Advance Edited Version

Distr.: General
3 May 2023

Original: English

Human Rights Council
Working Group on Arbitrary Detention

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

Opinion No. 29/2023 concerning Muhammet Şentürk (Türkiye)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 51/8.

2. In accordance with its methods of work,[1] on 2 August 2022 the Working Group transmitted to the Government of Türkiye a communication concerning Muhammet Şentürk. The Government replied to the communication on 3 October 2022. 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).

[1] A/HRC/36/38.

Submissions

Communication from the source

4. Muhammet Şentürk is a national of Türkiye born on 22 October 1992. Mr. Şentürk graduated from the Department of Business Administration at Karamanoğlu Mehmetbey University in 2014 and works as an adviser. He usually resides in Sancaktepe, Istanbul, Türkiye.

a. Arrest and detention

5. The source reports that, after the attempted coup d'état on 15 July 2016, an investigation was filed against Mr. Şentürk by the Karaman Chief Public Prosecutor's Office for the crime of being a member of an armed terrorist organization. As part of this investigation, Mr. Şentürk was arrested at his home in Sancaktepe, Istanbul, on 11 November 2016, by officials from the Anti-terror Branch of the Istanbul Police Department, on the basis of a warrant issued by the Karaman Public Prosecutor's Office. After spending two days in custody in Pendik District Police Headquarters, he was taken to Karaman Province, 800 km away, in a police car.

6. The source adds that, while Mr. Şentürk was in police custody, he was questioned by the police, accompanied by a lawyer appointed by the bar association. According to the source, Mr. Şentürk was arrested on the basis of article 314, paragraph 2, of Turkish Penal Code No. 5237 and article 5 of Anti-Terrorism Law No. 3713. During the police interrogation, he was accused of being in charge of the student organization of the Fethullahist terrorist organization in Karaman, that, according to witnesses, he had been to Ankara to meet up with military cadets and that he had used the ByLock application on his mobile telephone.

7. The source reports that, after being in custody for six days, Mr. Şentürk was brought before the Karaman Magistrates Judgeship on 17 November 2016. The judge ordered his detention on the grounds that he:

(a) Took part in the university organization of the Fethullahist terrorist organization, on the basis of statements of witnesses who were also under investigation, having been accused of similar actions;

(b) Participated in demonstrations to protest against the investigations into the *Zaman* newspaper;

(c) Had downloaded and was using the ByLock application;

(d) Had books written by Fethullah Gülen;

(e) Had an account with Bank Asya;

(f) Was a member of the "Akademi Gençlik Derneği" (Academic Youth Association), which had been closed pursuant to Emergency Decree No. 667.

8. The source reports that, on 17 April 2017, an indictment was filed against Mr. Şentürk, together with 149 other people, by the Karaman Chief Public Prosecutor's Office. In the indictment, the basis of the allegation of Mr. Şentürk being a member of the Fethullahist armed terrorist organization was as follows: (a) he used the code name "Emin"; (b) he had opened an account at Bank Asya on the instructions of the organization in 2014; (c) he was a member of the Karaman Academic Youth Association belonging to the Fethullahist terrorist organization; (d) he had downloaded and used the ByLock and Kakao applications; (e) he had participated in demonstrations to protest against investigations into the Fethullahist terrorist organization, on 18 December 2014; and (f) the statements of witnesses, namely M.T., S.D., Ö.B., M.A., V.E., B.S., Ş.B., İ.U., M.C. and M.Y.

b. Trial proceedings and conviction

9. According to the source, the Karaman Assize Court decided to admit the indictment against Mr. Şentürk, and the trial began, with the file numbered as 2017/117. In the first trial session, held on 3 August 2017, Mr. Şentürk had the opportunity to present his defence

regarding the allegations against him for the first time. He reportedly rejected that he used "Emin" as a code name and stated that he had been using the name as an unofficial middle name since childhood, and that his primary-school and high-school friends could testify to that. He also stated that he had opened an account at Bank Asya for his family to send him money while he was studying at university, that he had participated in the protests at the suggestion of his friends, that he did not use the ByLock application and that he used the Kakao Talk application because it was a common messaging application. He also stated that he had registered as a member of the Karaman Academic Youth Association because the president of the association was a close friend, and he stated that his reason for becoming a member of the association was to participate in its social activities, and that the association had not engaged in any illegal activity. Finally, he indicated that he did not accept the activities that the witnesses had described and that he did not have any responsibility in the university organization of the Gülen movement. However, the court decided to continue his detention.

10. According to the source, the second, third and fourth sessions of Mr. Şentürk's trial were held in his absence and the prosecutor's opinion on his detention was taken without his defence. The source adds that those sessions were held without his knowledge or defence submissions. The source also adds that the court decided to continue Mr. Şentürk's detention without even agreeing to accept his defence submissions.

11. On 3 November 2017, at the fifth trial session, Mr. Şentürk's lawyer requested his client's release on the grounds that the alleged actions did not constitute the crime of being a member of a terrorist organization and that there was no concrete and legally obtained evidence to demonstrate that he had used the ByLock application. However, the Court reportedly overruled the request and ordered the continued detention of Mr. Şentürk.

12. On 4 December 2017, Mr. Şentürk's high-school friends F.Y. and M.D. testified, before the Bakırköy Third Assize Court, at the request of the Karaman Assize Court. They stated that Mr. Şentürk had no affiliation with any terrorist organization, that he had been using the name Emin as a middle name for years and that they had known his name to be Muhammet Emin[2] since high school.

13. The source reports that, in its opinions on the merits of the case, the Public Prosecutor's Office alleged that Mr. Şentürk had committed the crime of being a member of an armed terrorist organization on the grounds that: (a) he had downloaded and used the ByLock application on his mobile telephone, according to an intelligence report entitled "ByLock Tespit ve Değerlendirme Tutanağı" (ByLock findings and evaluation report) prepared by the National Intelligence Agency; (b) he had taken part in the university organization of the Gülen movement; (c) he used a code name, "Emin"; (d) according to witness statements, he had been to Ankara to meet up with some military cadets placed in military schools by the organization and had given them religious talks; (e) he had opened an account at Bank Asya and had deposited 50 and 600 Turkish lira on different dates; (f) he was a member of the Karaman Academic Youth Association; (g) he had participated in a demonstration to protest against investigations into the movement on 18 December 2014 and had prepared the banners used in the protest; and (h) he had been in contact with several people who testified against him and were, according to Historical Traffic Search records (call records) obtained from the Information Technologies Agency, under investigation for the same crime.

14. On 16 February 2018, during the seventh trial session, the "ByLock findings and evaluation report" was reportedly added to the case file, and Mr. Şentürk was questioned about the report. In the report, it was alleged that Mr. Şentürk had downloaded the ByLock application to his mobile telephone and that he had exchanged messages with other users. The report had been prepared by the National Intelligence Agency in the context of intelligence activities and printed by two police officers before being added to the case file. The source notes that the report was not prepared in accordance with the law, and that it did

[2] According to the source, Muhammet is the name of the prophet of the religion of Islam and one of his nicknames was Emin, which means "righteous man" or "reliable man". In Türkiye, the names Muhammet and Emin are commonly used together as Muhammet Emin (meaning "reliable Muhammet" or "righteous Muhammet"), to praise the prophet culturally.

not meet the quality of legal evidence required under the Code of Criminal Procedure. For this reason, Mr. Şentürk reportedly rejected the report during the trial session. The source adds that no message content revealed that the application had been used in the context of terrorist activity. The source notes that Mr. Şentürk was also asked about the statements of witnesses who had reportedly testified in order to benefit from active remorse provisions 11 months after their imprisonment under the threat of a heavy custodial sentence. Mr. Şentürk's lawyer requested his client's release, stating that there was no concrete evidence in the case file that he had used the ByLock application in the context of terrorist activity. The lawyer also stated that it was against the law to submit the testimonies of witnesses who benefited from active remorse to prevent a heavy prison sentence and who had testified after they learned that Mr. Şentürk was in prison for the same reason. The court overruled the request for release and ordered the continued detention of Mr. Şentürk.

15. On 1 March 2018, Mr. Şentürk's lawyer reportedly submitted written defence statements with regard to the prosecution's opinion on the merits of the case. In those statements, the lawyer declared that the witness statements could not be considered as legitimate evidence as they had testified under the threat of imprisonment; that Mr. Şentürk had been using the name Emin as a middle name since his childhood, as stated by his high-school friends; that the actions of depositing money in Bank Asya and being a member of a certain association were completely legal and simply enjoyment of rights protected by the Turkish Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights); that the findings regarding the ByLock allegation had been obtained unlawfully and therefore could not be used as evidence in criminal proceedings; that there was no element in the content of the alleged messages that constituted the impugned crime; and that the demonstration that Mr. Şentürk had attended was a peaceful protest and was carried out within the scope of freedom of expression and with the knowledge and permission of the local administrators. Consequently, none of the acts attributed to Mr. Şentürk constituted the crime of being a member of the Gülen movement, as no terrorist organization under that name had existed at the time the alleged actions were carried out, and none of the alleged actions had involved violence or terrorism.

16. On 29 March 2018, Karaman Assize Court reportedly sentenced Mr. Şentürk to a heavy custodial sentence, of six years and eight months, on the following grounds: (a) he had downloaded and used the ByLock application, according to the ByLock findings and evaluation report prepared by the National Intelligence Agency; (b) he had used the code name "Emin"; (c) he had gone to Ankara to meet up with military cadets who were placed in military schools by the organization; (d) he had an account at Bank Asya and had deposited money into that account after January 2014; and (e) he had participated in the demonstration to protest against investigations into the *Zaman* newspaper on 18 December 2014. According to the source, there was no concrete evidence in the indictment or the reasoned decision regarding the act of "meeting up with military cadets", and no such allegation or related question was presented to Mr. Şentürk during the nine trial sessions. The source notes that it is unclear what this claim was based on. Mr. Şentürk had never had the opportunity to question in court the witnesses upon whose statements this allegation was based during the trial process. The witnesses were never questioned either by the court or by Mr. Şentürk's defence team.

17. The source reports that, after the reasoned decision on Mr. Şentürk's conviction was announced, his lawyer applied to the Ankara Regional Appeal Court on 19 May 2018. The Twentieth Penal Chamber of the Ankara Regional Court, in its decision dated 12 February 2019 and numbered E.2018/1597–K.2019/118, reportedly rejected the appeal on the merits and ruled that his detention should be continued. On 12 February 2019, Mr. Şentürk's lawyer filed an appeal with the Court of Cassation against this decision and, on 5 December 2019, the Sixteenth Penal Chamber of the Court of Cassation upheld the decision of the Karaman Assize Court in its decision numbered E.2019/4073–K.2019/7552.

18. Finally, Mr. Şentürk made an individual application against his prison sentence to the Constitutional Court through the Karaman M Type Closed Penitentiary Institution, where he was imprisoned. On 7 June 2021, in its decision under application No. 2020/14695, the Constitutional Court ruled that his application was inadmissible on the grounds that the right

to a fair trial and right to privacy had not been violated in relation to the use of ByLock and that the prison sentence did not violate the principle of legality of crimes and punishments (no punishment without law), or the right to freedom and security. The source notes that Mr. Şentürk has exhausted all domestic remedies with the decision of the Constitutional Court.

19. After being held for 48 months in Karaman M Type Closed Penitentiary Institution, Mr. Şentürk was released on probation on 9 November 2020. The source adds that the execution of his prison sentence was completed on 9 November 2021.

c. Analysis of violations

i. Category I

20. The source asserts that, aside from the fact that there is no concrete evidence that Mr. Şentürk was a member of an armed terrorist organization, there is no legal basis for his arrest and conviction on the basis of his past, peaceful actions. The source adds that the actual reason for his detention and conviction was the change in political conditions in Türkiye after the failed coup attempt of 15 July 2016. In other words, Mr. Şentürk was not detained and convicted because he was actually a member of a terrorist organization, but because he was considered to be a member of the Gülen movement as a result of legal actions such as depositing money in Bank Asya, being a member of a specific association, staying in student houses belonging to the Gülen movement, according to witness statements, and participating in peaceful protests. The authorities reportedly failed to provide concrete evidence to prove that Mr. Şentürk was indeed a member of an armed terrorist organization. None of the acts attributed to him in the indictment and reasoned decision include terrorism or violence.

21. The source notes that the Universal Declaration of Human Rights, the Covenant and various international legal norms prohibit retroactive criminalization. All grounds for Mr. Şentürk's detention relate to peaceful and legal actions such as holding an account in Bank Asya, being a member of a specific association, Historical Traffic Search records, attending peaceful demonstrations and staying in student houses belonging to the Gülen movement, according to witness statements, which took place long before the attempted coup. For this reason, there is no legal basis for either his detention or his conviction.

22. The source notes that all the actions attributed to Mr. Şentürk were in accordance with Turkish Law. Those actions cannot be considered a legitimate reason for detention and conviction for being a member of a terrorist organization.

23. The source adds that the main reason for Mr. Şentürk's conviction was the allegation of ByLock usage. The source firstly submits that, at the time that Mr. Şentürk was accused of using the ByLock application, the Gülen movement had not been designated as a terrorist organization by the competent judicial authorities. The Gülen movement was declared a terrorist organization for the first time after the attempted coup on 15 July 2016, which was the first violent act attributed to that group, "a sine qua non component of the definition of terrorism".

24. On the other hand, the source submits that the mere use of a regular communication application, such as WhatsApp, cannot be considered evidence of membership in a terrorist organization that did not exist at the time in question. Even assuming that Mr. Şentürk actually used ByLock to send messages, an allegation that he denied during the trial process, this would only have constituted the exercise of his right to respect for correspondence and his right to freedom of opinion and freedom of expression, which are fundamental rights guaranteed by several international covenants.

25. The source notes that the Working Group has previously stated that if the Government has not demonstrated that the person in question has committed a criminal activity by means of ByLock, as is the case here, no charges can be brought against him or her based solely on the use of this communication tool.[3]

26. According to the source, the other reason for Mr. Şentürk's detention and conviction is that he took part in the university organization of the Gülen movement during his university

[3] Opinion No. 42/2018, para. 87.

years, he used the code name “Emin”, he went, on several occasions, to Ankara to meet up with military cadets who were also members of the Gülen movement at that time, and he was responsible for the Gülen movement’s university student houses in Karaman. The source asserts that those allegations were based only on statements from witnesses, who were also under investigation for the same crime. Firstly, the source submits that those allegations could not be related to any kind of terrorist activity, as the Gülen movement was not designated as a terrorist organization at the time that the alleged actions took place. Secondly, none of the actions alleged by the witnesses is in nature violent, a sine qua non component of the definition of terrorism. Moreover, Mr. Şentürk was reportedly never asked about going to Ankara and meeting up with military cadets during the trial, and this allegation was based only on witness statements. No concrete evidence has been provided as to when, where and with whom these meetings took place or what was discussed.

27. One of the other reasons for Mr. Şentürk’s detention and conviction is that he had deposited money in his Bank Asya account in 2014. The source notes that the Turkish authorities consider that depositing money in Bank Asya after 25 December 2013 is a criminal activity. The authorities reportedly targeted Bank Asya after the corruption scandal of December 2013, and it is claimed that all Gülen movement members mobilized, under the instructions of the leader of the movement, and deposited money in Bank Asya to improve the bank’s capital. According to the source, it is a bogus charge that routine and insignificant money transfers (50 lira and 600 lira) in Mr. Şentürk’s bank account are considered terrorist activity even though there is no concrete evidence that he was directed by anyone. The source adds that this also indicates that his detention and conviction are not legitimate, but political.

28. The source notes that the authorities also based Mr. Şentürk’s detention and conviction on his membership of the Academic Youth Association and his participation in demonstrations to protest against judicial investigations into the *Zaman* newspaper. The source submits that Mr. Şentürk’s detention and conviction on the basis of mere membership of an association before 15 July 2016 constitute a serious interference with his freedom of association, as the national courts based their decisions solely on the membership without demonstrating that he had carried out any criminal activity in the context of the activities of the association. The source adds that simply treating a fundamental freedom as a crime is in itself a serious violation of the right to freedom of association and peaceful protest. The association in question was performing its activities in total legality at the time of the events; no court decision existed that determined that it was under the control of an illegal or terrorist organization. Moreover, the *Zaman* newspaper was reportedly targeted for criticizing the Government, not for producing propaganda for any act of violence or terrorism. Hence, according to the source, those actions cannot constitute evidence for any offence, including membership in a terrorist organization. None of the provisions of the Turkish Criminal Code foresee that being a legal member of an association and participating in peaceful demonstrations can be a crime. On the contrary, the Turkish Constitution protects the freedom of association (article 33). The source thus contends that article 314, paragraph 2, of the Criminal Code has been interpreted and applied in an arbitrary and unforeseeable manner and that this provision cannot constitute a legitimate law within the meaning of international human rights law.

29. In conclusion, the source submits that the acceptance of all these legal actions as evidence of membership in an armed terrorist organization demonstrates that the Turkish courts are not independent and impartial judicial authorities and that they ordered Mr. Şentürk’s arrest and his imprisonment under political influence. Therefore, his detention has no legal ground in domestic law and is arbitrary and illegal under the Turkish Constitution, the Universal Declaration of Human Rights and the Covenant.

ii. Category II

30. The source notes that the grounds for Mr. Şentürk’s detention and conviction, such as allegedly merely using a communication application, depositing money in Bank Asya, staying at student houses of the Gülen movement during his university years and taking part in a specific religious group (the Gülen movement), being a member of a specific association and attending peaceful demonstrations were legitimate actions on the dates they took place. The source asserts that Mr. Şentürk’s detention and imprisonment on those grounds indicate

that the Government has developed discriminatory practices against people who have sympathy with and/or some kind of relationship with the Gülen movement. For this reason, Mr. Şentürk's detention and conviction violated his rights under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.

31. The source recalls that one of the reasons given for Mr. Şentürk's detention and imprisonment was the allegation, based on National Intelligence Agency intelligence findings, that he had used a specific communication application called ByLock before 15 July 2016. The source asserts that the mere fact that downloading the ByLock application onto electronic devices constitutes evidence that can be used to convict an individual for membership of a terrorist organization, as in the present case, is an interference with the right to respect for correspondence. The source notes that any interference with this right can only be justified if it is in accordance with the law, pursues one or more of the legitimate aims to which the relevant constitutional provisions refer and is necessary in a democratic society in order to achieve such an aim. However, the domestic authorities reportedly did not comply with the law in obtaining relevant digital data regarding ByLock. Moreover, the authorities never demonstrated that any criminal activity had been committed by Mr. Şentürk through the use of ByLock. The content of the messages he allegedly sent do not contain any criminal or terrorist activity. The source thus submits that downloading the ByLock application and/or sending the alleged messages (an allegation that he denied) remain within the scope of exercising the fundamental rights in question and are totally legal activities protected by articles 22 and 26 of the Turkish Constitution. The source contends that taking into account legal activity, which constitutes the mere enjoyment of fundamental rights, as decisive evidence for Mr. Şentürk's conviction violates article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.

32. According to the source, all of the reasons for Mr. Şentürk's detention and conviction demonstrate that the Government considered him a member of the Gülen movement, which was a legal social and religious group at the time the actions took place. In particular, the authorities' consideration of being a member of a specific association and participating in peaceful protests as a criminal action proves that he was detained and convicted for his political thoughts and actions. The source notes that the main purpose of the demonstrations that Mr. Şentürk attended was to criticize the judicial investigations that targeted the *Zaman* newspaper, which was criticizing the Government with regard to the corruption scandal of December 2013. He reportedly attended the demonstration to express his political opposition to the Government in a peaceful way. Consequently, the source submits that Mr. Şentürk's detention and imprisonment for being a member of a certain association and participating in peaceful protests violate his rights under articles 18, 19 and 20 of the Universal Declaration and articles 18, 19, 21 and 22 of the Covenant.

iii. Category III

33. According to the source, Mr. Şentürk was condemned for being a member of a terrorist organization and was sentenced to imprisonment for six years and eight months, mainly for downloading and using the ByLock application and sending some messages through the application, without being involved in any criminal activity.

34. The source contends that, at the time that Mr. Şentürk was accused of using the ByLock application (from 4 December 2015 to 26 February 2016), the Gülen movement was not designated as a terrorist organization by the competent judicial authorities in the Turkish legal order. The Gülen movement was reportedly declared a terrorist organization for the first time after the attempted coup of 15 July 2016, which was the first violent act attributed to this group, a violent act being a sine qua non component of the definition of terrorism.

35. The source also contends that the ByLock evidence was used in violation of the adversarial proceedings and equality of arms principles during the trial process. The allegation was based solely on the intelligence findings of the National Intelligence Agency, which were allegedly obtained illegally from the ByLock servers; hence, the ByLock evidence is by its nature digital data. The source refers to article 134 of the Code of Criminal Procedure and article 17, paragraphs 3 and 4, of the regulation on judicial and preventive searches, pursuant to which it was obligatory to hand over a copy of the disk and the flash drive containing the ByLock data to the suspects or their lawyers, even without them having

requested it. However, in the present case, the disk and the flash drive containing the ByLock data were reportedly kept secret at the Chief Public Prosecutor's Office in Ankara, while the above-mentioned provisions were completely ignored and the main digital evidence in the case were not handed over to Mr. Şentürk or his lawyer. The source adds that Mr. Şentürk was convicted solely on the basis of letters or documents sent by the National Intelligence Agency, the police, the Information Technologies Agency and/or the prosecutor, which were presented as reflecting the truth, without any error. Had Mr. Şentürk been given these digital data, he would have had the opportunity to have them examined, allowing for an impartial, independent and objective digital forensic examination into the authenticity of the claim that he had used ByLock.

36. In the present case, Mr. Şentürk was reportedly convicted on the basis of documents (namely, writings on the findings and evaluation of ByLock) printed out by police officers from a computer with no mention of any names. The source asserts that these documents do not meet the requirements of "minutes" within the meaning of article 169 of the Code of Criminal Procedure, but the trial court reportedly decided that they alone were sufficient to convict Mr. Şentürk of the offence in question. Given that the digital materials relating to ByLock were never made available to Mr. Şentürk or his lawyer, it is reportedly impossible to conclude that the content of the alleged messages, used as evidence and prepared and printed by the executive bodies (the National Intelligence Agency and the police), constitute reliable evidence concerning the accusations of membership of a terrorist organization and use of the application by Mr. Şentürk. Thus, the source contends that Mr. Şentürk was deprived of his right to access the main evidence and to examine the data to review his alleged use of the application and whether the data had allegedly been modified by adding or extracting information or messages (whether evidence had been fabricated or not). The source submits that the principles of adversarial proceedings were violated, as the courts made their decisions without requesting the main evidence from its source, did not examine the main evidence independently, did not give a copy of the digital evidence to the defence and did not listen to Mr. Şentürk's defence on those issues.

37. The source notes that the only reason that downloading the ByLock application onto a smartphone constitutes sufficient evidence of membership in a terrorist organization is the claim that the application is used exclusively by Gülenists. To be able to disprove this claim, Mr. Şentürk and his legal team must also have access to and be able to examine the digital data containing all the correspondence made through ByLock. The source adds that, unless all the users of the application are considered individually and it can be shown that they are all Gülenists, accepting the "exclusive use" claim made by the National Intelligence Agency, the prosecution, the police and the courts is not consistent with rational thought or science. Since, in this way, the "exclusive use" claim would become unfounded, users could no longer be linked to membership of a terrorist organization. In the present case, the trial court reportedly convicted Mr. Şentürk while complying with the written instructions of governmental bodies (including the National Intelligence Agency and the police, which act within a hierarchy) and by treating these instructions as the absolute truth. The source notes that requests for investigation into and analysis of ByLock data from independent experts or institutions are always refused by Turkish courts, as in the present case.

38. However, Mr. Şentürk's conviction was based primarily on ByLock evidence, as accepted by the Government, which was reportedly seized and used in clear breach of the requirements of domestic law, specifically article 6, paragraphs 2–6, of the Law on the National Intelligence Agency and articles 134 and 135 of the Criminal Procedure Code.

39. According to the source, the judicial courts justified their decisions regarding Mr. Şentürk's conviction by referring to previous decisions of the Sixteenth Criminal Chamber of the Court of Cassation regarding ByLock. In turn, the Sixteenth Criminal Chamber and the General Assembly of Criminal Chambers of the Court of Cassation justified their decision on ByLock on the basis of the provision of article 6, paragraph 1, of Law No. 2937 on the National Intelligence Agency of 1983, which regulates the powers of the Agency. The source firstly notes that article 6, paragraph 1, of the Law on the National Intelligence Agency (*lex generalis*) cannot be considered a law within the meaning of the European Convention on Human Rights as it is worded extremely vaguely, gives the National Intelligence Agency a very broad competence and does not stipulate any limits to its acts and activities. According

to this provision, the Agency may perform any kind of act or activity without any limitation; it does not provide for any guarantee or control.[4] In the present case, the integrity and authenticity of the ByLock evidence were reportedly not ensured as a result of a lack of respect for the necessary safeguards in this respect.[5]

40. According to the source, this provision therefore cannot be considered as a law within the meaning of the European Convention on Human Rights because it is not foreseeable and therefore it cannot constitute a legal basis for interfering with the right to respect for correspondence. The source adds that, if the interpretation of the Court of Cassation in the present case is accepted, the National Intelligence Agency can have power without limitation. This would lead to the abolishing of all the guarantees foreseen in the European Convention on Human Rights, the Turkish Constitution and the Code of Criminal Procedure to protect the right to respect for private life and correspondence.

41. The source asserts that article 6, paragraphs 2–6, of the Law on the National Intelligence Agency (*lex specialis*) should have been applied in the present case. Article 6, paragraph 1, of that law is a ruling regulating the general powers of the Agency (*lex generalis*). In the present case, however, the communication was made through telecommunication, as accepted by the Court of Cassation. The source adds that interference with communication realized through telecommunication has been specially regulated by the provisions of article 6, paragraph 2, of the Law on the National Intelligence Agency, which was added in 2005 (*lex specialis*) in order to protect the privacy of communication. Article 6, paragraph 2, stipulates that a prior court order is required for the Agency to interfere with communications performed by telecommunication. However, the Agency reportedly obtained all the data from the ByLock server without any judicial decision.

42. The source asserts that, in the present case, the Court of Cassation did not apply *lex specialis* (art. 6, para. 2, of the Law on the National Intelligence Agency) but applied the provision from article 6, paragraph 1, which regulates the powers of the Agency in general (*lex generalis*) in order to find a legal basis for illegally obtained evidence. The source notes that, by not applying the provisions of article 6, paragraph 2, and provisions of the law (*lex posterior*) added in 2005, the laws were arbitrarily interpreted and applied by the Court of Cassation. Finally, the National Intelligence Agency reportedly previously examined the ByLock digital materials without any prior judicial decision and prepared a technical report, determined the users of the communication tool and downloaded a list onto a flash drive and hard disk, which it sent to the police and the Chief Public Prosecutor's Office in Ankara without any judicial or independent authority control. According to the source, this leads to the assumption that the ByLock data were examined without a prior court order authorizing such examination and that it is illegal evidence under article 134 and/or article 135 of the Criminal Procedure Code. The source adds that it is very easy to tamper with digital data and produce false evidence in these circumstances.

43. The source submits that the ByLock data were seized by the National Intelligence Agency illegally and without judicial review. The use of illegally obtained data as evidence is prohibited in domestic law, and this reportedly also violates Mr. Şentürk's right to a fair trial.

44. The other reason for Mr. Şentürk's arrest and prison sentence was allegations based on witness statements. In those statements, it was alleged that he had taken part in the university organization of the Gülen movement, had been to Ankara to meet up with military cadets and had been responsible for student houses of the Gülen movement. The source notes that there is no element in any of these statements that would constitute a violent act or terrorist crime. Moreover, all of the witnesses who made statements about Mr. Şentürk reportedly testified as part of the same criminal investigation. The witnesses who stated that he was meeting up with the military cadets made statements while in detention. In other words, they reportedly testified under the threat of a heavy custodial sentence.

[4] See European Court of Human Rights, *Big Brother Watch and Others v. the United Kingdom*, Application Nos. 58170/13, 62322/14 and 24960/15, Judgment, 25 May 2021.

[5] See the safeguards as referred to in the *Big Brother Watch v. the United Kingdom* judgment.

45. The source states that all of the witnesses whose statements were taken as the basis for the judgment were defendants who benefited from effective remorse, and that they did not testify in order to reveal the truth, but to avoid heavy prison sentences. The testimony of witnesses must be based on their own free will. The source notes that freedom is a fundamental human right, and the threat of being deprived of this right in prison is extremely serious and imminent. It adds that a statement taken under this threat should never be relied upon.[6] For this reason, the source submits that the right to a fair trial has been violated due to Mr. Şentürk's detention and conviction being based on these kinds of witness statements.

46. Moreover, Mr. Şentürk and his lawyer were never allowed to question the witnesses who had testified against him. The witnesses were not brought before the trial court; they were heard in Mr. Şentürk and his lawyer's absence. The source submits that this also violates the principles of adversarial proceedings and equality of arms and the right to a fair trial.

Response from the Government

47. On 2 August 2022, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 3 October 2022, detailed information about the current situation of Mr. Şentürk and to clarify the legal provisions justifying his detention, as well as its compatibility with the country's obligations under international human rights law, and in particular with regard to the treaties ratified by the State.

48. On 3 October 2022, the Government submitted its reply, in which it referred to the large-scale, brutal and unprecedented coup attempt perpetrated by the Fethullahist terrorist organization, a clandestine terrorist organization that had insidiously infiltrated critical government posts and attempted to destroy democracy and take over the democratically elected Government on 15 July 2016.

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

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

51. According to the Government, even before the attempted coup, the Fethullahist terrorist organization was known to employ complex strategies to advance its agenda. Those strategies included blackmailing politicians and bureaucrats, cheating on a mass scale in public exams in order to place its members in key government posts, practising social engineering, manipulation and indoctrination, and presenting fabricated stories to spark judicial proceedings against its opponents through its extensive network of media outlets, businesses, schools and non-governmental organizations. The organization is now employing the strategy of presenting itself as the victim of human rights violations to hide its crimes. Its members deliberately try to deceive and manipulate international public opinion by spreading false allegations against Türkiye. Those include unfounded claims of arbitrary arrest and

[6] See European Court of Human Rights, *Gafgen v. Germany*, Application No. 22978/05, Judgment, 1 June 2010.

detention, torture and even enforced disappearances, while its members go into hiding on the orders of their leader. In fact, it is the organization itself that perpetrated grave human rights violations in Türkiye, including cold-bloodedly killing innocent civilians, thus violating the very fundamental right to life of hundreds of Turkish citizens.

52. In line with the explanations provided above, Türkiye requests the special procedures of the Human Rights Council, including the Working Group on Arbitrary Detention, not to allow the Fethullahist terrorist organization and its members to abuse those mechanisms, and to dismiss their allegations. Türkiye will continue to uphold human rights and fundamental freedoms and maintain its long-standing cooperation with international organizations.

Further comments from the source

53. The reply of the Government was submitted to the source for further comments, which were provided on 23 October 2022. The source points to a lack of any clarification of Mr. Şentürk's personal situation whatsoever, and reiterates that he lacked fair trial guarantees.

Discussion

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

55. The Working Group notes that Mr. Şentürk has been released. However, in accordance with paragraph 17 (a) of its methods of work, the Working Group reserves the right to render an opinion, on a case-by-case basis, on 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 opinion that, in view of the seriousness of the allegations, it should proceed to render the opinion.

56. In determining whether the deprivation of liberty of Mr. Şentürk was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.[7]

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

58. While acknowledging the notification concerning the derogations, the Working Group emphasizes that, in the discharge of its mandate, it is empowered under paragraph 7 of its methods of work to refer to the relevant international standards set forth in the Universal Declaration of Human Rights and to customary international law. Moreover, in the present case, articles 9 and 14 of the Covenant are the provisions that are relevant to the alleged arbitrary detention of Mr. Şentürk. As the Human Rights Committee has stated, States parties derogating from articles 9 and 14 must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.[9] The Working Group welcomes the

[7] A/HRC/19/57, para. 68.

[8] Depositary notification C.N.580.2016.TREATIES-IV.4.

[9] General comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 4. See also general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 6; general comment No. 34 (2011) on the freedoms of opinion and expression, para. 5; general comment No. 35 (2014) on liberty and security of person, paras. 65–66; and *Özçelik et al. v. Turkey* (CCPR/C/125/D/2980/2017), para. 8.8.

lifting of the state of emergency on 19 July 2018 and the subsequent revocation of derogations by Türkiye.

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

Category I

60. The Working Group notes that the source alleged that Mr. Şentürk had been arrested without any reasonable suspicion of committing any criminal offence whatsoever. Thus, his arrest and detention were unlawful. The Working Group notes that it lacks any concrete and precise information on the grounds for Mr. Şentürk's arrest, but notes that facts that raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of the criminal investigation. The source's allegation of a lack of evidence of any involvement of the petitioner into illegal activity will be examined below, under categories II and III.

61. Nevertheless, the Working Group recalls that article 9 (3) of the Covenant requires that anyone arrested or detained on a criminal charge is to be brought promptly before a judicial authority. As the Human Rights Committee explains, while the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.[10]

62. In the present case, the Working Group observes that Mr. Şentürk was detained for six days before he was first brought before a judicial authority. The Government has presented no reasons for this delay, although it had the opportunity to do so. The Working Group therefore finds a violation of article 9 (3) of the Covenant and articles 3 and 9 of the Universal Declaration of Human Rights.

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

Category II

64. The source submits that Mr. Şentürk was arrested, charged, tried and sentenced on the basis of his alleged alliance with the Fethullahist terrorist organization. In this respect, the source noted that the main purpose of the demonstrations that Mr. Şentürk attended was to criticize the judicial investigations that targeted the *Zaman* newspaper, and to express his political opposition to the Government in a peaceful way. Consequently, the source submits that Mr. Şentürk's detention and imprisonment for being a member of a certain association and participating in peaceful protests violate his rights under articles 18, 19 and 20 of the Universal Declaration of Human Rights and articles 18, 19, 21 and 22 of the Covenant.

[10] General comment No. 35 (2014), para. 33.

65. The Working Group observes that the essence of the allegations against Mr. Şentürk is his alleged alliance with the Fethullahist terrorist organization, which, according to the Government, is known to employ complex strategies to advance its agenda. However, the Working Group notes that Mr. Şentürk was accused of using the ByLock application on his mobile telephone, taking part in the university organization of the Gülen movement, going to Ankara to give a religious talk in a military school, opening an account at Bank Asya, being a member of the Karaman Academic Youth Association and participating in a demonstration. The Government failed to explain how these alleged activities amounted to a criminal act. Nothing in the materials before it allows the Working Group to conclude that these activities can be regarded as capable of generating a reasonable suspicion that he had committed the alleged criminal offences. Moreover, the Working Group recalls that this is not the first time that it has examined a case involving the arrest and prosecution of a Turkish national for the alleged use of ByLock as one of the key manifestations of an alleged criminal activity.[11] In those other instances it concluded that, in the absence of a specific explanation of how the alleged mere use of ByLock constituted a criminal activity by the individual concerned, the detention was arbitrary. The Working Group regrets that its views in those opinions have not been respected by the Turkish authorities and that the present case follows the same pattern.

66. Absent any explanation by the Government, the Working Group finds no elements to support the allegation that Mr. Şentürk's activities did not remain within the limits of freedom of speech and freedom of assembly, insofar as they cannot be construed as a call for violence.

67. The Working Group has found a pattern that it has observed over the past six years concerning the arrest and detention in Türkiye and abroad of individuals with alleged links to the Gülen movement.[12] In all those cases, the Government has alleged criminal activity by individuals on the basis of their engagement in regular activities without any specification as to how such activities amounted to criminal acts. The Working Group finds that the present case follows the same pattern. No evidence whatsoever has been presented to the Working Group that the activities of the petitioner, described above, could have been equated with being engaged in any terrorism-related activity.

68. Based on the information available, and having particular regard to the context in which the alleged crimes occurred, the Working Group is of the view that the Government failed to demonstrate that any of the permitted restrictions on freedom of expression found in article 19 (3) of the Covenant and on freedom of assembly found in article 21 of the Covenant applied in Mr. Şentürk's case.

69. The Working Group therefore finds that his deprivation of liberty was arbitrary, falling within category II, as it resulted from his exercise of the rights and freedoms guaranteed under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant.

70. As a result, the Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

Category III

71. Given its finding that Mr. Şentürk's deprivation of liberty was arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Şentürk should have taken place. However, the trial did take place, and Mr. Şentürk was convicted and sentenced to six years and eight months of imprisonment. The source's allegation of unfairness of the trial are twofold. First, the source complains about the use of unlawfully obtained evidence and, second, the source complains of a violation of the principle of equality of arms, as the defence was not able to question the prosecution's witnesses.

72. In respect of the first complaint, the Working Group notes that it is accepted in international human rights jurisprudence that the question of whether the use as evidence of

[11] See, for example, opinions No. 42/2018, No. 44/2018, No. 29/2020 and No. 30/2020.

[12] Opinion No. 66/2020.

information obtained in violation of privacy rights renders a trial as a whole unfair has to be determined with regard to all the circumstances of the case.[13] The Working Group lacks sufficient information to make a conclusion in this respect.

73. As concerns the second complaint, the Working Group recalls that article 14 (3) (e) of the Covenant requires that everyone charged with a criminal offence shall have the right to examine, or have examined, witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. According to the source, Mr. Şentürk was unable to examine witnesses against him. Although the Government has had the opportunity to respond to these allegations, it has chosen not to do so. The Working Group thus cannot but conclude that article 14 (3) (e) of the Covenant and articles 10 and 11 (1) of the Universal Declaration of Human Rights were breached.

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

Category V

75. Although the source does not allege that Mr. Şentürk's arrest and detention also fall under category V, the Working Group will examine whether the authorities had a discriminatory intent to punish him. It notes that the present case joins a series of cases concerning individuals with alleged links to the Gülen movement that have come before the Working Group in the past few years.[14] In all these cases, the Working Group has found that the detention of the concerned individuals was arbitrary. A pattern is emerging whereby those with alleged links to the movement are being targeted on the basis of their political or other opinion, in violation of articles 2 (1) and 26 of the Covenant and articles 2 and 7 of the Universal Declaration of Human Rights. Accordingly, the Working Group finds that the Government of Türkiye detained Mr. Şentürk based on prohibited grounds for discrimination, and that his detention was thus arbitrary, falling under category V. The Working Group refers the present case to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

Concluding remarks

76. In the past six years, the Working Group has noted a significant increase in the number of cases brought to it concerning arbitrary detention in Türkiye. It expresses grave concern about the pattern that all these cases follow and recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law may constitute crimes against humanity.[15]

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

Disposition

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

The deprivation of liberty of Muhammet Şentürk, being in contravention of articles 2, 3, 7, 9, 10, 11 (1), 19 and 20 of the Universal Declaration of Human Rights and articles

[13] See, for example, European Court of Human Rights, *Bykov v. Russia*, Application No. 4378/02, Judgment, 10 March 2009, paras. 94–98.

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

[15] See, for example, opinions No. 66/2020, para. 67; No. 67/2020, para. 96; and No. 84/2020, para. 76.

2 (1), 9 (3), 14 (3) (e), 19, 21 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

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

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

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

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

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

Follow-up procedure

84. 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 compensation or other reparations have been made to Mr. Şentürk;

(b) Whether an investigation has been conducted into the violation of Mr. Şentürk'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 Türkiye with its international obligations in line with the present opinion;

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

85. 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.

86. The Working Group requests the source and the Government to provide the abovementioned 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.

87. 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.[16]

[*Adopted on 4 April 2023*]

[16] Human Rights Council resolution 51/8, paras. 6 and 9.