



Alexey Moskalev in court, 27 March 2023 / Photo: SOTA, collage: OVD-Info

07.03.2024

The UN Working Group on Arbitrary Detention Opinion Concerning Alexey Moskalev

OPINION NO. 76/2023 CONCERNING ALEXEY MOSKALEV (RUSSIAN FEDERATION AND BELARUS)

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 51/8.

In accordance with its methods of work, on 14 July 2023 the Working Group transmitted to the Government of the Russian Federation and the Government of Belarus

a communication concerning Alexey Moskalev. The Governments have not replied to the communication. The States are parties to the International Covenant on Civil and Political Rights.



PDF-version: WGAD Opinion No. 76/2023 concerning
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The Working Group regards deprivation of liberty as arbitrary in the following cases:

- 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);
- 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);
- 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);
- When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
- 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).

1. SUBMISSIONS

Communication from the source

Alexey Moskalev, born in 1968, is a citizen of the Russian Federation, who holds a passport issued by the Federal Migration Service of the Russian Federation for the Tula Region, in Yefremov. He is the father of a child who is a minor of 12 years of age. He usually resides in Yefremov, Tula Region.

Context

According to the source, the Russian Federation has used repressive mechanisms to combat anti-war expression since the invasion of Ukraine on 24 February 2022. On 4 March 2022, in the context of the invasion, the State Duma — a chamber of the Parliament of the Russian Federation — adopted Laws No. 31-FZ and No. 32-FZ, otherwise known as the «Fake News Law». The Fake News Law added article 280.3 to the Criminal Code and amended article 20.3.3 of the Code of Administrative Offences; both articles seek to punish discrediting the armed forces of the Russian Federation and are relevant to the present complaint.

The source submits that the Russian Federation uses the above-mentioned articles together in order to silence anti-war expressions. For instance, those who are fined under article 20.3.3 of the Code of Administrative Offences are at risk of subsequent criminal prosecution — facing up to seven years' imprisonment under article 280.3, part 1, of the Criminal Code if law enforcement officials conclude that they have violated the same provision again within one year.

The source submits that the extent of the use by the Russian Federation of the Fake News Law to silence anti-war expression is demonstrated by the more than 6,200 cases that have been brought under article 20.3.3 of the Code of Administrative Offences and 65 prosecutions of individuals under article 280.3 of the Criminal Code as of 24 March 2023.

Arrests, detentions and trial

The source submits that the persecution of Mr. Moskalev began after Mr. Moskalev's child, who is a minor, drew a picture with the flags of the Russian Federation and Ukraine accompanied with the inscriptions «No to war» and «Glory to Ukraine» during her school art lesson on 24 April 2022.

On 25 April 2022, a day later, Mr. Moskalev was found guilty of an administrative offence under article 20.3.3 of the Code of Administrative Offences by Yefremov Interdistrict Court of the Tula Region. The Court subsequently sentenced Mr. Moskalev to a fine of 32,000 roubles.

On 27 December 2022, a criminal case was opened against Mr. Moskalev for «discrediting the Russian army» under article 280.3 of the Criminal Code, based on its provisions related to social networks. More specifically, Yefremov Interdistrict Court of the Tula Region accused Mr. Moskalev of posting four messages, the content of which was shared with the Working Group, on the Odnoklassniki social network under the username «Moskalev Alexey» on 29 July 2022. The posts criticized the country's military, calling its military actions «terrorist in their nature» among similar characterizations.

According to the source, on 30 December 2022, three days after his criminal case was opened, Mr. Moskalev was summoned to the Federal Security Service building for an interrogation, where he was beaten and ill-treated by the Federal Security Service. His head was repeatedly smashed against the wall and floor, and he was locked in a room for two and a half hours while the Federal Security Service turned on the national anthem of the Russian Federation at full volume. The authorities then called an ambulance for Mr. Moskalev, who had a heart pain. The ambulance arrived, and doctors took Mr. Moskalev's blood pressure and gave him two pills and an injection to ease his heart pain. The doctors and

the ambulance subsequently left the scene. Mr. Moskalev did not complain about his health after this incident.

According to the source, the investigation against Mr. Moskalev did not require him to sign any legal documents stating that he had to remain in the city, and he was therefore under no legal obligation to do so. He reportedly moved cities shortly after the criminal case was opened against him because his child feared going back to school to face harassment and Mr. Moskalev believed that he and his child, who is a minor, needed a new start.

On 1 March 2023, Mr. Moskalev was reportedly arrested without a warrant by the Tula Region police forces outside his home in the city of Uzlovaya, Tula Region.

After his arrest, Mr. Moskalev was detained for the whole day in the police building of the Temporary Detention Centre of the Tula Region. The following day, he was placed under house arrest by the Yefremov Interdistrict Court of the Tula Region, and his minor child was sent to a children's home.

According to the source, the reason for Mr. Moskalev's house arrest was that the authorities viewed his move as an attempt to escape the investigation, despite him having moved several months before they arrested him. Allegedly, that the authorities only ordered the house arrest after various independent media wrote about Mr. Moskalev's story.

During Mr. Moskalev's house arrest, he was subject to restrictive measures commonly imposed on individuals under house arrest in the Russian Federation; he had an electronic monitor placed around his leg and was prohibited from leaving his apartment. In addition, the Commission on Juvenile Affairs reportedly believed that Mr. Moskalev would not be able to exercise parental control over his child, who is a minor, despite an investigator allowing Mr. Moskalev's minor child to be returned to him.

On 27 March 2023, a trial was held at the Yefremov Interdistrict Court of the Tula Region to decide Mr. Moskalev's case. Mr. Moskalev was present at his trial and was able to testify. He was represented by an attorney.

Mr. Moskalev's sentencing hearing took place the day after his trial, on 28 March 2023. However, Mr. Moskalev was not present at the hearing, because he escaped his home that same day and fled the Russian Federation. Nonetheless, the source submits that Yefremov Interdistrict Court sentenced Mr. Moskalev in absentia to two years in prison under article 280.3, part 1, of the Criminal Code for his posts on the Odnoklassniki social media network.

On 30 March 2023, Mr. Moskalev was arrested by police officers in Minsk, Belarus, without being shown a warrant. The Ministry of Internal Affairs of Belarus issued a press release in which it stated that it had arrested Mr. Moskalev on the basis of a request by the police of the Russian Federation.

On 12 April 2023, it became known that Mr. Moskalev had been transferred from Belarus to the Russian Federation. However, his whereabouts were not precisely identified, and he was not able to contact his attorney or his family until 3 May 2023.

On 20 April 2023, during the time that Mr. Moskalev was missing, his attorney appealed against his sentence before Tula Regional Court.

On 3 May 2023, Mr. Moskalev was found in SIZO-1 in Smolensk, Russian Federation. Thereafter, the source submits that Mr. Moskalev was able to meet with his attorney.

Reportedly, after his arrest by Belarusian authorities on 30 March 2023, Mr. Moskalev was detained in Smolevichi, Belarus, by eight employees of local special services.

According to the source, while detained, Mr. Moskalev was severely beaten on his chest and back and suffered a torn leg muscle in his right leg because of the beatings. He was dealt blows to the head and his head was beaten against the wall. Mr. Moskalev was also handcuffed and kept for an hour in handcuffs, which squeezed his hands very tightly. As a result of the handcuffing, Mr. Moskalev still cannot feel either of his thumbs.

Following the beatings, Mr. Moskalev was taken to a temporary detention centre, where the officers documented the bruises and marks on his body. The officers then forced Mr. Moskalev to sign a document stating that he had no claims against the security forces who had beaten him. Mr. Moskalev allegedly agreed to sign the document due to his fear that the officers would beat him further if he refused to sign it.

Mr. Moskalev spent three days in a temporary detention centre, where the conditions were poor. There were 12 people in one cell, and after getting up, the detainees had to roll up the mattresses and could not sit on them due to lack of space.

Following Mr. Moskalev's arrest and detention in the first detention centre, he was detained in another pretrial detention centre in the city of Zhodino, Belarus. He stayed there for one week and was then extradited to the Russian Federation.

Mr. Moskalev was taken out of Belarus and extradited to the Russian Federation by individuals in civilian clothes in an unmarked car. Once in the Russian Federation, he was taken to a temporary detention facility in Smolensk where he stayed for two days. He was then placed in the SIZO-1 detention centre in Smolensk and spent 17 days in quarantine. At one point during the quarantine period, another individual was put in Mr. Moskalev's cell with him. This individual reportedly made a mess in the cell, broke

glass, and applied force to Mr. Moskalev by strangling him and hitting his head against the wall. While in the cell, the individual talked about the need to sign up for the Wagner Group and «go to kill Ukrainians». Allegedly, the individual was purposefully placed in the cell with him by the security forces of the Russian Federation.

On 22 June 2023, Mr. Moskalev was moved to the SIZO detention centre in the Tula Region. His appeal hearing was scheduled for 3 July 2023 and took place as planned. Mr. Moskalev's sentence entered into force and the judge added to the verdict a ban on him using the Internet for two years, as well as an indication of «armed conflict» as an aggravating circumstance of the crime. Mr. Moskalev remains in custody and will now be transferred to a penal colony.

According to the source, on 1 March 2023, Mr. Moskalev's minor child was sent to the Social Rehabilitation Centre for Minors in Yefremov, Tula Region, where the child remained until 5 April 2023. During this time, the child was not able to see anyone, including Mr. Moskalev's lawyer.

On 20 April 2023, the Commission on Juvenile Affairs in Yefremov in the Tula Region dismissed a lawsuit seeking to restrict the rights of the parents of the child. Currently, the child is receiving remote education and living with a relative.

Legal analysis

The source submits that the arrest and detention of Mr. Moskalev is arbitrary under categories I, II, III and V as established by the Working Group on Arbitrary Detention.

Arbitrary detention in the Russian Federation from 1 March 2023 to 28 March 2023

Category I

The source recalls that detention is arbitrary under category I when it is impossible to invoke any legal basis justifying the deprivation of liberty. The source further recalls article 9 (1) of the Covenant, which establishes rights to liberty and security of person and proscribes arrest or detention which are not in accordance with the law. The source also refers to article 11 (2) of the Universal Declaration of Human Rights, which enshrines the principles of necessity and proportionality in relation to criminal liability.

The source recalls that one of the fundamental guarantees of due process is the principle of legality, which includes the principle of certainty. Moreover, the principle of legality requires the substance of penal law to be due and appropriate in a democratic society that respects human dignity and rights. Therefore, the penal punishment must, at a minimum, satisfy the principle of necessity, the prerequisite of injustice and the principle of guilt in the interest of formal and material justice. Punishment should fit the crime, not the criminal, and the requirement of the principle of legality must be construed more strictly in proportion to the severity of the prescribed punishment.

Article 280.3 of the Criminal Code of the Russian Federation cannot qualify as lex certa

The source submits that article 280.3, part 1, of the Criminal Code does not conform to the principle of legal certainty (*lex certa*) because it is not formulated with sufficient precision to allow an individual to access and understand the law and regulate his or her conduct accordingly.

Furthermore, article 280.3, part 1, is vague and broad. The provision «actions aimed at discrediting [the Armed Forces of the Russian Federation]» can be used to deprive individuals of their liberty without a specific legal basis and has a deterrent effect on the exercise of rights and freedoms of individuals because it has the potential to cause abuse, including arbitrary deprivation of liberty.

The source submits that article 280.3, part 1, is used solely to silence anti-war expressions, such as displaying signs or elements of clothing with phrases such as «No to war», «Peace», «Fascism will not pass», or taking part in anti-war rallies or silently supporting them, displaying Ukrainian flags, green ribbons or anti-war badges on clothing, posting, commenting or liking any anti-war posts on social media, or opposing State-promoted pro-war symbols (such as «Z» used on military vehicles).

Article 280.3 of the Criminal Code of the Russian Federation cannot qualify as lege apta

The source further submits that article 280.3, part 1, does not prescribe prison terms which are necessary or proportionate to the stated offence. The provision prescribes prison terms of up to five years of deprivation of liberty for harmless actions that are neither necessary to protect public or private interests from injury, nor proportionate to the guilt established under the law.

Mr. Moskalev was arrested, detained, and sentenced to two years' imprisonment under article 280.3, part 1, for his social media posts, which were found after he was investigated on account of an anti-war drawing by his minor child at a school art lesson.

The source therefore concludes the following: article 280.3, part 1, is vaguely and broadly worded and cannot qualify as either lex certa or lege apta; article 280.3, part 1, violates the due process of law undergirded by the principle of legality in article 11 (2) of the Universal Declaration of Human Rights; and proceedings based on the article are arbitrary for the purpose of article 9 of the Universal Declaration of Human Rights.

In view of the above, the source argues that Mr. Moskalev's arrest, detention and sentencing to two years' imprisonment lack legal basis and are thus arbitrary under category I.

Category II

The source submits that detention is arbitrary under category II when it results from the exercise of fundamental rights or freedoms protected under international law, including the rights to freedom of expression and freedom of association.

The source recalls that article 19 of the Covenant and article 19 of the Universal Declaration of Human Rights extend to ideas that offend or disturb the State and «protect peaceful political discourse and commentary on public affairs via the Internet, including the expression of ideas that may be regarded as offensive» as a core value of political rights in a free and democratic society.

The source further notes that although speech may be limited according to article 19 (3) of the Covenant and article 29 (2) of the Universal Declaration of Human Rights, the mere fact that it may be criminalized under domestic law does not deprive individuals of their right to freedom of speech under international law. Furthermore, offences should not be so vague, broad or imprecise that they grant officials unfettered discretion to criminalize the peaceful exercise of the right to freedom of expression.

The source recalls that restrictions on freedom of expression must be absolutely necessary in a democratic society. States cannot rely pretextually on the enumerated grounds in article 19 (3) of the Covenant and article 29 (2) of the Universal Declaration of Human Rights and must show in a specific and individualized fashion the nature of the threat posed by the speech in question and a direct and immediate connection between this threat and the expression in question.

The source notes that the Working Group has found that criminal sentences are disproportionate for offences such as damaging the State's reputation or weakening national morale. The Working Group has considered «the broad lack of proportionality between the power and impact of the work

and activities carried out by a single individual ... and the power and impact of an entire State machinery, with its executive, legislative and judicial organs and its armed forces, police and security agents».

More specifically, unsubstantiated references to national security concerns are insufficient to show that a detention based on the exercise of freedom of expression meets the article 19 (3) requirements, and limitations based on a national security justification must follow strictly the requirements of necessity and proportionality, which means that governments must show that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and © there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

The source recalls that peaceful political and social discourse cannot be restricted on the basis that it represents a threat to national security, and that the right to freedom of expression cannot be restricted merely to muzzle advocacy of democratic tenets or human rights. Limitations on free speech cannot be justified by merely referencing disturbances to public order. The documentation must show that the restriction is necessary to preserve the interest of maintaining public order, detention as a response to peaceful expression being invalid.

The source recalls that government institutions such as the military are not immune from criticism and that detention as punishment for criticizing¹⁶ or demoralizing the military is arbitrary.

According to the source, Mr. Moskalev was arrested, detained, prosecuted, and sentenced to two years' imprisonment in the Russian Federation to punish him for his social media posts discovered after a criminal case was opened against him after his child drew an anti-war drawing at a school art class.

The crime with which Mr. Moskalev was charged under article 280.3, part 1, of the Criminal Code of the Russian Federation, and the conduct of the subsequent trial, is evidence of a reprisal against him for his expression of a peaceful political opinion. Therefore, his detention must receive heightened scrutiny and a heightened standard of review.

The source submits that allowing anti-war expression to be prohibited under the guise of preventing «discrediting» of the use of the Armed Forces of the Russian Federation would negate the meaning of the Covenant, in particular article 20 (1), which states that «any propaganda for war shall be prohibited by law».

Furthermore, the source alleges that article 280.3, part 1, of the Criminal Code of the Russian Federation was adopted solely to silence speech related to the armed conflict.

The source submits that a sentence of two years' imprisonment for peaceful posts on social media related to the armed conflict in Ukraine is a dramatically disproportionate restriction on the right to freedom of expression.

Therefore, the source submits that article 280.3, part 1, of the Criminal Code is used to target persons engaged in peaceful critical expression, falls short of international standards, is aimed at suppressing debate of public interest concerning the armed conflict in Ukraine and creates a chilling effect on freedom of expression.

The source argues that the Russian Federation has violated Mr. Moskalev's freedom of expression guaranteed by article 19 (2) of the Covenant and article 19 of the Universal Declaration of Human Rights by arresting, detaining and prosecuting him and sentencing him to two years' imprisonment, rendering his detention arbitrary under category II.

Category III

The source recalls article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant, which prohibit arbitrary arrest and detention and require authorities to inform arrested individuals of the reason for the arrest at the time of the arrest, and of the charges against them.

The source submits that Mr. Moskalev was arrested on 1 March 2023 without a warrant, and was subsequently detained, under house arrest. The source recalls that house arrest may be compared to deprivation of liberty if it is carried out in closed premises that the person is not allowed to leave.

The source recalls that detentions that are in response to the exercise of freedom of opinion and freedom of expression require a particular vigilant review of the application of fair trial guarantees.

Moreover, the source submits that laws that restrict freedom of speech may have legitimate means but are prone to abuse, and that violations of such laws should not be punished by detention since such punishment is disproportionate.

The source submits that in the present case, Mr. Moskalev's house arrest from 2 to 28 March 2023 and his sentence of two years' imprisonment resulted solely from his peaceful expression of anti-war opinions.

The source submits that Mr. Moskalev's arrest falls within category III and that no house arrest and trial should have taken place. The source also submits that Mr. Moskalev's sentence was disproportionate and excessive.

Therefore, the source concludes that the violation of Mr. Moskalev's due process rights is of such gravity as to render his deprivation of liberty arbitrary under category III.

Category V

The source recalls articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, which guarantee human rights and equality to all persons without distinction based on political or other views.

The source further recalls that when a detention results from the active exercise of civil and political rights, there is a strong presumption that the detention also constitutes a violation of international law on the grounds of discrimination based on political or other views.

The source recalls that the Working Group has stated that sentencing and detention for expressing anti-war sentiments using a legal basis established solely to target those who criticize the Government and Armed Forces of the Russian Federation regarding the armed conflict in Ukraine violates the international obligation not to discriminate against people on the basis of their political opinions.

The source therefore argues that Mr. Moskalev's detention has been imposed on a discriminatory basis due to his anti-war political opinion. His detention constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, rendering his deprivation of liberty arbitrary under category V.

Arbitrary arrest in Belarus on 30 March 2023 and extraordinary rendition to the Russian Federation on 12 April 2023

Category I

The source submits that on 12 April 2023, following his arrest in Belarus on 30 March 2023, it became known that Mr. Moskalev had been transferred from Belarus to the Russian Federation. However, his whereabouts were not precisely identified, and he did not have a chance to contact his attorney or his family until 3 May 2023.

The source recalls that where transfers from one State to another are too irregular or informal, they constitute extraordinary rendition rather than extradition. Furthermore, extraordinary rendition constitutes government-sponsored abduction and extrajudicial transfer of a person from one country to another, which is not compatible with international law because it is aimed at circumventing procedural safeguards.

The source submits that because Mr. Moskalev was arrested in Minsk, Belarus, without an arrest warrant, and was subsequently transferred illegally to the Russian Federation, the international legal procedures regarding extradition for the purpose of arresting, detaining and returning individuals to face criminal proceedings were blatantly ignored.

The source therefore argues that Belarus is jointly responsible with the Government of the Russian Federation for the arrest and detention of Mr. Moskalev and his deportation to the Russian Federation, which took place in complete disregard of legal procedures and thus falls under category I.

Category III (secret detention in the Russian Federation following transfer from Belarus)

The source recalls that no one should be held in secret detention, and that secret detentions de facto constitute enforced disappearances, which are defined by «government refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law».

The source also recalls that secret detention facilitates torture and other ill-treatment because it denies detainees the legal safeguards and communication with the outside world that would normally dissuade or prevent the detaining powers from acting in such a way.

On 12 April 2023, it became known that Mr. Moskalev had been transferred from Belarus to an unknown location in the Russian Federation. His whereabouts were not precisely identified until 3 May 2023, and he was unable to contact his attorney or his family during the weeks between 12 April and 3 May 2023.

The source therefore argues that the Russian Federation violated its international obligations by imposing secret detention on Mr. Moskalev, which placed him outside the protection of the law, rendering his deprivation of liberty arbitrary under category III.

Response from the Governments

On 14 July 2023, the Working Group transmitted the allegations from the source to the Government of the Russian Federation and the Government of Belarus under its regular communications procedure. The Working Group requested the Governments to provide detailed information by 12 September 2023 about the current situation of Mr. Moskalev. The Working Group also requested the Governments to clarify the legal provisions justifying his detention, as well as its compatibility with the States' obligations under international human rights law, and in particular with regard to the treaties ratified by both States. Moreover, the Working Group called upon the Governments to ensure Mr. Moskalev's physical and mental integrity.

The Working Group regrets that it did not receive a response from the Government of the Russian Federation or from the Government of Belarus to this communication. The Governments did not request an extension of the time limit for their reply, as is provided for in the Working Group's methods of work.

Noting that allegations have been made against the Government of the Russian Federation and the Government

of Belarus, the Working Group will proceed to examine these separately.

2. DISCUSSION

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

In determining whether Mr. Moskalev's detention is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented 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. In the present case, the Governments have chosen not to challenge the *prima facie* credible allegations made by the source.

Allegations against the Government of the Russian Federation

Category I

The source submits that Mr. Moskalev was arrested on 1 March 2023 without a warrant and was subsequently detained under house arrest from 2 March to 28 March 2023. His child, who is a minor, was sent to a children's home.

In the absence of any submission from the Government, the Working Group considers that the source has presented a credible *prima facie* case that Mr. Moskalev's detention is without any legal basis, in violation of article 9 (1) of the Covenant. Pursuant to article 9 (1) of the Covenant, no one is to be deprived of liberty except on such grounds and in accordance with such procedure as are established by law.

To establish a legal basis for deprivation of liberty, the authorities must invoke that legal basis and apply it to the circumstances of the case. The international norms on detention include the right to be presented with an arrest warrant or the equivalent, except for arrests that are made in flagrante delicto, under articles 3 and 9 of the Universal Declaration of Human Rights, article 9 (1) of the Covenant and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. 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 authorities also deprived Mr. Moskalev of his right to challenge the legality of his detention, in violation of article 8 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (4) of the Covenant.

The source submits that during Mr. Moskalev's house arrest, he was subject to restrictive measures commonly imposed on individuals under house arrest in the Russian Federation; he had an electronic monitor placed around his leg, and he was prohibited from leaving his apartment. His minor child was sent to a home, as the Commission on Juvenile Affairs reportedly believed that Mr. Moskalev would not be able to exercise parental control over his minor child, despite an investigator allowing Mr. Moskalev's child to be returned to him.

In this regard, the Working Group recalls its position that house arrest may be compared to deprivation of liberty if it is carried out in closed premises which the person in question is not allowed to leave. The Working Group's deliberation No. 1 on house arrest also states that in all other situations, it will devolve on the Working Group to decide,

on a case-by-case basis, whether the case in question constitutes a form of detention, and if so, whether it has an arbitrary character. As the Working Group has found, the deprivation of liberty is not only a question of legal definition, but also a question of fact, and if a person is not free to leave a place or establishment, all appropriate safeguards that are in place to prevent arbitrary detention must be respected. The Working Group notes that Mr. Moskalev was deprived of his liberty in closed premises, he was not allowed to leave, and his child was sent away. In these circumstances, the Working Group finds that his house arrest was tantamount to deprivation of liberty.

Moreover, according to the source's unrebutted submission, following the illegal transfer of Mr. Moskalev from Belarus, his whereabouts were not precisely identified, and he was unable to contact his attorney or his family between 12 April and 3 May 2023. The Working Group thus finds that Mr. Moskalev was subjected to enforced disappearance, which is an aggravated form of arbitrary detention. As a result, he was unable to effectively exercise his right to challenge his detention so that a court could decide without delay on its legality in accordance with article 9 (3) and (4) of the Covenant. Given that Mr. Moskalev was unable to challenge his 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 also violated. In these circumstances, the Working Group finds that his right to contact with the outside world was denied, contravening rule 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and principles 15 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

For these reasons, the Working Group considers that the deprivation of liberty of Mr. Moskalev lacks legal basis and is thus arbitrary, falling under category I.

Category II

The source submits that the Russian Federation has violated Mr. Moskalev's freedom of expression by arresting, detaining and prosecuting him and sentencing him to two years' imprisonment, rendering his detention arbitrary under category II.

The Working Group 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 and are essential for any society and in fact constitute the foundation stone for every free and democratic society.³² 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. It protects the holding and expression of opinions, including those which are critical of, or not in line with, government policy.

However, the Working Group notes that, whereas speech may be limited according to article 19 (3) of the Covenant and article 29 (2) of the Universal Declaration of Human Rights, the mere fact that it may be criminalized under domestic law does not deprive individuals of their right to freedom of speech under international law. In this respect, the Human Rights Committee has emphasized that the form of expression is highly relevant in assessing whether a restriction is proportionate. As stipulated by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, certain types of expression should never be subject to restrictions, such as «discussion of government policies and political debate» and «peaceful demonstrations or political activities, including for peace or democracy». The Committee has also called upon States to refrain from imposing restrictions under

article 19 (3) of the Covenant that are not consistent with international human rights law.

The Working Group considers that Mr. Moskalev's online posts fall within the right to freedom of opinion and expression protected under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant and that he was detained for exercising this right. Mr. Moskalev's messages, as reported, did not call for violence or war.

The Working Group recalls that in a joint declaration on freedom of expression and «fake news», disinformation and propaganda, adopted in Vienna on 3 March 2017, several experts (including the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression) stated that general prohibitions on the dissemination of information based on vague and ambiguous ideas, including false news or information, are incompatible with international standards for restrictions on freedom of expression and should be abolished. In this regard, the Working Group has called upon States to refrain from using anti-disinformation laws to prosecute individuals for the dissemination of information in the course of their work and to abolish prohibitions on the dissemination of information based on vague and ambiguous ideas, including «false news» or «fake news». The Working Group recalls that the Committee has also expressed deep concern about the amendments to the Criminal Code of the Russian Federation made in March 2022, including article 280.3, for unduly restricting freedom of expression.

In the absence of a substantive response from the Government addressing these allegations, the only plausible explanation for Mr. Moskalev's arrest and detention is that he is being punished for the exercise of his rights to freedom of expression under article 19 of the Covenant and article 19 of the Universal Declaration of Human Rights. The

Government did not present any argument or evidence to the Working Group to invoke any of the limitations prescribed under these rights, nor did it demonstrate why bringing charges against Mr. Moskalev was a legitimate, necessary and proportionate response to peaceful anti-war expressions.

The source submits that article 280.3 of the Criminal Code cannot qualify as *lex certa*, since it is vague and broad. The provision «actions aimed at discrediting [the Armed Forces of the Russian Federation]» can be used to deprive individuals of their liberty without a specific legal basis, and has a deterrent effect on the exercise of the rights and freedoms of individuals because it has the potential to cause abuse, including arbitrary deprivation of liberty. The source submits that article 280.3, part 1, is used solely to silence anti-war expressions, such as displaying signs or items of clothing with phrases on them.

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. It has also found that offences must not be too vague, too broad and too imprecise as to grant officials unfettered discretion to criminalize the peaceful exercise of the right to freedom of expression. Vague criminal offences include offences of «enemy propaganda»⁴² and of „broadcasting false or exaggerated news that would affect the morale of the country“.

In the present case, the application of vague and overly broad provisions adds weight to the Working Group’s conclusion that Mr. Moskalev’s deprivation of liberty falls within category II. The Working Group calls upon the Government to repeal this law or bring it into line with its obligations under international human rights law. In this respect, the Working Group recalls the 2023 report of the Special Rapporteur on the situation of human rights in the Russian Federation,

who also called upon the Government, as a matter of urgency, to repeal this law.

The source further submits that article 280.3 of the Criminal Code cannot qualify as *lege apta* since part 1 does not prescribe prison terms which are necessary or proportionate to the stated offence. The provision prescribes prison terms of up to five years of deprivation of liberty for harmless actions, which are neither necessary to protect public or private interests from injury nor proportionate to the guilt established under the law. Mr. Moskalev was arrested, detained and sentenced to two years' imprisonment under article 280.3, part 1, for his social media posts, which were found after he was investigated due to an anti-war drawing by his minor child at a school art lesson. The source submits that in the present case, Mr. Moskalev's house arrest from 2 to 28 March 2023 and his sentence of two years' imprisonment resulted solely from his peaceful expression of anti-war opinions. Moreover, the source submits that laws that restrict freedom of speech may have legitimate means but are prone to abuse, and violations of such laws should not be punished by detention as such punishment is disproportionate. The Wor

king Group recalls that the principle of legality requires the substance of penal law to be due and appropriate in a democratic society that respects human dignity and rights (*nullum crimen, nulla poena sine lege apta*). It has previously found that penal punishment must, at the minimum, satisfy the principle of necessity, the prerequisite of injustice and the principle of guilt in the interest of formal and material justice.

The Working Group has found that criminal sentences are disproportionate for offences such as damaging the State's reputation or weakening national morale. It has considered «the broad lack of proportionality between the power and impact of the work and activities carried out by a single

individual ... and the power and impact of an entire State machinery, with its executive, legislative and judicial organs and its armed forces, police and security agents».

For these reasons, the Working Group finds that the deprivation of liberty of Mr. Moskalev is arbitrary under category II. The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

Category III

Given its finding that the deprivation of liberty of Mr. Moskalev is arbitrary under category II, the Working Group wishes to emphasize that in such circumstances, no trial should have taken place. As the issues raised by the source in relation to category III have been addressed in category I, the Working Group makes no further findings in relation to category III. The Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

Category V

The source submits that Mr. Moskalev's detention is discriminatory because it is due to his anti-war political opinion. The Working Group has held that detention and a sentence of imprisonment for expressing anti-war sentiments using a legal basis established solely to target those who criticize the Government and Armed Forces of the Russian Federation regarding the armed conflict in Ukraine, violates the international obligation not to discriminate against people on the basis of their political opinions.

Moreover, in the discussion above concerning category II, the Working Group has established that Mr. Moskalev's detention resulted from the peaceful exercise of his rights under international law. When detention results from the active exercise of civil and political rights, there is a strong

presumption that the detention also constitutes a violation of international law on the grounds of discrimination based on political or other views.

In this regard, the Working Group recalls the source's submission that the persecution of Mr. Moskalev began after Mr. Moskalev's minor child drew a picture with the flags of the Russian Federation and Ukraine accompanied with the inscriptions «No to war» and «Glory to Ukraine» during her school art lesson on 24 April 2022, and that the next day, on 25 April 2022, Mr. Moskalev was found guilty of an administrative offence under article 20.3.3 of the Code of Administrative Offences and fined 32,000 roubles.

In the light of the source's uncontested prima facie credible submissions, the Working Group finds that Mr. Moskalev was deprived of his liberty on discriminatory grounds on the basis of his political opinion. His detention violates articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. It is therefore arbitrary, falling within category V.

The Working Group considers that the Government of the Russian Federation is responsible for its own actions in the arrest and detention of Mr. Moskalev, as well as the subsequent violations of his rights in Belarus.

Allegations against the Government of Belarus

Category I

The source submits that Mr. Moskalev was arbitrarily arrested in Belarus on 30 March 2023 and subjected to extraordinary rendition to the Russian Federation on 12 April 2023.

The source submits that on 12 April 2023, following his arrest in Belarus on 30 March 2023, it became known that Mr. Moskalev had been transferred from Belarus to the

Russian Federation. However, his whereabouts were not precisely identified, and he did not have a chance to contact his attorney or his family until 3 May 2023. The source submits that because Mr. Moskalev was arrested in Minsk, Belarus, without an arrest warrant, and was subsequently transferred illegally to the Russian Federation, the international legal procedures regarding extradition for the purpose of arresting, detaining and returning individuals to face criminal proceedings were blatantly ignored.

In the absence of any submission from the Government of Belarus, the Working Group considers that the source has presented a credible case that Mr. Moskalev's detention is without any legal basis, in violation of article 9 (1) of the Covenant. Pursuant to article 9 (1) of the Covenant, no one is to be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. To establish a legal basis for deprivation of liberty, the authorities must invoke that legal basis and apply it to the circumstances of the case. The international norms on detention include the right to be presented with an arrest warrant or the equivalent, except for arrests that are made in flagrante delicto, under articles 3 and 9 of the Universal Declaration of Human Rights, article 9 (1) of the Covenant and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. 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 authorities also deprived Mr. Moskalev of his right to take proceedings before a court in Belarus to challenge the legality of his detention, in violation of article 9 (4) of the Covenant, articles 3 and 9 of the Universal Declaration of Human Rights

and principles 11 and 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Judicial oversight of detention is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis. Given that Mr. Moskalev had no opportunity to challenge his detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights was violated. His deprivation of liberty falls within category I.

Category III

In the absence of any response from the Government of Belarus, the Working Group finds that the authorities did not meet any minimum international standards of due process. As the Working Group has stated, involuntary expulsion to a foreign State without a hearing by judicial authorities cannot be in conformity with due process.⁵⁶ International law regarding extradition provides procedures that must be observed in returning individuals to face criminal proceedings in another country and in ensuring that their right to a fair trial is protected.

Where transfers from one State to another are too irregular or informal, they constitute extraordinary rendition rather than extradition. The Working Group has previously stated that the practice of «renditions», that is, the informal transfer of a person from the jurisdiction of one State to that of another on the basis of negotiations between administrative authorities of the two countries (often the intelligence services), without procedural safeguards, is irremediably in conflict with the requirements of international law. When a Government eludes procedural safeguards, in particular the right of the person affected to be heard, it cannot in good faith claim that it has taken reasonable steps to protect that person's human rights after removal, including the right not to be arbitrarily detained.

As a consequence, it will share responsibility for ensuing arbitrary detention.

The source has established a credible case, which was not rebutted by the Government of Belarus, that those procedures were not observed in the present case. Mr. Moskalev was arrested and handed over to the Russian Federation without any public extradition hearing by an independent and impartial tribunal in Belarus. The Government of Belarus could have transferred him through normal extradition channels, but chose to circumvent that process by forcibly transferring him to the Russian Federation. By facilitating the transfer of Mr. Moskalev, the Government of Belarus denied his fair trial rights.

The Working Group recalls that individuals should not be expelled to another country when there are substantial grounds for believing that their lives would be at risk, or that they would be in danger of being subjected to torture or ill-treatment. The risk of arbitrary detention in the receiving State must be among the elements taken into consideration. According to the source's uncontested allegations, the Belarusian authorities facilitated Mr. Moskalev's forcible transfer to the Russian Federation without any apparent regard for the risks. Moreover, the Government of Belarus has not provided any information to suggest that it assessed the charges and evidence against Mr. Moskalev, and whether he would receive a fair trial. The Working Group considers that the above-mentioned elements represent a violation of the principle of non-refoulement. The deprivation of liberty of Mr. Moskalev in Belarus falls within category III.

114. The Working Group considers that the Government of Belarus is responsible for its own actions in the arrest and forcible transfer of Mr. Moskalev, as well as the subsequent violations of his rights in the Russian Federation.

Concluding remarks

The Working Group recalls the un rebutted allegations of severe mistreatment and beatings meted out to Mr. Moskalev by authorities of the Russian Federation and Belarus. It is deeply troubled by the source's unrefuted submission that after Mr. Moskalev's forcible transfer from Belarus to the Russian Federation, when he was detained in a quarantine facility, an individual who was reportedly purposely placed in his cell by security forces of the Russian Federation strangled him and hit his head against the wall. It is gravely concerned for the health and well-being of Mr. Moskalev, noting the impact of such mistreatment on him.

The Working Group is thus obliged to remind the Government of the Russian Federation of its obligation under article 10 (1) of the Covenant and rules 1, 24, 27 and 118 of the Nelson Mandela Rules: all persons deprived of their liberty must be treated with humanity and with respect for their inherent dignity, including by being allowed to enjoy the same standards of health care available in the community. The Working Group urges the Government to immediately and unconditionally release Mr. Moskalev and to ensure that he receives the medical attention required. The Working Group refers the case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The Working Group is also deeply concerned about the well-being of Mr. Moskalev's minor child, who was placed in care homes as a result of the actions against Mr. Moskalev, noting that it was reportedly a child's drawing that led to the chain of events resulting in Mr. Moskalev's arbitrary detention. The Working Group notes that during the periods that Mr. Moskalev was detained without contact with the outside world, he was also unable to contact his minor child. The Working Group reminds the Government of the Russian Federation of its obligations under the Convention on the Rights of the Child, noting that in all actions concerning

children, the best interests of the child must be a primary consideration.

3. DISPOSITION

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

Regarding the Russian Federation:

- The deprivation of liberty of Alexey Moskalev, being in contravention of articles 2, 3, 7, 8, 9, 19 and 29 of the Universal Declaration of Human Rights and articles 2, 9, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, and V.

Regarding Belarus:

- The deprivation of liberty of Alexey Moskalev, being in contravention of articles 3, 8 and 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

The Working Group requests the Government of the Russian Federation and the Government of Belarus to take the steps necessary to remedy the situation of Mr. Moskalev 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.

The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Moskalev immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

The Working Group urges both Governments to ensure a full and independent investigation of the circumstances

surrounding the arbitrary deprivation of liberty of Mr. Moskalev and to take appropriate measures against those responsible for the violation of his rights.

In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights in Belarus, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, for appropriate action.

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

4. FOLLOW-UP PROCEDURE

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

- Whether Mr. Moskalev has been released and, if so, on what date;
- Whether compensation or other reparations have been made to Mr. Moskalev;
- Whether an investigation has been conducted into the violation of the rights of Mr. Moskalev and, if so, the outcome of the investigation;
- Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Russian Federation and Belarus with their international obligations in line with the present opinion;
- Whether any other action has been taken to implement the present opinion.

The Governments are invited to inform the Working Group of any difficulties they 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.

The Working Group requests the source and the Governments 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 of any failure to take action.

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.

[Adopted on 17 November 2023]

Ещё почитать