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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its 93rd session, 30 March-8 April 2022

Opinion No. 18/2022 concerning Pygamberdy Allaberdyev (Turkmenistan)

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 3 December 2021 the Working Group transmitted to the Government of Turkmenistan a communication concerning Pygamberdy Allaberdyev. 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. Pygamberdy Allaberdyev is a Turkmen national who usually resides in Balkanabat. Mr. Allaberdyev was 48 years old at the time of his arrest.

5. Before his arrest, Mr. Allaberdyev reportedly worked as a lawyer for the Nebitdagneft department of the Ministry of Oil and Gas of Turkmenistan. The source adds that Mr. Allaberdyev had increasingly become a vocal critic of the Turkmen Government. His increased public involvement coincided with increased public opposition abroad to a plan by the incumbent Turkmen President to introduce various amendments to the country's constitution.

6. The source reports that shortly after Mr. Allaberdyev started communicating with dissidents abroad, he was put under surveillance. According to the source, this is a practice regularly employed by the Turkmen Government against perceived critics. A few days before his arrest, Mr. Allaberdyev posted a video where he called for people to join him in a peaceful protest on 14 September 2020. The source notes that as described below, Mr. Allaberdyev would unfortunately never made it to the protest.

Context

7. According to the source, international human rights monitors document many instances of dissidents in Turkmenistan facing harassment, criminal penalties, and imprisonment for publicly challenging government policies and practices. Indeed, "accurate information about the human rights situation in Turkmenistan . . . is scarce and difficult to verify, in view of the exceptionally restrictive nature of the prevailing political regime, described as 'one of the world's most repressive and closed countries.'"¹

8. The source refers to the most recent review of Turkmenistan by the UN Human Rights Committee where the Committee expressed concern at the Government's continuous use of harassment, intimidation, torture and arbitrary arrests, detention and convictions on reportedly politically motivated charges as a retaliatory tool against dissidents.² The Human Rights Committee further emphasized the need for Turkmenistan to refrain from "using administrative and criminal provisions and other regulations as tools to curtail freedom of expression and other protected conduct."³

Arrest, detention and interrogation

9. The source reports that on the evening of 5 September 2020, while Mr. Allaberdyev was exiting a local grocery store with a friend, he was approached by an unidentified young man. Unprovoked, the young man began to verbally harass Mr. Allaberdyev before ultimately grabbing him by the collar. Almost immediately after the young man grabbed his collar, officers from the Balkanabat Police arrived. The young man then falsely accused Mr. Allaberdyev of instigating the conflict and left the scene. The source notes that Mr. Allaberdyev was arrested on allegations of instigating a violent confrontation outside of the grocery store, and that the police officers did not present a warrant or other decision by a public authority. He was then taken to the Balkanabat police station.

10. The source reports that within twenty minutes of arriving at the police station, the young man reappeared with a bandaged hand and fabricated evidence - a cane that the young man asserted that Mr. Allaberdyev had used to beat him. When Mr. Allaberdyev requested to see medical documents that showed that the young man was in fact injured, he was denied.

11. According to the source, the true reason for Mr. Allaberdyev's arrest became known later that night after two officers from Turkmenistan's Ministry for National Security (MNS) arrived at the police station to interrogate him. Rather than ask Mr. Allaberdyev about the incident that ostensibly prompted his arrest, the MNS officers questioned him about his

¹ The source refers to *Ryabikin v. Russia*, App. No. 8320/04, Eur. Ct. H.R. 116 (2008).

² CCPR/C/TKM/CO/2, para. 30

³ Ibid, para. 43.

alleged connections to activists associated with the protest movement abroad and whether he knew anything about the burning of a portrait of the Turkmen President. According to the source, Mr. Allaberdyev denied having any such contacts or knowledge about the alleged arson. In addition to interrogating Mr. Allaberdyev without a lawyer present, Turkmen officials reportedly also searched his home. According to the source, it is likely that the officials did this without a warrant as they searched his home within hours of detaining him. Notably, the young man who actually started the fight was reportedly never investigated or charged.

12. The source reports that on 8 September 2020, after being detained for three days, the prosecutor's office issued an arrest warrant against Mr. Allaberdyev, and he was charged with crimes under article 108 (intentional harm to health of moderate severity) and article 279 (hooliganism) of the Criminal Code of Turkmenistan. In this respect, the source alleges that the Turkmen Government regularly employs fabricated hooliganism charges against perceived critics of the Government.

13. According to the source, Mr. Allaberdyev was placed in pre-trial detention solely at the request of the investigator. He did not go before a judge prior to being placed in pre-trial detention and he was not placed there by court order.⁴ The source adds that Mr. Allaberdyev's pre-trial detention lasted longer than the legally permitted time, and his pre-trial detention was incommunicado.

14. On 14 September 2020, Mr. Allaberdyev's family filed a complaint with the Balkan region prosecutor's office. The complaint stated that they were forced to hire a lawyer to locate Mr. Allaberdyev after his arrest. In the complaint, they also asked the prosecutor's office to produce written documentation stating the reasons for Mr. Allaberdyev's arrest. The prosecutor's office did not provide access to any procedural documents, but they did allow Mr. Allaberdyev to meet with the lawyer three days later.

15. On 24 September 2020, a relative of Mr. Allaberdyev met with the investigator in the hope of learning more about Mr. Allaberdyev's arrest. The investigator, however, refused to answer the relative's questions, stating that the information could only be given to a lawyer. The relative immediately contacted the lawyer, who, after a telephone conversation with the investigator, withdrew from the case for "health reasons." The source claims that the lawyer's abrupt withdrawal from the case was likely the result of political pressure - not for valid health reasons.

16. The source reports that despite their best efforts, Mr. Allaberdyev's family was unable to obtain the services of another lawyer. One of the lawyers that the family reached out to informed them that it was well known in the region that Mr. Allaberdyev's arrest was politically motivated and under the capital's control, and that any lawyer who accepted his case would likely experience problems.⁵

Trial proceedings

17. According to the source, Mr. Allaberdyev's trial began on 29 September 2020. After Mr. Allaberdyev's friends and family arrived at the Balkanabat City Court for the morning trial, court officials announced that the trial would instead take place later that day at the pre-trial detention center where Mr. Allaberdyev was being held. Over 30 of Mr. Allaberdyev's friends and family went to the pre-trial detention center, and while only two of Mr. Allaberdyev's close relatives were allowed through the gate, they were excluded from the trial being told that it was closed.

⁴ In this respect, the source submits that although it is standard practice for Turkmenistan's prosecutor's office to issue arrest warrants, the practice is contrary to article 9(3) of the International Covenant on Civil and Political Rights, to which Turkmenistan is party.

⁵ In this respect, the source refers to a report published on 7 September 2020 by Memorial Human Rights Centre, a Russia-based human rights organization. According to the report, a local law enforcement source confirmed that Mr. Allaberdyev's arrest was made on instructions from the MNS headquarters in the Turkmen capital, and that the hooliganism case was transformed into a terrorism case, available at: https://memohrc.org/ru/news_old/turkmenistan-zakrytyy-sud-v-balkanabade-prigovoril-allaberdyeva-k-shesti-godam-lisheniya.

18. The source reports that the trial lasted only two hours and was not open to the public, although the trial judgement was later disclosed. At trial, Mr. Allaberdyev was shaved bald, and he did not have a lawyer representing him. As noted above, given the political nature of his arrest, Mr. Allaberdyev's family was unable to find an independent lawyer to represent him. The source is unaware whether the Government offered to appoint Mr. Allaberdyev a lawyer for the trial. He was also denied access to supporting witnesses. Although two witnesses were summoned to testify, a shop assistant and Mr. Allaberdyev's friend who was with him at the time of the alleged incident, they were never called to testify, even though one of those witnesses later confirmed that he was willing to testify to Mr. Allaberdyev's innocence. Instead, according to the source, the only witnesses who were allowed to testify were witnesses who were not even at the scene; their testimony was premised solely on hearsay.

19. The source reports that not only were Mr. Allaberdyev's friends and family denied access to his trial, but they were initially also denied access to the verdict. In order to avoid Mr. Allaberdyev's friends and family, who were forced to wait outside the pre-trial detention center, the lead investigator in Mr. Allaberdyev's case left through an alternative exit under armed guard. When Mr. Allaberdyev's friends and family asked the head of the detention facility for the verdict, he responded that he did not know what the court had decided. The source reports that Mr. Allaberdyev's friends and family would not learn of his fate until the following morning, when court officials unofficially reported that he was found guilty of hooliganism and intentional harm to health of moderate severity and sentenced to six years in prison.

20. According to the source, Mr. Allaberdyev has appealed the trial judgment. However, due to the political nature of his case, he has been unable to obtain an attorney. The source notes that further information about the status of Mr. Allaberdyev's appeal is unknown, as the Turkmen Government continues to hold him incommunicado.

21. After the trial, Mr. Allaberdyev was reportedly transported to Akdash Prison, where the source believes that he is still being detained. Prison officials have consistently denied Mr. Allaberdyev's family visitation. At first, the prison denied visitation under the auspices of ongoing construction at the prison. However, prison officials have since changed their reasoning and cite to the prison's COVID-19 quarantine protocols as a reason to deny visitation. Prison officials have also refused to make Mr. Allaberdyev available for telephone calls. At the time of the source's submission and since being detained for more than a year, Mr. Allaberdyev has not been able to see⁶ or speak with his family.

22. The source adds that Mr. Allaberdyev's health is also in jeopardy as prison officials refuse to provide him with the medication that his family sends him.

Analysis of violations

23. The source submits that the arrest and detention of Mr. Allaberdyev constitute an arbitrary deprivation of his liberty under categories I, II and III of the categories applicable to the consideration of cases by the Working Group.

Violation of category I – no legal basis

24. The source submits that despite the numerous international laws prohibiting incommunicado detention⁷, Mr. Allaberdyev was held incommunicado prior to his trial and continues to be held incommunicado to this day. He was reportedly arrested, interrogated, and charged, all without being able to communicate with an attorney or his family. His family was forced to file a formal complaint with the prosecutor's office and enlist the services of an attorney before they were finally able to locate Mr. Allaberdyev following his arrest. Mr. Allaberdyev was only allowed to meet with his lawyer three days after his arrest.

⁶ The source notes that one of Mr. Allaberdyev's relatives was reportedly able to see him from a distance for a brief period of time immediately after the trial.

⁷ In terms of incommunicado detention, the source refers to the jurisprudence of the Working Group on Arbitrary Detention, notably opinions No. 3/2013, 60/2013 and 4/2018. It also refers to A/HRC/13/42, p.2 and A/HRC/22/44, fn.27.

Subsequently, he was only permitted limited access to his attorney, who ultimately resigned, leaving Mr. Allaberdyev without counsel and without any contact to the outside world. During pre-trial detention, he was never given the opportunity to appear before a judge and challenge his pre-trial detention.

25. The source asserts that following his trial on 29 September 2020, the Government continues to hold Mr. Allaberdyev incommunicado. The Akdash Prison officials reportedly refuse to allow his family to visit him or provide him with food and clothing. The source thus submits that the above facts support a determination that Mr. Allaberdyev was held and continues to be held incommunicado in violation of articles 10 and 11 of the Universal Declaration of Human Rights, principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and article 9(3) of the International Covenant on Civil and Political Rights.

Violation of category II – substantive fundamental rights

26. The source notes that freedom of expression and opinion is guaranteed both by article 28 of the Constitution of Turkmenistan and international human rights treaties ratified by the State, in particular article 19 of the Covenant. The source adds that freedom of assembly is guaranteed by article 29 of the Constitution of Turkmenistan as well as article 21 of the Covenant.

27. The source submits that Mr. Allaberdyev was targeted by authorities for his public criticism, his alleged connection to foreign activists, and his attempt to organize a peaceful public protest. In this respect, the source adds that Mr. Allaberdyev drew Government attention only after he made his views public and before the events that took place on 5 September 2020. Moreover, the timing of Mr. Allaberdyev's arrest suggests that he was arrested in an alleged attempt to prevent him from attending the protest that he organized and in retaliation for his connection to dissidents abroad. The source notes that the Government's interrogation of Mr. Allaberdyev confirms that his arrest related to his expression and his attempts to assemble. Instead of interrogating Mr. Allaberdyev about the events leading to and surrounding his conviction, officers focused their interrogation on his links to dissidents abroad.

28. Furthermore, the source submits that the length of Mr. Allaberdyev's sentence, six years, is grossly disproportionate to the charges brought against him, suggesting that the Government's primary motivation for arresting and convicting Mr. Allaberdyev was to silence him. The Government's actions indicate that his imprisonment is a result of and in retaliation for his expression and attempt to assemble. The source submits that targeting and detaining Mr. Allaberdyev because of these actions amount to a restriction on both his right to freedom of expression and his right to freedom of assembly, as protected under articles 19 and 21 of the Covenant and articles 19 and 20 of the Universal Declaration of Human Rights.

29. While acknowledging that the rights to freedom of expression and assembly are not absolute and that they may be restricted to protect national security, public safety and public order, public health, and the fundamental rights and freedoms of others, the source submits that the arrest and detention of Mr. Allaberdyev fall well outside any possible legitimate restriction on these rights. The source adds that none of the article 19(3) and article 21 exceptions would justify Mr. Allaberdyev's arrest or detention because there is no evidence that his organizing or his public statements or contacts had any impact on national security, public order, or public health, nor did those actions violate the rights or reputations of others. The source notes that the Human Rights Committee has emphasized that the restrictions on the right to freedom of expression must not "put in jeopardy the right itself."⁸ Here, peaceful assemblies and public criticism fall well within the scope of articles 19 and 21 and to hold otherwise would "put in jeopardy the right itself."

30. As discussed above, the Government allegedly targeted Mr. Allaberdyev on the basis of his public criticism, contact with foreign activists, and his attempt to organize a protest. However, the Government used a pre-textual allegation of hooliganism to justify its detention of Mr. Allaberdyev. The source notes that a pre-textual allegation cannot be considered

⁸ CCPR/C/GC/34, para. 21.

“provided for by law” as required by any restriction on fundamental freedoms. Accordingly, the detention of Mr. Allaberdyev for exercising his right to freedom of expression and assembly does not meet an essential qualification for any legitimate exception to these fundamental rights.

31. Accordingly, the source submits that Mr. Allaberdyev’s detention is not premised on any recognized exceptions to the rights to freedom of expression and assembly, and the Government has acted in violation of articles 19 and 21 of the Covenant as well as articles 19 and 20 of the Universal Declaration of Human Rights, making his detention arbitrary as defined under category II.

Violation of category III - due process and fair trial rights

32. According to the source, Turkmenistan’s detention of Mr. Allaberdyev amounts to an arbitrary deprivation of liberty under category III. The source adds that due process is one of the key tenets of the right to a fair trial, and that the minimum international standards of due process are established in the Covenant, 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). The source notes that the Constitution of Turkmenistan likewise ensures the rights of criminal defendants at articles 34, 60, 63 and 107.

Right to release pending trial

33. The source submits that Mr. Allaberdyev was arbitrarily denied his right to release pending trial. He was detained for over three weeks while he awaited trial on trumped-up charges of hooliganism and assault. The source notes that even if Mr. Allaberdyev committed the alleged acts, something he vehemently denies, such blasé charges are not of the caliber the drafters of the Body of Principles envisioned when they carved out pre-trial detention for “special cases.” Moreover, even assuming that Mr. Allaberdyev’s pre-trial detention was justified, he was never given the opportunity to contest it. The pre-trial detention was not court ordered, rather, it came at the request of the very investigator in charge of his case. More still, Mr. Allaberdyev was not afforded counsel to contest his pre-trial detention and he was held incommunicado for over two weeks, before his family finally learned of his whereabouts after filing a formal complaint with the prosecutor’s office. Accordingly, the source submits that Mr. Allaberdyev’s pre-trial detention was in violation of articles 9(3) and (4) of the Covenant, articles 10 and 11 of the Universal Declaration of Human Rights and principles 19, 38, and 39 of the Body of Principles.

Right to a public hearing

34. The source also contends that Mr. Allaberdyev was denied his right to a fair public hearing in contravention of international norms and Turkmen law.⁹ The source notes that Mr. Allaberdyev’s trial was closed to the public and his family. Additionally, on the day of his trial, Turkmen officials changed the trial’s location. The source adds that the Government has not and cannot advance a justification for why Mr. Allaberdyev’s trial was closed. Accordingly, the source submits that the closed trial violated his rights under article 14(1) of the Covenant, article 27 of the Turkmen Criminal Procedure Code, and article 103 of the Turkmen Constitution.

Right to a fair hearing by an impartial judge

35. The source also submits that Mr. Allaberdyev’s trial was not conducted by an independent and impartial tribunal. According to the source, numerous human rights monitors have noted that the Turkmen judiciary suffers from an extreme lack of independence, as a result of the Turkmen President’s exclusive authority to appoint and dismiss judges.¹⁰

⁹ The source refers to CCPR/C/GC/32 as well as opinions Nos. 5/2013, 43/2016 and 70/2017.

¹⁰ The source also refers to opinion No. 70/2017, at para. 68.

36. The source submits that Mr. Allaberdyev's trial proved to be no different. As a general matter, his trial lasted only two hours. During the two-hour trial, the court heard from four live witnesses and relied on testimony from four other individuals that was adduced during the preliminary investigation. Notably, all of the witnesses testified against Mr. Allaberdyev, and the trial court refused to hear testimony from available witnesses who would have attested to his innocence. Additionally, the source notes that before the proceedings even began, Mr. Allaberdyev's head was shaved, something that reportedly does not happen unless the accused has been convicted. The source submits that the trial's short duration, coupled with the judge's refusal to hear exculpatory testimony, suggests that the judge had already determined Mr. Allaberdyev's guilt and essentially used the trial as a means to rubber stamp a predetermined result.¹¹ The source notes that no reasonable observer could possibly believe that Mr. Allaberdyev's trial was before an impartial court.

37. The source asserts that the trial judgment issued by the court also reflects that Mr. Allaberdyev did not receive a fair hearing. The judgment is reportedly confusingly written and suffers from internal inconsistencies. In this respect, the source notes that Turkmen trial judgments routinely suffer from these deficiencies which indicate that the case was likely falsified. Here, for example, the judgment reports that Mr. Allaberdyev initially approached the alleged victim. However, in the very next paragraph, the judgment reports that the alleged victim approached Mr. Allaberdyev. The judgment also relies on a witness, who purportedly asked to participate as a witness to the preliminary investigation to confirm the testimonies of Mr. Allaberdyev and the alleged victim, even though the witness was not present when the alleged altercation occurred. The source adds that the trial judgment also conflicts with reports from various human rights organizations. The source further notes that contrary to the judgment, the trial was not open to the public and the alleged victim was never investigated or charged.

38. The source submits that the Turkmen Government's failure to provide Mr. Allaberdyev with an impartial judge violated his rights under article 14(1) of the Covenant.¹² The source adds that the judgment is not duly reasoned and thereby prohibits Mr. Allaberdyev from effectively pursuing his right to appeal under article 14(5) of the Covenant.

Right to effectively participate in defence and consult with lawyers

39. The source submits that Mr. Allaberdyev's right to counsel was thwarted at every turn. He was reportedly arrested, charged, detained, and questioned all without access to his attorney. In fact, Mr. Allaberdyev was reportedly detained incommunicado for three days before he was allowed to speak with his attorney. More still, Mr. Allaberdyev's lawyer was denied access to the case file and ultimately withdrew under questionable circumstances immediately after speaking with the lead investigator. Relatedly, because the lawyer withdrew before obtaining access to Mr. Allaberdyev's file, the latter likely never saw the case file or the evidence the Government planned to use against him until the Government presented it at trial.

40. The source adds that due to the well-known political nature of Mr. Allaberdyev's case throughout the region, he was unable to procure the services of another independent attorney and was therefore unrepresented at trial and continues to be unrepresented throughout the pendency of his appeal. In this respect, the source adds that it is of no legal effect that Mr. Allaberdyev is a lawyer, as the right to representation is an unqualified right unrelated to the defendant's profession and, practically, Mr. Allaberdyev is a regulatory lawyer, not a criminal defence lawyer.

41. Accordingly, the source submits that the Government violated articles 9 and 14(3)(b) of the Covenant and severely infringed Mr. Allaberdyev's right to a fair trial.¹³

¹¹ The source refers to opinion No. 4/2018, at para. 71.

¹² The source also refers to CCPR/C/GC/32 as well as the Basic Principles on the Independence of the Judiciary, at para. 6.

¹³ The source refers to CCPR/C/GC/32 as well as opinion No. 70/2017.

Right to call witnesses and cross-examine Government witnesses

42. With reference to article 14(3)(e) of the Covenant, the source notes that one of the key tenets of a fair hearing is the principle of equality of arms, which requires that both parties have the same procedural rights.

43. According to the source, the Government denied Mr. Allaberdyev the opportunity to call witnesses whose testimony was relevant to his defence and it denied his right to cross-examine the prosecution's witnesses. According to the trial judgment, the court heard testimony from four live witnesses in addition to considering the statements of four witnesses who provided statements during the preliminary investigation. All eight of these individuals provided testimony against Mr. Allaberdyev. The source notes that conspicuously absent from the trial judgment is any mention of witnesses offering testimony on Mr. Allaberdyev's behalf, despite reports that witnesses were present and willing to do so. Moreover, Mr. Allaberdyev was not afforded an opportunity to cross-examine the individual whom he purportedly assaulted or any of the other individuals who provided statements during the preliminary investigation. It is also unlikely, given the trial's short duration and the trial judgment's silence with respect to testimony elicited on cross-examination, that Mr. Allaberdyev was given the opportunity to cross-examine the prosecution's witnesses. Accordingly, the source submits that the Government violated article 14(3)(e) of the Covenant.¹⁴

44. In conclusion, the source submits that the Turkmen Government targeted, detained, and arrested Mr. Allaberdyev on fabricated charges due to his alleged connections to the protest movement abroad. After his arrest, the Government repeatedly violated his right to a fair trial (including by detaining him incommunicado pending investigation and trial), his right to consult with counsel and to participate in his trial, and his presumption of innocence. For the forgoing reasons, the source submits that the incommunicado detention of Mr. Allaberdyev and continuing restriction on his freedoms is a violation of international law and is therefore arbitrary and illegal.

Response from the Government

45. On 3 December 2021, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 1 February 2022, detailed information about the current situation of Pygamberdy Allaberdyev and to clarify the legal provisions justifying his continued detention, as well as its compatibility with Turkmenistan's obligations under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Turkmenistan to ensure his physical and mental integrity.

46. The Working Group regrets that the Government neither sought an extension of the deadline in accordance with para. 16 of Working Group's methods of work, nor submitted a reply in the present case.

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. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see 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.

¹⁴ The source refers to opinion No. 16/2017, at para. 59.

49. The source has alleged, and the Government has chosen not to contest that Mr. Allaberdyev's detention falls under categories I, II and III of the Working Group. The Working Group shall proceed to examine these in turn.

Category I

50. The source has submitted, and the Government has chosen not to contest that Mr. Allaberdyev was arrested on 5 September 2020 following an altercation with another person outside of a grocery shop. This arrest was carried out in the absence of an arrest warrant.

51. While the Working Group accepts that at times arrests may be legitimately carried out in flagrante delicto circumstances, it is also cognisant that such circumstances are exceptional and should not be used as a pretext to carry out a premeditated arrest in the absence of an arrest warrant. The circumstances of Mr. Allaberdyev's arrest as submitted to the Working Group and not contested by the Government, suggest that his arrest was premeditated and that the arrest warrant should therefore have been presented. In this respect, the Working Group notes in particular that Mr. Allaberdyev was approached by the person who initiated the altercation and the speedy arrival of the police to arrest him on the spot, while the other person was allowed to depart and, in fact, was never even investigated. The content of the subsequent immediate interrogation of Mr. Allaberdyev by the MNS also did not relate to that incident (see para. 11 above), and his trial (see discussion below) also suggests that the true reason for his arrest was not this altercation.

52. Moreover, the arrest warrant was finally issued on 8 September 2020, and the Working Group observes that the Government has provided no explanation for the delay of three days for the issuance of this warrant. Furthermore, it was issued by the prosecution which also authorised Mr. Allaberdyev's pre-trial detention. Although it is not entirely clear, the circumstances as presented by the source and not contested by the Government suggest that there was no search warrant issued.

53. As the Working Group has previously stated, for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law which may authorise the arrest. The authorities must invoke that legal basis and apply it promptly to the circumstances of the case through an arrest warrant.¹⁵ Indeed, the international law on deprivation of liberty includes the right to be presented with an arrest warrant, which is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary deprivation, under articles 3 and 9 respectively of the Universal Declaration of Human Rights, article 9 of the Covenant, as well as under principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.¹⁶ Any form of detention or imprisonment should be ordered by, or be subjected to the effective control of, a judicial or other authority under the law, whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence, in accordance with principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The prosecutorial authorities do not satisfy this requirement. The Working Group thus finds that Mr. Allaberdyev's rights under article 9(1) of the Covenant were violated.

54. Furthermore, according to article 9(3) of the Covenant, anyone arrested or detained on a criminal charge shall be brought promptly before a judge to exercise judicial power. As the Human Rights Committee has noted, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee "promptly" before a judge or other officer authorized by law following his or her arrest; any longer delay must remain absolutely exceptional and be justified under the circumstances.¹⁷ Noting that Mr. Allaberdyev's arrest warrant was issued by the prosecution which also authorised his pre-trial detention and that Mr. Allaberdyev in fact did not appear before the judicial authority until the start of his trial on 29 September 2020, the Working Group finds that he was not brought promptly before a judicial authority, in violation of article 9(3) of the Covenant. The Working Group recalls that the prosecutorial

¹⁵ See e.g. opinions Nos. 72/2021, 89/2020, 79/2018, 35/2918, 93/2017, 75/2017, 66/2017 and 46/2017.

¹⁶ See opinions No. 30/2018, para. 39; No. 3/2018, para. 43; and No. 88/2017, para. 27.

¹⁷ CCPR/C/GC/35, paras. 32-33.

body cannot be considered a judicial authority for the purposes of article 9(3) of the Covenant.¹⁸ As a result, the authorities failed to establish the legal basis for his detention in accordance with the provisions of the Covenant.

55. Moreover, to establish that a detention is indeed legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged by article 9(4) of the Covenant. The Working Group recalls that according to the UN Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of their Liberty to Bring Proceedings before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.¹⁹ This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty,²⁰ applies to ‘all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law’.²¹ Moreover, it also applies ‘irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary’.²²

56. The right to take proceedings before a court in order that that court decides upon the lawfulness of detention also must be afforded without delay, as specified in article 9(4) and, as the Human Rights Committee has specified in its general comment No. 35,²³ the adjudication of the case should take place as expeditiously as possible. In the present case, Mr. Allaberdyev was not availed of the opportunity to exercise his right to challenge the legality of his detention until the start of his trial some four weeks after his arrest, and the Government has presented no explanation for this delay.

57. Mr. Allaberdyev was also not permitted to see his lawyer until some three days after his arrest, which in fact was the only time he was allowed legal assistance of his choice. The Working Group is particularly concerned that he was interrogated by the MNS officers in the absence of his lawyer and recalls that all 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 their apprehension, and such access must be provided without delay.²⁴ Noting the failure to present Mr. Allaberdyev before a judicial authority following his arrest as well as the denial of legal assistance immediately following his arrest, the Working Group finds a breach of article 9(4) of the Covenant.

58. Finally, the Working Group notes the uncontested allegations that Mr. Allaberdyev was held incommunicado prior to his trial, with the exception of one meeting with his lawyer three days after his arrest. The source has submitted, and the Government does not contest that Mr. Allaberdyev continued to be held incommunicado during his trial as well as subsequently.

59. As the Working Group has consistently found, holding persons incommunicado violates their right to be brought before a court under article 9(3) of the Covenant and to challenge the lawfulness of their detention before a court under article 9(4) of the Covenant.²⁵ This view is consistent with that of the Human Rights Committee, who in its general comment No. 35 has argued that “[I]ncommunicado detention that prevents prompt presentation before a judge inherently violates paragraph 3 [of Article 9].”²⁶ The Working Group once again recalls that judicial oversight of detention is a fundamental safeguard of personal liberty²⁷ and is essential in ensuring that detention has a legal basis. Given that

¹⁸ Ibid, para. 32; opinions Nos. 41/2020, para. 60; 6/2020, para. 47; 5/2020, para. 72; 14/2015, para. 28; and A/HRC/45/16/Add.1, para. 35.

¹⁹ A/HRC/30/37, at paras. 2 and 3.

²⁰ Ibid, at para. 11.

²¹ Ibid, at para. 47 (a).

²² Ibid, at para. 47 (b).

²³ CCPR/C/GC/35, para. 47.

²⁴ A/HRC/45/16, at paras. 51-52; A/HRC/30/37, principle 9 and guideline 8. See also the Basic Principles on the Role of Lawyers, paras. 16–22.

²⁵ See e.g. opinions Nos. 36/2020, 79/2017, 46/2017, 45/2017, 11/2018 and 35/2018.

²⁶ CCPR/C/GC/35, para 35.

²⁷ See A/HRC/30/37, at para. 3.

following the initial meeting with the lawyer three days after his arrest, Mr. Allaberdyev was subsequently unable to contact anyone and especially his lawyer, which is an essential safeguard to ensure the ability of any detainee to personally challenge their detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2(3) of the Covenant was violated. He was also placed outside the protection of the law, in violation of his right to be recognised as a person before the law under article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.

60. Noting all the above, the Working Group concludes that the arrest and subsequent detention of Mr. Allaberdyev lacked a legal basis and was therefore arbitrary falling under category I.

Category II

61. The source has submitted, and the Government has chosen not to contest that the true reason for Mr. Allaberdyev's arrest and detention was targeting by authorities for his public criticism, his alleged connection to foreign activists, and his attempt to organize a peaceful public protest.

62. The Working Group recalls that detention purely due to peaceful exercise of rights protected by the Covenant may be arbitrary.²⁸ Indeed, the Human Rights Council Resolution 24/5 "reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others". This echoes the principle enunciated in Human Rights Council Resolution 12/16 which calls on States to refrain from imposing restrictions which are not consistent with article 19(3), including: discussion of government policies and political debate; reporting on human rights; engaging in peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief.

63. The Working Group further recalls that freedom of opinion and freedom of expression as expressed in article 19 of the Covenant are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation stone for every free and democratic society.²⁹ According to the Human Rights Committee, no derogations can be made to article 19 simply because 'it can never become necessary to derogate from it during a state of emergency'.³⁰

64. Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers, and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.³¹ Moreover, article 19(2) of the Covenant protects all forms of expression and the means of their dissemination, including all forms of audio-visual as well as electronic and internet-based modes of expression.³²

65. Although article 19(3) permits certain restrictions to this right, the permitted restrictions to this right may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. As the Human Rights Committee has stipulated, 'restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated'.³³ It should be noted that article 21 of the Covenant permits restrictions to the right of assembly and association on the same three grounds.

²⁸ CCPR/C/GC/35, paras 17 and 53.

²⁹ CCPR/C/GC/34, at para 2.

³⁰ Ibid, at para. 5.

³¹ Ibid, at para. 11.

³² Ibid, at para. 12.

³³ Ibid, at para. 22.

66. In the present case, the Working Group is convinced that the true reason for Mr. Allaberdyev's arrest and detention was his peaceful exercise of the freedom of expression and freedom of association as evidenced by the fabricated circumstances of his arrest and the trial as well as the very harsh penalty imposed by the court. The Working Group especially notes the absence of any explanation from the Government in this case.

67. Notably, the Working Group has been presented with no evidence that any actions or expression by Mr. Allaberdyev incited violence or unrest. On the contrary, they appear to fall firmly within the permissible freedoms protected by articles 19 and 21 of the Covenant to which Turkmenistan is a party to. Consequently, the Working Group concludes that Mr. Allaberdyev's arrest and detention resulted from the exercise of the rights and freedoms guaranteed by articles 19 and 21 of the Covenant and therefore falls under category II.

68. The Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, for further action.

Category III

69. Given its finding that the deprivation of liberty of Mr. Allaberdyev is arbitrary under category II, the Working Group emphasizes that his trial should not have occurred. However, it did, and the source has submitted that because of a trial marred by severe violations of Mr. Allaberdyev's fair trial rights, he was sentenced to six years of imprisonment. The Working Group shall therefore proceed to examine the submissions under category III.

70. The source has submitted, and the Government does not contest that Mr. Allaberdyev was denied the legal assistance of his choice prior and during the trial. While he was allowed one meeting with his lawyer three days after his arrest, that lawyer then abruptly withdrew his services after intimidation from the authorities. In fact, that intimidation was so intense that no other lawyer would be willing to take on Mr. Allaberdyev's case neither during the initial proceedings nor at the appellate stage.

71. The Working Group recalls its comprehensive jurisprudence highlighting that such acts against lawyers are entirely unacceptable and violate articles 10 and 11 of the Universal Declaration of Human Rights as well as article 14 (3) (b) and (d) of the Covenant.³⁴ It is the legal and positive duty of the State to protect everyone on its territory or under its jurisdiction against any human rights violation and to provide remedy whenever a violation still occurs.³⁵ The Working Group recalls that 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 state, in principle 9, that legal counsel are to be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment.³⁶

72. Further, the source has argued, and the Government does not rebut that the trial of Mr. Allaberdyev took place in the pre-trial detention facility and was carried out behind closed doors. As the Human Rights Committee states in its general comment No. 32:

Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public 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 be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons.³⁷

73. The Working Group notes that the case of Mr. Allaberdyev clearly did not fall into any of the prescribed exceptions to the general obligation of public trials under article 14(1)

³⁴ Opinions Nos. 42/ 2020, 66/2019, 28/2018, 70/2017, 36/2017, 34/2017, 32/2017, 29/2017, 14/2017. See also A/HRC/45/16, at para. 54.

³⁵ See deliberation No. 10.

³⁶ See A/HRC/30/37 and also the Basic Principles on the Role of Lawyers, paras. 16–22.

³⁷ CCPR/C/GC/32, para. 29.

of the Covenant, and the Government of Turkmenistan has not invoked any of those exceptions to justify the closed trial. The Working Group thus finds a violation of article 14(1) of the Covenant.³⁸

74. The source has also submitted, and the Government does not contest that witnesses supporting Mr. Allaberdyev were not permitted to present their statements. As the Human Rights Committee states in its general comment No. 32 on the right to equality before courts and tribunals and to a fair trial, there is a strict obligation to respect the right to have witnesses admitted that are relevant for the defence and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.³⁹ In the present case, that right was denied to Mr. Allaberdyev and such a blanket refusal to allow any witnesses on behalf of the defence bears the hallmarks of a serious denial of equality of arms in the proceedings and is in fact a violation of article 14(3)(e) of the Covenant.⁴⁰

75. The Working Group further notes the uncontested submissions that the court hearing lasted mere two hours following which Mr. Allaberdyev received a heavy penalty of six years of imprisonment through a verdict which was not made public until repeated requests from the family. Moreover, the Working Group notes with disturbance that Mr. Allaberdyev appeared in the court with a shaved head and the Government has provided no explanation for this.

76. As the Working Group has previously noted, a very brief trial for serious criminal offences suggests that Mr. Allaberdyev's guilt had been pre-determined, in violation of his right to the presumption of innocence under article 14(2) of the Covenant.⁴¹ The Working Group also considers that Mr. Allaberdyev's appearance with a shaved head is not only a failure on behalf of the Government of its obligations under article 10 of the Covenant, requiring it to treat all persons deprived of their liberty with humanity and with respect for the inherent dignity of the human person, but also a further denial of the presumption of innocence in breach of article 14(2) of the Covenant. In this regard, the Working Group recalls that degrading presentation of the accused person at a trial violates the presumption of innocence⁴² and once again recalls the failure on behalf of the Government to explain the appearance of Mr. Allaberdyev in court.

77. Turning to the appellate proceedings, although the state of these is unclear, the Working Group finds a breach of article 14(5) of the Covenant as the verdict of the court of first instance was not announced publicly. In fact, the family of Mr. Allaberdyev had to plead with the authorities to find out the outcome of the trial. Such a situation where the court does not announce the judgement publicly not only undermines the impartiality of the whole proceedings, but also effectively prevents the prospective appellants from enjoying the effective exercise of the right to appeal.⁴³ As stated by the Human Rights Committee:

“The right to have one’s conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal, also to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal.”⁴⁴

78. Finally, the Working Group considers that the court failed to act in an impartial manner thus violating Mr. Allaberdyev's rights under article 14(1) of the Covenant since it failed to admit evidence and witnesses on behalf of Mr. Allaberdyev,⁴⁵ held the trial hearing behind closed doors, denied Mr. Allaberdyev the presumption of innocence and acted in a manner clearly indicating that the outcome had been pre-determined. In this regard, the

³⁸ See also opinions Nos. 2/2018 and 29/2017.

³⁹ CCPR/C/GC/32, para. 39.

⁴⁰ See also opinions Nos. 53/2019; 17/2019; 83/2018 and 2/2018.

⁴¹ See e.g. opinions Nos. 36/2018 and 75/2017.

⁴² Makhmadim Karimov Aidamir Karimov, Amon Nursatov, Saidabror Askarov, Abdumadzhid Davlatov And Nazar Davlatov v. Tajikistan, CCPR/C/89/D/1108 & 1121/2002, at para 7.4.

⁴³ See opinions Nos. 70/2017, 2/2018 and 44/2018.

⁴⁴ CCPR/C/GC/32, at para 49.

⁴⁵ See, e.g., opinion No. 66/2020.

Working Group recalls that the Human Rights Committee in its general comment No. 32 stated that the requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.⁴⁶ The Committee has further observed that:

“The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.”⁴⁷

79. Consequently, given all the above, the Working Group considers that the non-observance of the international norms relating to the right of Mr. Allaberdyev to a fair trial was of such gravity as to give his deprivation of liberty an arbitrary character, falling under category III.

80. Noting the acts of intimidation against Mr. Allaberdyev’s lawyer as well as the lack of impartiality displayed by the court, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers for appropriate action.

Concluding Remarks

81. The Working Group is seriously concerned at the uncontested allegations that Mr. Allaberdyev continues to be held incommunicado and that his family has not been able to visit him or even speak to him over the phone. The Working Group considers this to be a violation of principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment as well as of article 10 of the Covenant.

Disposition

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

The deprivation of liberty of Pygamberdy Allaberdyev, being in contravention of articles 3, 6, 8, 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights and articles 2(3), 9, 14, 16, 19 and 21 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

83. The Working Group requests the Government of Turkmenistan to take the steps necessary to remedy the situation of Pygamberdy Allaberdyev 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.

84. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Pygamberdy Allaberdyev 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 his immediate unconditional release.

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

86. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the (i) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; (ii) Special Rapporteur on the rights to freedom of peaceful assembly and of association; and (iii) Special Rapporteur on the independence of judges and lawyers, for appropriate action.

⁴⁶ CCPR/C/GC/32, at para. 19.

⁴⁷ Ibid, at para. 21.

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

Follow-up procedure

88. 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. Allaberdyev has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Allaberdyev;
- (c) Whether an investigation has been conducted into the violation of Mr. Allaberdyev'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 Turkmenistan with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

89. 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.

90. 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.

91. 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.⁴⁸

[*Adopted on 1 April 2022]*

⁴⁸ See Human Rights Council resolution 42/22, paras. 3 and 7.