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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-second session, 15–19 November 2021

Opinion No. 56/2021 concerning Server Mustafayev (Russian Federation)

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,¹ on 6 August 2021 the Working Group transmitted to the Government of the Russian Federation a communication concerning Server Mustafayev. The Government replied to the communication on 5 October 2021. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

¹ [A/HRC/36/38](#).

Submissions

Communication from the source

4. Server Mustafayev is a citizen of Ukraine born in 1986. As a Crimean Tatar, he is a member of a Muslim ethnic minority in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, temporarily occupied by the Russian Federation (hereinafter “Crimea”), where he usually resides.

5. According to the source, Mr. Mustafayev is a well-known human rights defender and civic journalist. He previously served as the coordinator of Crimean Solidarity, a civil society organization that monitors and documents human rights violations allegedly committed by the Russian authorities in Crimea, and in particular seeks to protect the rights of Crimean Tatars subject to trial in the judicial system of the Russian Federation. The source adds that in his capacity as coordinator of Crimean Solidarity, Mr. Mustafayev led several public meetings in February and April 2018, in which attendees discussed ongoing human rights violations committed by authorities of the Russian Federation in Crimea.

6. The source alleges that following the illegal occupation of Crimea by the Russian Federation in 2014,² authorities of the Russian Federation have systematically targeted “individuals opposed to the Russian Federation’s occupation of Crimea”.³ In particular, the Russian Federation has reportedly targeted Crimean Tatars, a Muslim ethnic minority in Crimea.⁴ The source notes that between May 2018 and August 2018 – a period covering the arrest of Mr. Mustafayev – the Office of the United Nations High Commissioner for Human Rights (OHCHR) documented 14 house raids by the Federal Security Service of the Russian Federation (FSB), 13 of which were targeted at properties owned by Crimean Tatars.⁵

7. According to the source, the General Assembly has condemned “the continuous widespread misuse” by the Russian Federation “of counter-terrorism and anti-extremism laws to suppress dissent”⁶ and has observed that the law enforcement system of the Russian Federation disproportionately affects Crimean Tatars.⁷ In particular, Russian Federation authorities have reportedly repeatedly pursued terrorism charges against Crimean Tatars who oppose the Russian Federation occupation, based on allegations that they are involved with Hizb ut-Tahrir.⁸ The source notes that this crackdown has continued to intensify since the occupation of Crimea began in 2014.⁹

a. Arrest and detention

8. The source reports that at 6 a.m. on 21 May 2018, four or five masked FSB officers entered Mr. Mustafayev’s home, accompanied by an FSB investigator and two alleged witnesses whose identities remain unknown. The FSB officers did not present any identification and did not wear badges. Although the lead investigator showed Mr. Mustafayev a document purporting to relate to the search of Mr. Mustafayev’s home, the document did not identify the premises that the FSB had been authorized to search. During the raid, Mr. Mustafayev requested access to his lawyer but the FSB officers reportedly denied his request. The officers searched his home for approximately four and a half hours, seizing both electronics and documents.

9. After the search was completed, Mr. Mustafayev was reportedly arrested. The source adds that the FSB officers did not inform him of the charges against him. Instead, he was

² General Assembly resolutions 71/205, 72/190, 73/263 and 74/168 and 75/192.

³ See the OHCHR conference room paper on human rights in the administration of justice in conflict-related criminal cases in Ukraine, April 2014–April 2020 (A/HRC/45/CRP.9), available at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session45/Documents/A_HRC_45_CRP_9_EN.pdf, para. 24.

⁴ General Assembly resolution 75/192, preamble.

⁵ See the OHCHR conference room paper on the human rights situation in Ukraine, 16 May–15 August 2018 (A/HRC/39/CRP.5), available at <https://undocs.org/A/HRC/39/CRP.5>, para. 114.

⁶ General Assembly resolution 75/192, preamble.

⁷ Ibid.

⁸ A/HRC/39/CRP.5, para. 111.

⁹ Ibid., paras. 106–108.

taken to the FSB headquarters in Simferopol, where he was interrogated. During this interrogation, he was permitted to have a lawyer and a Ukrainian interpreter present. He was asked questions about his alleged involvement in Hizb ut-Tahrir, as well as about the activities of other members of Crimean Solidarity. He was then taken to a temporary detention centre and kept in custody overnight.

10. On 22 May 2018, the day after his arrest, Mr. Mustafayev was reportedly taken to Kievsky District Court in Simferopol and informed during an in-camera hearing that he had been charged with violating article 205.5 (2) of the Criminal Code of the Russian Federation, on the basis of his alleged involvement with Hizb ut-Tahrir. The source adds that the charges were brought under the Criminal Code of the Russian Federation, despite the fact that Mr. Mustafayev is a Ukrainian citizen who was living in occupied Crimea.¹⁰ Moreover, while Hizb ut-Tahrir has been designated as a terrorist organization under the law of the Russian Federation since 2003, it is not considered a terrorist organization in Ukraine.

11. During this hearing, Mr. Mustafayev was reportedly ordered to be kept in pretrial detention. He was initially detained in Simferopol. On 12 September 2019, he was transferred from Simferopol to Krasnodar, which is in the territory of the Russian Federation, where he was detained for two months.¹¹ Thereafter, on 3 November 2019, he was transferred to Rostov-on-Don, Russian Federation, pending trial.

b. Trial proceedings

12. The source reports that on 15 November 2019, Mr. Mustafayev was put on trial before a panel of three judges of the Southern District Military Court in Rostov-on-Don. He was charged alongside seven co-defendants, who are also Crimean Tatars, all except one of whom reportedly have a history of involvement in the advocacy activities of Crimean Solidarity.

13. According to the source, Mr. Mustafayev was charged with two offences: (a) attempting to forcibly or violently seize power contrary to articles 30 and 278 of the Criminal Code of the Russian Federation; and (b) participating in the activities of a terrorist organization in violation of article 205.5 (2) of the Criminal Code of the Russian Federation. Each offence carried a maximum sentence of up to 20 years of imprisonment. Mr. Mustafayev and his co-defendants reportedly pleaded not guilty to their respective charges and alleged that the charges had been brought against them to silence them and punish them for their work as human rights defenders.

14. Following a 10-month trial which was allegedly marred by a number of procedural irregularities (see the submissions below), on 16 September 2020 the Military Court convicted Mr. Mustafayev and all but one of his co-defendants. According to the source, the judgment was inadequately reasoned and internally contradictory. Mr. Mustafayev was sentenced to a total of 14 years of imprisonment in a maximum security prison, with a further restriction on his freedom for one year afterwards.¹² Mr. Mustafayev is not expected to be released prior to September 2034.

15. The source notes that since his arrest on 21 May 2018, Mr. Mustafayev has been held in continuous detention for more than three years. This includes 17 months in pretrial detention (from 21 May 2018 until 15 November 2019), 10 months of detention during the trial (from 15 November 2019 to 16 September 2020) and 10 months of detention serving his sentence while awaiting consideration of his appeal (from 16 September 2020 to the present).

¹⁰ The source notes that the application by the Russian Federation of its own criminal law to occupied territory is contrary to international humanitarian law. It refers to the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), art. 64.

¹¹ The source asserts that the forcible transfer by the Russian Federation of Mr. Mustafayev from Crimea to territory of the Russian Federation is contrary to international humanitarian law. It refers to the Fourth Geneva Convention, art. 49.

¹² In this final year of his sentence (after he is released from imprisonment in a maximum security prison), Mr. Mustafayev will be banned from travelling outside a pre-defined area, prohibited from attending public events and required to present himself to authorities twice a month.

16. During this three-year period, Mr. Mustafayev has been detained at a number of detention centres: Penitentiary Unit No. 1 in Simferopol, SIZO-1 in Krasnodar, and SIZO-1 and SIZO-5 in Rostov-on-Don, Russian Federation. He is now detained in SIZO-3 in Novochoerkassk, a maximum security prison in the Russian Federation, while awaiting consideration of his appeal.

c. Recent developments

17. According to the source, Mr. Mustafayev is still being held at SIZO-3 in Novochoerkassk, Russian Federation, where he continues to suffer inappropriate health-care and dietary provision, and accommodation, which fall significantly below the standards set out in the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). This includes, inter alia, detention in an overcrowded, unclean and uninhabitable cell without adequate sleeping arrangements and without adequate ventilation and natural or artificial light; denial of access to adequate health-care services and to dental services; lack of attention to his medical issues, including his deteriorating vision, low blood pressure, headaches and cavities; lack of access to clean and dignified sanitary facilities; and lack of access to adequate drinking water.

18. According to the source, these deplorable conditions of detention not only violate Mr. Mustafayev's rights but also give rise to denial of his right to a fair trial. In particular, the Government is allegedly preventing Mr. Mustafayev from mounting an effective defence in his forthcoming appeal, including by interfering with his ability to meet and communicate with his chosen legal counsel. The source adds that while the appeal was filed on 16 September 2020, a hearing date has not yet been set by the Military Appeal Court.

d. Analysis of violations

19. The source submits that Mr. Mustafayev's detention was and continues to be arbitrary due to numerous severe violations of his fair trial rights, protected under the Universal Declaration of Human Rights and the Covenant. These include violations of his right to liberty, right to call and examine witnesses, right to the presumption of innocence, right to adequate time and facilities to prepare a defence, right to be tried in his presence and right to appear before an independent and impartial tribunal. The source thus submits that Mr. Mustafayev's detention is arbitrary under category III, in that the non-observance of fair trial norms is of such gravity as to give his deprivation of liberty an arbitrary character.¹³

e. Pretrial detention

20. The source submits that the Russian Federation kept Mr. Mustafayev in pretrial detention for approximately 17 months. Mr. Mustafayev challenged his pretrial detention at least eight times, without success. The source adds that at no point did the authorities of the Russian Federation provide individualized, substantiated reasons for this detention. Instead, the Military Court stated that pretrial detention was justified because of "the gravity of the charge, the circumstances of the joint criminal activity, the presence of citizenship of another State, and the presence of witnesses who were not examined". However, the Prosecutor did not provide, nor did the Military Court request, any evidence that Mr. Mustafayev would attempt to flee, commit additional crimes or intimidate witnesses. Instead, the Military Court allegedly improperly relied on "vague and expansive standards, such as 'public security'".¹⁴ The source thus submits that due to a lack of individualized, substantiated reasons for Mr. Mustafayev's pretrial detention, his detention violated article 9 (3) of the Covenant.

f. Ongoing detention

21. The source reports that at trial, the prosecution relied on the evidence of three key witnesses: the FSB officer who investigated the defendant and two individuals identified by

¹³ The source notes that there are also substantial grounds for believing that Mr. Mustafayev's detention is a result of his exercise of protected rights, including the rights to freedom of expression and freedom of religion or belief. It further asserts that Mr. Mustafayev's transfer to the Russian Federation, and trial under the law of the Russian Federation, violated international humanitarian law.

¹⁴ Opinion No. 56/2017, para. 9.

aliases, who were permitted to testify anonymously and who had allegedly participated in secret Hizb ut-Tahrir meetings alongside the defendants.

22. The source submits that the Military Court violated Mr. Mustafayev's right to call and examine witnesses under article 14 (3) (e) of the Covenant by: (a) permitting anonymous witnesses to testify against him without a legitimate basis or sufficient safeguards; and (b) preventing defence counsel from asking its questions and allowing the prosecution witnesses to refuse to answer.

i. Use of anonymous witnesses

23. The source notes that the Working Group has acknowledged the "problematic" nature of anonymous witnesses, barring "exceptional circumstances".¹⁵ It also refers to the jurisprudence of the Human Rights Committee and the European Court of Human Rights.

24. The source asserts that, in the present case, firstly, there were no "exceptional circumstances" justifying the use of anonymous witnesses.¹⁶ It adds that neither the prosecutor nor the Military Court offered a clear justification for anonymity, and instead cited vague, undefined security concerns and unsubstantiated fears for personal safety.

25. Secondly, the Military Court reportedly obstructed the defendants' cross-examination. Instead of "counterbalancing" the prejudicial impact of the anonymous witness statements, the Military Court further disadvantaged the defendants. In particular, the Military Court allegedly cut off cross-examination that was aimed at bringing about an understanding of the witnesses' motives for testifying. For example, one of the anonymous witnesses reportedly conceded he was an active member of Hizb ut-Tahrir and had financed the organization. As a clear consequence, he was presumably liable to prosecution himself, and therefore could have been pressured by the FSB to testify. Yet, the Military Court reportedly prevented any questions aimed at exploring this matter, on the spurious basis that it would lead to exposure of the anonymous witness's identity.

26. Thirdly, according to the source, the use of anonymous witnesses posed a number of unacceptable practical hurdles. Both anonymous witnesses testified from another room, with video and audio transmitted into the courtroom. However, their voices were distorted so heavily that the defendants and their lawyers repeatedly explained to the Military Court that they were having trouble understanding what the witnesses were saying. Furthermore, the defence expressed credible concerns that the witnesses were being coached or were reading from papers – which of course they were unable to verify because the witnesses were in a different room. For example, on many occasions, a question from the defence would be followed by a long pause.

27. The source therefore submits that Mr. Mustafayev's trial violated article 14 (3) (e) of the Covenant. Not only did the Military Court not offer a valid justification for the use of anonymous witnesses, but the anonymization obstructed Mr. Mustafayev's ability to mount a defence. Moreover, the Military Court made no effort to mitigate these issues. The source notes that these violations were particularly egregious because witnesses Bekirov and Ismailov were the only prosecution sources who claimed to have direct knowledge of the defendants' membership in Hizb ut-Tahrir, which formed the basis of the charges against Mr. Mustafayev.

ii. Obstruction of cross-examination of prosecution witnesses

28. The source notes that defendants are entitled "to be given a proper opportunity to question and challenge witnesses against them".¹⁷ According to the source, the President of the Military Court prevented Mr. Mustafayev and the other defendants from asking the prosecution witnesses hundreds of relevant questions on cross-examination.

¹⁵ Opinions No. 91/2017, para. 90; No. 25/2019, para. 64; and No. 16/2017, paras. 58–59.

¹⁶ While noting that improper use of anonymous witnesses is common in respect of cases against Crimean Tatars, the source refers to [A/HRC/45/CRP.9](#), para. 154.

¹⁷ Human Rights Committee, general comment No. 32 (2007), para. 39; and opinions No. 53/2011, para. 44; and No. 23/2015, paras. 21 and 37.

29. For instance, in addition to curtailing the cross-examination of the two anonymous witnesses as to their motives, the Military Court reportedly limited the cross-examination of the other key witness (the FSB investigator). The defence argued that the FSB had carried out the investigations of the defendants in violation of the Criminal Procedure Code of the Russian Federation, which would have rendered the evidence obtained inadmissible.¹⁸ It was therefore critical for the defence to be able to question the other key witness regarding compliance by the FSB with the Criminal Procedure Code. However, the Military Court reportedly effectively barred the defendants from doing so by preventing the asking of any questions related to the investigation methods of the FSB. In contrast, the prosecution was reportedly permitted to ask repetitive questions and badger defence witnesses.

30. Moreover, all three prosecution witnesses reportedly made vague, unsubstantiated allegations against the defendants (often amounting to hearsay), which the Military Court permitted to remain on the record. In fact, as discussed below, this evidence formed the basis for the Military Court's decision. When asked by the defence to provide further details or to describe the basis of their alleged knowledge, the witnesses responded hundreds of times that they did not know, or could not recall, or they made general references to the information being in the case file (which, according to the source, was often untrue). For example, both anonymous witnesses, when asked to provide additional details of their alleged participation in Hizb ut-Tahrir meetings with the defendants, testified over and over: "I do not remember." Yet, the Military Court stopped the defence from enquiring as to the reason the witnesses were unable to recall relevant information, overruling questions that challenged the witnesses' memory and highlighted contradictions in their testimony.

31. Consequently, the source submits that the Military Court's actions violated article 14 (3) (e) of the Covenant.

g. Violation of the right to the presumption of innocence

32. The source asserts that the Military Court denied Mr. Mustafayev the presumption of innocence in violation of article 14 (2) of the Covenant by: (a) its holding of Mr. Mustafayev in a glass cage in the courtroom; and (b) conviction of Mr. Mustafayev by means of an arbitrary verdict.

i. Being held in a glass cage

33. According to the source, the Human Rights Committee has repeatedly held that "defendants should not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals".¹⁹

34. However, for the duration of the trial, Mr. Mustafayev and the co-defendants were reportedly forced to sit in a glass enclosure to the side of the courtroom. The source submits that placing Mr. Mustafayev and his co-defendants in a cage throughout the hearings was a clear violation of article 14 (2) of the Covenant.

ii. Inadequately reasoned verdict

35. The source notes that the presumption of innocence also "guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt".²⁰ The source also refers to Human Rights Committee jurisprudence according to which "it is generally for the relevant domestic courts to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice".²¹

¹⁸ The source refers to art. 50 (2) of the Constitution of the Russian Federation and art. 75 (1) of the Criminal Procedure Code.

¹⁹ *Formonov v. Uzbekistan* (CCPR/C/122/D/2577/2015), para. 9.4; Human Rights Committee, general comment No. 32 (2007), para. 30; and *Sannikov v. Belarus* (CCPR/C/122/D/2212/2012), para. 6.8.

²⁰ Human Rights Committee, general comment No. 32 (2007), para. 30.

²¹ *Pustovoi v. Ukraine* (CCPR/C/110/D/1405/2005), para. 8.11.

36. The source submits that the Military Court’s evaluation of the facts and evidence in the case was clearly arbitrary. Barely a week after closing the 10-month trial, the Military Court issued its 40-page judgment convicting Mr. Mustafayev and all but one of his co-defendants. The source adds that the judgment reflects serious deficiencies in reasoning, noting that the trial “amounted to a denial of justice”. These include the following: (a) reliance on unreliable witness testimony; (b) reliance on irrelevant expert evidence; (c) failure to consider the absence of physical evidence; (d) application of a standard of proof lower than “beyond reasonable doubt”; and (e) indications that the Military Court prejudged the defence’s case.

Unreliable witness evidence

37. The source notes that the judgment relies heavily on the testimony of two anonymous witnesses. In the judgment, the Military Court characterized both as having given testimony that was “mutually consistent” and “consistent, logical and clear”, and explained that it did not give any weight to “specific inaccuracies” and allegedly “negligible” gaps in knowledge.

38. To reach this conclusion, the Military Court reportedly ignored a critical contradiction between the testimonies of the two anonymous witnesses. The source adds that one testified that the defendants had participated in secret meetings called *khalakats*, in private homes, in which participants had been open about their affiliation with Hizb ut-Tahrir. These were complemented by meetings called *sukhbets*, at local mosques, open to the public, during which the ideology of Hizb ut-Tahrir was discussed in veiled form, but it was forbidden to mention the name of the organization. In direct contradiction to this testimony, the other anonymous witness reportedly testified that *sukhbets* were held at the mosque using Hizb ut-Tahrir literature, and members of the public were prohibited from attending. The source notes that this is a critical inconsistency and demonstrates that the prosecution was unable to sufficiently identify the location and means through which the alleged terrorist activity took place.

39. Furthermore, the Military Court reportedly ignored the fact that although both anonymous witnesses claimed to have been active members of Hizb ut-Tahrir along with the defendants, neither could answer basic questions regarding the time period during which they frequented the alleged meetings, the location of the alleged meetings, and the organization’s ideology. The witnesses even left doubt as to whether they had ever met the defendants, struggling at times to name the defendants and showing themselves unable to describe the defendants’ basic physical features.

40. The source notes that the Military Court also gave significant weight to the FSB investigator’s testimony, despite evidence that put his credibility into question. Not only were the defendants precluded from testing his credibility on cross-examination, but his credibility was reportedly undermined by his own assertion that he had listened to and transcribed audio recordings that “proved” the defendants’ membership of Hizb ut-Tahrir – despite the fact that most of the audio recordings were in Crimean Tatar or Arabic and the FSB investigator spoke neither language.

Irrelevant expert evidence

41. The Military Court reportedly gave significant probative weight to an expert report produced by the Centre for Linguistic Expertise and Editing at Bashkir State Pedagogical University. This 250-page report purported to conduct a “comprehensive linguistic and theological examination” and concluded that the audio recordings obtained by the FSB investigator demonstrated the defendants’ membership of Hizb ut-Tahrir, and evidenced a “hostile attitude” towards non-Muslims. Yet, according to the source, these alleged experts had no theological expertise in Islam generally, or Hizb ut-Tahrir specifically. For example, the experts relied on a reference to *dawaat*, a basic concept of Islamic missionary work,²² as evidence of recruitment into Hizb ut-Tahrir. Nevertheless, the Military Court reportedly held

²² The source notes that *dawaat* (or *dawah*) is “the practice or policy of conveying the message of Islam to non-Muslims”.

that the Centre for Linguistic Expertise and Editing report presented a “scientifically substantiated” opinion, and it therefore had “no doubt as to the veracity” of the report.

Absence of physical evidence

42. According to the source, the prosecution and one of the anonymous witnesses alleged that Mr. Mustafayev and the other defendants had used specialized mobile phones to communicate as part of their ostensible “terrorist conspiracy”. They alleged that these phones did not connect to a network but allowed transfer of banned Hizb ut-Tahrir literature via Bluetooth.

43. However, the source notes that no such phones were ever found in searches of the defendants’ homes, nor in the shop where, it was alleged by one of the anonymous witnesses, one of the defendants had sold the devices to other Hizb ut-Tahrir members. The source notes that the Military Court nevertheless held that Mr. Mustafayev and the other defendants possessed these devices, and used them for secretive Hizb ut-Tahrir meetings.

“Aggregate” standard of proof

44. According to the source, the Military Court held that the “aggregate of evidence” supported a finding that Mr. Mustafayev was guilty of the conduct he was charged with. In this respect, the source submits that the Military Court’s reliance on an “aggregate of evidence” standard falls significantly below the “beyond reasonable doubt” standard of proof required under article 14 (2) of the Covenant.²³

Pre-emptive judgment during trial

45. The source asserts that the Military Court’s behaviour during the trial indicates that it had pre-emptively reached a judgment on the defendants’ guilt. In particular, the Military Court arbitrarily prevented the defendants from calling additional witnesses on the basis that “the testimonies of the previously questioned witnesses were sufficient”. In justifying this decision, the Military Court reportedly stated that the additional witnesses were “characterizing and redundant” because they “did not know about the unlawful activities of the defendants”. In other words, the Military Court declined to allow further defence witnesses, on the sole basis that they could not provide evidence to support the prosecutor’s case. Moreover, the source notes that the prosecution had more than 50 days to make its case, but the eight defendants were only given 18 days to present their defence, in violation of the right to equality of arms guaranteed by article 14 (1) of the Covenant.

46. The source submits that taken separately, and together, the Military Court’s evaluation of the evidence and conduct during trial makes it clear that Mr. Mustafayev’s right to the presumption of innocence pursuant to article 14 (2) of the Covenant was violated.

h. Violation of the rights to adequate time and facilities to prepare a defence and communicate with counsel

47. In the present case, the defence reportedly did not receive parts of the case file from the prosecution until July 2019, over a year after Mr. Mustafayev’s arrest. Moreover, Mr. Mustafayev’s lawyers reportedly struggled to meet with him during his pretrial detention in Simferopol because the detention centre only permitted the entry of a total of six attorneys per day for all detainees. The source adds that Mr. Mustafayev was also regularly unable to confer with his lawyer confidentially due to the presence of FSB guards and other detainees.

48. Moreover, although the trial was lengthy, the hearing schedule ordered by the Military Court reportedly did not allow adequate time between hearing days for Mr. Mustafayev to consult with his attorneys and prepare his defence effectively. Over the defendants’ objections, the Military Court scheduled back-to-back hearing days from 10 a.m. until 8 p.m. or 9 p.m. Thereafter, Mr. Mustafayev was transported back to the detention centre and forced to go to sleep at 10 p.m. The source adds that during hearing days, Mr. Mustafayev was constantly accompanied by an “escort” assigned by the Military Court and was unable to

²³ Human Rights Committee, general comment No. 32 (2007), para. 30.

meet with his attorneys confidentially. The “escort” also read any document passed between Mr. Mustafayev and his lawyers. Furthermore, on non-hearing days, Mr. Mustafayev was reportedly unable to meet with his attorneys confidentially at the detention centre without the presence of a guard. The source also adds that the Military Court denied Mr. Mustafayev’s request for confidential meetings, relying arbitrarily on an entirely unrelated shooting incident at FSB headquarters in Moscow as a reason to deny his request.

49. Furthermore, as described above, Mr. Mustafayev and his co-defendants were reportedly placed in a glass cage during hearings. This inhibited their ability to participate in the trial. They were often unable to hear the proceedings (including witness testimony and audio recordings), and could not freely confer with their lawyers at the bar table. When the defendants requested that the court allow them to sit elsewhere in order to enable their meaningful participation in the proceedings, the President reportedly rebuffed the request, stating: “The court is listening and we can hear quite well. The court is of the opinion that everyone can hear too. Stop complaining. Let’s continue.” The source adds that the court also rejected requests from the defence for short breaks in the proceedings to allow the defendants to consult with their attorneys.

50. The source submits that the actions described above violate article 14 (3) (b) of the Covenant.

i. Violation of the right of the defendant to be tried in his presence

51. According to the source, after Mr. Mustafayev objected to a court ruling on 10 August 2020, the President of the Military Court ordered that he be removed from the courtroom for the remainder of the trial.²⁴ The source notes that Mr. Mustafayev was raising valid concerns regarding the trial procedure and the apparent partiality of the Military Court.²⁵

52. The source notes that Mr. Mustafayev was not permitted to return until 31 August 2020. The trial thus reportedly proceeded in his absence on 11 August, 12 August, 17 August, 18 August, 20 August and 24 August 2020.

53. Previously, Mr. Mustafayev had reportedly been excluded from the court on three other occasions: 24 December 2019, 20 May 2020 and 16 June 2020. The source adds that the effect of these exclusions was further compounded by the Military Court’s refusal to permit Mr. Mustafayev to review the written transcript of each day that he missed. Although the Military Court reportedly suggested that Mr. Mustafayev could be sent an audio recording of the proceedings, the detention centre where he was being held did not permit audio discs to be brought onto the premises, so this did not occur. The source notes that, to date, Mr. Mustafayev has been unable to access an audio recording of the proceedings due to limitations on what can be brought into the detention facility where he is being held.

54. The source submits that for these reasons, Mr. Mustafayev’s frequent removal from the courtroom violated article 14 (3) (d) of the Covenant.

j. Violation of the right to be tried by a competent, independent and impartial tribunal

55. The source asserts that Mr. Mustafayev is a civilian activist who was tried by a military court, without adequate legal basis or justification.²⁶ Beyond these institutional concerns, the source adds that, in addition to the bias exhibited by the Military Court with respect to the procedural conduct of the trial, and the poorly reasoned judgment, on a number

²⁴ The source notes that after the Military Court announced this decision and a short recess on 11 August 2020, two of Mr. Mustafayev’s defence attorneys remained in the courtroom to consult with him before he was removed. In response, the Court reportedly threatened the attorneys with administrative charges.

²⁵ The source notes that Mr. Mustafayev argued, inter alia, that the President’s prompting of witnesses, interruption of defence cross-examination and failure to treat the defence and the prosecutor equally were grounds for concern.

²⁶ The source refers to [A/75/334](#), paras. 9–10, and relevant jurisprudence of the European Court of Human Rights. The source notes that, in any event, the application by the Russian Federation of its own criminal law to Mr. Mustafayev – a Ukrainian citizen living in occupied Crimea – is problematic.

of occasions the Military Court reportedly displayed personal animus towards Mr. Mustafayev, mocking him and smirking during his submissions. On one occasion, for instance, the President of the Military Court reportedly interrupted Mr. Mustafayev's submissions to say: "Are you done speaking? How much longer? ... You don't need to continue. You can go back to the detention centre later." The source adds that the Military Court further chastised Mr. Mustafayev, and declared "inadmissible" his references to the "annexation" of Crimea and cautioned him against using such "violent adjectives". The Military Court also ignored Mr. Mustafayev's complaints regarding the inadequacy of the food being given to the defendants.²⁷

56. The source submits that the Military Court's actions described above violated article 14 (1) of the Covenant.²⁸

Response from the Government

57. On 6 August 2021, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 5 October 2021, detailed information about the current situation of Mr. Mustafayev and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of the Russian Federation under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of the Russian Federation to ensure his physical and mental integrity.

58. On 5 October 2021, the Government submitted its reply, in which it explains that by the verdict of the Southern District Military Court of 16 September 2020, Mr. Mustafayev, as the ex-coordinator of the "Crimean Solidarity" so-called civil initiative, was found guilty of committing crimes under part 2 of article 205, part 1 of article 30, and article 278, of the Criminal Code of the Russian Federation. In this regard, he was sentenced to imprisonment for a term of 14 years to be served in a strict regime penal colony, to be followed by restriction of liberty for a term of one year.

59. From 23 May 2018 to 12 September 2019, Mr. Mustafayev was held in a federal State institution named Detention Centre No. 1 of the Directorate of the Federal Penitentiary Service of the Russian Federation in Crimea and the city of Sevastopol (SIZO-1 of the Federal Penitentiary Service of the Russian Federation), on the basis of relevant court decisions. Then, by a decision of the North Caucasus District Military Court, of 12 September 2019, he was transferred to SIZO-1 of the Russian Federal Penitentiary Service for the Rostov Region, from which he was moved to SIZO-1 and subsequently SIZO-2 of the Federal Penitentiary Service of the Russian Federation in Krasnodar Territory, in the period from 12 September to 3 November 2019.

60. The Government notes that the defendant also stayed in SIZO-1 of the Russian Federal Penitentiary Service for the Rostov Region from 3 November 2019 to 23 September 2020. From 17 December 2020 to the present, he has been detained in SIZO-3 of the Chief Directorate of the Federal Penitentiary Service of the Russian Federation in the Rostov Region, located in the city of Novocherkassk, in connection with the appeal against the above-mentioned verdict.

61. Upon admission to SIZO-1 of the Federal Penitentiary Service of the Russian Federation for Crimea and Sevastopol, as well as to SIZO-1 and SIZO-2 of the Federal Penitentiary Service of the Russian Federation in Krasnodar Territory, Mr. Mustafayev underwent medical examinations, without expressing complaints about his health; during the period of detention in these institutions, he did not seek medical help. In SIZO-1 of the Russian Federal Penitentiary Service for the Rostov Region, he applied for medical help in connection with an acute respiratory illness, which was provided to him in full. Currently,

²⁷ The source notes that on a number of occasions the defendants were served food that was beyond its expiry date, was covered in mould and/or was pork, even though Mr. Mustafayev does not eat pork for religious reasons.

²⁸ Human Rights Committee, general comment No. 32 (2007), para. 22; and opinion No. 50/2011, para. 16.

his state of health is satisfactory; there is no need for emergency medical measures or hospitalization. He has no symptoms of a new coronavirus disease infection, or diseases that would impede detention.

62. While being held in all the above-mentioned pretrial detention centres, Mr. Mustafayev was properly provided with an individual sleeping place, bedding and tableware, and other necessary household items, including personal hygiene items, as well as three hot meals a day, in accordance with the established standards. At the same time, the Government notes that violations were committed against Mr. Mustafayev in terms of observance of the norm of four square metres of living space per person, as prescribed in article 23 of Federal Law No. 103-FZ of 15 July 1995 on the detention of suspects and those accused of committing crimes.

63. In this regard, the Government adds that the prosecutor's offices of Crimea, Krasnodar Territory and Rostov Region have repeatedly sent appropriate submissions to the heads of the territorial bodies of the penal system of the mentioned constituent entities of the Russian Federation, as well as the heads of the aforementioned pretrial detention centres. Based on the results of their consideration, measures were taken to eliminate violations of the law, and officials were disciplined.

64. The Government also notes that a number of cells in SIZO-3, including the one where Mr. Mustafayev was kept, require repair. In this regard, a claim sent to the city court on 9 September 2021 by the acting prosecutor of Novocherkassk is currently being considered on the merits. Because of the quarantine measures that were introduced and also on the basis of the decree of 21 October 2020 by the chief State medical adviser on epidemiology, visitation rights for all detainees in the penitentiary system of the Rostov Region were suspended from 22 October 2020, until further notice.

65. According to the Government, exceptions are made for meetings with lawyers, who must wear personal protective equipment – masks, gloves and shoe covers – with the meetings taking place through a glass barrier. During his detention in remand centres in the Rostov Region, Mr. Mustafayev was given six meetings with a lawyer, and 28 parcels were received, which were given to him against his signature, in full. He did not appeal to the administration of the institutions or to the prosecutor's office with complaints about the conditions of detention. On 7 September 2019 – during the period of detention in SIZO-1 of the Federal Penitentiary Service of the Russian Federation for Crimea and Sevastopol – Mr. Mustafayev was received by the assistant prosecutor therefrom, and informed him about his disagreement with the confiscation of personal property by the prison administration. During an inspection, it was revealed that on 28 May and 20 June 2019, searches had been carried out in the cell where Mr. Mustafayev was being held, by the staff of the pretrial detention centre, and notebooks with notes, binders with printed texts and an uncensored book in Arabic were found. In accordance with the requirements of the relevant legislation, the records concerning the materials relating to the criminal case were subsequently returned to the accused.

66. The Government notes that the seizure of other items that are prohibited was held to be lawful. Nevertheless, on 1 July 2021, an appeal, citing similar reasons, was received from Mr. Mustafayev for consideration by the prosecutor's office of Crimea. In addition, the prosecutor's office of Krasnodar Territory considered complaints from other citizens in the interests of Mr. Mustafayev about violation of the conditions of his detention in SIZO-1. In turn, the Novocherkassk prosecutor's office looked into Mr. Mustafayev's complaints about the toothache and visual impairment he suffered while being held in SIZO-3. In connection with the verified failure to provide him with qualified medical care, on 9 August 2021 the acting prosecutor made a corresponding submission to the Federal Penitentiary Service of the Russian Federation. As a result, the violations were rectified.

67. On the basis of the consideration given to the above-mentioned appeals, the applicants were provided with answers by the relevant officials within the time period prescribed by law. There were no violations of the requirements of Federal Law No. 59-FZ of 2 May 2006 on the procedure for considering appeals from citizens of the Russian Federation. Mr. Mustafayev has no restrictions on his freedom of religion or on any other of his legal rights.

68. The Government notes that together with Mr. Mustafayev, six other persons were convicted in the same criminal case for committing terrorist crimes, and one citizen was found innocent. In regard to the public prosecutor's disagreement with the verdict acquitting one citizen, an appeal was brought on 17 September 2020. The verdict was also appealed by the convicts and their defenders. From 23 December 2020 to 7 September 2021, the participants in the proceedings became acquainted with the materials relating to their criminal case, including the minutes of the court sessions. In addition, they listened to the audio recording of the trial. Such a long period of time is due to the size of the case (filling more than 50 volumes) and of the transcript (1,865 pages), which also required translation into the Crimean Tatar language at the request of the defence. Since, in the opinion of the court, the convicts and their defenders unnecessarily prolonged the proceedings, using their procedural rights in bad faith, by a decree of 15 June 2021 and in accordance with the provisions of article 6 of the Criminal Procedure Code, the time for their additional familiarization – including in relation to Mr. Mustafayev – with the materials of the criminal case was limited to the period until 24 June 2021. At the same time, the court duly took into account that previously Mr. Mustafayev had repeatedly studied the materials relating to the case, and a copy of the minutes of the court sessions was immediately handed to him.

69. On 2 July 2021, Mr. Mustafayev filed a complaint against his conviction (the complaint had not been considered at the time of the Government's response). Nevertheless, given that on 9 September 2021 the court considered the comments received on the court record, the case is being prepared for transfer to the Military Court of Appeal for consideration on the merits.

Further comments from the source

70. On 7 October 2021, the Government's response was transmitted to the source for further comments. In its response dated 21 October 2021, the source reiterates its initial submissions and notes that the Government has not rebutted the substantive allegations concerning the detention and trial of Mr. Mustafayev. The source points out that the Government has admitted that Mr. Mustafayev is being held in facilities that need repair and thus has de facto admitted that his conditions of detention do not meet international standards.

Discussion

71. The Working Group thanks the source and the Government for their submissions.

72. As a preliminary issue, the Working Group wishes to clarify that it has addressed the Russian Federation in this case purely because its authorities are implicated in the detention of Mr. Mustafayev. The present opinion is given without prejudice to the legal status of Crimea and the resolutions of the General Assembly.²⁹

73. In determining whether Mr. Mustafayev's deprivation of liberty was 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. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.³⁰

74. The Working Group notes that the source has made numerous and detailed allegations concerning various fair trial guarantees that allegedly were not observed during the trial of Mr. Mustafayev. While all these allegations were transmitted to the Government, the Working Group observes that in its reply the Government has chosen to focus on the allegations concerning Mr. Mustafayev's conditions of detention, the health care provided, complaints submitted in relation to these two aspects and the findings of the investigations into these complaints. Without disputing the importance of addressing these allegations, the Working Group regrets that the Government has chosen not to address any allegations concerning the actual arrest and the conduct of Mr. Mustafayev's trial by the military court,

²⁹ See, inter alia, General Assembly resolution 75/192.

³⁰ [A/HRC/19/57](#), para. 68.

which are at the heart of the source's submissions arguing that the arrest of Mr. Mustafayev is arbitrary.

75. The Working Group notes the submission that Mr. Mustafayev was arrested on 21 May 2018 following a raid on his home by FSB officers. The source has submitted and the Government has chosen not to contest that while the officers allegedly showed some documents to justify the search, these did not explain the reasons for such a search. The Working Group finds this highly irregular, and while it is not entirely clear whether there was a search warrant issued, it wishes to recall that article 9 of the Covenant requires that any deprivation of liberty be carried out on the grounds and in accordance with procedures established by law. This would normally require that a person be arrested on the basis of a duly issued arrest warrant. This requirement is removed if the arrest is carried out in flagrante delicto. The Working Group notes that it is also possible that an arrest would take place following a search, if the findings of the search justified the arrest. However, in such circumstances, it is of paramount importance that the search be carried out strictly in accordance with the established procedure, which requires a duly issued and authorized search warrant. Otherwise, the arrest which follows the search cannot be said to satisfy the requirements of article 9 of the Covenant.

76. Moreover, even when an arrest follows findings made during a properly authorized search, the authorities are still obliged to inform the person of the reasons for the arrest at the time of that arrest. The Working Group observes that the Government has chosen not to contest that this did not take place when Mr. Mustafayev was arrested on 21 May 2018.

77. The Working Group observes that article 9 (2) of the Covenant imposes two requirements for the benefit of persons who are deprived of liberty: first, they are to be informed, at the time of arrest, of the reasons for the arrest; and second, they are to be promptly informed of any charges against them. As the Human Rights Committee has explained, one major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded. While oral notification of reasons for arrest satisfies the requirement, that information must be provided immediately upon arrest.³¹ The Working Group observes that although Mr. Mustafayev was charged on the day following his arrest, satisfying the second element of article 9 (2) of the Covenant, he was not informed of the reasons for his arrest at the time of arrest, which breaches the first element of article 9 (2) of the Covenant.³²

78. The Working Group further observes the uncontested allegations that pretrial detention was imposed upon Mr. Mustafayev on 22 May 2018 by a court that failed to provide individualized reasons for imposing this measure. Rather, as submitted by the source and not contested by the Government, the court cited the gravity of the charge, and nationality of another State, as reasons for the pretrial detention (see para. 20 above).

79. The Working Group recalls that it is a well-established norm of international law that pretrial detention is to be the exception and not the rule, and that it should be ordered for as short a time as possible.³³ Article 9 (3) of the Covenant provides that it is not to be the general rule that persons awaiting trial are detained, but that release may be subject to guarantees to appear for trial and at any other stage of the judicial proceedings. It follows that liberty is recognized as a principle and detention as an exception in the interests of justice.³⁴

80. In order to give effect to this principle, pretrial detention must be based on an individualized determination that it is reasonable and necessary, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.³⁵ The courts must

³¹ Human Rights Committee, general comment No. 35 (2014), paras. 24–27.

³² Opinions No. 65/2020, para. 75; No. 33/2020, para. 55; No. 31/2020, para. 42; No. 83/2019, para. 50; No. 46/2019, para. 51; No. 32/2019, para. 29; and No. 10/2015, para. 34.

³³ Opinions No. 8/2020, para. 54; No. 1/2020, para. 53; No. 57/2014, para. 26; No. 49/2014, para. 23; and No. 28/2014, para. 43; Human Rights Committee, general comment No. 35 (2014), para. 38; and [A/HRC/19/57](#), paras. 48–58.

³⁴ [A/HRC/19/57](#), para. 54.

³⁵ Human Rights Committee, general comment No. 35 (2014), para. 38.

examine whether alternatives to detention, such as bail, would render custodial measures unnecessary.³⁶ This did not take place in the case of Mr. Mustafayev. Moreover, the pretrial detention was imposed by a military court, which the Working Group has already indicated does not satisfy the requirements of article 9 (3) of the Covenant.³⁷ The Working Group therefore finds that his pretrial detention did not satisfy the requirements of article 9 (3) of the Covenant and was therefore arbitrary.

81. Consequently, noting the failure to notify Mr. Mustafayev of the reasons for his arrest at the time of arrest, in breach of article 9 (2) of the Covenant, and that his pretrial detention was imposed in violation of article 9 (3) of the Covenant, the Working Group finds that his detention was arbitrary under category I.

82. The source has made numerous submissions concerning the trial of Mr. Mustafayev, in particular that the military court relied upon unreliable witnesses and irrelevant experts, and did not satisfy the “beyond reasonable doubt” standard of proof. In this respect, the Working Group recalls that it has consistently refrained from taking the place of the national judicial authorities, or acting as a kind of supranational tribunal, when it is urged to review the application by the judiciary of domestic law.³⁸ It is outside of the mandate of the Working Group to reassess the sufficiency of the evidence or to deal with errors of law allegedly committed by the domestic court.³⁹

83. Similarly, the source has argued that the military court’s evaluation of the facts and evidence in this case was arbitrary, as the 40-page judgment was issued a mere week after concluding a 10-month trial, and reflects serious deficiencies in reasoning, including the following: (a) reliance on unreliable witness testimony; (b) reliance on irrelevant expert evidence; (c) failure to consider the absence of physical evidence; (d) application of a standard of proof lower than “beyond reasonable doubt”; and (e) indications that the court prejudged the defence’s case.

84. Once again, the Working Group must reiterate that it cannot take the place of a domestic tribunal when it is being urged to review the sufficiency or indeed the appropriateness of witnesses or evidence. This is the sovereign domain of the national courts, on which the Working Group does not trespass.

85. However, the source submits, and the Government agrees, that Mr. Mustafayev, a civilian, was tried by a military court. In this regard, the Working Group, in its practice, has consistently argued that the trial of civilians by military courts is in violation of the Covenant and customary international law, and that under international law, military tribunals can only be competent to try military personnel for military offences.⁴⁰ Moreover, in the present case, the Government had the possibility to explain the involvement of the military court in the case of Mr. Mustafayev, but it failed to do so. The Working Group therefore finds a breach of article 14 (1) of the Covenant.

86. Furthermore, the Government has chosen not to contest the allegations made by the source that the testimony of two anonymous witnesses was crucial in the case against Mr. Mustafayev. The source has also submitted, and the Government has chosen not to contest, that the court failed to provide legitimate explanation for the anonymity of these witnesses. The Working Group also notes the uncontested allegations regarding the court obstructing the cross-examination of these witnesses, including by not allowing the defence to ask all the questions they deemed were required, cutting the cross-examination short, and having the

³⁶ Ibid.; opinion No. 83/2019, para. 68; and United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37), annex, guideline 15.

³⁷ Opinion No. 10/2021, para. 56. See also the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, annex, guideline 4, para. 55, as well as guideline 17; and opinion No. 46/2017, para. 20.

³⁸ See opinion No. 40/2005.

³⁹ See, for example, opinions No. 5/2021, No. 60/2019, No. 58/2019, No. 49/2019, No. 16/2017 and No. 15/2017.

⁴⁰ A/HRC/27/48, paras. 67–70. See also opinions No. 44/2016, No. 30/2017, No. 28/2018, No. 32/2018 and No. 66/2019.

anonymous witnesses appear via video link with highly distorted voices which the defence team could not understand.

87. As the Human Rights Committee stated in paragraph 39 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, there is a strict obligation to respect the right to have witnesses admitted that are relevant for the defence and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. In the present case, that right was denied to Mr. Mustafayev, as he and his defence team were not allowed to cross-examine the anonymous witnesses properly.⁴¹ The Working Group considers that the behaviour of the court bears the hallmarks not only of serious denial of equality of arms in the proceedings, in violation of article 14 (3) (e) of the Covenant, but also of the failure to act in an impartial manner, in violation of article 14 (1) of the Covenant.

88. The source has alleged various interferences with Mr. Mustafayev's right to legal assistance: he was not allowed a lawyer upon arrest, although one was allowed to be present during his interrogation. Subsequently, during the trial, owing to the scheduling of the trial, Mr. Mustafayev was prevented from meaningful interaction with his lawyers, and the interactions that were possible were not confidential as "escort" guards or other guards would listen in and even check the documents that the lawyers would pass to Mr. Mustafayev. He was again prevented from meeting his lawyer when mounting an appeal to his conviction.

89. The Working Group is mindful that in response to these allegations the Government has merely stated that Mr. Mustafayev had six meetings with his lawyer while in the SIZO in Rostov, without specifying any further information. The Government also states that meetings overall were limited since 22 October 2020, due to the global pandemic. However, the Working Group observes that these measures were introduced after Mr. Mustafayev was sentenced, and the Government did not provide any explanation about the allegations concerning his access to a lawyer during earlier periods. The Working Group also recalls that:

If the exigencies of the prevailing public health emergency require restrictions on physical contact, States must ensure the availability of other ways for legal counsel to communicate with their clients, including secured online communication or communication over the telephone, free of charge and in circumstances in which privileged and confidential discussions can take place.⁴²

90. Noting the above, the Working Group must conclude that Mr. Mustafayev's right to legal assistance was not respected as required under article 14 (3) (b) of the Covenant.

91. The source has also alleged that Mr. Mustafayev was denied the right to be tried in person, as the court excluded him from proceedings on various occasions for different periods of time (see paras. 51–53 above) and the court did not provide him with transcripts of the proceedings from which he was excluded. In its response, the Government has provided no response to these allegations, and the Working Group therefore must establish a violation of the right to be tried in person as provided under article 14 (3) (d) of the Covenant.

92. The source has also submitted – and the Government has chosen not to address – that Mr. Mustafayev had to appear before the court in a glass cage, which not only prevented him from hearing the witnesses properly and taking part fully in the proceedings, but also violated his presumption of innocence. Once again, noting the absence of a government reply to these allegations, the Working Group finds a breach of article 14 (2) of the Covenant.

93. Furthermore, the Working Group notes the uncontested allegations of the court's bias as summarized in para. 55 above. The source has also argued, and the Government has not rebutted, that the prosecution was given almost three times as much time to present its case than the defence (see para. 45 above). The Working Group also observes the uncontested allegations that Mr. Mustafayev was ejected from the court proceedings purely because he raised concerns over the procedural irregularities.

⁴¹ See also opinions No. 29/2017, No. 2/2018, No. 17/2019 and No. 53/2019.

⁴² Deliberation No. 11 (A/HRC/45/16, annex II), para. 21.

94. The Working Group has already established its view that the court failed to act as an impartial tribunal in the way it denied to Mr. Mustafayev an equal opportunity to cross-examine witnesses. In the view of the Working Group, these further submissions are additional evidence of lack of impartiality on the part of the court and the Working Group therefore finds a further violation of Mr. Mustafayev's rights under article 14 (1) of the Covenant.

95. Noting all the above, the Working Group finds that the violations of Mr. Mustafayev's right to a fair trial are of such gravity as to give his detention an arbitrary character, falling under category III.

96. The Working Group notes that the source has alleged that Mr. Mustafayev was arrested and tried due to his ethnic background as a Crimean Tatar belonging to the Muslim faith. The Working Group is particularly mindful that the Government has chosen not to address these allegations and in fact has provided no explanation as to what criminal actions by Mr. Mustafayev may have formed the basis for his arrest and subsequent trial. The Government has merely stated that Mr. Mustafayev, as a former leader of "Crimean Solidarity", an independent civil society organization, was found guilty in accordance with several provisions of the Criminal Code.

97. The Working Group recalls the 2018 report of OHCHR covering the same time period as that of Mr. Mustafayev's arrest, which documents the following:

In May 2018, OHCHR recorded three new cases of detention of Crimean Tatar men accused by Russian Federation authorities of affiliation with Hizb ut-Tahrir. In total, since the beginning of the occupation, at least 33 Crimean residents have been arrested for alleged ties with radical Muslim groups, and four of them have been convicted.

Another 10 individuals accused of membership in Hizb ut-Tahrir stood trial in Rostov-on-Don in the Russian Federation during the reporting period, in violation of international humanitarian law prohibiting the forcible transfers of protected persons outside the occupied territory, regardless of the motive.

In the majority of the cases documented by OHCHR, the charges against the Muslims were based on the content of conversations among themselves, during which they discussed global political developments, religious writings, Muslim culture and application of sharia law. In none of the cases known to OHCHR did Russian Federation authorities present any credible evidence that the defendants called for the use of force, violation of public order or engagement in any unlawful activity in Crimea.⁴³

98. The Working Group observes a striking similarity between the cases described by OHCHR and that of Mr. Mustafayev, and that also in the present case, the Government has presented no evidence whatsoever that Mr. Mustafayev called for the use of force, violation of public order or engagement in any unlawful activity in Crimea. In the light of this, and noting the credible allegations made by the source, the Working Group concludes that the detention of Mr. Mustafayev constitutes a violation of international law on the grounds of discrimination based on national, ethnic or social origin and religion, in breach of article 26 of the Covenant, falling under category V.

99. 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 human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on minority issues.

Disposition

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

The deprivation of liberty of Server Mustafayev, being in contravention of articles 2, 3, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and

⁴³ A/HRC/39/CRP.5, paras. 111–113.

26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

101. The Working Group requests the Government of the Russian Federation to take the steps necessary to remedy the situation of Mr. Mustafayev 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.

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

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

104. 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 human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on minority issues.

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

Follow-up procedure

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

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

107. 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.

108. 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.

109. 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.⁴⁴

[Adopted on 16 November 2021]

⁴⁴ Human Rights Council resolution 42/22, paras. 3 and 7.