

UPR Submission
on
Right to Privacy in Turkey
By
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Foundation for Education, Training and Integration) (SERA)

For
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EXECUTIVE SUMMARY

1. This submission of the Foundation SERA (Stiftung für Erziehung, Ausbildung und Integration / Foundation for Education, Training and Integration) (SERA) highlights a number of key areas of concern regarding Turkey's compliance with its international human rights obligations relating to right to privacy, freedom of expression, principle of legality and unacceptability of retroactive criminalization.
2. This submission examines the utilization of ByLock by the Turkish authorities as legal evidence and as a criminal act, and underlines that such use is not only a violation of Turkey's international commitments on freedom of expression and right to privacy, but is also against the principle of legality and is additionally a form of retroactive criminalization.
3. This submission ends with a recommendations section.

INTERNATIONAL AND CONSTITUTIONAL OBLIGATIONS OF TURKEY

4. The republic of Turkey is a member of the United Nations and party to the International Covenant on Civil and Political Rights (ICCPR). The ICCPR guarantees freedom from the retroactivity of crimes and punishments (art. 15, ICCPR; art. 11, UDHR); freedom of expression (art. 19, ICCPR; art. 19, UDHR); and the right not to be subject to arbitrary arrest or detention (art. 9, ICCPR; art. 9, UDHR).
5. 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 (Arts. 38 and 15§2), the ECHR (Arts.7 and 15§2) and the ICCPR (Arts. 15 and 4§2).

LEGAL FRAMEWORK RESTRICTIONS

1. Between July 2016 and 2019, Turkey prosecuted and detained 79,337¹ individuals under anti-terrorism legislation for allegedly using the messaging application ByLock, an encrypted messaging application downloadable via Google Play Store or Apple Store and was in service until 19th February 2016. According to the Deputy Minister of Interior, there are still almost 15,000 individuals to be prosecuted on the same grounds.
2. Turkey's National Intelligence Agency (Millî 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 has been offered to the exclusive use of the members of the Gülen Movement" though it was downloadable via Google Play Store, Apple Store and other electronic markets.
3. Although the MİT report has been widely criticized² by:
 - 1.1. Fox-IT, a Dutch forensic IT company which issued an independent report³ that described the MİT investigation as, in advance, biased towards its stated conclusion (Fox-IT found the report was fundamentally flawed in its argumentation, not based on forensic principles, and lacking objectivity and transparency).
 - 1.2. Internationally respected lawyers who concluded it is "nonsensical to suggest that [ByLock's] availability was restricted to a particular group of people,"⁴ i.e. members of the Gülen Movement,
 - 1.3. International human rights groups⁵ due to discrepancies it includes,

Turkey's highest criminal court accepted MİT's conclusion and held that technical data⁶ proving an individual downloaded or used ByLock constitutes evidence of membership

¹ Statement of Deputy Minister of Interiors: <https://www.sozcu.com.tr/2019/gundem/catakli-511-bin-kisiye-fetoden-islem-yapildi-3770339/>

² 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/>.

³ 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>.

⁴ 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

⁵ Arrested Lawyers Initiative, ByLock-Ever Changing Evidence,

https://arrestedlawyers.files.wordpress.com/2018/01/ByLock_report_by_the_arrested_lawyers.pdf

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/>

⁶ Though it is dubious how MİT acquired so-called ByLock data and Turkish authorities intentionally leave this question unanswered. Coupled with the fact that the forensic principles were not followed in ByLock

in the designated terrorist organization FETÖ/PDY, a crime under art. 314 of the Turkish Penal Code.⁷ Therefore, using ByLock is accepted as a crime in Turkey.

4. The MIT investigation produced an “arrest list” of ByLock users. As of November 2018, the list identified 95,310 ByLock users; the Turkish Government carried out criminal operations against 79,339 individuals; and operations against 15,000 more were planned.⁸
5. By prosecuting and detaining individuals because they allegedly used ByLock, Turkey has violated its international obligations to adhere to the principle of legality, protect freedom of expression, and abstain from arbitrary detention.
6. The Working Group on Arbitrary Detention (WGAD) has described legality as requiring “the substance of penal law to be due and appropriate in a democratic society that respects human dignity and rights.”⁹ Penal punishment thus requires that the accused be guilty and the punishment necessary, in the interest of formal and material justice.¹⁰
7. The retroactive criminalization of the use of ByLock violates the principle of legality, since at the time of such alleged use (in all cases before the attempted coup) there was no law banning its use, and no sanction was attached to its use.¹¹ No one using ByLock would have known that their behaviour in so doing was criminal; it was not foreseeable. Using ByLock only became de facto criminal after-the-fact as a result of the MIT report and its judicial interpretation.
8. By retroactively criminalizing a legal means of expression, Turkey has violated the principle of legality, as well as its international obligations to protect freedom of expression and abstain from arbitrary detention.
9. The use of ByLock does not prove criminal guilt. Convictions based on ByLock use therefore violate the principle of legality. The so-called FETÖ/PDY members may have used ByLock, but using ByLock, a public messaging application, does not make someone a FETÖ/PDY member. As the Council of Europe Commissioner for Human Rights observed: “[I]t would be rare for a Turkish citizen never to have had any contact or dealings with [FETÖ/PDY] in one way or another.”¹²

prosecutions, it is perfectly reasonable to assert that Turkish people snared under ByLock investigations have had their human rights violated.

⁷ The Court of Cassation, 16th Chamber, Case No. 2015/3, Decision No. 2017/3 (24 April 2017); the Criminal Chambers of the Court of Cassation, General Assembly, Decision No. 2017/16.MD-956, Case No. 2017/370 (26 September 2017).

⁸ Cumhuriyet Daily, “New ‘Purple Brain’ cases are on the way” (17 November 2018): http://www.cumhuriyet.com.tr/haber/turkiye/1144039/Yeni_Mor_Beyin_vakalari_yolda.html; see also the Arrested Lawyers Initiative, “Report: Ever-Changing Evidence: ByLock” (December 2017), at pp. 6–12: https://arrestedlawyers.files.wordpress.com/2018/01/ByLock_report_by_the_arrested_lawyers.pdf.

⁹ WGAD, Opinion No. 10/2018, at para. 53.

¹⁰ Ibid.

¹¹ Ibid., at para. 50.

¹² Council of Europe Commissioner for Human Rights, “Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey” (7 October 2016), at para. 20: [https://rm.coe.int/ref/CommDH\(2016\)35](https://rm.coe.int/ref/CommDH(2016)35).

10. 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.¹³
11. An arrest or detention that lacks any legal basis—in violation of the principle of legality—is arbitrary.¹⁴ Retroactive criminal punishment by detention amounts to arbitrary detention.¹⁵ Arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the ICCPR, such as freedom of expression, is arbitrary.¹⁶
12. The UN Human Rights Committee opted that detention on the grounds of using or downloading Bylock cannot justify a deprivation of liberty.¹⁷
13. The UN Working Group on Arbitrary Detention, has constantly¹⁸ opted for the response that Turkey, detaining an individual on grounds of using Bylock constitutes violation of freedom of expression¹⁹ and the right to liberty (Article 9 ICCPR). Furthermore, the WGAD concluded that the Turkish Government’s detention praxis against the members of the Gülen Movement forms the Category-V²⁰ violation.²¹ This suggests that 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.
14. 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 are sufficient

¹³ Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, at paras. 11, 12.

¹⁴ Human Rights Committee, General Comment No. 35, “Article 9: Liberty and Security of Person”, at para. 11.

¹⁵ *Ibid.*, at para. 17.

¹⁶ *Ibid.*

¹⁷ 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.’

¹⁸ 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.

¹⁹ WGAD, Opinion No. 44/2018, at paras. 86—88; WGAD, Opinion No. 42/2018, at paras. 88, 89.

²⁰ 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.’

²¹ 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.’

evidences that Turkey has violated its international human rights commitments while investigating, detaining, arresting and convicting its citizens on grounds of ByLock use.²²

RECOMMENDATIONS

SERA calls upon the government of Turkey to significantly improve the overall conditions for rule of law in the country. Particularly, in relation to retroactive criminalization of the use of ByLock the government of Turkey should:

1. Unconditionally release and drop charges against all individuals who have been arbitrarily prosecuted or detained based on the alleged use of ByLock.
2. 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.
3. Authorize an official visit by the UN Special Rapporteur on the right to privacy to review the National Intelligence Agency (MIT) investigation into connections between ByLock use and membership to a terrorist organization.

²² See in particular Yasir Gokce, "The ByLock Fallacy: An In-depth Analysis of the ByLock Investigations in Turkey" (2018) 26 Digital Investigation 81.