization and against whom an investigation is ongoing for his affiliation with FETÖ/PDY, had given the order to make use of such information to [another individual], who is also being investigated for his affiliation with FETÖ/PDY; that he had made online propaganda for the Organization by sharing posts regarding persons and institutions affiliated with FETÖ/PDY on his Twitter account; and that he had worked with "imams" and other members of the Organization's "cell" within the judiciary.

48. On 11 January 2018, the 9th Criminal Chamber of the Court of Cassation accepted the indictment against Mr. Yaman. Hearings were held on 16 April and 13 August 2018, and the proceedings are ongoing.

49. The Government outlines the domestic remedies available to Mr. Yaman, including: (a) the right to object to detention under article 91 (5) of the Code of Criminal Procedure; (b) an action for compensation under article 141 of the same Code; and (c) an individual application to the Constitutional Court. Mr. Yaman has not taken action under articles 91 (5) or 141 of the Code of Criminal Procedure. However, he has filed eight applications to the Constitutional Court, in which he alleged that his rights had been violated during the state of emergency. On 24 July 2017, the Court found his application inadmissible for non-exhaustion of other legal remedies. His other applications are pending before the Constitutional Court.

Conditions of detention

50. The Government states that Mr. Yaman was detained on 20 July 2016 by Ankara Criminal Court of Peace on the charge of "being a member of an armed terrorist organization" and was sent that day to Sincan T-Type Closed Penal Institution. The Government emphasizes that Mr. Yaman has received medical treatment throughout his detention and gives several examples of the treatment and medication that he has been prescribed for high blood pressure, kidney disease and other ailments.

51. During his detention from 20 July to 9 October 2016 at Sincan T-Type Closed Penal Institution, Mr. Yaman contacted his lawyer 15 times and contacted his family 18 times.

52. On 9 October 2016, Mr. Yaman was transferred to Keskin T-Type Closed Penal Institution, where he is detained in a single room. In accordance with Law No. 5275 and the Regulation on Administration of Penal Institutions and Execution of Penalties and Security Measures, it was determined that Mr. Yaman needed to be held in either a single or a three-person room with additional security measures for his safety, given his condition and his former position. His single room is not a cell. Detainees held in those rooms have the same rights as other detainees who stay in communal rooms.

53. According to the Government, Mr. Yaman was allowed to make telephone calls during the state of emergency, in accordance with Decree Law No. 667, and more frequently after the state of emergency ended. Detainees are allowed a 10-minute telephone call once a week. Mr. Yaman contacted his lawyer 122 times during his detention at Keskin T-Type

Closed Penal Institution. He wrote 97 petitions to different institutions, all of which were transferred to their addressees.

54. Temporary overcrowding occurred in some institutions as a result of the number of people detained after the coup attempt. With the conclusion of the state of emergency, it is expected that there will be improvements in detention conditions.

Submissions on arbitrary detention

55. The Government argues that the allegations communicated to the Working Group fall within the scope of articles 9 and 14 of the Covenant. As a result, the communication is inadmissible because the notification of derogation covers those provisions. Analysis of the derogation should take into account the conditions under which it was made and should not be based on principles applicable during normal periods. Any other approach would render article 4 of the Covenant meaningless. In support of its argument, the Government discusses the approach of the European Court of Human Rights. The Government also outlines the provisions allowing for the declaration of a state of emergency in Turkey, including articles 15 and 119 to 122 of the Constitution.

56. In addition, the Government recalls that Mr. Yaman was held in custody for three days before being detained in accordance with the decision of a competent court. He did not file an objection against the custody, even though he had the right to do so. The period of custody was proportionate, given that: (a) investigations were being carried out in relation to a large number of individuals suspected to be affiliated with FETÖ/PDY; (b) numerous people had been taken under custody under the same investigation; and (c) the complexity and seriousness of the alleged crime had warranted such custody.

57. The Government submits that Mr. Yaman gave his statement in the presence of a lawyer and was accorded his right to legal assistance. Mr. Yaman was brought promptly before a judge after being taken into custody. Decisions relating to his custody and detention were made by independent judges, who provided their reasons. Mr. Yaman exercised his right to appeal. The charges and evidence were explained in the indictment presented to the court. Prosecution of those who participated directly in the attempted coup is in itself not enough to combat FETÖ/PDY, and it is therefore important to identify others who helped to orchestrate a violent takeover.

58. According to the Government, the prosecution of Mr. Yaman is based on concrete evidence. He was not detained because of his dissenting opinions. In addition, Mr. Yaman filed an objection that the investigation against him should be conducted in accordance with the Law on the Court of Cassation. However, that objection was rejected as the Law does not apply to certain charges under the Criminal Code. The alleged crime attracts severe penalties. Moreover, the courts have stated that membership of a terrorist organization is a continuous crime, and judges and prosecutors who are suspected members of an armed terrorist organization are considered to be caught in flagrante delicto at the moment they are apprehended.

59. In relation to the confidentiality order, the Government recalls that article 153 of the Code of Criminal Procedure allows for restrictions on the right of defence counsel to examine a file if a judge determines that it would jeopardize the investigation of certain crimes. Those crimes include the charges against Mr. Yaman under article 314 of the Criminal Code. Mr. Yaman and his lawyer had sufficient information to object to his detention since they had been informed about the accusations during the interrogation. Moreover, the restriction on the file was removed once the indictment had been approved by the court.

60. Finally, the Government submits that the allegations in the present case were not raised at the national level. International human rights mechanisms are subsidiary remedies, and the examination of a human rights violation by an international body should not be undertaken when it can be redressed within domestic proceedings. The allegations should be rejected under article 41 (1) (c) of the Covenant owing to the non-exhaustion of domestic remedies.

Further comments from the source

61. The source reiterates that, when a member of the Court of Cassation is alleged to have committed a crime, the investigation must be conducted by the Prosecutor's Office of the Court of Cassation, except when the suspect is apprehended in flagrante delicto. This was not the case for Mr. Yaman. Neither the Criminal Court of Peace nor the 9th Criminal Chamber is competent to hear a matter involving a member of the Court of Cassation.

62. The source denies that reasons have been given for Mr. Yaman's continued detention, noting that previous decisions have been simply repeated. Mr. Yaman has only been presented four times to the court during his 28-month detention, and proceedings have taken place in his absence. Mr. Yaman has also been detained without any evidence. The Government's references to conversations on the communication application Bylock, which refer only to "Hamza", is not sufficient evidence. In addition, Mr. Yaman does not have a Twitter account through which he could have shared propaganda, and there are 20 Twitter accounts operating under the name "Hamza Yaman".

63. The source disputes the Government's claims relating to Mr. Yaman's access to his lawyers and family members. In particular, Mr. Yaman can only meet with his lawyers in rooms equipped with audio and video recording facilities, and he is detained in a cell. He has filed objections against his detention and has sought compensation, but his applications have either been ignored or rejected, and he has had no effective remedy.

Discussion

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

65. At the outset, the Working Group wishes to clarify that the procedural rules governing its consideration of communications on alleged cases of arbitrary detention are contained in its methods of work. There is no provision in the methods of work that prevents the Working Group from considering communications owing to the lack of exhaustion of domestic remedies. 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.[6]

66. As a further preliminary issue, the Working Group notes the Government's argument that Mr. Yaman's situation falls within the scope of the derogation from its obligations under articles 2 (3), 9–10, 12–14, 17, 19, 21–22 and 25–27 of the Covenant.[7] While acknowledging the notification of those 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 most relevant to the alleged detention of Mr. Yaman. As the Human Rights Committee has stated in its general comments No. 35 (2014) on liberty and security of person and No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, 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.[8] Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.[9]

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[6] See opinions Nos. 44/2018, 43/2018, 42/2018, 11/2018, 41/2017, 38/2017, 19/2013 and 11/2000.

[7] See depositary notification C.N.580.2016.TREATIES-IV.4 of 11 August 2016 (notification under article 4 (3)), available at https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf. Although the derogation has since been revoked, it was in force at the time of Mr. Yaman's arrest.

[8] See general comment No. 35, para. 65; and general comment No. 32, para. 6. The Working Group and other special procedure mandate holders have expressed concern that renewals of the derogation do not appear to comply with the requirements of necessity and proportionality under international law, particularly under article 4 (1) of the Covenant. See urgent appeal TUR 7/2018, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23766. See also the Government's response, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=34274.

[9] See general comment No. 32, para. 6.

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

68. The source alleges that there were a number of procedural defects in relation to Mr. Yaman's arrest and initial custody. Several of the issues raised by the source involve questions of whether Mr. Yaman's investigation was carried out in accordance with national laws, such as Law 2797 on the Court of Cassation. The Working Group is not, as a general rule, competent to reach conclusions on the application of national law. However, the Working Group considers that two of the source's allegations, namely, that Mr. Yaman was taken into custody before an instruction was issued by the Public Prosecutor and that the search of his home was carried out without a search warrant, have an important bearing on whether there was a legal basis for the detention. The Government did not address either of those allegations.

69. According to article 9 (1) of the Covenant, no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. As the Working Group has stated, in order for a deprivation of liberty to have a 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 through the required procedure, in the present case, the issuing by the Public Prosecutor of an instruction (see, e.g., opinions No. 36/2018 and No. 35/2018). That instruction was not issued before Mr. Yaman was taken into custody, and a legal basis was not invoked for his arrest. In addition, Mr. Yaman's home and office were searched pursuant to an approval of seizure not a search warrant. Any evidence obtained was done so illegally and cannot form the legal basis of a decision to detain Mr. Yaman.[10]

70. Furthermore, the Working Group wishes to comment on the issue of apprehension in flagrante delicto. According to the submissions from both parties, members of the Court of Cassation can be arrested and investigated only when caught in flagrante delicto of committing a crime that attracts a serious penalty. In the present case, the source argues that Mr. Yaman learned about the attempted coup from the news and was arrested at his residence. He was therefore not arrested in flagrante delicto. The Government submits that membership of a terrorist organization is a continuous crime and judges who are suspected members of an armed terrorist organization are considered to be caught in flagrante delicto at the moment they are apprehended. The Working Group cannot agree with the Government's reasoning, as it appears to be contrary to the presumption of innocence. In its jurisprudence, the Working Group has consistently found that an offence is flagrant if the accused is either apprehended during the commission of a crime or immediately thereafter, or is arrested in hot pursuit shortly after a crime has been committed.[11] As a result, the Working Group considers that Mr. Yaman was not arrested in flagrante delicto and there was no legal basis invoked for his arrest as the required procedures were not followed.

71. According to the source, the decisions regarding the continuation of Mr. Yaman's detention have been systematically notified immediately after the date of examination, thereby preventing him from appealing against the decision or effectively challenging his detention. The Government had not addressed that allegation. The Working Group considers that the failure to provide timely notification of the decisions made on Mr. Yaman's detention amounts to a violation of article 9 (4) of the Covenant, which requires the court to decide without delay on the lawfulness of detention. The Working Group has observed that judicial

[10] The Working Group made a similar finding in paras. 39–40 of its opinion No. 36/2018, in the case where evidence had been obtained without a search warrant and used in court proceedings.

[11] See opinion No. 9/2018, para. 38. See also opinions No. 36/2017, para. 85; No. 53/2014, para. 42; No. 46/2012, para. 30; No. 67/2011, para. 30; and No. 61/2011, paras. 48–49; and E/CN.4/2003/8/Add.3, paras. 39 and 72 (a).

oversight of deprivation of liberty, including periodic review, is a fundamental and non-derogable safeguard of personal liberty.[12] Such oversight is essential in ensuring that detention has a legal basis (see, e.g., opinions No. 46/2017 and No. 28/2016). Given that Mr. Yaman has been unable to challenge his detention effectively, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant has also been violated.

72. For the reasons above, the Working Group finds that the Government has failed to establish a legal basis for Mr. Yaman's arrest and detention. His deprivation of liberty is therefore arbitrary under category I.

73. Although the Working Group makes no findings in relation to category II in the present case, it wishes to comment briefly on the allegations against Mr. Yaman. The Working Group observes that the allegations in the indictment appear to focus on Mr. Yaman's membership of FETÖ/PDY, particularly his use of the Bylock communication application, the content of other users' correspondence on Bylock that mention him and his use of a Twitter account to share online propaganda. However, the Government has not explained how Mr. Yaman's alleged conduct demonstrates his membership of an armed terrorist organization or that he has committed any criminal activity, nor how criminal accusations involving use of an encrypted communication programme and social media are compatible with the rights to freedom of expression and association.

74. In addition, the source alleges that there have been multiple violations of Mr. Yaman's right to a fair trial during his custody, detention and proceedings to review his detention.

75. The source submits that Mr. Yaman's right to appear in person during the review of his detention has been violated. Mr. Yaman has only been presented four times to the court during his 28-month detention, and proceedings have taken taking place in his absence. The Government has not refuted that allegation. The Working Group considers that Mr. Yaman has the right to appear in person at all of his hearings, both to review the legality of his detention[13] and at the trial hearings. As the Human Rights Committee has stated, the physical presence of detainees at the hearing may assist the inquiry into the lawfulness of detention and serves as a safeguard for the right to security of person.[14]

76. In addition, the Working Group notes that it has been over two years (28 months) since Mr. Yaman was detained in July 2016. While the case against Mr. Yaman involves complex allegations relating to alleged membership of FETÖ/PDY, the Government has offered no explanation as to why this process has taken over two years. There is no apparent end in sight to the constant renewal of Mr. Yaman's detention on 29 occasions. Given the extensive delay, the courts must reconsider alternatives to detention.[15] The right to be tried within a reasonable time and without undue delay is one of the fair trial guarantees embodied in articles 10 and 11 (1) of the Universal Declaration of Human Rights and articles 9 (3) and 14 (3) (c) of the Covenant, and that right has been violated in the present case. If Mr. Yaman cannot be tried within a reasonable time, he is entitled to release under article 9 (3) of the Covenant.[16]

77. The source alleges that a confidentiality order was placed on Mr. Yaman's file and his defence counsel has not been able to challenge his detention without seeing the fundamental evidence that formed the basis for the detention. The Government submits that the restriction of the defence's access to the file is permissible under article 153 of the Code of Criminal Procedure, that Mr. Yaman and his lawyer had sufficient information to object to his

[12] See 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, principle 4 and guideline 3. See also A/HRC/30/37, para. 3.

[13] See opinions No. 18/2018, paras. 54–55; and No. 9/2018, para. 50. See also United Nations Basic Principles and Guidelines, principle 11 and guideline 10.

[14] See general comment No. 35, paras. 34 and 42. See also the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 32 (2) and 37.

[15] See general comment No. 35, para. 37.

[16] See A/HRC/19/57, paras. 48–58. See also opinion No. 18/2018, para. 50.

detention since they were informed about the accusations during the interrogation, and that the restriction on the file was removed when the indictment was approved by the court.

78. As the Working Group has stated, every individual deprived of liberty has the right to have access to material related to their detention or presented to the court by the State in order to preserve the equality of arms, including information that may assist the detainee in arguing that the detention is not lawful or that the reasons for the detention no longer apply.[17] However, that right is not absolute, and the disclosure of information may be restricted if such a restriction is necessary and proportionate in pursuing a legitimate aim, such as protecting national security, and if the State has demonstrated that less restrictive measures would be unable to achieve the same result, such as providing redacted summaries that clearly point to the factual basis for the detention.[18]

79. The Working Group considers that Mr. Yaman's right to have full access to his file applied from the moment of his detention and that it is not sufficient that the restriction was removed when the indictment was approved by the court. According to the source, an indictment was not filed until 17 months after Mr. Yaman's arrest. Moreover, the Government has failed to explain how the justification for restricting the defence's access under article 153 of the Code of Criminal Procedure — namely that the investigation would have been jeopardized had Mr. Yaman been given such access — applied in the present case. The Government has also made no submissions relating to the necessity, proportionality or legitimacy of the confidentiality order. This is a serious violation of the principle of the equality of arms under article 10 of the Universal Declaration of Human Rights and article 14 (1) and (3) (b) of the Covenant to a fair hearing and to have adequate time and facilities for the preparation of his defence "in full equality".[19]

80. In addition, the Working Group considers that Mr. Yaman has not been accorded his right to adequate time and facilities for the preparation of his defence and to communicate with the counsel of his choosing during his initial three-day custody and his ongoing detention. The source alleges that Mr. Yaman met with a defence lawyer for only 2 to 3 minutes under police supervision prior to giving his statement during his initial custody period. Moreover, the source alleges that the legal advice provided to Mr. Yaman during his detention has been monitored by the prison staff and he can only meet with his lawyers in rooms equipped with audio and video recording facilities. The source also claims that Mr. Yaman is being held in a prison at a substantial distance from the place of trial in order to impede the provision of legal advice. The Government has not refuted any of those allegations. As the Working Group has stated, respect for the confidentiality of legal counsel-detainee communications must be ensured.[20] Accordingly, Mr. Yaman's rights under articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (b) of the Covenant have been violated.

81. Finally, the source alleges that Mr. Yaman's matter has not been heard by an independent and impartial tribunal. Mr. Yaman has requested that judges recuse themselves from considering his appeals against detention orders, but his requests have not been processed. According to the source, the judge who considers appeals against detention orders is the same judge who decides on the continuation of detention. In addition, the judges who have heard Mr. Yaman's matter have revealed their opinions on the case and cannot act impartially. The Government asserts that Mr. Yaman's detention has been reviewed by independent judges but did not specifically address the source's allegations.

82. The Working Group is of the view that the judges in the present case should have considered Mr. Yaman's requests for recusal and withdrawn from the case if the objection was well-founded. Moreover, the court charged with reviewing the arbitrariness and lawfulness of the detention must be a different body from the one that ordered the detention,

[17] See United Nations Basic Principles and Guidelines, principle 12 and guidelines 11 and 13.

[18] Ibid, guideline 13, paras. 80–81.

[19] See, e.g., opinions No. 18/2018, para. 53; No. 89/2017, para. 56; No. 50/2014, para. 77; and No. 19/2005, para. 28 (b), in which the Working Group reached a similar conclusion on the violation of the principle of equality of arms when information had been withheld from the defendant.

[20] See United Nations Basic Principles and Guidelines, principle 9 and guideline 8.

in order to meet the standard of independent and impartial review under article 9 (4) of the Covenant.[21]

83. In reaching those conclusions, the Working Group takes note of the significant concern regarding the risks of executive control over the judiciary in Turkey following the attempted coup, and its negative impact on the rule of law.[22] As the Council of Europe Commissioner for Human Rights has noted: "It will be a significant challenge for Turkey to demonstrate that, even in a context where close to 3,500 members of the judiciary have been dismissed and thousands imprisoned, Turkish courts can still provide effective remedies for potential human rights violations caused by arbitrary measures taken by the executive or the administration, or even by the judiciary itself."[23]

84. Accordingly, the Working Group finds that the source has established a prima facie violation of Mr. Yaman's right to a fair hearing by an independent and impartial tribunal under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. The Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers.

85. The Working Group concludes that the above violations of the right to a fair trial are of such gravity as to give Mr. Yaman's deprivation of liberty an arbitrary character under category III.

86. Furthermore, the source alleges that Mr. Yaman was targeted owing to his decisions and dissenting opinions as a member of the Court of Cassation that were not in line with government expectations. In particular, Mr. Yaman held no partisan affiliation with the Government in undertaking his role as a judge. As a result, he was subjected to discrimination (including the rejection of his participation in seminars, scientific conferences and international meetings), targeted by government-run media and terrorist websites and ultimately dismissed from his position and deprived of his liberty. The source presented a credible prima facie case that Mr. Yaman was among the 3,000 judges and prosecutors who had chosen not to join the Government-supported initiative known as the Platform for Unity in the Judiciary, and had subsequently been detained.[24] The Government submits that Mr. Yaman's prosecution is based on concrete evidence and is not related to his dissenting opinions.

87. The Working Group recalls that judges represent a special category of public servants, whose independence is guaranteed under international law.[25] Allegations of discrimination against members of the judiciary should therefore be subjected to particularly exacting scrutiny, even in times of a serious public emergency.[26] The Working Group considers that the Government has failed to offer a sufficient explanation for Mr. Yaman's detention to satisfy that heightened level of scrutiny. The Government has not referred to any concrete evidence that Mr. Yaman had ever been a member of any terrorist organization or that he had

[21] See opinion No. 18/2018, para. 56; and United Nations Basic Principles and Guidelines, principle 6 and guideline 4, para. 51.

[22] Office of the United Nations High Commissioner for Human Rights (OHCHR), "Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East" (March 2018), pp.12–14, available at https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf.

[23] See memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, CommDH (2016) 35, 7 October 2016, para. 42. Available from https://www.refworld.org/docid/58120efb4.html.

[24] OHCHR has also documented a similar pattern of the dismissal and detention of judges and lawyers following the failed coup attempt. OHCHR, "Report on the impact of the state of emergency on human rights in Turkey", pp. 12–14.

[25] See Basic Principles on the Independence of the Judiciary, which are also supported by other standards, such as the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors.

[26] OHCHR, "Report on the impact of the state of emergency on human rights in Turkey:, p. 13. See also OL TUR 5/2017, available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23138. See also the Government's response, available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=33590.

been involved in, either directly or indirectly, the attempted coup on 15 July 2016. On the contrary, the information submitted by the source, which the Government did not contest, indicates that Mr. Yaman had contributed to a safer society by serving at the highest levels of the judiciary in hearing matters involving terrorism and organized crime, and had required close protection from the State to carry out those functions. Accordingly, the Working Group finds that Mr. Yaman was targeted because he had not supported the Government in carrying out his judicial functions, and was detained on the discriminatory basis of his political or other opinion.

88. For those reasons, the Working Group finds that Mr. Yaman's deprivation of liberty was motivated by a discriminatory ground, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. Accordingly, his deprivation of liberty is arbitrary under category V.

89. The Working Group wishes to express its grave concern about Mr. Yaman's health, which has reportedly deteriorated as a result of being held during his custody period in overcrowded and unsanitary conditions, and in ongoing isolation. Mr. Yaman suffers from serious health problems, including high blood pressure and kidney disease, and risks losing his kidney. The Government acknowledges that Mr. Yaman has required and been provided treatment for these health problems. The Working Group also notes that Mr. Yaman is being detained a substantial distance away from his family,[27] and that the frequency of his contact with his family is a matter of dispute between the source and the Government. Restrictions on Mr. Yaman's contact with his family are likely to be contributing factors to his poor health. Mr. Yaman has been detained for 28 months in circumstances that violate his rights under international human rights law. The Working Group urges the Government to release Mr. Yaman immediately and ensure that he receives the necessary medical care.

90. In addition, the source alleges that Mr. Yaman has been held in single-cell isolation since October 2016, a punishment that may only be imposed pursuant to an investigation and approval by a judge, and which constitutes inhuman treatment and psychological torture. While the Government denies that Mr. Yaman is being held in a cell, it does not appear to challenge the allegation that he is being held in isolation. The Working Group considers that Mr. Yaman has been held in such conditions for an excessive period. It is unclear why he poses a security risk of such magnitude that requires isolation, which must only be an exceptional practice. The Working Group has decided to refer the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

91. The Working Group welcomes the recent conclusion of the state of emergency in Turkey and the revocation of derogations made under the Covenant. However, the it is aware that a large number of individuals were arrested following the attempted coup d'état of 15 July 2016,[28] including judges and prosecutors, and many remain in detention and are still undergoing trial. The Working Group urges the Government to resolve those cases as quickly as possible in accordance with its international human rights obligations.

92. The Working Group would welcome the opportunity to conduct a country visit to Turkey. Given that a significant period of time has passed since its last visit to Turkey, in October 2006, the Working Group considers that it is an appropriate time to conduct another visit. The Working Group recalls that in March 2001 the Government issued a standing invitation to all thematic special procedure mandate holders, and looks forward to a positive response to its previous request to visit made on 8 November 2017.

Disposition

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

The deprivation of liberty of Hamza Yaman, being in contravention of articles 2, 7, 8, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and articles 2 (1), 2

[27] This appears to violate rule 59 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

[28] In the past two years, the Working Group has noted an increase in the number of cases brought to it concerning arbitrary detention in Turkey. See, e.g., opinions Nos. 44/2018, 43/2018, 42/2018, 11/2018, 41/2017, 38/2017 and 1/2017.

(3), 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

94. The Working Group requests the Government of Turkey to take the steps necessary to remedy the situation of Mr. Yaman without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the Covenant.

95. The Working Group considers that, taking into account all the circumstances of the case, in particular the risk of harm to Mr. Yaman's health, the appropriate remedy would be to release him immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

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

97. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to: (a) the Special Rapporteur on the independence of judges and lawyers; and (b) the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

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

Follow-up procedure

99. 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. Yaman has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Yaman;

(c) Whether an investigation has been conducted into the violation of Mr. Yaman's rights and, if so, the outcome of the investigation;

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

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

100. 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.

101. 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.

102. 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.[29]

[*Adopted on 21 November 2018*]

[29] See Human Rights Council resolution 33/30, paras. 3 and 7.