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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April – 1 May 2020

Opinion No. 8/2020 concerning Shakthika Sathkumara (Sri Lanka)

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 27 December 2019, the Working Group transmitted to the Government of Sri Lanka a communication concerning Shakthika Sathkumara. The Government has not replied to the communication. Sri Lanka 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. Delankage Sameera Shakthika Sathkumara is a 34-year-old Sri Lankan national. He is an award-winning writer and poet, having published a number of books and short stories. In addition, he is a civil servant, working as an Economic Development Officer in the Polgahawela Divisional Secretariat. He usually resides in the Kurunegala District.

Arrest and detention

5. On 15 February 2019, Mr. Sathkumara published a short story on social media in a post that was publicly viewable. The text, titled “Ardha”, reportedly tells the story of a young ex-monk who has recently quit the monastic life and who moves into the boarding house of another friend while he pursues a university degree. The story contains themes of homosexuality and alludes to an instance of possible sexual abuse. It belongs to a post-modern literary tradition and is a “frame short story”, which is a type of creative fiction.

6. On 25 February 2019, a Buddhist organisation lodged a complaint against the short story before the Inspector-General of Police in Colombo. The organisation demanded withdrawal of the publication and the arrest of Mr. Sathkumara. A representative of the organisation alleged that the work was defamatory to Buddhism and that Mr. Sathkumara was in violation of section 291B of the Penal Code of 1885 and section 3(1) of Sri Lanka’s International Covenant on Civil and Political Rights Act (ICCPR Act).¹

7. On 6 March 2019, a group of Buddhist monks reportedly visited Mr. Sathkumara’s place of work at the Polgahawela Divisional Secretariat. They delivered a petition against him and his literary work, particularly in relation to *Ardha*, alleging that it defames Buddhism. Mr. Sathkumara explained that the story was not intended to defame or hurt the religious feelings of the community. He clarified that the story is part of a larger tradition of Sinhalese literature expressing the author’s creative thoughts and views on the world at large. The monks objected that Mr. Sathkumara, as a public servant, cannot defame Buddhism. He responded that public servants also have freedom of expression. Mr. Sathkumara was subsequently informed that an inquiry would be conducted.

8. On 1 April 2019, Mr. Sathkumara went to the Polgahawela Police Station with his lawyer, where several monks were waiting near the Chief Inspector’s office. The Chief Inspector called the monks into his office and spoke with them for half an hour before calling in Mr. Sathkumara. Mr. Sathkumara and his lawyer had a discussion with the monks, explaining that Mr. Sathkumara is an award-winning author, that his work was not intended to harm anyone, and that the post had already been removed from social media. They agreed to settle the matter with an apology from Mr. Sathkumara. Mr. Sathkumara was then asked to make a statement. However, the source alleges that while Mr. Sathkumara was making his statement, the Chief Inspector interrupted and informed him that the issue was a serious matter and that he would not allow it to be settled. After Mr. Sathkumara finished recording his statement, the Chief Inspector informed him that he was under arrest for offences under section 291B of the Penal Code and sections 2(1) and 3(1) of the ICCPR Act.

9. According to the source, during the afternoon of 1 April 2019, Mr. Sathkumara was taken to the Polgahawela Magistrates’ Court following his arrest. The Polgahawela Police provided the Magistrate with a copy of their report and asked that the Court order that Mr. Sathkumara be held in detention until 12 April 2019 while they conducted further investigations. Mr. Sathkumara’s lawyer challenged the police request, arguing that his client is the author of several books and that his story was not intended to insult Buddhism or any other religious feelings. He explained that Mr. Sathkumara had already apologised to the Buddhist monks. The Magistrate ordered Mr. Sathkumara to be held in pre-trial detention until 9 April 2019 and denied the request for release on bail.

¹ Act No. 56 of 2007. As noted in its Preamble, the ICCPR Act is intended to give legislative effect to certain provisions of the International Covenant on Civil and Political Rights to which Sri Lanka acceded on 11 June 1980.

10. The source reports that Mr. Sathkumara was subsequently taken to Kegalle Remand Prison, where he was held in pre-trial detention. Reports suggest that the prison is severely overcrowded, with approximately 800 prisoners forced to share limited facilities designed to hold only 200 individuals.

11. Following the decision of the Magistrates' Court, Mr. Sathkumara's lawyers filed a request for bail at the Kurunegala High Court. However, this case was not heard until 9 July 2019 and decided on 5 August 2019.

Pre-trial proceedings

12. On 9 April 2019, Mr. Sathkumara appeared for his first pre-trial hearing before the Polgahawela Magistrates' Court. During the hearing, the lawyer representing the association of monks argued that Mr. Sathkumara had, through his story, insulted Buddhism, the Buddhist Sasana and clergy. Mr. Sathkumara was again ordered to be held on remand until 23 April 2019.

13. On 23 April 2019, Mr. Sathkumara appeared for his second pre-trial hearing, where he filed a petition arguing that he was wrongfully deprived of his liberty, as arrests under sections 291A or 291B of the Penal Code require the prior approval of the Attorney-General. The Magistrate again ordered that Mr. Sathkumara be held on remand until his next hearing on 7 May 2019. The presiding judge reportedly denied bail on the ground that the Magistrates' Court does not have authority to grant bail for a person who is accused or suspected of committing a crime under the ICCPR Act, and only the High Court can grant such bail.

14. On 30 April 2019, Mr. Sathkumara's lawyers filed a petition with the Supreme Court of Colombo, alleging violations of his rights guaranteed by the Sri Lankan Constitution. This petition was set to be argued on 30 September 2019, but has been rescheduled to be heard on 28 July 2020, reportedly without explanation.

15. According to the source, over the next three months, the Magistrates' Court repeatedly extended Mr. Sathkumara's detention, despite the fact that the police made little progress on developing the investigation and the case for trial. On 7 May 2019, Mr. Sathkumara appeared before the Magistrates' Court and was again remanded until 21 May 2019. On 21 May 2019, Mr. Sathkumara's lawyer argued that the police were unreasonably delaying the case, as they claimed that they required more time to undertake further investigations into the uploading of the short story. Once again, Mr. Sathkumara was ordered to be held on remand until 4 June 2019 and then again until 18 June 2019.

16. On 25 June 2019, the Polgahawela Police reported that their investigation was concluded and that the matter could be referred to the Attorney-General for his decision as to whether charges should be filed. Mr. Sathkumara's lawyer requested again that he be released on bail, as he had at that point been in custody for 85 days. The bail application was denied, another hearing was set for 4 July 2019, and Mr. Sathkumara's remand custody was again extended. On 4 July 2019, Mr. Sathkumara's detention was again extended until 18 July 2019.

17. On 9 July 2019, the Kurunegala High Court heard Mr. Sathkumara's request for bail, but the judgment was postponed until 5 August 2019. On 1 August 2019, the Polgahawela Magistrates' Court again ordered an extension to Mr. Sathkumara's detention.

18. Finally, on 5 August 2019, the High Court granted Mr. Sathkumara's release on bail in the amount of two sureties worth 200,000 Sri Lankan Rupees each, as well as on condition that he report to the Polgahawela Police Station once every two weeks. According to the source, Mr. Sathkumara was not immediately released following the High Court's ruling. He was only released from Kegalle Remand Prison on 8 August 2019, after 127 days in detention.

19. At the time of the source's petition to the Working Group, Mr. Sathkumara had still not been formally indicted and no charges had been filed against him. The Attorney-General is expected to appear in the Magistrates' Court with a decision on whether indictments will be filed. There has been no further hearing in this matter at the Magistrates' Court since 1 August 2019.

20. The source emphasizes that, while Mr. Sathkumara is currently released on bail, he still faces the threat of arrest and further detention for charges which have yet to be formally brought against him. Additionally, Mr. Sathkumara is required to meet unduly harsh bail conditions, including providing two sureties worth 200,000 Sri Lankan Rupees each, as well as reporting to the Polgahawela Police Station once every two weeks.

21. Mr. Sathkumara has sought to continue his work as a government employee following his arrest. Although he received a letter of reinstatement from the Government in late October 2019, he has been refused a position by the Irrigation Department of Colombo, where he was reassigned. He had hoped to find a position in the Kurunegala District where he formerly worked, but this has thus far been denied.

Analysis of violations

22. The source submits that Mr. Sathkumara's arrest and detention was arbitrary under categories I, II and III.

Category I

23. Article 11(2) of the Universal Declaration of Human Rights and article 15(1) of the Covenant guarantee individuals the right to know the content of the law and what conduct violates it. The Human Rights Committee has stated that "[a]ny substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application."² Similarly, the Committee has determined that a law "must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."³ The source notes that the exact wording of article 15(1) of the Covenant is also enshrined in article 13(6) of the Sri Lankan Constitution.

24. The source argues that Mr. Sathkumara's arrest is part of a pattern of abusive application of the ICCPR Act, which serves to suppress a broad range of legitimate forms of individual expression. The source refers to several publicly reported examples, including the attempted arrest of a journalist under the ICCPR Act for reporting on Buddhist extremist violence against Sri Lanka's Muslim minority. Additionally, the source refers to an alleged incident involving a Muslim whose shirt had a print that was mistaken by the authorities as a Buddhist symbol, who was also arrested under the ICCPR Act. The source adds that the Government has used the ICCPR Act to open an investigation into a prominent filmmaker and playwright, after a Buddhist monk complained that a recent radio drama produced by him distorted Buddhist terminology.

25. According to the source, these cases illustrate that the application of the ICCPR Act is vague and overly broad. Almost any form of expression challenging Buddhist power, actions by Buddhists, or expressing personal beliefs could be considered a violation of section 3(1) of the ICCPR Act, which prohibits propagating religious hatred. As a result, neither the text of the ICCPR Act nor its application provides sufficient precision for an individual to be able to know what forms of expression will violate the Act.

26. Mr. Sathkumara could not have reasonably known that his work would incur criminal sanctions. His story does not advocate violence or war, nor does it incite discrimination or hostility. There has been no evidence presented that the story had the effect of incitement, nor has Mr. Sathkumara ever been accused of any form of violence or incitement to violence. Accordingly, there were no grounds for Mr. Sathkumara or any other impartial observer to reasonably suspect that the publication would be criminalised under the ICCPR Act. The source claims that Mr. Sathkumara's conduct is punished only because of the practice of applying the law when speech is perceived as challenging by Buddhists. Such application cannot be considered precise, as required by article 11(2) of the Universal Declaration of Human Rights or article 15(1) of the Covenant. Mr. Sathkumara's arrest and detention is

² Human Rights Committee, General comment No. 35, para. 22.

³ Human Rights Committee, General comment No. 34, para. 25.

arbitrary because the first legal basis for his detention, namely the ICCPR Act, is both vague and overly broad.

27. Furthermore, section 291B of the Sri Lankan Penal Code, the second legal basis for Mr. Sathkumara's arrest, is also vague and overly broad. Section 291B prohibits "deliberate and malicious acts intended to outrage religious feelings of any class, by insulting its religion or religious beliefs." The standards of "outrage religious feelings" and "insulting" are inherently subjective, thus failing to provide clear guidance to any individual on what speech amounts to a violation. The lack of textual clarity as to the reach of this provision leads to its application in a manner that infringes upon the freedoms of expression and religion under international law. While Buddhism is the State religion under article 9 of the Sri Lankan Constitution, freedom of expression and religion are also guaranteed under articles 10 and 14(1)(a) and (e) of the Constitution.

28. The source claims that perceived insults to Buddhism or the Buddhist establishment often result in arrests following a complaint from the monks. Section 291 of the Penal Code has repeatedly been used to suppress legitimate forms of expression. Given the political influence of the Buddhist clergy and the special constitutional status afforded to Buddhism as the State religion, section 291B effectively provides a mechanism to stifle unorthodox religious views and expression.

29. According to the source, the police used section 291B to arrest Mr. Sathkumara for the legitimate exercise of his freedom of expression. The intent of his story was not to advocate against the Buddhist religion, and, in fact, he considered his story to be part of a tradition of critical Sinhalese literature on Buddhist philosophy. As further evidence of his intent, Mr. Sathkumara removed the story from social media and was prepared to issue a formal apology as agreed upon in the initial settlement with the monks prior to his arrest.

30. As a result, Mr. Sathkumara's arrest and detention pending trial was arbitrary under category I because the legal basis for his detention under section 3(1) of the ICCPR Act and section 291B of the Penal Code is both vague and overly broad.

Category II

31. The source claims that the Government arbitrarily arrested and detained Mr. Sathkumara on the basis of the exercise of his rights to freedom of expression and freedom of thought, conscience and religion.

32. 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." This right is not limited by form or subject matter, and includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, such as cultural and artistic expression, teaching, and religious discourse.⁴ Moreover, all means of expression are covered, including electronic and internet-based modes of expression.⁵

33. Mr. Sathkumara was arrested and detained because of his expression manifested in the short story, *Ardha*. The source alleges that the police cited criminal statutes that place limitations on free expression as the basis for his arrest. While the right to freedom of expression is not absolute, the State can only impose restrictions under limited conditions. Freedom of expression may only be limited when provided by law and necessary for the respect of the rights or reputations of others, protection of national security, public order, health or morals. The Human Rights Committee has held that limitations on the freedom of expression under article 19(3) of the Covenant must "meet a strict test of justification."⁶

34. 34. The exceptions to the right to freedom of expression do not apply in the present case. While the restrictions on expression were written into law, these laws were vague and overly broad. The short story did not infringe upon or in any way threaten "the rights or

⁴ Ibid, para. 11.

⁵ Ibid, para. 12.

⁶ Human Rights Committee, Communication No. 628/1995, *Park v. Republic of Korea*, para. 10.3.

reputations of others, protection of national security or public order, health or morals.” In the context of what counts as legitimate grounds for restricting expression, the Human Rights Committee has been clear that “[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.”⁷

35. The source argues that the Government applies both the ICCPR Act and section 291B of the Penal Code to criminalise actions that are merely perceived to be offensive or insulting to Buddhists. As a result, the application of these laws does not rise to the level of a legitimate prohibition of hate speech. The source stresses that any interpretation of article 20 of the Covenant in a way that inhibits free expression amounts to a violation of article 5 of the Covenant. Article 5 prohibits interpretations of the Covenant which aim to destroy “any of the rights and freedoms recognized [in the Covenant].” Using these laws to harass, detain, and potentially punish Mr. Sathkumara cannot qualify as a legitimate exception to the freedom of expression.

36. Moreover, if a legitimate justification had existed, the Government had a duty to specify the manner of the threat posed by Mr. Sathkumara’s story. Under the Human Rights Committee’s jurisprudence, “the State party must demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes.”⁸ The authorities have offered no explanation - beyond the Buddhist clerics’ indignation at the content of the story - as to why Mr. Sathkumara’s right should be curtailed. No exceptions are applicable to the restrictions of Mr. Sathkumara’s right to freedom of expression, and therefore his detention and continued prosecution amount to a violation of article 19 of the Covenant.

37. The source further alleges that the Sri Lankan authorities have violated Mr. Sathkumara’s right to freedom of thought, conscience and religion. The right to freedom of thought, conscience and religion is an essential tenet of international law, as expressed in article 18 of the Covenant and article 10 of the Sri Lankan 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 has stated that article 18 “encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief...”.⁹ Moreover, freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.¹⁰

38. According to the source, Mr. Sathkumara’s arrest and detention stem from the short story he wrote and posted to his social media account. Mr. Sathkumara’s story dealt primarily with religious themes and Buddhist philosophy, provoking the ire of Buddhist monks, which in turn led to charges of incitement on the basis of religion. The fact that Mr. Sathkumara’s writing and posting of his original short story constitutes the basis of his arrest and detention amounts to a limitation on his right to freedom of religion.

39. According to article 18(3) of the Covenant, the right to freedom of religion may only be limited when such restrictions are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others.” The source reiterates that these exceptions do not apply to the present circumstances. As the Human Rights Committee has stated, the fact that a religion is recognised as a State religion or that it is established as official or traditional shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including article 18.¹¹ Given that no exception applies to the Government’s restriction of Mr. Sathkumara’s right to freedom of religion, his detention and continued prosecution amounts to a violation of article 18 of the Covenant.

⁷ Human Rights Committee, General comment No. 34, para. 48.

⁸ Human Rights Committee, Communication No. 926/2000, *Shin v. Republic of Korea*, para. 7.3.

⁹ Human Rights Committee, General comment No. 22, para. 1.

¹⁰ *Ibid.*

¹¹ *Ibid.*, para. 9.

Category III

40. According to article 9(1) of the Covenant, “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Article 13(1) of the Sri Lankan Constitution similarly prohibits arrest except in accordance with legal procedure.

41. While the police presented the legal justification for Mr. Sathkumara’s arrest at the police station, the source claims that the basis for the charges was not accompanied by any evidence. Mr. Sathkumara and the complainant monks had already agreed to settle the issue amongst themselves when the Chief Inspector would not allow the matter to be settled. According to the source, the Chief Inspector stated that Mr. Sathkumara was under arrest pursuant to section 291B of the Penal Code and the ICCPR Act, but did not explain on what grounds Mr. Sathkumara’s violations were based. Moreover, the source states that under Sri Lankan criminal procedures, arrests made pursuant to section 291 require the approval of the Attorney-General. No such approval was sought. In light of the irregular manner of arrest, Mr. Sathkumara’s arrest and detention was arbitrary and in violation of article 9 of the Universal Declaration of Human Rights and article 9(1) of the Covenant.

42. Furthermore, article 14(3)(c) of the Covenant guarantees that each individual subject to arrest shall be tried without undue delay. The Human Rights Committee has explained that, “[a]n important aspect of the fairness of a hearing is its expeditiousness” and “in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.”¹²

43. Mr. Sathkumara was held without bail for 127 days, and formal charges have yet to be filed. While he was able to appear before a court during the period of his detention, the courts repeatedly delayed important decisions on his case while extending the period of his detention. The hearing of Mr. Sathkumara’s petition with the Supreme Court filed on 30 April 2019 was rescheduled for 28 July 2020. Due to the substantial delays in Mr. Sathkumara’s trial and due to the failure of the detaining authorities to provide legitimate grounds for the length of proceedings, the Government has violated Mr. Sathkumara’s right to be tried without undue delay, contrary to article 14(3)(c) of the Covenant.

44. In addition, article 9(3) of the Covenant provides the right to release pending trial. Under this provision, pre-trial detention 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 individualised 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.¹³ Pre-trial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.¹⁴

45. Mr. Sathkumara was held without formal charges or a right to bail. The ICCPR Act, which provided the grounds for Mr. Sathkumara’s detention, requires that anyone accused of violating the Act shall, by default, be denied bail. Section 3(4) of the Act states that “An offence under this section shall be cognizable and non-bailable, and no person suspected or accused of such an offence shall be enlarged on bail, except by the High Court in exceptional circumstances.” The source claims that this provision violates the requirement in article 9(3) of the Covenant that pre-trial custodial detention is not the general rule. According to the source, during the 23 April 2019 hearing before the Magistrates’ Court, the judge explicitly stated that the reason he could not grant bail was due to the charges alleged under the ICCPR Act.

46. Moreover, because the denial of bail was based upon section 3(4) of the ICCPR Act rather than an individualised determination regarding Mr. Sathkumara’s case, the Magistrates’ Court failed to take the totality of the circumstances into account as required under the Covenant. The courts offered no determination as to whether Mr. Sathkumara represented a flight risk or a threat of repeating the supposed offence. Even if the short story did constitute

¹² Human Rights Committee, General comment No. 32, paras. 27, 35.

¹³ Human Rights Committee, General comment No. 35, para. 38.

¹⁴ Ibid.

some form of public threat or offence, it had been removed from social media prior to Mr. Sathkumara's arrest. There were no circumstances that could reasonably justify the excessive period of detention without trial or formal charges.

47. For the above reasons, Mr. Sathkumara's arrest and detention violated international law, as the expression through his short story is protected under applicable provisions of the Covenant, as well as other sources of international and Sri Lankan law. By arresting Mr. Sathkumara and subjecting him to lengthy pre-trial detention, the conditions of which violated international law, the Government has arbitrarily detained Mr. Sathkumara.

Response from the Government

48. On 27 December 2019, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting the Government to provide detailed information by 25 February 2020 about the current situation of Mr. Sathkumara. The Working Group also requested the Government to clarify the legal provisions justifying his detention, as well as its compatibility with Sri Lanka's obligations under international human rights law.

49. The Working Group regrets that it did not receive a response from the Government to its communication. The Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

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

51. The Working Group welcomes the release of Mr. Sathkumara from pre-trial detention on 8 August 2019. According to paragraph 17(a) of its methods of work, the Working Group reserves the right to render an opinion on whether the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. Mr. Sathkumara was allegedly subjected to serious human rights violations, including being detained for the exercise of his rights to freedom of religion and expression. Moreover, while Mr. Sathkumara is currently released on bail, he still faces the threat of arrest and further detention, as a decision by the Attorney-General is pending on whether indictments will be filed. For these reasons, the Working Group considers that it is important to render an opinion in this case.

52. 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 the 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.

53. As a preliminary matter, the Working Group notes that the High Court granted Mr. Sathkumara's release on bail on 5 August 2019, but he was not actually released from Kegalle Remand Prison until three days later on 8 August 2019. The reason for this delay is not clear.¹⁵ The Working Group does not have sufficient information to make a finding on this matter. However, it takes this opportunity to reiterate that maintaining a person in detention after release has been ordered by a court competent to exercise control over the legality of detention is a manifest violation of article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant and renders the detention arbitrary because it lacks legal basis.¹⁶

¹⁵ The delay may have been caused by the need to secure two sureties of 200,000 Sri Lankan Rupees each. During its visit to Sri Lanka in December 2017, the Working Group learned of numerous cases in which accused persons were granted bail, but remained in custody because they were unable to afford the bail or provide the requisite sureties: A/HRC/39/45/Add.2, para. 23.

¹⁶ Opinion Nos. 9/2011, para. 38; 7/2011, paras. 15-17; 3/2011, para. 20; 3/2010, para. 6; 21/2007, para. 19; 5/2005, para. 19; Decision Nos. 45/1995, para. 6 and 61/1993, para. 6. See also Human Rights Committee, General comment No. 35, para. 22.

54. Furthermore, according to article 9(3) of the Covenant, pre-trial detention should be the exception and not the rule, and should be ordered for as short a time as possible.¹⁷ That is, liberty is recognised under article 9(3) as a principle and detention as an exception in the interests of justice.¹⁸ As noted by the Human Rights Committee in its General comment No. 35 (2014):

“It should not be the general practice to subject defendants to pre-trial detention. 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. The relevant factors should be specified in law and should not include vague and expansive standards such as "public security".” (para 38)

55. The Working Group notes that the Government has not explained the reasons that led to the decision to place Mr. Sathkumara in pre-trial detention, nor the reasons for the multiple extensions of the orders remanding him in custody. In addition, the Government did not explain why these measures were reasonable and necessary. Accordingly, the Working Group finds that the Government did not establish a legal basis for Mr. Sathkumara’s pre-trial detention in accordance with the requirements of article 9(3) of the Covenant.

56. The Working Group finds that there was no legal basis for Mr. Sathkumara’s arrest and pre-trial detention. His detention was arbitrary under category I.

57. In addition, the source alleges that Mr. Sathkumara was arbitrarily arrested and detained on the basis of the peaceful exercise of his rights to freedom of thought, conscience and religion and freedom of expression. According to the source, the authorities detained Mr. Sathkumara because of his religious belief and expression as manifested in the short story, *Ardha*. The Government did not provide any information in response to these allegations.

58. The Working Group will examine each of the source’s arguments in turn. The source alleges that the authorities have violated Mr. Sathkumara’s right to freedom of thought, conscience and religion under article 18 of the Universal Declaration of Human Rights and article 18 of the Covenant by detaining him for writing and posting his short story on social media. According to the source, Mr. Sathkumara’s short story deals with Buddhist philosophy and is alleged to have insulted Buddhism, a religion which is accorded the foremost place and special protection under article 9 of the Sri Lankan Constitution.¹⁹ Mr. Sathkumara was detained for allegedly propagating religious hatred under section 3(1) of the ICCPR Act, and for insulting the religion or religious beliefs of a class of persons under section 291B of the Penal Code.

59. The right to freedom of thought, conscience and religion in article 18(1) of the Covenant encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.²⁰ Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.²¹ The fact that a religion is recognised as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including article 18.²² Moreover, prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20(2) of the Covenant.²³ Accordingly, the Working Group considers that Mr. Sathkumara’s short story falls clearly within the boundaries of the right to freedom of thought, conscience and religion protected

¹⁷ A/HRC/19/57, paras. 48-58.

¹⁸ *Ibid.*, para. 54.

¹⁹ See A/HRC/43/48/Add.2, 28 February 2020, para. 58 (in which the Special Rapporteur on freedom of religion or belief notes that this provision is almost equivalent to Buddhism being made the official religion of the State).

²⁰ Human Rights Committee, General comment No. 22, para. 1

²¹ *Ibid.*, para. 2.

²² *Ibid.*, para. 9.

²³ Human Rights Committee, General comment No. 34, para. 48.

under article 18(1) of the Covenant, and that his detention resulted from peacefully exercising that right.

60. Similarly, the source argues that Mr. Sathkumara was arrested and detained because he exercised his freedom of expression by writing and posting a short story online on a social media platform, in violation of article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. According to the source, the authorities have applied section 3(1) of the ICCPR Act and section 291B of the Penal Code to criminalise expression that is merely perceived to be offensive or insulting to Buddhists.²⁴ The authorities have offered no explanation, other than the Buddhist clerics' indignation at the content of the short story, as to why Mr. Sathkumara's right to freedom of expression should be curtailed.

61. The Working Group considers that Mr. Sathkumara's short story falls clearly within the boundaries of the right to freedom of expression protected under article 19(2) of the Covenant, as this right includes cultural and artistic expression and religious discourse.²⁵ As the Human Rights Committee has stated, this right also embraces expression that may be regarded as deeply offensive.²⁶ The fact that the short story in this case contained references to controversial themes of homosexuality and sexual abuse does not prevent it from falling within the scope of the freedom of expression.²⁷

62. The Government did not explain the threat posed by Mr. Sathkumara's conduct to the legitimate interests that States might invoke under articles 18(3) and 19(3) of the Covenant, namely respect for the rights, freedoms or reputations of others, national security, public safety, public order, public health or morals, and how the arrest and detention of Mr. Sathkumara was necessary to protect any of those interests. Importantly, there is no information to suggest that Mr. Sathkumara's short story advocated violence or war, or incited discrimination or hostility. There has also been no evidence presented that the story had the effect of incitement, nor has Mr. Sathkumara ever been accused of any form of violence or incitement to violence that would justify restriction of his activities as religious hate speech under article 20 of the Covenant.

63. Moreover, the Working Group is not convinced that detaining Mr. Sathkumara and possibly prosecuting him for offences that may lead to his imprisonment for up to 12 years is a proportionate response to his writing and posting a short story online. The short story has since been removed from the site on which it was posted, and Mr. Sathkumara has offered to provide a formal apology. The Working Group refers this case to the Special Rapporteurs on the freedom of religion or belief and on the promotion and protection of the right to freedom of opinion and expression.

64. The Working Group concludes that Mr. Sathkumara's arrest and detention resulted from the peaceful exercise of his rights to freedom of thought, conscience and religion and freedom of expression. His detention was arbitrary under category II.

65. In addition, the Working Group received credible allegations that Mr. Sathkumara was held in pre-trial detention for 127 days from 1 April 2019 to 8 August 2019²⁸ without sufficient legal justification. That is, Mr. Sathkumara's arrest and detention pending trial was

²⁴ In his recent report, the Special Rapporteur on freedom of religion or belief notes, with specific reference to Mr. Sathkumara's case, that the ICCPR Act is invoked to protect religions or beliefs against criticism or perceived insult and that the "ICCPR Act has ironically become a repressive tool curtailing freedom of thought or opinion, conscience and religion or belief". A/HRC/43/48/Add.2, para. 72.

²⁵ Human Rights Committee, General comment No. 34, para. 11.

²⁶ *Ibid.*

²⁷ See Opinion No. 33/2019 (finding that a fictional story considered offensive by the authorities about a female character who burns the Qu'ran after watching a film showing a woman stoned to death for alleged adultery fell within the protection of article 19(2) of the Covenant).

²⁸ The period of Mr. Sathkumara's pre-trial detention from his arrest on 1 April 2019 until his release on 8 August 2019 was 130 days. While the source states that this period was 127 days, this may have been calculated based on the High Court's ruling on 5 August 2019 that Mr. Sathkumara be released on bail. The Working Group considers that Mr. Sathkumara was deprived of liberty until his release from prison on 8 August 2019, as discussed above.

alleged to be arbitrary because the legal basis for his detention under section 3(1) of the ICCPR Act and section 291B of the Penal Code is not defined with sufficient precision. These provisions are vague and overly broad and do not allow an individual to know what conduct violates the law.

66. Section 3(1) of the ICCPR Act states that:

“No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.²⁹ According to section 3(3), the maximum penalty for this offence is ten years of “rigorous imprisonment”.

In addition, section 291B of the Penal Code provides that:

“Whoever, with the deliberate and malicious intention of outraging the religious feelings of any class of persons, by words, either spoken or written, or by visible representations, insults, or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”³⁰

67. The Working Group considers that these provisions are so vague and overly broad in their content and application that they could, as in the present case, result in charges being brought against individuals who had merely exercised their rights under international law. Many forms of legitimate expression and conduct could be considered as amounting to propagation of religious hatred under section 3(1) of the ICCPR Act, and the standards of “outraging the religious feelings of any class” and insulting the religion or religious beliefs of that class in section 291B of the Penal Code are inherently subjective. In making these findings, the Working Group is particularly mindful of the views of the Special Rapporteur on freedom of religion or belief who recently noted the lack of clarity and room for misinterpretation of these provisions, stating that revision is required to bring them into line with international human rights standards.³¹

68. 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.³² In the present case, the application of vague and overly broad provisions adds weight to the Working Group’s conclusion that Mr. Sathkumara’s deprivation of liberty falls within category II. Moreover, the Working Group considers that, in some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty.

69. Given its finding that Mr. Sathkumara’s detention was arbitrary under category II, the Working Group emphasizes that no trial of Mr. Sathkumara should take place in future. At present, he is released on bail and a decision is pending as to whether further proceedings will be initiated against him. However, the Working Group will consider whether the information presented by the source discloses violations of the right to a fair trial to date.

70. The source alleges that the authorities violated Mr. Sathkumara’s right not to be subjected to arbitrary arrest under article 9(1) of the Covenant, which provides that no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. According to the source, while the police presented the legal justification for Mr. Sathkumara’s arrest at the police station, the basis for the charges was not accompanied by any evidence. Mr. Sathkumara and the complainant monks had already agreed to settle the issue when the Chief Inspector would not allow the matter to be settled. Moreover, the Chief Inspector stated that Mr. Sathkumara was under arrest pursuant to section 291B of the Penal Code and the ICCPR Act, but did not explain on what grounds the alleged violations were based. In addition, the source states that arrests made pursuant to

²⁹ See: <https://www.lawnet.gov.lk/wp-content/uploads/2016/12/INTERNATIONAL-COVENANT-ON-CIVIL-AND-POLITICAL-RIGHTS-ICCPR-ACT-NO-56-OF-2007.pdf>

³⁰ See: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/67628/64581/F1856665391/LKA67628.pdf>

³¹ A/HRC/43/48/Add.2, 28 February 2020, paras. 71-74, 92(e).

³² Opinion No. 41/2017, paras. 98–101. See also Opinion No. 62/2018, paras. 57-59; Human Rights Committee, General comment No. 35, para. 22 and General comment No. 34, para. 25.

section 291 of the Penal Code require the approval of the Attorney-General, but no such approval was sought in this case.

71. The Working Group considers itself competent to determine whether the facts demonstrate a failure to afford an individual a fair trial under applicable international standards, but has consistently refrained from taking the place of the national judicial authorities or substituting itself for a domestic appellate tribunal.³³ The Working Group is therefore not able to evaluate whether the charges against Mr. Sathkumara were accompanied by sufficient evidence.³⁴ It is for the Sri Lankan authorities to determine whether the settlement of the matter between Mr. Sathkumara and the monks has removed the evidentiary basis for charges under the ICCPR Act and section 291B of the Penal Code. The source acknowledges that the police presented the legal justification for Mr. Sathkumara's arrest, which appears to have included the reasons for the arrest and notification of the provisions under which Mr. Sathkumara was being arrested and charged.

72. Moreover, it is not clear to the Working Group how the Chief Inspector failed, as the source claims, to explain the grounds on which the alleged violations of the Penal Code and ICCPR Act were based. The alleged misconduct by Mr. Sathkumara, namely the publication of a short story that defames Buddhism, was discussed at the meeting on 1 April 2019 in the presence of his lawyer, who later that afternoon had sufficient information about the alleged offences to argue before the Polgahawela Magistrates' Court that Mr. Sathkumara should not be remanded. In addition, while the source noted that Mr. Sathkumara filed a petition arguing that he was wrongfully arrested, as arrests under sections 291A or 291B of the Penal Code require the prior approval of the Attorney-General, it did not cite any provision to demonstrate that such approval was required and that a violation of arrest procedures had therefore occurred. In these circumstances, the Working Group is unable to conclude that article 9 of the Covenant was violated.

73. The source argues that Mr. Sathkumara was not afforded his right to be tried without undue delay given that he was held for 130 days in pre-trial detention, and in reportedly overcrowded conditions, following his arrest. The reasonableness of any delay in bringing a case to trial must be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the authorities.³⁵

74. Mr. Sathkumara's pre-trial detention was extended by the Polgahawela Magistrates' Court on at least nine occasions before he was released.³⁶ This is a relatively uncomplicated case involving a publication uploaded to social media by an individual who admitted doing so, and the contents of the publication were known to the authorities and the community. It is therefore unclear why the police required further time to investigate, and why the Attorney-General has not determined whether to file indictments that could potentially result in Mr. Sathkumara's imprisonment for up to 12 years. The Government offered no justification for the delay.

75. In addition, the hearing of Mr. Sathkumara's petition to the Supreme Court was filed on 30 April 2019 but rescheduled for over a year later to be heard on 28 July 2020, without explanation. In these circumstances, the Working Group considers that the delay in bringing Mr. Sathkumara to trial has been and continues to be unacceptably long, in violation of articles 9(3) and 14(3)(c) of the Covenant. The delay is exacerbated by the fact that Mr. Sathkumara was detained solely for the exercise of his rights under international human rights law.³⁷ As the Working Group noted during its visit to Sri Lanka in December 2017, lengthy pre-trial detention and undue delays in trials are serious problems that may lead to arbitrary

³³ Opinion Nos. 64/2019, para. 89; 63/2017, para. 45; 59/2016, para. 60; 33/2015, para. 89; 12/2007, para. 18; 40/2005, para. 22; 10/2002, para. 18.

³⁴ Opinion Nos. 75/2018, para. 73; 53/2018, para. 79; 57/2016, para. 115; 10/2000, para. 9.

³⁵ Human Rights Committee, General comment No. 35, para. 37 and General comment No. 32, para. 35.

³⁶ The extensions reportedly took place on 9 April 2019, 23 April 2019, 7 May 2019, 21 May 2019, 4 June 2019, 18 June 2019, 25 June 2019, 4 July 2019, 1 August 2019.

³⁷ See Opinion No. 46/2019, para. 63 (the Working Group was not convinced that there was a category II violation and was unable to find that a 16-month delay before the trial was unreasonable).

detention in many cases.³⁸ There is a pressing need for non-custodial measures, such as bail and sureties set at realistic levels, to be implemented.³⁹

76. Furthermore, the source alleges that Mr. Sathkumara was held without formal charges or a right to bail. The ICCPR Act, which provided the grounds for Mr. Sathkumara's detention, requires that anyone accused of violating the Act be denied bail. Section 3(4) of the Act states that "An offence under this section shall be cognizable and non-bailable, and no person suspected or accused of such an offence shall be enlarged on bail, except by the High Court in exceptional circumstances." According to the source, during the 23 April 2019 hearing before the Polgahawela Magistrates' Court, the magistrate explicitly stated that a Magistrates' Court could not grant bail due to the allegations against Mr. Sathkumara under the ICCPR Act. The Government did not challenge the source's claims.

77. In its jurisprudence, the Working Group has repeatedly confirmed that mandatory pre-trial detention - in this case a "non-bailable" offence under section 3(4) of the ICCPR Act - violates a State's obligations under international human rights law.⁴⁰ In particular, non-bailable offences violate the requirement under article 9(3) of the Covenant that pre-trial detention is an exceptional measure rather than the rule. Such non-bailable offences also violate the requirement that pre-trial detention must be based on an individualised determination that it is reasonable and necessary in the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.⁴¹ As the Human Rights Committee has stated, pre-trial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.⁴²

78. The Working Group also considers that non-bailable offences deprive a detainee of the right to seek alternatives to detention, such as bail, in violation of the right to be presumed innocent under article 11(1) of the Universal Declaration of Human Rights and article 14(2) of the Covenant. The imposition of mandatory pre-trial detention for certain offences reverses the presumption of innocence, so that those subject to ongoing criminal proceedings are automatically detained without a balanced consideration of non-custodial alternatives to detention. Moreover, mandatory pre-trial detention deprives judicial authorities of one of their essential functions as members of an independent and impartial tribunal, namely assessing the necessity and proportionality of the detention in each case.⁴³

79. While section 3(4) of the ICCPR Act allows for the High Court to grant bail "in exceptional circumstances", this was not sufficient to remedy the violation of Mr. Sathkumara's right to an individualised assessment of his case under article 9(3) of the Covenant. The Working Group takes note that it took 127 days before the High Court granted bail to Mr. Sathkumara on 5 August 2019.

80. The Working Group concludes that these violations of the right to a fair trial are of such gravity as to give Mr. Sathkumara's pre-trial detention an arbitrary character under category III.

81. Finally, the Working Group has previously determined that provisions that permit mandatory pre-trial detention create two categories of defendants: those who are subject to criminal proceedings that do not require automatic detention and can benefit from alternative measures, such as bail, and those who, as in the case of Mr. Sathkumara, are alleged to have committed criminal acts that do not allow for such alternatives (or, in this case, only in exceptional circumstances under the ICCPR Act). The Working Group reiterates that this distinction discriminates between criminal defendants in a manner which ignores the equality of human beings based on their "other status" (i.e. being accused of a crime that does not allow for alternative measures to detention), a prohibited ground of discrimination under

³⁸ A/HRC/39/45/Add.2, paras. 21, 22 and 24. See also CCPR/C/LKA/CO/5, paras. 17-18.

³⁹ A/HRC/39/45/Add.2, paras. 23, 83(a)-(c).

⁴⁰ Opinion Nos. 64/2019, 14/2019, 75/2018, 61/2018, 53/2018, 16/2018, 24/2015, 57/2014; A/HRC/42/39/Add.1, paras. 36-38; A/HRC/19/57, paras. 48-58.

⁴¹ See Human Rights Committee, General comment No. 35, para. 38.

⁴² *Ibid.*

⁴³ This applies to the initial judicial review of detention, and also limits the ability of judges to undertake ongoing periodic reviews of the necessity and proportionality of detention.

articles 2 and 7 of the Universal Declaration of Human Rights and articles 2(1) and 26 of the Covenant.⁴⁴ While Mr. Sathkumara was released on 8 August 2019 after 130 days of pre-trial detention, he was detained on a discriminatory basis until that point. Accordingly, the Working Group considers that the facts in the present case disclose a violation of category V.

82. While the Working Group visited Sri Lanka in December 2017, it would welcome the opportunity to conduct a follow-up visit to assist the Government with the implementation of the recommendations made during the initial visit. The Working Group notes that Sri Lanka has maintained a standing invitation to all thematic Special Procedures mandate holders since 17 December 2015.

Disposition

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

The deprivation of liberty of Shakthika Sathkumara, being in contravention of articles 2, 7, 9, 10, 11, 18 and 19 of the Universal Declaration of Human Rights and articles 2(1), 9, 14, 18, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

84. The Working Group requests the Government of Sri Lanka to take the steps necessary to remedy the situation of Mr. Sathkumara 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.

85. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Sathkumara an enforceable right to compensation and other reparations, including reinstatement of his employment,⁴⁵ in accordance with international law.

86. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of Mr. Sathkumara, and to take appropriate measures against those responsible for the violation of his rights.

87. The Working Group requests the Government to bring its laws, particularly section 3(1) and (4) of the ICCPR Act and section 291B of the Penal Code, into conformity with the recommendations made in the present opinion and with the commitments made by Sri Lanka under international human rights law.

88. In accordance with paragraph 33(a) of its methods of work, the Working Group refers this case to: (i) the Special Rapporteur on the freedom of religion or belief, and (ii) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression for appropriate action.

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

Follow-up procedure

90. 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 compensation or other reparations have been made to Mr. Sathkumara;
- (b) Whether an investigation has been conducted into the violation of Mr. Sathkumara's rights and, if so, the outcome of the investigation;
- (c) Whether any legislative amendments or changes in practice have been made to harmonise the laws and practices of Sri Lanka with its international obligations in line with the present opinion;

⁴⁴ Opinion Nos. 64/2019, 14/2019, 75/2018, 1/2018.

⁴⁵ Opinion No. 83/2017, para. 94 (calling for the reinstatement of employment of the detainee's relatives).

(d) Whether any other action has been taken to implement the present opinion.

91. 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.

92. 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.

93. 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.⁴⁶

[Adopted on 1 May 2020]

⁴⁶ Human Rights Council resolution 42/22, paras. 3 and 7.