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Human Rights Council
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. 84/2018 concerning Andrew Craig Brunson (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 12 April 2018 the Working Group transmitted to the Government of Turkey a communication concerning Andrew Craig Brunson. The Government replied to the communication on 10 July 2018. 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).

* The annex to the present document is being issued without formal editing.

Submissions

Communication from the source

4. Andrew Craig Brunson, born in 1968, is a citizen of the United States of America and a pastor from North Carolina, who has resided legally in Izmir, Turkey, since 1997. He is married, has three children, and serves as pastor of the Izmir Resurrection Church, which is a small, Protestant Christian community.

Arrest and detention

5. The source reports that on 7 October 2016, Mr. Brunson returned from a trip to find a notice outside his door, summoning him to the local police station in Izmir. He thought that he would be receiving a long-awaited permanent residence card. However, upon arrival at the police station, he was arrested by the police on the basis of a warrant issued by the Izmir Provincial Directorate of Migration Management and informed that he was being deported as he was a "threat to national security", also referred to as "G-82".

6. However, instead of being deported, Mr. Brunson was reportedly transferred to the Harmandali immigration detention centre. From the outset, he was told that he was being detained until his deportation. He was not given any further explanation or shown any documentation or evidence of any alleged offences. At one point, the Turkish authorities had him sign a document without any legal or consular assistance, which was in Turkish and apparently indicated his pending deportation. As Mr. Brunson believed that he was in the process of being deported and he wanted to comply with the authorities to avoid being detained any longer, he signed the document. However, after he had signed it, the official in the room received a call, and Mr. Brunson saw the official change the document, marking the box that indicated that the document applied to a "leader", "member" or "supporter" of a terrorist organization. Mr. Brunson was not given copies of the document or an explanation of the change in the allegation after he had signed it.

7. The source reports that the Turkish authorities initially denied all attempts by legal counsels and officials of the United States Consulate to gain access to Mr. Brunson. Attempts by friends to provide clean clothes were also denied for the first six days of his detention. In addition, officials specifically denied Mr. Brunson access to a Bible during his detention. Following the intervention of United States government officials, access to United States consular officials and legal counsel was finally granted on 5 November 2016.

8. On 11 October 2016, an attorney without access to Mr. Brunson's file attempted to challenge his detention. The court, however, summarily rejected the legal challenge, claiming that Mr. Brunson was a threat to public safety. Appeals regarding Mr. Brunson's detention were filed, and all of them were denied.

9. According to the source, Mr. Brunson was held without charge for 63 days. On 9 December 2016, he appeared before the Izmir Fifth Criminal Court of Peace where he was accused of being a member of an armed terrorist organization under article 314 (2) of the Turkish Penal Code, which carries a potential prison sentence of seven and a half years. Following the court hearing, Mr. Brunson was transferred to Sakran Prison in Aliaga, Izmir, despite no evidence having been presented to justify the accusations against him. He was subsequently transferred to Kiriklar High Security Prison in Buca, Izmir, where he was held in pretrial detention.

10. The source notes that although Mr. Brunson was eventually allowed legal representation, all discussions with his attorney were recorded and his legal file was sealed. In addition, under Emergency Decree No. 694, he could be held without any formal charges for up to seven years, completely destroying the ability to prepare an adequate defence and obliterating all rights to due process. According to the source, Mr. Brunson maintained his innocence and reiterated that his only reason for being in Turkey was to talk about Jesus Christ.

11. On 24 August 2017, Mr. Brunson appeared before the Izmir Second Criminal Court of Peace on the basis of his original accusation under article 314 (2) of the Turkish Penal Code. However, he was instead accused of the following additional crimes: obtaining

classified government information for the purposes of political or military espionage (art. 328 (1)); attempting to overthrow or subvert the functioning of the Government (art. 312 (1)); attempting to overthrow or subvert the functioning of the Grand National Assembly (art. 311 (1)); and attempting to overthrow the constitutional order (art. 309 (1)).

12. The source notes that the crime under article 328 (1) carries a sentence of 15 to 20 years of imprisonment, while the crimes under articles 309 (1), 311 (1) and 312 (1) not only carry aggravated life sentences, but require the accused to have used force and violence. According to the source, although no evidence had been put forth to substantiate the accusations, the Court decided to keep Mr. Brunson in detention on the basis of article 100 of the Criminal Procedure Code.

13. According to the information received, Mr. Brunson was subsequently indicted and the first hearing of his case was scheduled for 16 April 2018 in Izmir. According to the bill of indictment, he contributed to the preparation of the attempted coup d'état, in coordination with "armed terrorist organizations" such as the Gülen movement, or the Fethullah Terrorist Organization, and the Kurdistan Workers' Party. These charges reportedly relied on only one anonymous witness and secret documents. He was also accused of "Christianization".

Legal analysis

14. The source asserts that the deprivation of liberty of Mr. Brunson violates Turkish domestic legislation, including articles 100 and 101 of the Criminal Procedure Code and articles 10, 19, 24 and 36 of the Constitution. The source submits that the deprivation of liberty of Mr. Brunson also violates articles 9, 14, 18, and likely 15, of the International Covenant on Civil and Political Rights, to which Turkey is a signatory, articles 2, 7, 9, 10 and 11 of the Universal Declaration of Human Rights, and articles 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

15. The source notes that on 20 July 2016, the Government of Turkey declared a state of emergency for a duration of 90 days, which was subsequently extended. During the state of emergency, the Government reportedly detained many individuals who it believed to have opposed its political agenda, including many who had only exercised their fundamental freedoms. In this respect, the source refers to the public statement issued in August 2016 by a group of United Nations special procedure mandate holders, including members of the Working Group on Arbitrary Detention, who urged the Government of Turkey to uphold its obligations under international human rights law, even during the current state of emergency. They emphasized that "one cannot avoid, even in times of emergency, obligations to protect the right to life, prohibit torture, adhere to fundamental elements of due process and non-discrimination, and protect everyone's right to belief and opinion".[1]

16. However, the source notes that the Turkish authorities apparently targeted members of minority faiths, in particular Protestant Christians, during the state of emergency. The source asserts that the Turkish authorities are increasingly violating articles 18 (freedom of religion and belief), 22 (freedom of association) and 26 (right to equal protection without any discrimination on the basis of nationality or religion) of the Covenant. During the declared state of emergency, the Turkish authorities reportedly targeted several Protestant believers, including five other citizens of the United States, who had, on the basis of their faith, attempted to care for the refugee community, regardless of the faith or ethnicity of the refugees. The detention of Mr. Brunson is one in a growing list of cases of abuse, discrimination and targeting of Protestant believers by the Turkish authorities.

17. According to the source, the Turkish authorities arrested Mr. Brunson and kept him in detention for a considerable period of time without informing him of the reasons and the charges against him, therefore violating the principles of article 9 of the Covenant. Moreover, the Government temporarily denied Mr. Brunson legal counsel and a notary, therefore denying him access to advice and the necessary signatures to challenge his detention before a Turkish court, which would have obligated the court to decide without delay on the lawfulness of his detention. The legal counsel of Mr. Brunson sought access to the State's

[1] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394&LangID=E.

legal file on him to be able to file the appropriate legal actions to challenge his detention, but the Turkish authorities denied the attorney such access. These denials reportedly prevented Mr. Brunson's attorneys and family from taking appropriate legal recourse.

18. The source reports that during the initial period of Mr. Brunson's detention, the Turkish authorities also temporarily denied him access to officials of the United States Consulate. The Turkish authorities reportedly tried to force him to waive his right to consular access in writing. However, he refused to comply and requested consular access. The source asserts that the denial by the Turkish authorities of access to consular officials violates article 36 of the Vienna Convention on Consular Relations.

19. The source adds that, without granting access to counsel or consular officials, the Turkish authorities had Mr. Brunson sign a document in Turkish regarding his detention, and he was not informed of its full purpose. Only after he had signed it did the authorities alter the information on the document. This incident reportedly compounded the confusion and silence regarding the charges against Mr. Brunson.

20. Led to believe that he was to be deported imminently, Mr. Brunson reportedly agreed to leave Turkey voluntarily and not challenge the deportation with legal counsel. He believed that complying with the requests of those in authority was his best chance of avoiding any long-term problems. However, it became clear that the authorities did not intend to deport Mr. Brunson in the immediate future and instead they intended to detain him indefinitely. According to the source, the authorities used Mr. Brunson's agreement not to challenge his deportation with legal counsel to restrict his access to an attorney who could have challenged his continued and arbitrary detention.

21. The source asserts that the refusal by the Turkish authorities to allow Mr. Brunson to have a Bible during his detention violates paragraph 42 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

Response from the Government

22. On 12 April 2018, 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 11 June 2018, detailed information on the current situation of Mr. Brunson and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Turkey 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 Turkey to ensure the physical and mental integrity of Mr. Brunson.

23. On 22 May 2018, the Government requested an extension of the deadline, which was granted on 29 May 2018 with a new deadline of 11 July 2018. On 6 July 2018, the Government made a request for a second extension, which was not granted by the Working Group as it was deemed to be incompatible with paragraph 16 of its methods of work. The Government subsequently submitted its reply on 11 July 2018.

24. In its reply, the Government referred to its previous responses to communications from the Working Group and underlined the terrorism threats faced by Turkey, the grave nature of the attempted coup of 15 July 2016 and the measures taken as a consequence. For reference, the Government submitted background information with regard to the Fethullah Terrorist Organization and the measures taken against it and other terrorist organizations.[2]

Circumstances of the case

25. The Government submits that the Izmir Chief Public Prosecutor's Office initiated an investigation into Mr. Brunson, who was taken into custody on 9 December 2016 by the Office. Once in custody, he was informed of the charges against him and his legal rights, in

[2] For full background information, see, for example, opinions No. 38/2017, paras. 22–30, and No. 44/2018, paras. 42–49. See also opinions No. 42/2018, para. 47, and No. 43/2018, para. 37.

accordance with the current legislation. The Government argues that Mr. Brunson also exercised his right to inform his family of his custody status.

26. According to the Government, the Chief Public Prosecutor's Office took a statement from Mr. Brunson on 9 December 2016, when he was asked questions such as whether he preached to a specific ethnic group, whether he preached that establishing a dialogue with members of the Fethullah Terrorist Organization/Parallel State Structure would be beneficial, and whether he was in contact with the members of that organization. In his statement, Mr. Brunson allegedly denied the accusations and was detained on the same date on the charge of membership of an armed terrorist organization by Izmir Criminal Magistrate's Office. The Government contends that the reasons for the detention order were the details and nature of the suspected crime, the existing evidence, the fact that not all the evidence had been collected, the grounds for detention as established in the relevant legislation and the fact that Mr. Brunson posed a flight risk considering the prescribed penalty for the suspected crime. It was also noted in the reasoning for the order that, in view of all those elements, detention was a proportional measure and judicial control measures would not be sufficient.

27. The Government further submits that the Chief Public Prosecutor's Office took a second statement from Mr. Brunson and on that occasion he was asked questions in relation to allegations made based on files that a secret witness with the code name "Dua" had provided and on statements within them. The allegations were related to Mr. Brunson's contact with a person who had compiled information on all the petrol stations in the Mediterranean region and on the ethnicity of the people working in those stations; his relationship with an officer of the United States Army who had compiled information on the credentials of railway personnel; his presence during an incident in which an officer of the United States Army had described the terrorist coup attempt as an "earthquake" and had given another person equipment in order to help him flee; his talks with executives of the Fethullah Terrorist Organization/Parallel State Structure; the text message that he had sent after the attempted coup, which proved that he had been aware of the coup; his sheltering of affiliates of the Kurdistan Workers' Party, a terrorist organization, in his church; and his speeches in 2013 that were aimed at turning the Gezi Park protests into chaos.

28. The Government argues that taking into account the scope of the investigation and the evidence collected, after his second statement Mr. Brunson was referred to the Criminal Magistrate's Office for detention, on the grounds of being a member of an armed terrorist organization, obtaining confidential government information for the purposes of political and military espionage, attempting to overthrow the Government or preventing it from fulfilling its functions, attempting to overthrow the Grand National Assembly or preventing it from fulfilling its functions, and attempting to overthrow the constitutional order. The Criminal Magistrate's Office ruled in favour of Mr. Brunson's detention for those charges on 24 August 2017. In the reasoning for the detention order, it was stated that there was concrete evidence to support the strong suspicion that he had committed the offences for which he had been charged. Further reasons for the detention order were the details and nature of the suspected crimes, the existing evidence, the lower and the upper limits of the prescribed penalty, the fact that there was still evidence to be collected given the scale and scope of the investigation and the fact that the charges were legally defined as catalogue crimes. It was also noted in the reasoning for the order that, in view of all those elements, detention was a proportional measure and judicial control measures would not be sufficient.

29. The Government explains that Mr. Brunson's detention was judicially reviewed by Izmir Criminal Magistrate's Office on 27 December 2016, 6 January 2017, 30 January 2017, 3 February 2017, 2 March 2017, 29 March 2017, 26 April 2017, 18 May 2017, 25 May 2017, 26 June 2017, 18 July 2017, 14 August 2017, 13 September 2017, 13 October 2017, 10 November 2017, 11 December 2017, 6 January 2018, 2 February 2018 and 1 March 2018. The Criminal Magistrate's Office ruled to continue Mr. Brunson's detention on the basis of the information and documents in the file to support the strong suspicion that he had committed the crimes, the details and nature of the suspected crimes, the existing evidence, the lower and upper limits of the prescribed penalty, the content of the file and the fact that judicial control measures would be insufficient.

30. The Government submitted numerous excerpts of the indictment, which in its view can be considered relevant to the claims (see annex).

31. The Government submits that the Chief Public Prosecutor's Office completed the indictment on 5 March 2018 and filed for a public criminal case before the Izmir Second Assize Court against the suspect. In the indictment, in accordance with articles 328 (1) and 314 (2) of the Penal Code, Mr. Brunson was charged with the crimes of obtaining information intended to be kept confidential to maintain the security of the State or its domestic and foreign political interests, for the purposes of political or military espionage. It was also stated that he was suspected of committing those crimes on behalf of armed terrorist organizations, without being a member of them.

32. Two trials were subsequently held on 16 April 2018 and 7 May 2018 at the Izmir Second Assize Court (file No. 2018/172), with another trial scheduled for 18 July 2018. The Government argues that Mr. Brunson did not make an individual application to the Constitutional Court with regard to the allegations and complaints submitted to the Working Group, although such an option is still available to him.

33. With regard to the claim that Mr. Brunson's detention is arbitrary or that the ongoing proceedings are contrary to the law, the Government submits that, at the time of its response, there had been no objections raised by Mr. Brunson or his legal counsel against the decisions to arrest or detain him or to prolong his detention. The Government therefore argues that there are a number of avenues of redress for Mr. Brunson in Turkey and thus he has not exhausted the domestic remedies available to him. In this respect, the Government notes that the European Court of Human Rights requires all domestic remedies to be exhausted before it can consider a case that comes before it admissible.

34. Regarding the present allegations, the Government submits that a criminal case was initiated against Mr. Brunson, and that the charges against him are based on concrete evidence. Taking into account its declaration of derogation from provisions of the Covenant, it has assessed that the process through which Mr. Brunson was arrested and taken into custody was not ungrounded or arbitrary. The Government reiterates that Mr. Brunson was duly notified of the charges against him, that he gave a statement in the presence of a lawyer and that his rights to defence and legal assistance were respected while under custody. All decisions to arrest the suspect and keep him in custody and detention were justified by independent judges. Mr. Brunson had the right to appeal against those decisions, which he chose not to exercise.

35. With regard to the allegations concerning the conditions of Mr. Brunson's detention, the Government submits that he was transferred to Kiriklar High Security Prison from Sakran Prison on 17 July 2017. He was kept in the same room from the day he arrived in that facility and did not make any requests for a single room. The Government notes that in order to attend court hearings, Mr. Brunson was always taken from his room and brought to the courtroom.

36. The Government argues that Mr. Brunson, upon his request, was taken to polyclinics for physical examinations, medical checks and treatment several times. Medical personnel regularly provided the medicine he was prescribed and his state of health was monitored. During his meetings with the psychosocial service and prison personnel, the suspect stated that he did not have any problems. Furthermore, the Government argues that Mr. Brunson expressed that he got along well with the personnel and was quite pleased with the functioning of the institution and his living conditions. The Government further argues that Mr. Brunson kept a Bible and religious books with him freely, as permitted by the provisions of article 70 of Law No. 5275 on the Execution of Penalties and Security Measures.

Additional comments from the source

37. On 11 July 2018, the response from the Government was transmitted to the source for comments. In its response of 13 August 2018, the source argues that the treatment of Mr. Brunson would not fall under the derogation from the Covenant declared by the Government of Turkey, claiming that the derogation does not satisfy the requirements of the Covenant. The source explains that at the time of its response, Mr. Brunson had not made an application to the Constitutional Court as there had been no final ruling at the Izmir Second Assize Court.

38. The source denies all the allegations made by the Government against Mr. Brunson, arguing that it is the responsibility of the Government to prove that Mr. Brunson is guilty of the charges. The source argues that the statements made by the secret witness with the code

name “Dua” cannot be taken into account, as the witness has been discredited and no concrete evidence to prove any of the allegations made by him or her has been provided. Furthermore, neither Mr. Brunson nor his attorney were allowed access to any alleged evidence, as his file remained sealed, despite Mr. Brunson being in custody for nearly a year at that point without an indictment.

39. The source denies Mr. Brunson ever knowing or having had any contact with the two individuals referred to in the indictment (A.B.A. and K.C.A.), and it submits that the indictment wholly lacks any evidence whatsoever that Mr. Brunson has done anything illegal. According to the source, the majority of the claims are made against unknown third parties and based on complete hearsay and conjecture at best. The source disputes the interpretation by the Government of Mr. Brunson’s text messages and points out that the text messages actually show that Mr. Brunson had returned to the United States on 20 July 2016, after the failed coup attempt on 15 July 2016, and subsequently returned to Turkey willingly. The source submits that this is clear evidence of the fact that Mr. Brunson had absolutely nothing to do with the failed coup as the Government tries to claim.

40. The source further submits that although the Government tries to distance itself from religious persecution, in paragraphs 500–502 of the indictment, the Government specifically states that Christianization and the actions carried out by the claimant as an evangelical church pastor are criminal terrorist activities.

41. The source reiterates that Mr. Brunson was taken into custody on 7 October 2016 and was then transferred on 9 December 2016 to Sakran Prison in Aliaga, Izmir. The source therefore contends that Mr. Brunson was continuously detained from 7 October 2016, and he was not brought before a judge until 9 December 2016.

42. Furthermore, the source reiterates that Mr. Brunson was denied access to his file, which destroyed his right to a defence. According to the source, Mr. Brunson was not allowed access to an attorney for the first 63 days of his custody, and he and his attorney were subsequently not allowed access to the prosecutor’s file until after they received the indictment on 9 March 2018.

43. The source submits that Mr. Brunson was taken to the polyclinics on two occasions. The first time was while he was still under the control of the Directorate of Migration Management, upon the insistence of the authorities. The second time was in June 2017 when, upon the request of Mr. Brunson, he was seen at the prison, approximately one to two weeks after his request. Shortly after that visit at the prison, Mr. Brunson fainted and was taken to hospital. Furthermore, he requested to see his medical records on multiple occasions but his request was never granted. During meetings, Mr. Brunson relayed that he was not well and required medication. He has been on medication since May 2017. The source denies the claim made by the Government and submits that Mr. Brunson was not pleased that he was being detained in prison as an innocent man, and that he was most certainly not pleased with being placed in an overcrowded prison cell, which at times held up to 22 prisoners, despite being built to hold a maximum of 8.

44. The source therefore concludes that the arrest and detention of Mr. Brunson were unlawful and arbitrary.

Additional information from the Government

45. On 7 August 2018, the Government submitted information to the Working Group, noting that at the trial held on 18 July 2018, the Izmir Second Assize Court had decided to continue Mr. Brunson’s detention. The next trial was scheduled for 12 October 2018. Following the application made by the defendant’s lawyer objecting to his continued detention, the Court ruled on 25 July 2018 to release Mr. Brunson pending trial under judicial control measures, through electronic means (an electronic bracelet or other devices), prohibiting him from leaving his domicile or leaving the country.

Further information from the source

46. On 14 August 2018, the source confirmed that since 25 July 2018, Mr. Brunson had been confined to house arrest in his apartment, with an electronic bracelet, and with constant

police surveillance outside his apartment and a travel ban imposed upon him. The source submits that the imposition of the house arrest did not alter the arbitrary character of Mr. Brunson's detention, and that the house arrest should in fact be considered by the Working Group as a continuation of that arbitrary detention.

Discussion

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

48. As a preliminary point, the Working Group notes that Mr. Brunson was in fact released on 12 October 2018. This followed the decision of the Izmir Second Heavy Crimes Court ruling on the same day, in which the Court found Mr. Brunson guilty of "willingly and knowingly helping a terrorist organization without being a member of the internal hierarchy of the organization" and sentenced him to three years, one month and 15 days of imprisonment. With reference to article 63 of the Penal Code, the Court then found that the period that Mr. Brunson had been held under arrest offset the appointed sentence time and lifted the house arrest and travel ban. Consequently, Mr. Brunson has now left Turkey and returned to the United States.

49. The Working Group notes that in accordance with paragraph 17 (a) of its methods of work, it reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. In the present case, the Working Group is of the view that the allegations made by the source are extremely serious. Moreover, the Working Group is mindful that the decision of the Izmir Second Heavy Crimes Court of 12 October 2018 is not final and must be confirmed by a higher court. Furthermore, Mr. Brunson was in fact found guilty and sentenced. The Working Group shall therefore proceed to deliver an opinion.

50. As a further preliminary point, the Working Group wishes to stress that the procedural rules to handle communications from sources and responses of Governments are contained in its methods of work (A/HRC/36/38) and in no other international instrument that the parties might consider applicable. In that regard, the Working Group would like to clarify that there is no rule in its methods of work that prohibits the consideration of communications due to the lack of exhaustion of domestic remedies in the country concerned. Sources have no obligation to exhaust domestic remedies before sending a communication to the Working Group.[3]

51. As a final preliminary issue, the Working Group notes that the Government of Turkey argues that Mr. Brunson's situation falls within the scope of the derogations that it made from its obligations under the Covenant. On 21 July 2016, the Government of Turkey informed the Secretary-General that it had declared a state of emergency for three months, in response to the severe danger to public security and order, amounting to a threat to the life of the nation in line with article 4 of the Covenant. The Government stated that the measures taken might involve derogation from its obligations under articles 2 (3), 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27 of the Covenant.[4]

52. 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 arbitrary detention of Mr. Brunson. As the Human Rights Committee 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.

[3] See also opinions No. 11/2000, No. 19/2013, No. 38/2017, No. 8/2018, No. 42/2018, No. 43/2018 and No. 44/2018.

[4] See https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf.

53. The source has submitted that the detention of Mr. Brunson is arbitrary but it has not specified under which categories as applied by the Working Group. The Government has not addressed the categories of the Working Group either, but objects to the submissions of the source, arguing that the detention of Mr. Brunson is not arbitrary. The Working Group shall proceed to examine the allegations.

54. The source has argued that Mr. Brunson was first taken into custody on 7 October 2016, on the basis of an arrest warrant by the Izmir Provincial Directorate of Migration Management. He was informed that he was to be deported and he was subsequently transferred to the Harmandali immigration detention centre. The source submits that he was held there until 9 December 2016, when he appeared before the Izmir Fifth Criminal Court of Peace.

55. The Government, in its reply, has made no comments concerning the allegations regarding Mr. Brunson's arrest on 7 October 2016 and has only stated that he was taken into custody on 9 December 2016. The Government has therefore failed to specifically respond to the allegations submitted by the source regarding the initial detention of Mr. Brunson.

56. The source has also submitted that from his detention on 7 October 2016, Mr. Brunson sought consular assistance, which was initially denied and only granted following the intervention of United States government officials on 5 November 2016. These events preceded the arrest of 9 December 2016 and the Government has made no response to the allegations.

57. The Working Group finds it plausible that Mr. Brunson was in fact initially detained on 7 October 2016 and that he did seek consular assistance, which was denied to him until 5 November 2016. This conclusion is supported by the complete failure on behalf of the Government to address the submissions made by the source in this regard. However, the Working Group observes that the initial detention of Mr. Brunson appears to have been a mere pretext for his subsequent arrest on 9 December 2016 and that his holding for the alleged purposes of deportation was a ruse to hold him for the charges of which he was notified on 9 December 2016.

58. The Working Group recalls that it considers a detention to be arbitrary under category I if it lacks a legal basis. In the present case, the Working Group has already established that Mr. Brunson was initially arrested on 7 October 2016. While his arrest was authorized by a warrant, he was not notified of any charges against him until 9 December 2016, and during this two-month period his lawyer had no access to his file.

59. The Working Group reiterates that article 9 (2) of the Covenant requires that anyone who is arrested is not only informed at the time of arrest of the reasons for the arrest, but also promptly informed of any charges against him or her. As explained by the Human Rights Committee in its general comment No. 35, the obligation contained in article 9 (2) has two requirements: the reasons for arrest must be provided immediately upon arrest (para. 27) and information on the charges must be provided promptly thereafter. In relation to the first requirement, the Working Group observes that Mr. Brunson was taken into custody without a true explanation of the reasons for his detention, in clear breach of article 9 (2) of the Covenant.

60. Furthermore, with regard to the right to be promptly informed of charges, the Human Rights Committee has noted in its general comment No. 35 that this right applies in connection with ordinary criminal prosecutions and also in connection with military prosecutions or other special regimes directed at criminal punishment. In the present case, Mr. Brunson was in detention from 7 October 2016 and was only informed of the charges against him on 9 December 2016. This means that he was in custody for over two months with no information on the charges against him, in breach of article 9 (2) of the Covenant.

61. Moreover, as noted earlier, despite not knowing the charges against Mr. Brunson, Mr. Brunson's lawyer tried to challenge the legality of that detention. However, neither Mr. Brunson nor his lawyer were allowed access to his file, which was a further severe impediment to the exercise of Mr. Brunson's right to challenge the legality of his detention in accordance with article 9 (4) of the Covenant. The Working Group recalls that judicial

oversight of detention is a fundamental safeguard of personal liberty (see A/HRC/30/37, para. 3) and is essential in ensuring that detention has a legal basis.[5]

62. The Working Group therefore concludes that the failure to notify Mr. Brunson of the charges against him for over two months, in breach of article 9 (2) of the Covenant, and the efforts to prevent him from effectively exercising his right to challenge the legality of his detention, in violation of article 9 (4), render his detention arbitrary, falling under category I.

63. The Working Group observes several allegations made by the source concerning violations of Mr. Brunson's right to a fair trial, which may render his detention arbitrary under category III. These alleged violations include failure to respect attorney-client privilege, failure to provide access to the full legal file against Mr. Brunson for the purposes of preparing his defence, failure to provide Mr. Brunson with an interpreter and denial of consular assistance. The Working Group takes particular note of the fact that the Government has not responded to any of these allegations specifically but has merely stated that Mr. Brunson was allowed legal assistance from the start of his detention.

64. The Working Group considers that the failure on behalf of the Government to allow Mr. Brunson and his lawyer fair access to his case file, which had been declared as classified, is a serious violation of the principle of the equality of arms under article 10 of the Universal Declaration of Human Rights and articles 14 (1) and 14 (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".[6] Moreover, the Government did not submit any information in response to the Working Group's regular communication in relation to this allegation, and it has therefore not demonstrated why restricting access to classified information was necessary and proportionate to pursuing a legitimate aim, such as national security. It has also failed to demonstrate why less restrictive measures, such as providing redacted summaries, or copies of documents to Mr. Brunson and his lawyer for use within the detention facility, or any other means of accommodation, would have been unable to achieve the same result.

65. The Working Group notes that the Government has made no submissions in relation to the allegation made by the source that Mr. Brunson's discussions with his lawyers were all recorded. The Working Group wishes to emphasize that the right to communicate with counsel as enshrined in article 14 (3) (b) of the Covenant requires that the counsel be able to meet his or her clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.[7] The Working Group therefore considers that there has been a serious breach of article 14 (3) (b) of the Covenant.

66. The Working Group observes the lack of response on behalf of the Government to the allegation made by the source that in the Harmandali immigration centre Mr. Brunson was told to sign a document, without any legal or consular assistance, which was in Turkish. This is a breach of article 14 (3) (f) of the Covenant as the document clearly concerned the criminal proceedings against Mr. Brunson, and he was entitled to the free assistance of an interpreter as he could not understand the language in which the document was drafted.

67. The Working Group observes that the Government has made no submissions in relation to the allegation by the source that Mr. Brunson requested but was denied consular assistance from the date of his initial arrest on 7 October 2016 until 5 November 2016, a period lasting nearly a month.

68. The Working Group notes that consular assistance or consular protection constitutes an important safeguard for individuals who are arrested and detained in a foreign State to ensure compliance with international standards. Consular assistance provides detainees and consular officials of the detainees' nationality with certain consular rights, which include the

[5] See opinions No. 11/2018, No. 35/2018 and No. 44/2018.

[6] See, for example, opinions 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 classified information is withheld from the defendant. See also opinions No. 18/2017 and No. 2/2018.

[7] See the Human Rights Committee's general comment No. 32, para. 34. See also *Khomidova v. Tajikistan* (CCPR/C/81/D/1117/2002), para. 6.4; *Siragev v. Uzbekistan* (CCPR/C/85/D/907/2000), para. 6.3; and *Gridin v. Russian Federation* (CCPR/C/69/D/770/1997), para. 8.5.

right to freely communicate with and have access to their detained nationals and to be informed about the arrest without delay. These rights are enshrined in rule 62 (1) of the Nelson Mandela Rules and principle 16 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

69. In the present case, the Government of the United States clearly asserted its rights to consular assistance in relation to Mr. Brunson, and the denial of that assistance therefore constitutes a further breach of international law by the Government of Turkey.

70. The Working Group therefore concludes that the partial non-observance of the international norms relating to the right to a fair trial in the case of Mr. Brunson has been of such gravity as to give his deprivation of liberty an arbitrary character (category III).

71. The Working Group is mindful of the wider context in which the arrest and detention of Mr. Brunson took place. It specifically notes that Mr. Brunson was only one of a number of citizens of the United States standing trial in Turkey in relation to the failed coup attempt. Moreover, the Working Group is mindful of the submissions made by the source, to which the Government did not provide a response, that the arrest and detention of Mr. Brunson was part of a wider targeting of minority faiths, in particular Protestant Christians, during the state of emergency in Turkey. The source specifically argued that the detention of Mr. Brunson was one in a growing list of cases of abuse, discrimination and targeting of Protestant believers by the Turkish authorities following the failed coup attempt, a submission which the Government chose not to address.

72. The Working Group recalls that Mr. Brunson had been living peacefully in Turkey for over 20 years and had always been a Christian pastor in the country, freely practising his religion. It was the failed coup attempt of 15 July 2016 that appeared to profoundly change the attitude of the Turkish authorities towards Mr. Brunson. The Working Group is therefore of the view that the source has made a credible submission that the arrest and detention of Mr. Brunson was the result of him being targeted by the Turkish authorities on the basis of his nationality and faith and thus resulted from discrimination expressly prohibited under the Covenant. The Working Group therefore concludes that the arrest and detention of Mr. Brunson also falls under category V.

73. The Working Group welcomes the lifting of the state of emergency in Turkey in July 2018 and the revocation of derogations made from its obligations under the Covenant. However, the Working Group is aware that a large number of individuals were arrested following the attempted coup d'état of 15 July 2016,[8] including judges and prosecutors, and that many remain in detention and are still undergoing trial. The Working Group urges the Government to resolve these cases as quickly as possible in accordance with its international human rights obligations.

74. On 15 November 2016, the Working Group issued a request to the Government of Turkey to invite the Working Group to conduct a country visit and a reminder of this request was sent on 8 November 2017. The Working Group reiterates that it would welcome the opportunity, at the earliest convenience of the Government, to conduct a visit to Turkey in order to engage with the Government in a constructive manner and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty. The Working Group is mindful that Turkey issued a standing invitation to special procedure mandate holders in March 2001 and stands ready to discuss the arrangement of such a visit.

Disposition

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

The deprivation of liberty of Andrew Craig Brunson, being in contravention of articles 3, 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the

[8] 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, for example, opinions No. 1/2017, No. 38/2017, No. 41/2017, No. 11/2018, No. 42/2018, No. 43/2018 and No. 44/2018.

International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

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

77. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to expunge Mr. Brunson's criminal record and accord him an enforceable right to compensation and other reparations, in accordance with international law.

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

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

Follow-up procedure

80. 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. Brunson's criminal record has been expunged, and whether compensation or other reparations have been made to him;

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

(c) 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;

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

81. 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.

82. 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.

83. 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.[9]

[*Adopted on 23 November 2018*]

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

Annex

Excerpts of the indictment submitted by the Government of Turkey

1. “The suspect acted like an irregular war personnel operating on a rather intelligence and psychological war doctrine under the disguise of Evangelist church pastor. The witness statements indicate that, as the İzmir Protestant Resurrection Church Pastor, he engaged in activities with a view to divide and to split the Country and to provoke the public against each other by creating domestic disturbances through exploitation of ethnic, religious belief and sectarian differences under the disguise of humanitarian aid, educational activities and courses in coordination with PKK and FETÖ/PDY armed terrorist organizations and in line with the purposes of these organizations within a structure consisting of army officers who have had special training and are operating on special techniques, with a history of working in intelligence agencies.

2. Within this framework, he worked together with A.B.A., another suspect, and her husband about whom a separate investigation file is being prepared. A.B.A. compiled information on locations of all gas stations in the Mediterranean Region, which are considered to have a strategic importance, can provide fuel support and can be used as logistic centres or fuel storages by occupying or hostile forces in case of a war, occupation or chaos. She has also compiled information about the ethnicity of the people working there, the number of people working at night shifts at these stations, proximity of these stations to the nearest villages, which is completely considered as an espionage activity. A.B.A. went to the church of the suspect Andrew Craig Brunson even though it was not a day of worship, secretly met him and took some maps and information from the suspect.

3. A.C. Brunson was also in close contact with K.C.A., another suspect, about whom a separate investigation file is being prepared. There is also strong evidence supporting that Brunson has undertaken some activities together with him. K.C.A compiled information and prepared the list on credentials and the workplaces of the 700–800 employees of the State Railways of the Republic of Turkey. Considering that these employees could resist any sabotage of the railways, this information can be only needed to prevent railways from being used as transportation network in an event of invasion. Furthermore, K.C.A. is understood to be informed about the military coup attempt tried to be staged on 15 July 2016. According to the statement of the covert witness code-named ‘Dua’, K.C.A used the term ‘earthquake’ to describe an expected military coup attempt, gave some special survival equipment to a Turkish citizen in order to help him survive the destruction and other negative effects that may arise by the so-called earthquake.

4. As a result of the examination of the HTS records of the mobile telephone (GSM line No: 0532 292 01 56) acquired from the suspect, it was seen that GSM line No: 0538 37985 27 owned by K.C.A, the GSM line No: 0530 208 63 63 owned by M.Ç., and the GSM line No. 0532 292 01 56 owned by suspect Andrew Craig Brunson signalled in Alsancak, İzmir between 12.00–18.45 on 29 August 2010 (Sunday).

5. The same GSM lines of three above-mentioned persons signalled again in Alsancak, İzmir, between 09.50–22.27 on 28 August 2011 (Sunday) which was one year later from 29 August 2010.

6. The same GSM lines of these three people signalled again in Alsancak, İzmir, between 12.01–20.31 on 2 September 2012 (Sunday) which was one year later from 28 August 2011.

7. During the review of the HTS inventory of the GMS line No. 0532 292 01 56 used by the suspect Andrew Craig Brunson, it was seen that three times with regular intervals he was in the same place with K.C.A. against whom a separate investigation is being prepared, in a way that a meaning could be attributed in scope of the investigation. The statement of the covert witness code-named ‘Dua’ and the review of the flash drive delivered by him/her including information acquired from the computers of some other suspects whose investigations have been distinguished, have revealed that a list of ‘the military officers to contact’ was found in the flash drive which was understood to be acquired from K.C.A.’s

computer. Since the suspect was frequently in contact with K.C.A., another suspect and the people in the list were military officers working as teachers at military schools, it was understood that the suspect acted in a way that could be qualified as espionage and could not be accorded to a pastor.

8. During his statement taken in the presence of a lawyer, he openly acknowledged that the following text message, sent at 12.38 on 21 July 2016 and revealed after the examination of his mobile telephone, was actually sent by him. The text message says: 'Hello Dan. Thank you. Yes. I am fine. I am sorry for not responding. Yesterday I was flying to the USA to meet Norine. Several months ago, we planned to come to the USA to be with the kids for 3 weeks and it has been an interesting timing for Turkey. We were expecting some events that would shake the Turks. The necessary conditions to return to Jesus have occurred. The coup attempt was a shock. A lot of Turks trusted in the army like they did in the past but this time it was too late. And after the coup attempt, this is a different shake-up. I guess it will only get worse. We will win in the end. Talk to you soon.' These aforementioned sentences expressing his unhappiness and discomfort right after the failure of the coup attempt were asked and his response was as follows: 'I remember the text you showed me. I was in the United States of America on those dates. But I don't remember which airlines I used. I may have gone through Germany. I texted this message to a friend in Canada. I didn't mean that I was upset because the coup failed. I expressed my impression regarding the feelings of Turkish people. It was only an expectation for people to turn to religion and religious belief after such chaos the public go through.' Despite his explanation, considering that how the citizens of the State of Republic of Turkey could unite on their spiritual values with a sense of national unity during chaotic times, the suspect was not found persuasive and sincere.

9. It was understood from this text message of the suspect that he was informed about the military coup and he was not happy that it failed. With the phrase of 'A lot of Turks trusted in the army like they did in the past but this time it was too late', he expressed the expectations of the FETÖ/PDY members in the army who participated in the coup attempt as well as their supporters and his unhappiness about its lateness in taking place. With the phrase stating that 'And after the coup attempt, this is a different shake-up.' he meant that he felt troubled with the swift and efficient measures the State of Republic of Turkey together with its nation took after the military coup attempt and he expressed it openly by saying that 'I guess it will only get worse'. By articulating the phrase of 'We will win in the end' he chose his side in the fight against the FETÖ/PDY armed terrorist organization, which has been going on for years, and peaked on 15 July 2016, and clearly manifested his support to FETÖ/PDY organization, hoped success in line with its goals within the chaos environment resulting from the military coup attempt. Since it is clear that this text does not reflect the socioeconomic assessment of a foreign pastor living in our country, it is considered as a statement expressing discomfort resulting from the failure of an organizational act with a goal, strategy and information.

10. It was understood that, although he was not a member of these organizations, the suspect met with senior members of FETÖ/PDY and PKK armed terrorist organizations and acted in accordance with the goals of the FETÖ/PDY and PKK armed terrorist organizations. He acted in cooperation with the other foreign elements whose names and credentials are specified in other files and against whom investigations are being conducted based on same charges.

11. Although it could not be established that FETÖ/PDY armed terrorist organization acted together with the illegal structure of which the suspect is a member, in staging in the military coup attempt on 15 July 2016 and that the suspect and his friends were directly connected with the military coup attempt, in light of the evidence collected within the scope of investigation file, it is clear that they were informed about this attempt, worked together to evaluate the consequences, used the terms 'earthquake' or 'quake' so as to mask the coup and informed the persons they were in contact with to remain unharmed and to take position.

12. When the statements of the covert witness code-named 'Dua' are reviewed it is seen that the suspect and his friends handed over some special survival equipment that normally military men use, to certain persons that they were in contact with, by saying that a quake would happen in the country, though scientifically it is not possible to predict an earthquake beforehand. What they meant with quake was actually an attempt of a military coup, and they

acted so closely with the FETÖ/PDY armed terrorist organization which staged the attempt of military coup that they were informed about the coup attempt.

13. One of the friends of the suspect with whom he accorded in actions and ideals argued with a Turkish citizen in June 2011 and he said that 'I will find you in the wreckage 6–7 years later and I will chop your head off. Have you seen how the American green berets have fought? Emre Uslu, chief officer of police and his friends are the owners of the Republic of Turkey and their owners are the Americans.' These statements clearly revealed the aims of this illegal structure.

14. Suspect Andrew Craig Brunson by contacting in secret with senior members of the FETÖ/PDY armed terrorist organization, also carrying out activities in coordination with the members of PKK terrorist organization has tried to separate an ethnic group from the Republic of Turkey with a view to lead and direct them for certain purposes.

15. As is known, the ultimate purpose of FETÖ/PDY armed terrorist organization is to create a new understanding of Islam that is guided and manipulative; to direct certain segments of society which they think that they do not belong to the belief of Islam or believe in different sects of Islam or carry a potential to be separated from the state and the nation, to a different faith base; initially to capture the control of the Republic of Turkey and the other Turkic States by abusing feelings and beliefs of true Muslim people to become active in Muslim countries and then to divide the Republic of Turkey, which is a great centre of power with a very important geopolitical location, history, population and national synergy, into controllable small parts with a view to submit it to the foreign powers they are affiliated with.

16. The ultimate purpose of PKK armed terrorist organization is through an armed struggle to separate a part of the territory that is under the authority of the Republic of Turkey with a view to establish a state that is based on Marxist-Leninist principles in the region, by planning intense and serious actions that would create turmoil and chaos in the society to achieve the goals of undermining people's trust in the state authority, disrupting the public order and social peace and creating concrete danger for the state territory, nation and sovereignty.

17. The suspect willingly knowing these purposes, has worked on this plan of ultimately seeking to create a turmoil in the country, to slide it into chaos and to divide it in line with the purposes of the FETÖ/PDY and PKK armed terrorist organizations. He has collected information to fulfil this purpose. He has actively carried out activities to direct people who have a certain ethnic origin towards this purpose and organized other activities along the same line.

18. While respecting all religious beliefs and their respective religious organizations, the State of Republic of Turkey, irrespective of whatever religion people belong to, cannot tolerate any kind of activity that seek to create a synergy to abuse people's beliefs with the aim of constituting a threat to its sovereignty.

19. These types of illegal structures under the disguise of working for the benefit of the society, by means of their organized manpower, organizational abilities and financial capacities, try to further their secret agendas and damage the sovereignty and the social and cultural structure of the countries in which they are operating."