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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-sixth session, 29 April-3 May 2013

No. 6/2013 (Turkey)

Communication addressed to the Government on 12 September 2012.

Concerning 250 detained defendants in the *Balyoz* or "Sledgehammer" cases

The Government replied to the communication on 17 December 2012.

The State is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.

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

(a) When it is clearly impossible to invoke any legal basis for 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 the detainee) (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 International Covenant on Civil and Political Rights (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 for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The information was submitted to the Working Group on Arbitrary Detention as follows. According to the source, 250 defendants were detained in the Republic of Turkey in connection with the "Sledgehammer" Trial. The following list of detained "Sledgehammer" defendants was submitted to the Working Group:

Indictment I (163 detained defendants):

Abdullah Dalay, Abdullah Gavremoğlu, Abdurrahman Başbuğ, Ahmet Feyyaz Öğütcü, Ahmet Küçükşahin, Ahmet Necdet Doluel, Ahmet Şentürk, Ahmet Topdağı, Ahmet Tuncer, Ahmet Türkmen, Ahmet Yavuz, Ali Aydın, Ali Demir, Ali Deniz Kutluk, Ali İhsan Çuhadaroğlu, Ali Rıza Sözen, Ali Semih Çetin, Ali Türkşen, Ayhan Gedik, Ayhan Taş, Aytekin Candemir, Bahtiyar Ersay, Barbaros Kasar, Behcet Alper Güney, Behzat Balta, Bekir Memiş, Bora Serdar, Bülent Ömer Mirmiroğlu, Bülent Tunçay, Burhan Gögce, Cem Aziz Çakmak, Cemal Candan, Cemal Temizöz, Cemalettin Bozdağ, Cengiz Köylü, Çetin Doğan, Doğan Fatih Küçük, Doğan Temel, Dora Sungunay, Dursun Çiçek, Dursun Tolga Kaplama, Emin Küçükkılıç, Engin Alan, Engin Baykal, Ercan İrençin, Erdal Akyazan, Erdinç Atik, Ergin Saygun, Ergün Balaban, Erhan Kuranaer, Ertuğrul Uçar, Faruk Doğan, Faruk Oktay Memioğlu, Fatih Altun, Fatih Musa Çınar, Fatih Uluç Yeğin, Fuat Pakdil, Gökhan Çiloğlu, Gökhan Gökay, Gökhan Murat Üstündağ, Gürbüz Kaya, Hakan Akkoç, Hakan İsmail Çelikcan, Hakan Sargın, Halil Helvacıoğlu, Halil İbrahim Fırtına, Halil Kalkanlı, Halil Yıldız, Hamdi Poyraz, Hanifi Yıldırım, Harun Özdemir, Hasan Basri Aslan, Hasan Fehmi Canan, Hasan Gülkaya, Hasan Hakan Dereli, Hasan Hoşgit, Hasan Nurgören, Hayri Güner, Hüseyin Hoşgit, Hüseyin Özçoban, Hüseyin Polatsoy, Hüseyin Topuz, İbrahim Koray Özyurt, İhsan Balabanlı, İkrami Özturan, İlkay Nerat, İsmet Kışla, İzzet Ocak, Kadir Sağdıç, Kahraman Dikmen, Kasım Erdem, Kemal Dinçer, Kıvanç Kırmacı, Kubilay Aktaş, Levent Çehreli, Levent Erkek, Levent Görgeç, Lütfü Sancar, Meftun Hıraca, Mehmet Alper Şengezer, Mehmet Fatih İlğar, Mehmet Ferhat Çolphan, Mehmet Fikri Karadağ, Mehmet KayaVarol, Mehmet Kemal Gönüldaş, Mehmet Otuzbiroğlu, Mehmet Ulutaş, Mehmet Yoleri, Memiş Yüksel Yalçın, Metin Yavuz Yalçın, Mücahit Erakyol, Muharrem Nuri Alacalı, Mümtaz Can, Murat Ataç, Murat Özçelik, Mustafa Aydın Gürül, Mustafa Çalış, Mustafa Erdal Hamzaoğulları, Mustafa Karasabun, Mustafa Kemal Tutkun, Mustafa Koç, Mustafa Korkut Özarslan, Mustafa Önsel, Mustafa Yuvanç, Namık Koç, Nedim Ulusan, Nejat Bek, Nihat Altunbulak, Nihat Özkan, Nurettin Işık, Nuri Ali Karababa, Orkun Gökalp, Özden Örnek, Özer Karabulut, Ramazan Cem Gürdeniz, Recai Elmas, Recep Rıfkı Durusoy, Recep Yıldız, Refik Hakan Tufan, Şafak Duruer, Salim Erkal Bektaş, Sırrı Yılmaz, Soner Polat, Soydan Görgülü, Suat Aytın, Süha Tanyeri, Şükrü Sarışık, Taner Balkış, Taner Gül, Tayfun Duman, Taylan Çakır, Tuncay Çakan, Turgay Erdağ, Utku Arslan, Veli Murat Tulga, Yaşar Barbaros Büyüksağnak, Yüksel Gürcan, Yunus Nadi Erkut, Yurdaer Olcan, Yusuf Kelleli, Yusuf Ziya Toker, Zafer Karataş

Indictment II (23 detained defendants):

Ahmet Erdem, Ahmet Dikmen, Ahmet Sinan Ertuğrul, Ahmet Zeki Üçok, Ayhan Üstbaş, Beyazıt Karataş, Bilgin Balanlı, Bülent Günçal, Bülent Kocabuç, Hakan Büyük, Halit Nejat Akgüner, İsmail Taş, Mehmet Örgen, Mehmet Erkorkmaz, Mehmet Eldem, Mustafa Erhan Pamuk, Nedim Güngör Kurubaş, Onur Uluocak, Rafet Oktar, Refik Levent Tezcan, Servet Bilgin, Sinan Topuz, Turgut Atman

Indictment III (64 detained defendants):

Abdullah Can Erenoğlu, Abdullah Cüneyt Küsmez, Ahmet Hacıoğlu, Ahmet Bertan Nogalylaroğlu, Ali Sadi Ünsal, Ali Yasin Türker, Alpay Çarkarcan, Aydın Sezenoğlu, Aziz Yılmaz, Bahadır Mustafa Kayalı, Berker Emre Tok, Bülent Olcay, Bülent Akalın, Can Bolat, Celal Kerem Eren, Cenk Hatunoğlu, Davut İsmet Çınkı, Deniz Cora, Derya Günergin, Derya Ön, Ender Kahya, Ender Güngör, Erdem Caner Bener, Erhan Şensoy, Erhan Kubat, Fahri Can Yıldırım, Fikret Güneş, Gürsel Çaypınar, Hakan Mehmet Köktürk, Hasan Özyurt, Haydar Mücahit Şişlioğlu, Hüseyin Çınar, İbrahim Özdem Koçer, İsmail Taylan, Kadri Sonay Akpolat, Kemalettin Yakar, Korcan Pulatsü, Kubilay Baloğlu, Levent Kerim Uça, Mehmet Baybars Küçükatay, Mehmet Cem Okyay, Mehmet Koray Eryaşa, Murat Ünlü, Murat Özenalp, Murat Saka, Mustafa İlhan, Mustafa Haluk Baybaş, Nadir Hakan Eraydın, Necdet Tunç Sözen, Nuri Selçuk Güneri, Oğuz Türksoyu, Osman Kayalar, Ömer Faruk Ağa Yarman, Önder Çelebi, Rasim Arslan, Rıdvan Ulugüler, Sami Yüksel, Serdar Okan Kırçiçek, Süleyman Namık Kurşuncu, Şafak Yürekli, Ümit Metin, Yalçın Ergül, Zafer Erdim İnal, Ziya Güler

4. According to the source, on 21 January 2010 a Turkish newspaper broke the story of a 2003 military coup plot to overthrow the Government. Earlier that month, an anonymous individual had delivered three DVDs and a CD containing incriminating evidence to Mehmet Baransu, a reporter. The plot allegedly encompassed detailed preparations for the coup and plans to "provoke tensions with a third country, in order to spark political chaos and justify a military takeover." The plans included the bombing of various mosques, the takeover of hospitals and pharmacies, the downing of a Turkish fighter jet in a false-flag operation, the shutting down of non-governmental organizations, the arrest of various journalists and politicians, and the appointment of a cabinet.

5. The material delivered by the informant also included voice recordings and documents on discs linked with a military seminar held from 5 to 7 March 2003. During the seminar, 162 military officers took part in a series of workshops designed to test the military's readiness under extreme scenarios. The content of the seminar was set out on PowerPoint slides and the workshops were recorded at the order of the commander of the First Army, General Çetin Doğan, who led the seminar. The officers were reportedly given various hypothetical situations of turmoil and domestic disturbance, and were to strategize how best to address such situations. Over subsequent weeks, more details about the alleged coup plan surfaced as *Taraf* and other newspapers serialized the contents of many of the alleged coup plot documents.

6. According to the source, a total of three indictments charged 365 individuals with involvement in the alleged "Sledgehammer" Coup Plot to overthrow the Government. The source reports that the primary evidence forming the basis for these indictments is the "Sledgehammer Security Action Plan" and other documents describing the alleged coup plan and related operations, all of which are unsigned digital documents that have not been authenticated by the Turkish Court or successfully traced to military computers. According to the source, prosecution and defence agree that the recordings of the March 2003 military seminar are authentic.

7. The first indictment, against 195 individuals, was reportedly issued on 6 July 2010 after the first wave of arrests on 11 February. Sixty-three of these individuals have been detained since their arrests. According to the source, the indictment alleges that the defendants planned a series of activities and operations designed to destabilize the country, with the eventual aim of overthrowing the elected government and replacing it with a cabinet of their choosing. According to the indictment, the military seminar held from 5 to 7 March 2003 was a dress rehearsal for the "Sledgehammer" coup. The indictment states that evidence "suggests that all the suspects have committed the crime of attempting to overturn the Turkish Government by force, and should be PENALIZED according to the TCK (Turkish Criminal Code) Law no/ 765 Articles 147, 61/1, 31, 33, 40."

8. In a second wave of arrests in May and at the beginning of June 2011, 15 additional individuals were reportedly jailed. In a second indictment 28 individuals were charged and arrest warrants issued for 8 of the non-detained defendants.

9. According to the information received, the third wave of arrests took place between the end of June and September 2011, during which 64 arrests were made. The third indictment reportedly charged 143 individuals with attempting to overthrow the Government.

10. Prior to the trial, 17 generals and admirals in line for promotion were reportedly jailed in September 2010 in connection with the "Sledgehammer" investigations. In July 2011, 22 military commanders, including several generals and officers, were charged with carrying out an Internet campaign to undermine the Government, in connection with the "Sledgehammer" controversy.

11. On 29 July 2011, in response to these mass arrests and in protest against what they viewed as the unjust imprisonment of their colleagues, the Chief of the Armed Forces along with the heads of the Army, Navy and Air Force reportedly resigned.

12. According to the information received, the "Sledgehammer" trial began on 16 December 2010, at the Istanbul 10th High Criminal Court, with 365 defendants. Three hundred and sixty-three were serving or retired military officers and two were civilians. Prosecutors have reportedly requested 15- to 20-year sentences for the serving and retired officers.

13. According to the source, the defendants did not have access to any of the documents allegedly implicating them during the investigation, though some documents were briefly shown to suspects during their interrogation. The defendants did not have access to these documents until after 19 July 2010, the date that the first indictment was accepted by the Court. They were then reproduced in digital form so that no forensic examination could be conducted to verify the files' authenticity. The defence was reportedly not provided with access to the forensic images of the CDs until 18 months after the Court received the evidence. The Court had denied access to the CDs on the grounds that there were a sufficient number of expert reports in the file and no further analyses were needed.

14. Once granted access, several independent experts forensically analyzed the documents on behalf of the defence. According to the defence, they contained numerous anachronisms, inconsistencies and errors, suggesting the incriminating documents had been forged and used to frame the defendants.

15. According to the source, the Court repeatedly denied defence requests to reconsider the prosecution's claims and appoint an independent expert to verify the evidence, as well as repeated defence requests to call two key witnesses, former Commander of Land Forces, General Aytaç Yalman, and former Chief of General Staff, General Hilmi Özkök. The indictment reportedly claims that General Yalman prevented the alleged coup, while media reports have often pointed to General Özkök as having halted the alleged coup preparations.

As the two most senior military officers at the time, both are in a position to clarify the role of the seminar of 5 to 7 March 2003. Neither was questioned by prosecutors. The Court reportedly considered that their testimony would be "unnecessary".

16. On 15 June 2012, defence attorneys reportedly staged a walkout in protest at unfairness in the legal proceedings, the Court's refusal to grant requests for independent fact-finding and forensic analyses presented by the defence, and its refusal to appoint an independent expert to examine the alleged electronic evidence. On 16 April 2012, the defence lawyers filed a complaint with the Supreme Board of Judges and Prosecutors (HSYK) against the prosecutors in the case, claiming that their right to defence and a fair trial had been violated.

17. The source reports that on 4 August 2012, the Turkish Supreme Military Council, led by the Prime Minister, forcibly retired 40 generals and admirals, 34 of whom are on trial in this case.

18. The trial resumed on 6 August 2012. According to the source, given the retirement of the 34 generals and admirals on 4 August, there was hope among the relatives of the defendants that the judges would allow them to be released from custody for the remaining duration of the trial. However the Court ruled that the detentions would continue. The Court also ruled that the trial would resume without the presence of the defence lawyers at the subsequent sessions in August and September, even though Turkish law requires defence lawyers to be present. One defence lawyer, on behalf of all the other defence lawyers, submitted a letter to the judges summarizing the violations of due process in the trial. He was reportedly not allowed to address the court and walked out of the courtroom in protest.

19. Based upon complaints from the judges, new indictments have reportedly been issued against a number of the defendants for statements they made during the trial. The source cites the following two examples as illustrative. Ahmet Zeki Ucok was indicted on 29 February 2012 under the Turkish Criminal Code for allegedly "openly insulting" the three judges presiding in the Court. The indictment reportedly cites the following two statements made by Mr. Ucok during his defence on 10 November 2011, "These [are] extra-legal approaches to the law of the…courthouse, which sees itself above the Turkish judiciary…" "There exists no other court in any country of the world that so cruelly violates the rights and the freedom of the soldiers of its own army with unfounded charges based on fraudulent documents."

20. In addition, Çetin Doğan was indicted on 26 June 2012 for allegedly insulting public officials (Istanbul Counter-Terrorism Branch police officers) during his defence in court. The indictment reportedly cites the following statement made by Doğan, "The Counter-Terrorism Branch has turned into the branch for producing terror. We have said that this branch, which has prepared and produced the reports that form the basis of the indictments, has distorted the facts by claiming a document from the Ankara Police Department had come from the associations branch, and we filed a complaint about it…".

21. The source contends that the current detention of the defendants results from the deprivation of, in particular, their due process rights under Turkish law, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

22. The source further contends that the recent forced retirement of the 34 officers violates the presumption of innocence and indicates that the outcome of the trial has been predetermined.

23. The source points out that Turkish law requires prosecutors to collect and present evidence that is both inculpatory and exculpatory, and contends that the prosecutors have not presented evidence favourable to the defence and even taken steps to hide evidence from the defence.

24. The source also contends that the Court has not independently assessed the evidence submitted by the prosecution, and not allowed evidence by the defence on its veracity.

25. The source further contends that the detention of the defendants is disproportionate. At the time of the source's first submission on 7 September 2012, 163 defendants from the first indictment had been detained for up to 31 months, and 87 defendants from the second and third indictments had been detained for up to 27 months. According to the source, neither the Court nor the prosecution offered evidence suggesting that the defendants presented a potential flight risk or that they could be involved in the any further crimes. The Court refused the defence lawyers' request to address the prosecution's demand for continued detention.

26. The source points to the implementation of article 14, paragraph 3 (c), of the Covenant in the Turkish Criminal Procedure Code and Constitution, which requires courts to render written decisions on the continued detention of defendants in lieu of releasing them on bail. Under article 108 of the Turkish Criminal Procedure Code, such decisions must be issued monthly and contain legal and factual grounds for detention. The decisions affirming continued detention invoke generic pronouncements that the detention was necessary owing to, for example, "the nature of the charges" or "the continued presence of strong suspicion of criminal activity." The source contends that these statements are vague and overly broad.

27. The source also contends that on 13 June 2011, shortly before the second indictment was accepted, the Court placed microphones on the ceiling to record all conversations, including those between the defence attorneys and their clients, preventing confidential communication between them.

Response from the Government

28. The communication was sent to the Government of Turkey on 12 September 2012. The Government filed a request for extension of the deadline to respond on 14 November 2012 and this was granted by the Working Group at its sixty-fifth session in November 2012, in light of the complexity of the case.

29. On 17 December 2012, the Government replied to the communication. The Government informs the Working Group that a judicial first instance judgment was handed down on 21 September 2012 and that this is subject to appeal.

30. At the outset, the Government reminds the Working Group that some of the claimants have submitted their cases and similar petitions to the European Court of Human Rights. The cases before the Court and the Working Group are identical or parallel in relation to many issues. The Government informs the Working Group of decision n° 28484/10 of 10 April 2012 of the Court in the case of Çetin Doğan. It requires that the case before the Working Group be deemed inadmissible on this ground. The Government also submits that the case is inadmissible as domestic remedies have not been exhausted. In addition, the Government points to its new internal procedure for individuals who claim that their fundamental human rights have been violated.

31. The Government then turns to the events leading to the opening of the investigations in the trial of the *Balyoz* or "Sledgehammer" cases. In its edition of 22 January 2010, the *Taraf* newspaper published information regarding a planned military coup d'état inside the command of the first army of Istanbul, shortly after the rise to power of the AKP political

party (Party for Justice and Development) in late 2002 and early 2003. Further to the publication and the dissemination of the information in the press and the submission of evidence and other material (CDs, documents) to the Istanbul prosecutor's office, the Prosecutor of the Republic decided to open a criminal case.

32. According to the indictment, from 5 to 7 March 2003, under the orders of one of the applicants, Çetin Doğan, an army general and chief commander of the first battalion in Istanbul during this period of events, a generic "worst case scenario" plan was negotiated. The Government reports that the chief commander of the terrestrial forces at that time stated in an interview given on 2 September 2012 in the Hurriyet daily newspaper that the seminar given took place against his orders. During the course of the seminar, the conversations relating to this plan were recorded by order of the general. The Government reports that the tapes concerned as well as the other evidence were submitted to the prosecutor's office.

33. According to the Government's reply, on 26 January 2010, pursuant to article 153 of the Code of Criminal Procedure, the 11th Istanbul Assize Court ordered the restriction of access to the investigation file with respect to the particularity and the characteristics of the investigation, the persons against whom the investigation was being conducted and the presence of documents relating to State security and documents containing personal information about hundreds of people. In addition, on 23 February 2010, pursuant to article 10 of the Law on the fight against terrorism, the 10th Assize Court made another decision to limit access to the investigation file in order to prevent a breach of the confidentiality of the investigation.

34. The Government reports that on 6 July 2010 the prosecutor presented an indictment against 196 accused persons in total. On 19 July 2010, the 10th Appeal Court declared the indictment admissible.

35. Following an e-mail tip-off on 6 December 2010, a search was carried out by the intelligence service in a raid on the General Directorate at the Gölcük Fleet Command. The Government reports that a large amount of digital evidence was found hidden under the floorboards, including several operation plans and documents containing information obtained unlawfully by certain members of the police force. Some of these documents tended to confirm evidence obtained previously.

36. On the basis of evidence obtained during these searches, several statements were obtained and, on 11 November 2010, the Public Prosecutor of Istanbul prepared a second indictment against 143 defendants in total. On 23 November 2011, the competent court declared that the indictment was admissible. On 29 December 2011, a decision was rendered to consolidate this with the *Balyoz* case in view of the close connection in law and in fact between the two matters.

37. According to the Government's reply, a further e-mail tip-off dated 19 February 2011 was sent to the Directorate of Security of Istanbul. A search was carried out on 21 February 2011, at the Eskihesir residence of a retired intelligence service colonel. On 16 June 2011, on the basis of evidence obtained during the searches, the Public Prosecutor of Istanbul prepared a new indictment against a total of 28 defendants. On 28 June 2011, the indictment was declared admissible. On 3 October 2011, in view of the close connection in law and in fact between the two matters, a decision to consolidate this with the *Balyoz* case was rendered.

38. According to the Government's reply, the principal accusation made by the Public Prosecutor is that the defendants had prepared a coup d'état in five stages under the direction of General Çetin Doğan, aimed at overthrowing the Government. According to the Public Prosecutor, the first stage involved information activities. The names of hundreds of public servants (prefects, under-prefects, judges, prosecutors, burgomasters and

bureaucrats) were filed according to various criteria. In the second stage, it was planned to prepare the terrain for the military intervention. The third stage involved proclamation of military law and de facto military intervention and the overthrow of the Government. The fourth stage was to establish a national unity Government and the fifth was the planning of elections, to transfer executive authority back to civilians.

39. The Government reports that the Public Prosecutor demanded sentences of 15 to 20 years' imprisonment. The number of defendants charged and sentenced in the *Balyoz* affair was 365, of whom 250 were in detention awaiting trial.

40. The Government based its presentation of the case on the decision of the European Court of Human Rights, *Çetin Doğan* v. *Turkey* (n.28484/10, April 10th, 2012, §§ 9-17). The first hearing of the *Balyoz* case took place on 16 December 2010. Since then and until 21 September 2012 (when the ruling of the first hearing was given), 108 hearings had taken place. On 21 September 2012, following the announcement of the ruling of the first hearing at the end of the hearing, 327 defendants in the case were sentenced to between six and 20 years' imprisonment; the competent court decided to end the procedure for two of the defendants and to acquit 37 others. The competent court ordered the cases of the three remaining defendants to be dismissed.

41. At the time of the Government's reply to the Working Group, the full judgment with reasons had not yet been delivered. The Government reported that several defendants had stated that they would appeal.

42. The Government informs the Working Group that the defendants were placed under police custody and in detention awaiting trial on different dates. The 10th Circuit Court of Istanbul decided to place certain defendants in pretrial detention and to deliver arrest warrants for the defendants who had been absent from the hearing. In order to do this, the Court acted on the basis of evidence in the investigation file on the occurrence of events giving rise to serious suspicions concerning the commission of the offences in question; on the fact that not all of the evidence had been fully obtained; on the possibility that the defendants could be exercising a certain influence on witnesses; and on the fact that some witnesses had not yet taken the stand. It also acted on the basis of the fact that the offence of which the defendants were accused was among those cited in article 100 of the Turkish Criminal Procedure Act (CPP) and that the application of the relevant stipulations to the judicial review would therefore be insufficient, in light of the reasons mentioned above.

43. According to the Government's reply, the defendants who were not charged in the first indictment, were placed under pretrial detention either during the penal investigation stage conducted by the Public Prosecutor, or following the ordinance of admissibility of the second and third indictments. Within this context, the evidence collected during the search conducted in the Eskisehir residence of the retired intelligence service colonel and of the commander of the Gölcük Fleet was taken into consideration. During the defendants' pretrial detention, their detention conditions were examined at regular intervals in application of article 108 of the CPP and it was decided that the interested parties' detention be continued.

44. Pursuant to articles 100, 101, 104 and 10 of the CPP, the defendants were able to challenge by appeal the detention rulings. However their challenges were rejected by the appellate courts.

45. The Government notes that the petitioners have complained that the national authorities have acted against the principles protected by articles 5, 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant. The Government also notes that the applicants were deprived of their liberty after the opening of a criminal investigation against them. At the time of the submission of their communication to the Working Group, no ruling had been made against the applicants. Therefore, at the

time of the submission, the applicants were not being held under a final judgment of conviction, and they were not serving custodial sentences imposed on them. In its reply, the Government informs the Working Group that criminal proceedings against the applicants are pending before the Supreme Court and no final judgment has been rendered at the current time in relation to them.

46. The Government acknowledges that detention after trial may fall within the mandate of the Working Group on Arbitrary Detention, if a custodial sentence was imposed following a trial in which the fundamental guarantees of the right to a fair trial have not been met. In this regard, the Government notes that the applicants brought their complaints to the Working Group before the delivery of the first instance judgment of conviction of 21 September 2012. Given that the judgment in question was not final at this time, the Government emphasizes that the applicants' complaint cannot be considered as a claim related to deprivation of liberty after a final judgment. Accordingly, the claims in question cannot be examined in the same way as complaints concerning the phase before and during the trial and consequently fall only within the scope of article 5 of the European Convention on Human Rights and article 9 of the Covenant.

47. Moreover, according to the Government, the Working Group considers that it is not within its mandate to declare a deprivation of liberty "unfair" or "unjust", or to comment on the value of the evidence produced during trial. The Government notes that it is not for the Working Group to evaluate the facts and evidence in the case, nor is it a substitute for national courts of appeal.

48. The Government addresses the applicants' express challenges to the evidence upon which the courts have relied to order their temporary or provisional detention. The Government reiterates that it is up to the national judges to appreciate in an independent manner the value of the evidence and the investigation. The Government notes that it is obvious that nobody could be really sure about the value of the evidence until the end of the trial and the judicial process.

49. Notwithstanding the fact that the Government is of the view that the Working Group is not competent to assess the complaints relating to an alleged violation of the right to a fair trial, the Government considers it useful to specify that all the fundamental guarantees of the right to a fair trial, under international instruments ratified by Turkey (in this case article 6 of the European Convention on Human Rights and article 14 of the Covenant) have been met in this case.

50. According to the Government's reply, the deprivation of liberty is permitted with the purpose of bringing the person concerned before a competent judicial authority. The deprivation of liberty can only be justified if there are plausible reasons to suspect a person of having committed an offence, and in this respect the Government is of the opinion that the circumstances hereof justify the measure of deprivation of liberty as well as the methods used. The provisional detention of the defendants was justified in this case, under the international instruments ratified by Turkey and the detention cannot be considered arbitrary.

51. The Government considers that, when taking into consideration the evidence, the established facts detailed above, the nature of the offence in question and the sociopolitical context in Turkey over the last 50 years, it is reasonable to conclude that plausible reasons existed to suspect that the petitioners committed the offence. However, given the fact that the matter is still pending before the national appellate jurisdiction (Supreme Court) the Government once again deems it useful to note that it respects the presumption of innocence of the petitioners and accords primary importance to this principle.

52. Concerning the petitioners' claim that the criminal process and trial against them is in fact a political trial, the Government considers that it is impossible to accept such a

consideration and firmly denies this allegation. The Governments wonders if the petitioners have submitted to the Working Group any evidence in support of this allegation. In fact, the trial in question is being heard by an independent and impartial court, established by law and satisfying all the requirements for a court within the meaning of article 6 of the European Convention on Human Rights and article 14 of the Covenant. It relies on concrete facts and evidence, the examination of which is the responsibility of the lower courts.

53. The Government states that all petitioners in this matter were informed of the reasons for the deprivation of their liberty, within the shortest time limits required by the international instruments ratified by Turkey (article 5, paragraph 2, of the European Convention on Human Rights and article 9, paragraph 2, of the Covenant). Therefore the petitioners cannot allege that their deprivation of liberty is arbitrary.

54. With regard to the petitioners' allegation that the duration of their provisional detention is excessive, the Government notes that some petitioners have remained in pretrial detention for up to 23 months, and others up to 19 months or 15 months. The Government refers to the jurisprudence of the European Court of Human Rights in this respect. In view of the standards established at the international level and in light of the circumstances of this case, the nature of the alleged offence and in particular of the fact that organized crime was involved, the large number of defendants and the considerable evidence, the fact that it is confronted by a very complex matter and that the national authorities accorded sufficient attention and considerable diligence to this case, the Government considers that the said duration of detention cannot be considered to be unreasonable or arbitrary.

55. In its reply, the Government refers to article 5, paragraph 4, of the European Convention on Human Rights and article 9, paragraph 4, of the Covenant, which provide that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. The Government notes that the petitioners have in particular contested the restriction of access to all the evidence and material in the file at the examination stage.

56. In this regard, the Government considers that it is worth noting that the applicants had the opportunity to object to the orders of their placement and their continued detention. They also benefited from the assistance of a lawyer of their choice for the appeal proceedings. Requests for extension and appeal were also examined by independent and impartial courts as quickly as possible.

57. The Government emphasizes the need to preserve the confidentiality of statements in criminal proceedings. Giving the right of access to all the case documents from the initial phase would have had the effect of lifting the confidentiality of the investigation and jeopardizing the objective. It would lead to difficulties for States in their fight against organized crime in particular. Moreover, the Government considers that the restrictions on access to all the elements in the case were legitimate under international human rights instruments and in particular under the European Convention on Human Rights. The court dealing with the case based its decision on the restrictions on the fact that the investigation file contained a large number of documents relating to the privacy of certain persons, that this was required for the proper conduct of the investigation and that it contained confidential documents concerning national security. Thus the competent court took into account the right to privacy, the requirements for the efficient conduct of the investigation and national security. Finally, the fact that the petitioners were made aware of evidence of primary importance allowing them to appreciate the lawfulness of their arrest, and that the European Court of Human Rights case law does not impose the right of access by a suspect or by his lawyer to all evidence and material in the file at the initial phase of an

investigation, leads the Government to consider that the grievance of the petitioners based on the restriction of access to the evidence has no foundation.

58. Finally, the Government refers to article 5, paragraph 5, of the European Convention on Human Rights and article 9, paragraph 5, of the Covenant, which provide that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. In this respect, the Government considers that the petitioners were not deprived of their liberty unlawfully and that they have not exhausted all domestic legal recourses, in particular individual recourse before the Turkish Constitutional Court. Consequently, they have not given the national authorities the opportunity to rule on the question and they cannot allege any violation of this right before any international authority in view of the well-established principle of customary international law.

59. In conclusion, given the foregoing reasons, the Government considers that all requirements of the right to liberty and security were met in this case and, on the basis of the facts, there was no arbitrary detention.

Further comments from the source

60. The source submitted its additional comments on 11 April 2013. It informs the Working Group that the violations that it identified in its petition have been independently confirmed by the European Commission in connection with the accession of Turkey to the European Union and by reputable international NGOs.

61. In its annual progress report on Turkey, the European Commission stated:

> "Concerns persisted over the rights of the defence, lengthy pre-trial detention and excessively long and catch-all indictments, leading to significantly enhanced public scrutiny of the legitimacy of these trials. … These cases have been overshadowed by real concerns about their wide scope and the shortcomings in judicial proceedings.
>
> …
>
> "Investigations tend to expand rapidly; the judiciary accepts mainly evidence collected by the police only, or supplied by secret witnesses." [1]

62. The source notes that, rather than offering a justification for its actions or disputing the source's assertions with specifics, the Government in its response simply states in generic language that, "all the fundamental guarantees of the right to a fair trial . . . have been met in this case." The Government did not respond to the claims that in the trials the following violations had taken place: (1) shifting the burden of proof to defendants to prove their innocence; (2) the right to a trial without undue delay; and (3) violating attorney-client confidentiality. According to the source, they remain uncontroverted facts.

63. The source then reiterates and clarifies its original submission on a number of points. Given the forcible retirement and the additional indictments for defamation, the source reiterates that the Government was operating from a presumption that the defendants were guilty, indicating that the outcome of the trial was predetermined, and thus demonstrating that the Court had violated the defendants' right to be presumed innocent. The source notes that, rather than disputing these facts, the Turkish Government in its response simply stated in a conclusory manner, without further explanation, that "[The

[1] European Commission, Turkey 2012 Progress Report, October 10, 2012, p. 7, available at: http://www.avrupa.info.tr/fileadmin/Content/Files/File/key_documents-Turkish/tr_rapport_2012_en.pdf.

Government of Turkey] respects the presumption of innocence of the petitioners and accords primary importance to this principle."

64. The source also reiterates that the court omitted the process for evaluating evidence; denied defence requests for witnesses and experts; and withheld (or distorted) exculpatory evidence from the defence. In its response the Turkish Government asserted that this was necessary because such evidence had to remain confidential so as not to jeopardize the investigation and its objectives. The source notes that Turkish law dictates that prosecutors must collect and present evidence that implicates as well as that which exculpates and that article 14, paragraph 3(a), of the Covenant necessarily requires the accused to have access to all the information being used. The source submits that because the defendants did not have access to all the evidence, all proffered justifications by the Turkish Government are irrelevant, as such action was in violation of the defendants' rights under Turkish and international law.

65. The source further reiterates that the Government has violated the right of the defendants to be tried without undue delay. Twenty-one of the 163 defendants from the first indictment were detained for up to 23 months from their arrest until their conviction, with the remaining 142 defendants detained for up to 19 months, and 87 defendants from the second and third indictments detained for up to 15 months. The source submits that, during this period, neither the Court nor the prosecution provided any reasoning for the protracted proceedings. There was no periodic review satisfying Turkish law or the Covenant.

66. The source also notes that Turkish law requires courts to render written monthly decisions stating the legal and factual grounds for the continued detention of defendants in lieu of releasing them on bail. However, the Turkish Court, in all its decisions affirming continued detention, offered no detailed explanation as to why the defendants could not be released, other than invoking generic pronouncements that the detention was necessary due to, for example, "the nature of the charges" or "the continued presence of strong suspicion of criminal activity." According to the source, the Court refused the defence lawyers' request to speak following the Court's repeated demands for continued detention and did not provide an explanation as to why some defendants in the "Sledgehammer" case were released and tried while free, whereas the 250 that make up the vast majority were detained, despite the fact that all 365 defendants were facing identical legal charges.

67. With regard to the right to client-attorney confidentiality, the source reiterates that shortly before the second indictment, the Court had placed microphones on the ceiling to record all conversations in the courtroom, including those between the defence attorneys and their clients. The source submits that the result of the recording of the conversations was to prevent confidential communication between the defendants and their counsel, thus violating the right to attorney-client confidentiality provided for in article 14, paragraph 3(b) the Covenant and Turkish law. The source also notes that the Turkish Government provides no response to this due process violation.

68. In conclusion, the source contends that the continued detention of the petitioners is arbitrary, in that it violates the rights and fundamental freedoms established in the Covenant, the Universal Declaration of Human Rights, and the Body of Principles. They should therefore be released immediately from detention.

Discussion

69. The Government makes two main procedural points. One is that the cases are under appeal in the court system, and the other is that there is a domestic constitutional complaints procedure under which some actions have been brought by defendants to the current trials. The Government claims that the communication should be dismissed by the Working Group because the case is sub judice, or still under judicial consideration. It

suffices to note that the Working Group is not bound by any such sub judice rule, which in domestic jurisdictions imposes restrictions on out-of-court comments and statements regarding cases which are under judicial consideration. Similar considerations apply in relation to exhaustion of domestic remedies and lis pendens doctrines. The Working Group does not follow such doctrines in the same way as domestic courts or certain other international courts, tribunals or other human rights bodies. Otherwise, the Working Group would not be able to fulfil its mandate to consider cases of violations of the right of the accused to be tried within a reasonable time or to be released.

70. The other main procedural point concerns the applications to the European Court of Human Rights. The Government has requested that the communication be declared inadmissible given that some of the claimants have submitted their case and a similar petition before the European Court of Human Rights and that the cases before the European Court and the Working Group are identical or parallel on many issues. The Government has referred the Working Croup to the European Court's rulings on admissibility and the further procedures in Case no. 28484/10, *Çetin Doğan* v. *Turkey*. The Working Group has benefited from the summary of the facts and grievances linked with the case in the preliminary decision of the European Court on admissibility. In 2012, the European Court posed these two questions to the parties:

> 1. Did the applicant have at his disposal, as guaranteed by article 5 § 4 of the Convention, an effective remedy available to contest the legality of his pre-trial detention?
>
> In particular, during the period of instruction (prior to the opening of the hearings before the crown court), did the applicant benefit from a fair hearing and a contradictory procedure before the judge during the examination of his requests to be released (*Erkan İnan* v. *Turkey*, no. 13176/05, §§ 31-32, 23 February 2010)?
>
> 2. Moreover, during the proceedings, did the applicant have the possibility to be notified of the opinion of the Public Prosecutor on the appeals he introduced against the decisions denying his requests for release (*Altınok* v. *Turkey*, no. 31610/08, §§ 57-61, 29 November 2011)?

71. The Working Group does not have the same admissibility criteria as the European Court. In a case such as Mr. Doğan's, the European Court will primarily review compliance with the European Convention on Human Rights, while the Working Group will review compliance with the Covenant and customary international law. The Working Group does not consider itself precluded from the examination of a communication on the sole ground that an identical or the same application is pending before the European Court. The Working Group will in this case proceed to consider the issues relating to the Covenant and customary international law.

72. Having studied and analysed the material before it, the Working Group considers it appropriate to address all 250 individuals in one Opinion, as their legal charges included involvement in the alleged "Sledgehammer" Coup to overthrow the Government, and the allegations put forward by the source relate to these individuals as a group.

73. The Government has not addressed a number of the allegations put forward by the source, including in relation to due process violations. The Working Group notes that the Government does not avail itself of the opportunity of offering an explanation for the various allegations in relation to due process violations either by acknowledging that these have indeed taken place as identified by the source or by rebutting or otherwise disputing them. In the absence of any further information submitted by the Government other than that referred to above and taken duly into account, the Working Group must base its opinion on the case as provided by the source. According to its revised methods of work,

the Working Group is in a position to render an opinion on the case on the basis of the submissions that have been made.

74. The source has alleged that the Government has violated the right of the defendants to be tried without undue delay. In this regard the Working Group notes that, while the right to a fair trial necessarily implies that justice be done without undue delay, the question as to what is a reasonable time depends on the circumstances and complexity of each case and, where appropriate, on the use of remedies and of the right periodically to contest the accused's continued preventive detention. In reaching its decisions, the Working Group proceeds on a case-by-case basis. The Government has not shown that the defendants had effective remedies available to contest the legality of their pretrial detention as well as the issue of bail. The Government has not shown that the courts provided periodic decisions stating the legal and factual grounds for the continued detention of the defendants, also addressing the proportionality review involved in determining continued detention in lieu of release on bail. In the Working Group's opinion, this provides sufficient grounds for it to conclude that there has been a violation of article 9, paragraph 3, of the Covenant and article 9 of the Universal Declaration of Human Rights.

75. The source has alleged that there were several grave violations of the defendants' fair trial rights in the main proceedings. The Working Group has considered all the submissions made by the source and the responses by the Government. The Government's response did not dispute the source's allegations about procedural irregularities in the first phase of the trial, particularly with regard to the requirement under Turkish law that a court must undergo a process of evaluating the authenticity of the evidence before it. Nor did the Government dispute the source's allegation that it refused to consider three expert reports from the defence refuting the authenticity of the digital evidence or to appoint its own expert to evaluate that evidence. Furthermore, the Government's response did not dispute that the court refused to allow the defence to call two key witnesses, one of whom claimed to have thwarted the alleged coup.

76. The Government contends that the restrictions on the accused's access to confidential material in the investigation file were legitimate under international human rights instruments. In this regard, the Working Group notes that such restrictions would be legitimate in respect of material which is not then used as evidence against the accused at trial and is not of an exculpatory nature. In the current case, however, in violation of article 14, paragraph 3(b) of the Covenant, the accused, on the pretext of national security, were denied access to substantial evidence used by the prosecution at trial and to some potentially exculpatory evidence.

77. The Government did not rebut the allegation that microphones placed throughout the courtroom enabled the Government to listen to confidential attorney-client communications during the trial. Thus, in violation of article 14, paragraph 3(b), the accused were deprived of the right to communicate with their defence counsel in private in the courtroom during the trial.

78. The Working Group concludes that, given the circumstances of the case, the due process violations identified above constitute breaches of articles 9 and 14, paragraph 3, of the International Covenant on Civil and Political Rights and articles 9, 10 and 11 of the Universal Declaration of Human Rights. Thus, the deprivation of liberty of the 250 petitioners falls within category III of the arbitrary detention categories referred to by the Working Group when considering the cases submitted to it.

Disposition

79. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of the 250 detained defendants in the *Balyoz* or "Sledgehammer" cases is arbitrary, in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights as well as articles 9, 10 and 11 of the Universal Declaration of Human Rights; it falls within category III of the arbitrary detention categories referred to by the Working Group when considering the cases submitted to it.

80. Consequent upon the opinion rendered, the Working Group requests the Government of Turkey to remedy the situation of these 250 persons in accordance with the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Working Group considers that, taking into account all the circumstances of the case, an adequate remedy would be an enforceable right to compensation under article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

81. The Working Group has noted the information provided by the Government of Turkey in its submissions that the cases are subject to various domestic appeals and review procedures. Due account would need to be taken in these procedures of the shortcomings identified above in this Opinion.

[Adopted on 1 May 2013]