



Joint Stakeholder Submission by the Open Dialogue Foundation (ODF), the Human Rights Defenders e.V. and the Arrested Lawyers Initiative to the UN Human Rights Council's Universal Periodic Review – TURKEY

35th Session (Jan.-Feb. 2020)

ARBITRARY APPLICATION OF ANTI-TERRORISM LAWS AND CRIMINALIZATION OF USING AN I-MESSAGE APPLICATION (BYLOCK)

16 July 2019



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I. SUBMITTERS

- a. The Open Dialogue Foundation (ODF)** was established in Poland in 2009 on the initiative of Ukrainian student and civic activist Lyudmyla Kozlovska (who currently serves as President of the Foundation). Since its founding, statutory objectives of the Foundation include the protection of human rights, democracy and the rule of law in the post-Soviet area. The Foundation originally focused its attention primarily on Kazakhstan, Russia, Ukraine and – since 2016 – Moldova, but this area of interest was expanded in July 2017 due to the rapidly deteriorating situation in Poland and other EU member states affected by illiberal policies implemented by their populist governments. ODF pursues its goals through the organisation of observation missions, monitoring especially individual human rights' violation cases. The Foundation also has extensive experience in the field of protection of the rights of political prisoners and refugees. Based on its work, ODF publishes analytical reports and distributes them among the UN, EU institutions, OSCE, Council of Europe, foreign ministries and parliaments. The Foundation has its permanent representative offices in Warsaw and Brussels.

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- b. Human Rights Defenders (HRD)** is a nonprofit and nongovernmental organization established under German Law, based in Koln. As an international civil society organisation, HRD is independent of any political ideology, economic interest or religion. It has aim to support people who are exposed to all kinds of human rights violations. HRD works to defend right to life, rule of law, right to privacy, freedom of expression, freedom of thought, conscience and religion, freedom of associations.



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- C. **The Arrested Lawyers Initiative (ALI)** is a human rights group, founded in 2016, consists of lawyers across Europe. The ALI is based in Brussels, makes advocacy for lawyers persecuted due to exercising their profession. The ALI has produced more than 10 reports and factsheets which have been cited by the UN High Commissioner and Special Rapporteurs, the European Parliament, the US State Department and various NGOs.
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II. INTRODUCTION

1. Republic of Turkey is a member of the United Nations and party to the ICCPR and the ICESCR. On 21 July, 2016, the Turkish Government declared a state of emergency. The state of emergency was effective until 18 July, 2018. Turkey notified a derogation from the ICCPR, Art. 2§3 (right to an effective remedy), Art. 9 (right to liberty and security), Art. 10 (right to humane treatment in detention), Art. 12 (freedom of movement), Art. 13 (procedural guarantees in expulsion proceedings), Art. 14 (right to a fair trial), Art. 17 (right to privacy), Art. 19 (right to freedom of expression), article 21 (right of peaceful assembly), Art. 22 (freedom of association), Art. 25 (political rights), Art. 26 (equality before the law) and Art. 27 (protection of minorities) ICCPR were mentioned as the rights, which would have been effected from the derogations.¹
2. Since 2014, Turkey has been arbitrarily using the anti-terrorism legislation to oppress its dissents. Commissioner for Human Right of the Council of Europe said:
 “Laws with an overly broad definition of terrorism and membership of a criminal organisation and the judiciary’s tendency to stretch them even further is not a new problem in Turkey, as attested in numerous judgments of the European Court of Human Rights. This problem has reached unprecedented levels in recent times. Prosecutors, and increasingly also the courts, consider lawful and peaceful acts and statements protected under the European Convention on Human Rights as proof of criminal activity ... what is used as evidence is sometimes so inconsistent and arbitrary ... that it has become virtually impossible to foresee in good-faith the

¹ International Commission of Jurists, ‘Justice Suspended: Access to Justice and the State of Emergency in Turkey’ (2018), 8-9 <<https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf>> accessed 4 March 2019



legal consequences of actions ... this uncertainty discourages legitimate dissent and criticism.”²

3. According to the survey³ by the Arrested Lawyers Initiative carried out on the Turkish Justice Ministry’s statistics,
 - Turkey has indicted 221.366 people under Art. 314 Turkish Penal Code (membership to an armed terrorist organisation) between 2012 and 2017,
 - moreover, public prosecutors have indicted more than 300.000 individuals under 309-316 of Turkish Penal Code which stipulate crimes against the Constitutional Order in 2017 and 2018,
 - Statistics also indicate that, in 2017, Turkish prosecutors have opened investigations against 527.154 individuals under Articles 309-316, this number is 456.175 in 2018.

4. The Penal Code does not contain a definition of an armed organisation or an armed group. The lack of legal definitions and criteria of the armed terrorist organization and the crime of membership in the armed terrorist organization make them prone to arbitrary application.⁴ Vague formulation of the criminal provisions on the security of the state and terrorism and their overly broad interpretation⁵ by the Turkish judges and prosecutors make all lawyers and other human rights defenders a prospective victim of judicial harassment.

III. CRIMINALIZATION OF USING AN I-MESSAGE APPLICATION (BYLOCK)

5. ByLock was an encrypted i-message application downloadable via Google Play Store, Apple Store and was in service until 19 February, 2016.
6. Turkey’s National Intelligence Organization (Milli İstihbarat Teşkilatı or MİT) obtained the digital data related to Bylock by intelligence means (hacking and reverse engineering) from the servers based in Lithuania (According to the Lithuanian Government, Turkey has never submitted an official request under judicial cooperation procedures) and issued a report concluding: “ByLock

² <https://www.coe.int/en/web/commissioner/-/turkey-needs-to-put-an-end-to-arbitrariness-in-the-judiciary-and-to-protect-human-rights-defenders>

³ <https://arrestedlawyers.org/2019/05/30/abuse-of-the-anti-terrorism-laws-by-turkey-is-steadily-increasing/>

⁴ CDL-AD(2016)002-e Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)002-e_12](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e_12)

⁵ <https://rm.coe.int/third-party-intervention-10-cases-v-turkey-on-freedom-of-expression-an/168075f48f>



has been offered to the exclusive use of the members of the Gulen Movement” though it was downloadable via Google Play Store, Apple Store and other electronic markets.⁶

7. With an unprecedented judgment, the General Criminal Board of the Court of Cassation (Turkey’s highest criminal court) rendered a judgment accepting the MİT’s opinion and concluding that downloading or using an encrypted i-message application (called ByLock) constitutes sufficient ground in order to convict someone under the Article 314 of the Turkish Penal Code which stipulates the membership to an armed terrorist organisation, and requires 7,5 to 15 years imprisonment.⁷
8. Under these judgments, Turkey has so far prosecuted and detained 79.337⁸ individuals under anti-terrorism legislation for allegedly using the messaging application. According to the Deputy Minister of Interior, there are still almost 15.000 individuals to be prosecuted on the same grounds.

IV. CRITICISM TOWARDS the MİT’s report on BYLOCK

9. FOX-IT, a Dutch forensic IT company:

FOX-IT which issued an independent report⁹ that describes the MİT investigation as, in advance, biased towards its stated conclusion.

The investigation performed by Fox-IT contradicts the key findings of the MİT. Fox-IT also discovered inconsistencies in the MİT report that indicated manipulation of results and/or screenshots by MİT. What is more, Fox-IT found that the MİT investigation is fundamentally flawed due to the contradictory and baseless findings, lack of objectivity and lack of transparency.

Overall, Fox-IT concluded that the quality of the MİT report is very low, especially when it was weighed against the legal consequences of the conclusions which is the detention of 75,000 Turkish

⁶ It is still dubious how MIT acquired so-called Bylock data and Turkish authorities intentionally leave this question unanswered. Although Turkish case law requires that digital data shall be shared with suspects, defendants and the Courts, Turkish Intel has not yet shared it. It only sends to the Courts reports individualized for the defendant as a hard copy.

⁷ The Court of Cassation, 16th Chamber, Case No. 2015/3, Decision No. 2017/3 (24 April 2017); the General Criminal Board of the Court of Cassation, 26.09.2017 dated, 2017/16 MD-956 E. 2017/370 K, the General Criminal Board of the Court of Cassation, 20.12.2018 dated, 2018/419 E, 2018/661 K.

⁸ Statement of Deputy Minister of Interiors: <https://www.sozcu.com.tr/2019/gundem/catakli-511-bin-kisiye-fetodenislem-yapildi-3770339/>

⁹ Fox-IT, “Expert Witness Report on ByLock Investigation” (13 September 2017): <https://foxitsecurity.files.wordpress.com/2017/09/bylock-fox-it-expert-witness-report-english.pdf>.



citizens.¹⁰ Fox-IT found the report was fundamentally flawed in its argumentation, not based on forensic principles, and lacking objectivity and transparency.

10. FREEDOM HOUSE¹¹

Tens of thousands of Turkish citizens have been arbitrarily detained for their alleged use of the encrypted communications app ByLock. Legal and technical experts have disputed the government's claim that the app was primarily used by members of the Gülen movement, pointing to its wide availability and popularity in 41 countries. It was once available to download at no cost on the app stores of Apple and Google, until it was removed by the developer.*

Turkish officials claim that the app was designed by a senior member of the Gülen movement. Experts believe that Turkey's National Intelligence Organization (MIT) hacked a ByLock server located in Lithuania, which listed its hundreds of thousands of users in an unencrypted form. Despite a lack of evidence, and the arbitrary nature of the blanket arrests, numerous users have been deemed guilty by association for simply downloading the app. The ByLock controversy has also ensnared members of the human rights community. Taner Kılıç, the Turkey chair of Amnesty International, was detained in June 2017, and the only known evidence in his case was the allegation that he had used ByLock, which he has denied.

11. Moreover, International respected lawyers concluded that it is “nonsensical to suggest that [ByLock's] availability was restricted to a particular group of people,”¹² i.e. members of the Gulen Movement.

¹⁰ <https://blog.fox-it.com/2017/09/13/fox-it-debunks-report-on-bylock-app-that-landed-75000-people-in-jail-in-turkey/>

¹¹ For example, see Freedom House, “Freedom on the Net 2017: Turkey Country Report”, at pp. 14, 15: <https://freedomhouse.org/report/freedom-net/2017/turkey>; Human Rights Defender, “What Is ByLock?” (V3.0), available at: <https://humanrights-ev.com/what-is-bylock/>.

¹² Thomas K. Moore, “Opinion on the Legality of the Actions of the Turkish State in the Aftermath of the Failed Coup Attempt in 2016 & The Reliance on the Use of the ByLock App as Evidence of Membership of a Terrorist Organization” (24 July 2017): <http://2oq5cg28288838bmfu32g94v-wpengine.netdna-ssl.com/wp-content/uploads/2017/09/Redacted-Opinion.pdf>; <https://www.2bedfordrow.co.uk/opinion-on-the-legality-of-the-actions-of-the-turkish-state/> accessed 28 May 2019



12. The Arrested Lawyers Initiative, an international human rights group, presented the discrepancies of the Turkish Government's narrative on ByLock.¹³

V. NATIONAL AND INTERNATIONAL FRAMEWORK

13. Constitution of the Republic of Turkey and the International Covenant on Civil and Political Rights (ICCPR) guarantee:

- a) freedom from the retroactivity of crimes and punishments (art. 15, ICCPR; art. 11, Universal Declaration of Human Rights (UDHR) ; art. 38 TC);
- b) freedom of expression (art. 19¹⁴, ICCPR; art. 19, UDHR, art. 26¹⁵ TC); and
- c) the right not to be subject to arbitrary arrest or detention (art. 9, ICCPR; art. 9, UDHR); art. 19 TC),
- d) the right to demand respect for his/her private and family life¹⁶, the freedom of communication,¹⁷ and the right to request the protection of his/her personal data.¹⁸

¹³ Arrested Lawyers Initiative, Bylock-Ever Changing Evidence, https://arrestedlawyers.files.wordpress.com/2018/01/bylock_report_by_the_arrested_lawyers.pdf

¹⁴ **Article 19 ICCPR**

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

¹⁵ **Freedom of expression and dissemination of thought, Article 26**- Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively.

¹⁶ **Article 17 ICCPR**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

¹⁷ **Freedom of communication, Article 22**- Everyone has the freedom of communication. Privacy of communication is fundamental. Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law in cases where delay is prejudicial, again on the abovementioned grounds, communication shall not be impeded nor its privacy be violated.

¹⁸ **Article 20**- Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated...

Everyone has the right to request the protection of his/her personal data... Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law.



14. Freedom from the retroactivity of crimes and punishments and the principle of no punishment without law have been envisaged in a non-derogable way by the Constitution (Art.15§2), the ECHR (Art. 15§2) and the ICCPR (Art. 4§2).
15. According the Working Group on Arbitrary Detention (WGAD), legality requires “the substance of penal law to be due and appropriate in a democratic society that respects human dignity and rights.”¹⁹ Consequently, penal punishment requires that the accused be guilty and the punishment necessary, in the interest of formal and material justice.²⁰

VI. CONCLUSION

16. Criminalization of the use of ByLock constitutes the retroactive punishment because

- it is not foreseeable under Turkish Laws,
- it is unprecedented in Turkish case law²¹,
- at the time of such alleged use it was not the object of sufficiently precise, valid law to which a sufficiently certain sanction was attached.²²

17. The use of ByLock does not prove criminal guilt.²³ Using an electronic communication software which was offered to public use via the most visited and famous online platform (i.e Apple and Google Play stores) is legitimate exercise of fundamental rights, namely the freedom of expression and the freedom of [confidential] communication, not a crime. Freedom of expression includes the right to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, including all forms of electronic and internet-based modes of expression.²⁴

¹⁹ WGAD, Opinion No. 10/2018, at para. 53.

²⁰ Ibid.

²¹ Using ByLock only became de facto criminal after-the-fact as a result of the MIT report and its unprecedented judicial interpretation.

²² Ibid., at para. 50.

²³ Privacy International, Being arrested for using encryption like being arrested for locking your front door or owning a safe, <http://www.bylockreality.com/index.php/2018/01/22/being-arrested-for-using-encryption-like-being-arrested-for-locking-your-front-door-or-owning-a-safe/>

²⁴ Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, at paras. 11, 12.



18. A conviction may be based on correspondence which show a crime has been committed provided that such correspondences have been legally acquired and in any case it is supported with other concrete evidence.
19. An arrest or detention that lacks any legal basis—in violation of the principle of legality—is arbitrary.²⁵ Retroactive criminal punishment by detention amounts to arbitrary detention.²⁶ Arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the ICCPR, such as freedom of expression, is arbitrary.²⁷
20. By retroactively criminalizing a legal means of expression and communication, Turkey has violated the principle of legality, as well as its national and international obligations
- i. to protect and respect
 - the freedom of expression,
 - the freedom of confidential communication,
 - the principle of no punishment without law,
 - the prohibition of retroactive punishment,
 - the right to privacy of private life, and
 - ii. to abstain from arbitrary detention.
21. UN Human Right Committee opted that detention on grounds of using or downloading Bylock cannot justify a deprivation of liberty.²⁸
22. UN Working Group on Arbitrary Detention, has constantly²⁹ opted for the response that Turkey, detaining an individual on grounds of using Bylock constitutes violation of freedom of expression³⁰ and the right to liberty (Article 9 ICCPR). Furthermore, the WGAD concluded that the Turkish Government's detention praxis against the members of the Gulen Movement forms the Category-

²⁵ Human Rights Committee, General Comment No. 35, “Article 9: Liberty and Security of Person”, at para. 11.

²⁶ Ibid., at para. 17.

²⁷ Ibid.

²⁸ Views adopted by the Committee under the Optional Protocol, concerning communication No. 2980/2017, CCPR/C/125/D/2980/2017, ‘It recalls that a derogation under article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary.’

²⁹ In six of seven of the complaints lodged by those detained in the investigation, which were carried out after the 2016 coup attempt, and with which derogations from the ICCPR were involved.

³⁰ WGAD, Opinion No. 44/2018, at paras. 86—88; WGAD, Opinion No. 42/2018, at paras. 88, 89.



V³¹ violation³² (in other words, the WGAD opted for the decision that Turkey has committed a violation of the right to liberty on the grounds of discrimination that is based on nationality, religion, ethnic or social origin, political or other opinions, or any other status).

23. Concerns over the accuracy of the MIT report, the legality of the data collection upon which it is founded, and the legality of its use as evidence in court amplify and multiply the grounds on which Turkey has violated its international human rights commitments.³³

VII. RECOMMENDATIONS

24. We urge the Turkish Government to

- a) Unconditionally release and drop charges against all individuals who have been arbitrarily prosecuted or detained based on the alleged use of ByLock,
- b) Authorize an official visit by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism to investigate prosecutions in response to the attempted coup in July 2016 and make pertinent recommendations,
- c) Authorize an official visit by the UN Special Rapporteur on the right to privacy to review the Millî İstihbarat Teşkilatı investigation into connections between ByLock,
- d) Share the digital data which has been using for prosecutions of alleged ByLock users with the defendants and their lawyers, and clarify how this data was acquired,

³¹ Office of the United Nations' High Commissioner for Human Rights, 'Revised Fact Sheet No. 26' (8 February 2019) 6

<<https://www.ohchr.org/Documents/Issues/Detention/FactSheet26.pdf>> accessed 3 March 2019.

Within the context of the WGAD, the definition of Category V is as follows: '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.'

³² UN Working Group on Arbitrary Detention, Opinion No. 78/2018, concerning Hamza Yaman (Turkey), UN Doc A/HRC/WGAD/2018/78; Opinion No. 84/2018 concerning Andrew Craig Brunson (Turkey), UN Doc A/HRC/WGAD/2018/84; Opinion No. 42/2018 concerning Mestan Yayman (Turkey) UN Doc A/HRC/WGAD/2018/42; Opinion No. 43/2018 concerning Ahmet Caliskan (Turkey) UN Doc A/HRC/WGAD/2018/43; Opinion No. 44/2018 concerning Muharrem Gençtürk (Turkey) UN Doc A/HRC/WGAD/2018/44; Opinion No. 11/2018 concerning Mesut Kaçmaz, Meral Kaçmaz and two minors (Pakistan and Turkey) UN Doc A/HRC/WGAD/2018/11.

'In these complaints, the UN-WGAD concluded that Turkey violated Articles 2, 7, 9, 14, 16, 19, 21, 22, 26 ICCPR, on the grounds of discrimination based on nationality, religion, ethnic or social origin, political or other opinions, or any other status.'

³³ See in particular Yasir Gokce, "The Bylock Fallacy: An In-depth Analysis of the Bylock Investigations in Turkey" (2018) 26 Digital Investigation 81.



- e) Conduct a legal review regarding using the principle of retroactive law in ByLock cases,
- f) At the legislative level, narrow and clarify the concepts of terrorism, terrorist organisation and armed group, as well as the concept of participation in a terrorist organisation – in accordance with international standards and obligations under the ICCPR and the European Convention on Human Rights,
- g) In accordance with internationally recognised human rights standards, specify the criteria for prosecuting terrorism cases with a view to avoiding its broad interpretation as well as selective and discriminatory application,
- h) Adopt legislative and law enforcement measures to ensure that counter-terrorism legislation is not used against those exercising their right to freedom of expression, freedom of opinion and freedom of information, as well as against those engaged in peaceful and legitimate journalistic, public, legal, and human rights activities,
- i) Ensure effective, comprehensive and impartial investigation of violations committed by law enforcement and intelligence officers when investigating cases involving charges of “propaganda” and “distribution of materials of terrorist organisations”,
- j) Ensure free and safe working conditions for lawyers in counter-terrorism cases,
- k) Reaffirm the commitment to human rights obligations under international agreements ratified by Turkey.