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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-ninth session, 23–27 November 2020

Opinion No. 89/2020 concerning Daler Sharipov (Tajikistan)

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 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 14 July 2020 the Working Group transmitted to the Government of Tajikistan a communication concerning Daler Sharipov. The Government has not replied to the communication. 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).

Submissions

Communication from the source

4. Daler Sharipov is a Tajik national, born in January 1988, whose usual residence is Vahdat, Tajikistan. He is an independent journalist, activist, and bookstore owner. He began his career working as a broadcaster at a State-owned television channel, Safina, where he was a presenter for two programmes, *Muoshirat* and *Katraaz Bahr*, which discussed youth issues.

5. According to the information received, in 2012 Mr. Sharipov started a youth organization called Kadam Bakadam to unite youth from all regions of the country to oppose corruption. However, the Government allegedly refused to allow the organization to be registered, and Mr. Sharipov was thereafter monitored and harassed by authorities. He was often called in for interrogations by police, he was beaten by unidentified assailants in May 2012 (the Ministry of Internal Affairs investigated the case but never found the perpetrators) and he was detained by security service officials after he filmed the funeral of a famous imam.

6. After leaving his broadcasting position, he took a job as columnist at an independent newspaper, *Ozodagon*, where he wrote about current issues. Mr. Sharipov was a strong advocate of press freedom. The source reports that *Ozodagon* was forced to close in 2019, after repeated harassment by the authorities, and most of the newspaper's staff sought asylum abroad. Mr. Sharipov remained in Dushanbe, writing frequently about campaigns to pressure Muslim women into refraining from wearing hijabs, as well as other issues.

a. Arrest and detention

7. The source indicates that, on 28 January 2020, Mr. Sharipov was called for questioning by the State Committee for National Security. He was detained upon arrival, allegedly without presentation of a warrant and without being informed of the grounds for his arrest, and was held without access to a lawyer or his family for three days. Additionally, later the same day, the police raided Mr. Sharipov's apartment and confiscated a computer and several books. Mr. Sharipov was held at the Shohmansur office until 29 January, whereupon he was transferred to the Dushanbe detention centre of the State Committee for National Security.

8. In the days following Mr. Sharipov's detention, his family was not informed of the reasons for his arrest. When his relatives contacted the authorities, they were promised that Mr. Sharipov would be released immediately after interrogation and verification. On 29 January 2020, Mr. Sharipov was provided with a lawyer by a non-governmental organization. However, neither his counsel nor his family were allowed to meet with him.

9. On 30 January 2020, Mr. Sharipov was brought before Ismoili Somoni District Court in Dushanbe. At the hearing, Mr. Sharipov was ordered to be held in pretrial detention for two months, pending further investigation into charges that he incited religious discord, in violation of article 189 (1) of the Criminal Code, which provides that:

Actions which lead to arousing national, racial, local or religious hostility, or dissension, humiliating national dignity, as well as propaganda of the exclusiveness of citizens by a sign of their relation to religion, national, racial, or local origin, if these actions were committed in public or using means of mass media, are punishable by up to five years of restriction of liberty or imprisonment for the same period of time.

10. According to the source, also on 30 January, Mr. Sharipov was permitted to meet with his lawyers for the first time. To obtain access to Mr. Sharipov, his attorneys were reportedly compelled by the authorities to sign a non-disclosure agreement concerning their representation. On 31 January, Mr. Sharipov's lawyers appealed against the pretrial detention order. However, the court denied the appeal on 4 February.

b. Investigation and trial

11. According to the source, on 1 February 2020 the prosecutor issued a statement explaining that the charges against Mr. Sharipov related to more than 200 articles and notes of supposedly extremist content, published between 2013 and 2019. The prosecutor noted

one manuscript in particular, alleging that it was written in support of the Muslim Brotherhood, a group forbidden by Tajikistan.

12. The source states that, although the Government did not publicly identify the articles upon which it was basing the indictment, the manuscript in question is entitled “The Prophet Muhammad and terrorism”. Approximately 99 copies were printed, 20 of which were distributed, and the rest were confiscated. The manuscript was a preliminary draft and was printed in a small batch to seek feedback. In addition to circulating a small number of copies among friends, before he was arrested, Mr. Sharipov provided a copy of the manuscript to the State Committee on Religious Affairs, a government agency, for comments. The Committee confirmed that it was indeed involved in examining the manuscript and was scheduled to provide comments.

13. It is reported that Mr. Sharipov’s manuscript goes out of its way to oppose terrorism, extremism and radicalism, using religious doctrine. Multiple independent first-hand sources confirmed that the manuscript does not promote religious extremism or violence. According to one journalist who examined it, the manuscript discusses Islam through the prism of the life of the Prophet Muhammad, quotes from the Qur’an and quotes from spiritual figures who say that terrorism has nothing to do with Islam. This follows other publications by Mr. Sharipov, such as a 2019 article titled “Muhammad was for peace and against terrorism”.

14. According to the source, neither the State Committee for National Security nor the prosecutor specifically identified aspects of the manuscript that represented extremism. However, individuals associated with the State media apparatus have claimed that the primary basis for Mr. Sharipov’s arrest is that his manuscript featured quotes by two prominent Islamic scholars, which have been connected to the Muslim Brotherhood. The source states that Mr. Sharipov did cite these scholars at the end of the manuscript; nevertheless, he only quoted one passage from one of them in the text. Although this scholar has made statements that could meet the threshold of incitement, Mr. Sharipov does not mention any of those in the manuscript.

15. On 30 March 2020, the State Committee for National Security reportedly announced the conclusion of its investigation into Mr. Sharipov and transmitted his case to the prosecutor for indictment. On 4 April 2020, the prosecutor filed the indictment against Mr. Sharipov with Shohmansur District Court, charging him with violating article 189 (1) of the Criminal Code, which carries a maximum sentence of five years’ imprisonment.

16. Mr. Sharipov’s trial began on 15 April 2020. The source reports that, despite Tajik officials repeatedly claiming that there were no cases of coronavirus disease (COVID-19) in the country, the presiding judge closed the trial to the public “due to warnings by the World Health Organization” about large gatherings during the pandemic. Members of the media were allegedly not allowed to attend.

17. The source reports that the trial lasted for two days. Although the media was unable to learn specifics of the prosecutor’s case, reports indicate that the prosecutor relied exclusively upon Mr. Sharipov’s manuscript as evidence that he had violated article 189 (1), claiming that the text was extremist propaganda that had been published and distributed unofficially. On 16 April 2020, the court convicted Mr. Sharipov of violating article 189 (1) and sentenced him to one year of imprisonment. The court has not released a copy of the judgment to the public or the media.

18. According to the source, following the trial, Mr. Sharipov was returned to the State Committee for National Security detention centre for four days, before being transferred to Correctional Colony 3/13 in Yovon district to serve his sentence. At the time of submission by the source, Mr. Sharipov remained in Colony 3/13, with limited family access due to the COVID-19 pandemic.

19. The source claims that the arrest and detention of Mr. Sharipov is arbitrary under categories I, II and III because it was carried out without justification, resulted from and amounted to reprisal for the legitimate exercise of his rights to freedom of expression and of religion, and because it failed to meet minimum standards of due process.

c. Legal analysis

i. Category I

20. The source states that a detention is arbitrary under category I when there is no legal basis or justification for it, and that this includes an arrest without substantive evidence to justify it.

21. The source claims that both at the time of arrest and at trial, the Government failed to present evidence that Mr. Sharipov had engaged in any activity that would be considered a crime at the time of his detention and that was not protected by well-established principles of human rights law. Mr. Sharipov has never engaged in violence. The Government's allegations that he has published "extremist content" in his writings are baseless. In its statement of 1 February 2020, the prosecutor's office alludes to two sources of extremist content: the first are hundreds of articles that Mr. Sharipov has published and the second is a manuscript. As regards the articles, the source argues that the Government fails to identify in its indictment any specific articles written by Mr. Sharipov that could qualify as extremist or as advocating for any violence. Moreover, a significant portion of Mr. Sharipov's prior reporting during his early career was broadcast by the State-controlled television network. When taken in the context of Mr. Sharipov's long history of good-faith journalism, the Government's claim that he published 200 articles of extremist content is not credible. Moreover, the manuscript cited by the Government allegedly does not support the Government's claims, as "The Prophet Muhammad and terrorism" specifically makes the case against violence. The Government allegedly failed to cite any evidence that would justify Mr. Sharipov's detention.

ii. Category II

22. The source recalls that article 19 (2) of the Covenant provides that: "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." The same right is protected under article 19 of the Universal Declaration of Human Rights. Freedom of expression is also guaranteed in article 30 of the Constitution of Tajikistan. This right, as provided in article 19 (2) of the Covenant, is not limited by form or subject matter. As the Human Rights Committee stated in its general comment No. 34 (2011), the right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse (para. 11). Moreover, in the same general comment, the Human Rights Committee emphasizes that journalistic work receives strong protection under article 19.

23. The right to freedom of thought, conscience and religion is a foundational freedom protected under article 18 of the Covenant, as well as article 26 of the Constitution. The rights contained in article 18 of the Covenant include the freedom to have or to adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching. The Human Rights Committee explains that article 18 encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief.¹

24. The source alleges that the Government has detained Mr. Sharipov based on the legitimate exercise of his rights to freedom of expression and of religion. The Government's justification for initially detaining Mr. Sharipov relates to more than 200 articles that he published as a journalist, and to a pre-publication manuscript that he had distributed for comment. Given that the work of journalists is protected under article 19, the detention of Mr. Sharipov on the basis of his publication, in the course of performing his duties as a journalist, amounts to a restriction of his freedom of expression. Furthermore, because Mr. Sharipov's manuscript amounted to an act of religious discourse, it fell within the scope of

¹ General comment No. 22 (1993), para. 1.

both the rights to freedom of expression and of religion. Accordingly, Mr. Sharipov's detention on the basis of writing, printing and circulating his manuscript for comment amounts to a restriction on his freedom of religion and his freedom of expression.

25. Moreover, it is claimed that the prosecution of Mr. Sharipov fits with the broader pattern of judicial harassment of independent journalists and media workers, which has been recognized by the Human Rights Committee in its most recent review of Tajikistan.² Mr. Sharipov was targeted due to his status as an independent journalist who criticizes the Government's violations of human rights, including its violation of the right to freedom of religion. Furthermore, Mr. Sharipov's arrest occurred shortly before the election on 1 March 2020, and the detention effectively prevented Mr. Sharipov from covering it and commenting on it. According to the source, the Government's detention of Mr. Sharipov, based on the exercise of his rights to freedom of expression and of religion, was in violation of articles 18 and 19 of both the Covenant and the Universal Declaration of Human Rights.

26. The source claims that although the rights to freedom of expression and of religion are not absolute, none of the exceptions to these rights applies to the detention of Mr. Sharipov. Under international law, free expression and manifestations of religion may only be restricted in limited circumstances. The Human Rights Committee has established a three-part "strict test of justification"³ for analysing limitations on such fundamental rights: in order for such a limitation to be permissible, it must (a) be provided for by law; (b) serve an enumerated purpose; and (c) be necessary to achieve that purpose. The enumerated purposes for which a Government may restrict these rights are to protect national security, public safety and public order, public health, and the fundamental rights and freedoms of others.

27. The Human Rights Committee has emphasized that such restrictions must not "put in jeopardy the right itself". It is not sufficient for a Government to merely invoke one of the enumerated exceptions, rather, it must specify the precise nature of the threat posed by the protected activity, establish a direct and immediate connection between the expression and the threat and demonstrate why the limitation was necessary.⁴

28. According to the source, the Government's actions do not fall within the scope of the enumerated exceptions in articles 18 (3) or 19 (3) of the Covenant. The law under which Mr. Sharipov is detained is alleged to be too vague and overbroad to satisfy the "provided for by law" element of the test. The Human Rights Committee has clarified that "provided for by law" requires that laws be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly".⁵ The purported legal ground for Mr. Sharipov's detention is article 189 (1) of the Criminal Code, which criminalizes activity that leads to "dissension". Allegedly, no speaker can reasonably be expected to know what activity will lead to dissension, given that one is unable to predict how individuals will respond. Accordingly, it is claimed that article 189 (1) relies on impermissibly vague language, and that prosecutions under this article do not fall within the scope of permissible exceptions to freedom of expression and religion.

29. The source further claims that the Government's detention of Mr. Sharipov does not serve an enumerated purpose. The purpose of restricting fundamental freedoms must be more than a mere pretence. In the case of Mr. Sharipov, the source claims that the Government's primary reason for targeting him was his activities as a critic. As the Government targeted Mr. Sharipov due to his public criticism and independent reporting, his detention does not come under any of the exceptions enumerated in articles 18 and 19 of the Covenant.

30. The source also argues that the detention of Mr. Sharipov is neither necessary nor proportionate to serve the alleged goal of stopping the circulation of extremist content. Depriving a speaker of physical liberty is a severe measure to take when there were alternative options available to achieve the same objective, such as prohibiting the publication of Mr. Sharipov's manuscript and ordering that his articles not be published. Given that Mr. Sharipov had submitted his manuscript for approval to a government agency,

² CCPR/C/TJK/CO/3.

³ *Park v. Republic of Korea* (CCPR/C/64/D/628/1995), para. 10.3.

⁴ See general comment No. 34 (2011).

⁵ *Ibid.*, para. 25.

the Government possessed the authority to ensure that his manuscript could not go to print, which would have been a less restrictive limitation on Mr. Sharipov's freedoms than holding him in detention. Allegedly, the detention of Mr. Sharipov is neither necessary nor proportionate to achieve its purported objective.

31. The source alleges that, because the Government cannot meet the elements required to justify restricting Mr. Sharipov's rights to freedom of religion and of expression, his detention based on his exercise of those rights constitutes a violation of articles 18 and 19 of the Covenant, and amounts to arbitrary detention under category II.

iii. Category III

32. The source recalls that a deprivation of liberty is arbitrary under category III when there is a total or partial non-observance of international norms relating to the right to a fair trial. The minimum international standards of due process are established in the Universal Declaration of Human Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

Right not to be subjected to arbitrary arrest

33. Article 9 (1) of the Covenant protects the right to liberty and freedom from arbitrary detention, and guarantees that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". This right is reiterated in article 9 of the Universal Declaration of Human Rights and principles 2 and 36 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Human Rights Committee has interpreted this right to mean that "procedures for carrying out legally authorized deprivation of liberty should also be established by law and States parties should ensure compliance with their legally prescribed procedures".⁶ Moreover, article 19 of the Constitution guarantees that "no one may be detained and arrested without legal grounds". Furthermore, both the Covenant and the Body of Principles require that arrestees be notified of the grounds for their arrest at the moment they are arrested. Additionally, the Code of Criminal Procedure requires that arrests occur "according to the decision of the judge or determination of the court".

34. The source claims that Mr. Sharipov was not shown a warrant or informed of the legal grounds for his arrest at the time he was detained, which allegedly amounts to a violation of the Covenant. Moreover, there is no indication that such a warrant authorized by a judge or court exists. Given that Mr. Sharipov was not arrested in flagrante delicto, the Government allegedly had time to obtain such an order, and its failure to do so is without justification. Accordingly, the source states that the arrest and pretrial detention of Mr. Sharipov amounts to a violation of his due process rights under article 9 (1) of the Covenant, article 9 of the Universal Declaration of Human Rights and principles 2 and 36 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, as well as article 19 of the Constitution, falling under category III.

Pretrial release

35. Article 9 (3) of the Covenant provides the right to liberty during trial. Pretrial detention under this provision should be the exception, not the norm, and must be justified based on the circumstances. The Human Rights Committee has found that "detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. ... Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances."⁷ Principles 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment further confirm that, except in special cases, a criminal detainee is entitled to release pending trial.

⁶ General comment No. 35 (2014), para. 23.

⁷ *Ibid.*, para. 38.

36. The authorities allegedly lack a sufficient basis to justify detaining Mr. Sharipov before his trial. He has no history of violence and is not accused of an act of violence. As such, the source claims that there is no public safety justification for his detention. Moreover, the Government has seized all the copies of his manuscript, which means that he is not at risk of destroying evidence. His home and family are in Tajikistan, and there is no evidence that he would be a flight risk. Accordingly, it is argued that denying Mr. Sharipov pretrial release amounts to a violation of article 9 (3) of the Covenant as well as of principles 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which results in his detention falling under category III.

Right to counsel

37. Article 14 (3) (d) of the Covenant guarantees the right to a legal defence, by stating that a criminal defendant has the right “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing”. In addition, article 14 (3) (b) of the Covenant guarantees a criminal defendant the right “to communicate with counsel of his own choosing”. The Human Rights Committee has clarified that such guarantee “requires that the accused is granted prompt access to counsel”,⁸ and that “States parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention”.⁹ Principle 18 (1) and (3) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment further provides for the right of a detainee to “communicate and consult with his legal counsel” and that such right “may not be suspended or restricted save in exceptional circumstances”. Rule 119 of the Nelson Mandela Rules also provides for the right to access legal advice, and article 19 of the Constitution guarantees that “a person has the right to services of an attorney from the moment of his arrest”.

38. The source further claims that Mr. Sharipov was denied access to counsel for the first three days of his arrest. Despite the fact that his counsel requested to see him on 29 January 2020, they were denied access that day, and not permitted to see him until the following day. The day that Mr. Sharipov was allowed access to his attorneys was reportedly the same day as the pretrial hearing. As a result, his attorneys were denied the extra day that they would have had to prepare for his hearing had they been allowed to see their client when they initially requested. The Government’s refusal to allow his attorneys access for three days falls far short of the constitutional protections in Tajikistan, which guarantee access to an attorney from the moment of arrest.

39. Moreover, the Government’s requirement that Mr. Sharipov’s attorneys sign a non-disclosure agreement allegedly amounts to interference with his counsel’s ability to fully represent him. A non-disclosure agreement prevents his attorneys from seeking consultation or outside assistance. In addition, the non-disclosure agreement prevents them from providing the media with updates on their client, which is a crucial component of advocacy.

40. Accordingly, the Government’s interference with Mr. Sharipov’s right to representation allegedly amounts to a violation of articles 14 (3) (b) and (d) of the Covenant, principle 18 (1) and (3) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 119 of the Nelson Mandela Rules, as well as article 19 of the Constitution.

Closure of the trial to the public

41. Article 14 (1) of the Covenant provides that, in the determination of any criminal charge, “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal”. Article 10 of the Universal Declaration of Human Rights similarly guarantees the right to a fair and public hearing. As the Human Rights Committee has explained in its general comment No. 32 (2007): “The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large” (para. 28). Although the right to a public hearing is not absolute, it may only be restricted “for reasons of morals, public order (*ordre public*) or

⁸ General comment No. 32 (2007), para. 34.

⁹ General comment No. 35 (2014), para. 35.

national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interest of justices”, and, in the absence of such exceptional circumstances, “a hearing must be open to the general public, including members of the media”, without entrance being limited to a select group of people (para. 29). Even if a State invokes one of the above-mentioned grounds to close a trial to the public, the government must make the judgment public.

42. It is alleged that the authorities closed Mr. Sharipov’s trial to the public and the media in violation of article 14 of the Covenant. Although the trial was purportedly closed for public health reasons, this alleged justification does not stand up to scrutiny. The Government claimed that there were no cases of COVID-19 in the country, which, if true, undermines the judge’s reasons for closing the trial. Moreover, restricting all of the media from the trial is disproportionate. Merely allowing one or two members of the media to attend the trial would significantly increase its transparency, at little expense to increased health risks, particularly when the risk is assessed by the Government’s own measure of zero cases. Lastly, the authorities failed to make the judgment publicly available, for which there are no grounds for exception under article 14. Accordingly, the Government violated Mr. Sharipov’s rights under article 14 by closing his trial to the media and the public, and his detention is therefore arbitrary under category III.

d. Human rights context

43. The source argues that the Government has severely curtailed the exercise of political rights within the country, particularly following the human rights crackdown that started in 2015. It has introduced restrictions impeding independent expression and media, despite constitutional protections and legislation intended to promote a free press. Article 30 of the Constitution recognizes citizens’ freedom of expression and prohibits State censorship and prosecution for criticism; however, the Criminal Code reflects a different reality. For example, the Criminal Code criminalizes insulting the President and State officials.

44. Reportedly, critics of the Government, independent journalists, and their families often face harassment from authorities. Dozens of journalists have fled the country out of fear. According to the source, there are at least ten reports each month from journalists regarding threats and restrictions on access to information. The source cites a recent example of the Government’s persecution of another independent journalist, who was arrested in December 2017 and sentenced to 12 years in prison after he wrote an open letter to the President about local corruption. He was released after nine months in prison. After leaving the country for safety, he received an additional eight-month prison sentence in absentia in January 2019.

Response from the Government

45. On 14 July 2020, the Working Group transmitted the allegations made by the source to the Government through its regular communications procedure. The Working Group requested the Government to provide, by 14 September 2020, detailed information about the situation of Mr. Sharipov. The Working Group called upon the Government to ensure Mr. Sharipov’s physical and mental integrity.

46. The Working Group regrets that it did not receive a response from the Government, and neither did the Government request an extension of the time limit for its reply, as provided for in the Working Group’s methods of work.

Discussion

47. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

48. In determining whether Mr. Sharipov’s detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). In the present

case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

49. The Working Group wishes to reaffirm that States have the obligation to respect, protect and fulfil all human rights and fundamental freedoms, including liberty of the person. Any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international and regional instruments.¹⁰ Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is obliged to assess the judicial proceedings and the law itself to determine whether such detention is consistent with international human rights law.¹¹

50. The Working Group also wishes to reiterate that it applies a heightened standard of review in cases where the rights to freedom of movement and residence, freedom of asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities, are restricted, or where human rights defenders are involved.¹² Mr. Sharipov's role as an independent journalist and an activist requires the Working Group to undertake this kind of intense and strict scrutiny.

Category I

51. The Working Group will first consider whether there have been violations under category I, which concerns deprivation of liberty without a legal basis being invoked.

52. The source submits, and the Government does not contest, that Mr. Sharipov was not presented with a warrant or informed of the reasons for his detention at the time of the arrest, on 28 January 2020.

53. As the Working Group has stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not implemented in the present case.¹³

54. International law on the right to personal liberty includes the right to be presented with an arrest warrant to ensure the exercise of effective control by a competent, independent and impartial judicial authority; this is inherent to the right to liberty and security of person and to the prohibition of arbitrary detention, under articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, as well as principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or

¹⁰ General Assembly resolution 72/180, preambular para. 5; and Human Rights Council resolution 41/2, preambular para. 2; resolution 41/6, para. 5 (b); resolution 41/10, para. 6; resolution 41/17, preambular para. 1; resolution 43/26, preambular para. 13; resolution 44/16, preambular para. 25; resolution 45/19, preambular para. 9; resolution 45/20, preambular para. 2; resolution 45/21, preambular para. 3; and resolution 45/29, preambular para. 3. See also Commission on Human Rights resolution 1991/42, para. 2; and resolution 1997/50, para. 15; Human Rights Council resolution 6/4, para. 1 (a); and resolution 10/9, para. 4 (b); and opinions No. 41/2014, para. 24; No. 3/2018, para. 39; No. 18/2019, para. 24; No. 36/2019, para. 33; No. 42/2019, para. 43; No. 51/2019, para. 53; No. 56/2019, para. 74; No. 76/2019, para. 36; No. 6/2020, para. 36; No. 13/2020, para. 39; No. 14/2020, para. 45; and No. 32/2020, para. 29.

¹¹ Opinions No. 1/1998, para. 13; No. 82/2018, para. 25; No. 36/2019, para. 33; No. 42/2019, para. 43; No. 51/2019, para. 53; No. 56/2019, para. 74; No. 76/2019, para. 36; No. 6/2020, para. 36; No. 13/2020, para. 39; No. 14/2020, para. 45; and No. 32/2020, para. 29.

¹² Opinions No. 21/2011, para. 29; No. 47/2018, para. 54; No. 51/2018, para. 77; No. 55/2018, para. 62; No. 61/2018, para. 45; and No. 82/2018, para. 26.

¹³ Opinions No. 93/2017, para. 44; No. 10/2018, paras. 45–46; No. 36/2018, para. 40; No. 46/2018, para. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51; No. 65/2019, para. 59; No. 71/2019, para. 70; No. 72/2019, para. 40; No. 82/2019, para. 74; No. 6/2020, para. 39; No. 11/2020, para. 37; No. 13/2020, para. 46; No. 14/2020, para. 49; No. 31/2020, para. 40; No. 32/2020, para. 32; No. 33/2020, paras. 53 and 71; and No. 34/2020, para. 44.

Imprisonment.¹⁴ The Working Group has been presented with no valid grounds to justify an exception to this rule in the present case. Moreover, the search of Mr. Sharipov's house and seizure of his personal belongings without a warrant also violated article 12 of the Universal Declaration of Human Rights and article 17 of the Covenant.¹⁵

55. The Working Group also finds that, in order to invoke a legal basis for deprivation of liberty, the authorities should have informed Mr. Sharipov of the reasons for his arrest, at the time of arrest, and promptly informed him of the charges.¹⁶ Their failure to do so violated articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) and (2) of the Covenant, as well as principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and renders his arrest devoid of any legal basis.

56. The Working Group observes that Mr. Sharipov was not allowed to meet with his lawyer until two days after the arrest – the same day as the hearing at which a judge ordered his pretrial detention. International human rights law, including article 9 (4) of the Covenant, requires that anyone arrested on criminal charges be able to challenge the legality of the detention before a court of law;¹⁷ which, in turn, requires timely access to legal assistance in order to prepare for such proceedings.¹⁸ In the present case, the Working Group considers that Mr. Sharipov was prevented from challenging the legality of his detention during his pretrial hearing, because he was denied access to legal assistance from the moment of the arrest, until the day of his appearance before the court. Mr. Sharipov's right to challenge the legal basis of his detention was therefore violated, rendering his detention arbitrary under category I,¹⁹ and contrary to articles 3, 8 and 9 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (1) and (4) of the Covenant, as well as principles 11, 32 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

57. In this context, the Working Group recalls that it is affirmed in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court²⁰ that the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and that this right is essential to preserve legality in a democratic society.²¹ The right applies to all forms and situations of deprivation of liberty, irrespective of the place of detention or the legal terminology used in the legislation. Effective

¹⁴ The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary. See decisions No. 1/1993, paras. 6–7; No. 3/1993, paras. 6–7; No. 4/1993, para. 6; No. 5/1993, paras. 6, 8 and 9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; and No. 44/1993, paras. 6–7. For more recent jurisprudence, see opinions No. 38/2013, para. 23; No. 48/2016, para. 48; No. 21/2017, para. 46; No. 63/2017, para. 66; No. 76/2017, para. 55; No. 83/2017, para. 65; No. 88/2017, para. 27; No. 93/2017, para. 44; No. 3/2018, para. 43; No. 10/2018, para. 46; No. 26/2018, para. 54; No. 30/2018, para. 39; No. 38/2018, para. 63; No. 47/2018, para. 56; No. 51/2018, para. 80; No. 63/2018, para. 27; No. 68/2018, para. 39; No. 82/2018, para. 29; No. 6/2020, para. 40; No. 11/2020, para. 38; No. 13/2020, para. 47; No. 14/2020, para. 50; No. 31/2020, para. 41; No. 32/2020, para. 33; No. 33/2020, para. 54; and No. 34/2020, para. 46. See also art. 5 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

¹⁵ Opinion No. 33/2019, para. 48. See also art. 8 (1) and (2) of the European Convention on Human Rights.

¹⁶ See, for example, opinion No. 10/2015, para. 34. See also opinions No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51; No. 51/2019, para. 57; No. 56/2019, para. 78; No. 65/2019, para. 60; No. 71/2019, para. 71; No. 82/2019, para. 74; No. 6/2020, para. 41; No. 13/2020, para. 48; No. 14/2020, para. 51; No. 31/2020, para. 42; No. 33/2020, para. 55; and No. 34/2020, para. 47.

¹⁷ See the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37).

¹⁸ A/HRC/45/16, para. 51.

¹⁹ Opinion No. 50/2020, para. 45.

²⁰ A/HRC/30/37.

²¹ *Ibid.*, paras. 2–3.

judicial oversight and control of deprivation of liberty is essential in ensuring that detention has a legal basis.²²

58. The Working Group therefore considers that the deprivation of liberty of Mr. Sharipov lacks a legal basis and is thus arbitrary, falling under category I.

Category II

59. The source submits, and the Government does not contest, that Mr. Sharipov has been refused registration of his organization, has been forced to see the newspaper he contributed to closed down, and has been imprisoned for his various social activities which have included organizing an anti-corruption youth group, writing columns in support of press freedom and circulating his religious manuscript. This case thus concerns alleged violations of the right to freedom of thought, conscience and religion, of the right to freedom of opinion and expression, and of the right to take part in the conduct of public affairs.

60. The Working Group notes the Human Rights Committee's observation, in paragraph 8 of its general comment No. 25 (1996), that citizens take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves and that this participation is supported by ensuring freedom of expression, assembly and association.²³ Moreover, the Working Group recalls that "given that peaceful assemblies often have expressive functions, and that political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should enjoy a heightened level of accommodation and protection", as the Committee restated in paragraph 32 of its general comment No. 37 (2020).

61. The Working Group recalls that article 19 (2) of the Covenant provides that "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". According to the Human Rights Committee's authoritative reiteration and elucidation of the treaty commitment undertaken in the Covenant, this right includes political discourse, commentary on public affairs, discussion of human rights, and journalism.²⁴ Moreover, as the restatement and interpretation of relevant international law by the four independent global human rights experts on freedom of expression and access to information make clear, "general prohibitions on the dissemination of information based on vague and ambiguous ideas, including 'false news' or 'non-objective information', are incompatible with international standards for restrictions on freedom of expression ... and should be abolished".²⁵

62. Although freedom of opinion and expression is not without limitation, article 29 (2) of the Universal Declaration of Human Rights provides that the only legitimate limitations to the exercise of one's rights and freedoms must be for the purposes of securing due

²² Opinions No. 35/2018, para. 27; No. 39/2018, para. 35; No. 83/2018, para. 47; No. 32/2019, para. 30; No. 33/2019, para. 50; No. 44/2019, para. 54; No. 45/2019, para. 53; No. 59/2019, para. 51; No. 65/2019, para. 64; No. 71/2019, para. 72; No. 76/2019, para. 38; No. 82/2019, para. 76; No. 6/2020, para. 46; No. 14/2020, para. 54; No. 31/2020, para. 46; No. 32/2020, para. 39; No. 33/2020, para. 52; and No. 34/2020, para. 52.

²³ Opinions No. 13/2007, No. 46/2011, No. 42/2012, No. 26/2013, No. 40/2016, No. 35/2018, No. 36/2018, No. 45/2018, No. 46/2018, No. 9/2019, No. 44/2019 and No. 45/2019.

²⁴ Human Rights Committee, general comment No. 34 (2011), para. 11. See also, for example, opinions No. 31/1998, No. 52/2013, No. 40/2015, No. 44/2015, No. 7/2016, No. 3/2019 and No. 45/2019. Even statements considered unacceptable, disrespectful and in very bad taste by the authorities are entitled to protection: see opinions No. 10/2018, para. 63; No. 61/2018, para. 56; No. 20/2019, para. 71; and No. 14/2020, para. 65.

²⁵ Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, adopted by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Organization for Security and Cooperation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur for Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, in Vienna on 3 March 2017, para. 2 (a), available at www.ohchr.org/Documents/Issues/Expression/JointDeclaration3March2017.doc.

recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. The Covenant similarly lists the few legitimate objectives in articles 18 (3), 19 (3), 21 and 22 (2).²⁶

63. In the Working Group's view, the principle of necessity and proportionality inheres equally in all fundamental human rights. The Working Group, in its deliberation No. 9, confirmed that the notion of "arbitrary" *stricto sensu* includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary (A/HRC/22/44, sect. III). In its jurisprudence with regard to the application of the principle of proportionality, the Working Group has applied the four-pronged test of: (a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (b) whether the measure is rationally connected to the objective; (c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (d) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.²⁷

64. In view of the standard described above, the Working Group finds that the situation in the present case falls short of such requirement. There is no evidence of any violence or incitement to violence and therefore the standard for permissible restriction of the right, requiring a legitimate aim or objective in a free and democratic society, has not been met. In addition, even if the restriction is considered to pursue a legitimate aim, the source has presented a credible argument that other less restrictive means could have been implemented to achieve the same objective. In turn, the Government was given an opportunity but failed to justify why the detention of Mr. Sharipov was necessary and proportional in the present case. The Working Group therefore concludes that the restriction of Mr. Sharipov's rights, as protected by articles 9, 18 and 19 of the Covenant, was neither legitimate, nor necessary or proportional.

65. Moreover, the Working Group considers, as explained below, that the language used in article 189 (1) of the Criminal Code is vague and overly broad. The Working Group is concerned that these provisions appear to lack a clear definition, and may, as in the present case, be used to punish the peaceful exercise of human rights and have prevented Mr. Sharipov from regulating his behaviour accordingly.

66. According to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and to draw public attention to the observance of human rights.²⁸ The source has demonstrated that Mr. Sharipov was detained for the exercise of his rights under this Declaration. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.²⁹

67. The Working Group will elaborate further on the propriety of detention under article 189 of the Criminal Code (on arousing national, racial, local or religious hostility) in view of

²⁶ See also arts. 9 (2), 10 (2) and 11 (2) of the European Convention on Human Rights.

²⁷ Opinions No. 54/2015, para. 89; No. 41/2017, para. 86; No. 56/2017, para. 51; No. 58/2017, para. 48; No. 76/2017, para. 68; No. 82/2018, para. 38; No. 87/2018, para. 64; and No. 32/2020, para. 49.

²⁸ See also General Assembly resolution 74/146, para. 12. As the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, observed in A/HRC/24/38 (para. 52): "Juvenal's question *quis custodiet ipsos custodes* (who guards the guardians?) remains a central concern of democracy, since the people must always watch over the constitutional behaviour of the leaders and impeach them if they act in contravention of their duties. Constitutional courts must fulfil this need and civil society should show solidarity with human rights defenders and whistle-blowers who, far from being unpatriotic, perform a democratic service to their countries and the world."

²⁹ See, for example, opinions No. 75/2017, No. 15/2020 and No. 16/2020.

the principle of legality and its effect on the rights to a fair trial, to freedom of opinion and expression and to freedom of thought, conscience and religion.

68. One of the fundamental guarantees of due process is the principle of legality, which means that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached.

69. According to the source, article 189 (1) of the Criminal Code provides that actions leading to national, racial, local or religious hostility, or to dissension, humiliation of national dignity, or propaganda about the exclusiveness of citizens by a sign of their relation to religion, national, racial, or local origin, are punishable by up to five years' imprisonment if committed in public or using mass media.

70. The Working Group finds that such vaguely and broadly worded provisions, which cannot qualify as *lex certa*, could be used to deprive individuals of their liberty without a specific legal basis and violate the due process of law undergirded by the principle of legality in article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.³⁰

71. The Working Group further notes that the Human Rights Committee has found that detention pursuant to proceedings that were incompatible with article 15 of the Covenant are necessarily arbitrary within the meaning of article 9 (1).³¹

72. In the Working Group's view, the principle of legality also requires the substance of penal law to be due and appropriate in a democratic society that respects human dignity and rights.³²

73. The Working Group considers that the provisions of article 189 (1) of the Criminal Code, which provide for fixed-term imprisonment of up to five years for a peaceful religious manuscript, are neither necessary to protect public or private interests against injury nor proportionate to guilt. Punishment should fit the crime, not the criminal.

74. The Working Group therefore finds that Mr. Sharipov's deprivation of liberty is arbitrary, falling within category II, as it resulted from his legitimate exercise of the rights and freedoms under articles 18, 19, 20 (1) and 21 (1) of the Universal Declaration of Human Rights and articles 18 (1), 19 (1) and (2), 21, 22 (1) and 25 (a) of the Covenant.³³

75. In view of the above, the Working Group decides to refer the present case to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

Category III

76. Given its finding that Mr. Sharipov's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that in such circumstances no trial should take place. However, as his trial has taken place, the Working Group will now consider the alleged violations of the right to a fair trial and due process.

77. The source submits, and the Government does not dispute, that Mr. Sharipov had no access to legal counsel of his choice during the first days of his detention, effectively preventing his lawyer from assisting him in the preparation of his defence for the pretrial hearing. Moreover, as the source explained and the Government failed to refute, as a condition to having access to his client, Mr. Sharipov's lawyer was forced by the authorities to sign a non-disclosure agreement concerning his representation; in the view of the Working

³⁰ Opinions No. 62/2018, para. 57; and No. 36/2019, para. 42.

³¹ *Fardon v. Australia* (CCPR/C/98/D/1629/2007), para. 7.4 (2).

³² Opinions No. 10/2018, para. 53; and No. 36/2019, para. 44.

³³ See also arts. 9 (1), 10 (1) and 11 (1) of the European Convention on Human Rights.

Group, this is incompatible with the right to effective legal representation under articles 9 and 14 of the Covenant.

78. In the Working Group's view, the Government failed to respect Mr. Sharipov's right to legal assistance, which is inherent in the right to liberty and security of person as well as the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and articles 9 (1) and 14 (1) and (3) (b) and (d) of the Covenant, as well as principles 15, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and principles 1, 5, 7, 8, 21, 22 of the Basic Principles on the Role of Lawyers.³⁴

79. The Working Group considers that this violation substantially undermined and compromised Mr. Sharipov's capacity to defend himself in any subsequent judicial proceedings. As the Working Group has stated in principle 9 and guideline 8 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and must be promptly informed of this right upon apprehension; and nor should access to legal counsel be unlawfully or unreasonably restricted.³⁵

80. The Working Group further notes the denial of Mr. Sharipov's due process right, within the ambit of articles 3, 9 and 10 of the Universal Declaration of Human Rights and articles 9 (1) and 14 (1) of the Covenant, to be visited by and to correspond with his family and to be given adequate opportunity for communication with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations, in accordance with principles 15 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rules 43 (3) and 58 of the Nelson Mandela Rules. Giving prompt and regular access to family members, as well as to independent medical personnel and lawyers, is an essential and necessary safeguard for the prevention of torture as well as for protection against arbitrary detention and infringement of personal security.³⁶

81. The source also maintains, and the Government does not contest, that Mr. Sharipov has been denied the right to a public hearing during his trial. As the Human Rights Committee made clear in its general comment No. 32 (2007), "all trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly", since "the publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large" (para. 28).

82. While article 14 (1) of the Covenant provides that "the press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice", its terms make clear that such exceptions to the rule must pass the strict test of necessity and proportionality.³⁷

³⁴ See also arts. 5 (1) and 6 (1) and (3) (b) and (c) of the European Convention on Human Rights.

³⁵ A/HRC/30/37, annex, paras. 12–15 and 67–71. See also Human Rights Committee, general comment No. 32 (2007), para. 34.

³⁶ Opinions No. 10/2018, para. 74; No. 30/2018, para. 47; No. 35/2018, para. 39; No. 39/2018, para. 41; No. 47/2018, para. 71; No. 22/2019, para. 71; No. 36/2019, para. 56; No. 44/2019, paras. 74–75; No. 45/2019, para. 76; No. 56/2019, para. 83; No. 65/2019, para. 68; No. 6/2020, para. 54; No. 11/2020, para. 54; No. 31/2020, para. 51; No. 32/2020, para. 59; No. 33/2020, para. 87; and No. 34/2020, para. 57.

³⁷ See also art. 6 (1) of the European Convention on Human Rights.

83. The Working Group finds that the situation in Mr. Sharipov's trial fails to pass this test. Preventing the spread of COVID-19 is legitimate objective for the preservation of public order (*ordre public*) and public health in a democratic society and restricting attendance numbers at a hearing is rationally connected to this objective. Nevertheless, the harm of outright denial of the right to a public trial outweighs any possible benefits. While nations around the world grapple with the grim reality of the COVID-19 pandemic, they must balance the imperative of combating the disease with respect for, and observance of, human rights and fundamental freedoms for all without distinction.³⁸

84. The failure to make public the court's judgment, by contrast, cannot be justified by the COVID-19 pandemic and the Government has provided no justification for it. It is a manifest violation of article 14 (1) of the Covenant, which provides that any judgment rendered in a criminal case or in a suit at law is to be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. Mr. Sharipov's case surely involves no juvenile or family issue.

85. The Working Group also expresses its gravest concern at Mr. Sharipov's incommunicado detention. The Working Group wishes to note that the General Assembly has consistently held, firstly in its resolution 60/148 (para. 11) and most recently in its resolution 74/143 (para. 17), that incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment.

86. Given the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give Mr. Sharipov's deprivation of liberty an arbitrary character that falls within category III.

Category V

87. The Working Group will now examine whether Mr. Sharipov's deprivation of liberty constitutes discrimination under international law for the purpose of category V.

88. The Working Group notes that Mr. Sharipov has faced repeated persecution from the Government because of his role as an independent journalist and activist, as well as his circulation of a religious manuscript. The Human Rights Committee, in its concluding observations on the third periodic report of Tajikistan, adopted on 18 July 2019, expressed its concern about "harassment of independent journalists and media workers for critically reporting on State policies and on other matters of public interest, including through intimidation" (CCPR/C/TJK/CO/3, para. 47 (h)). Mr. Sharipov's case appears to fit this trend.

89. The Working Group considers that Mr. Sharipov's deprivation of liberty constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant as well as principle 5 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment on the grounds of discrimination based on political views, religious beliefs and the status of human rights defender. His deprivation of liberty therefore falls under category V.³⁹

Disposition

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

The deprivation of liberty of Daler Sharipov, being in contravention of articles 2, 3, 7, 9, 10, 11 (1) and (2), 18, 19 and 21 (1) of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9 (1), (2), (3) and (4), 14 (1) and (3) (b) and (d), 15 (1), 18 (1), 19 (1) and (2), 21, 22 (1), 25 (a) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

³⁸ Working Group on Arbitrary Detention, deliberation No. 11 (A/HRC/45/16, annex II), paras. 20–21.

³⁹ See also art. 14 of the European Convention on Human Rights.

91. The Working Group requests the Government of Tajikistan to take the steps necessary to remedy the situation of Mr. Sharipov 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.

92. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Sharipov immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Sharipov.

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

94. The Working Group requests the Government to bring its laws, in particular the crime of “arousing national, racial, local or religious hostility” under article 189 of the Criminal Code, into conformity with the recommendations made in the present opinion and its obligations under international human rights law.

95. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to:

- (a) The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism;
- (b) The Special Rapporteur on the situation of human rights defenders; and
- (c) The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for appropriate action.

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

Follow-up procedure

97. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Sharipov has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Sharipov;
- (c) Whether an investigation has been conducted into the violation of Mr. Sharipov’s rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Tajikistan with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

98. 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.

99. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

100. 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.⁴⁰

[Adopted on 27 November 2020]

⁴⁰ Human Rights Council resolution 42/22, paras. 3 and 7.