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**Human Rights Council**  
**Working Group on Arbitrary Detention****Opinions adopted by the Working Group on Arbitrary Detention at its ninety-ninth session, 18–27 March 2024****Opinion No. 5/2024 concerning Artsiom Zharnak (Belarus)\***

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 51/8.

2. In accordance with its methods of work,<sup>1</sup> on 27 October 2023 the Working Group transmitted to the Government of Belarus a communication concerning Artsiom Zharnak. The Government submitted a late response on 27 December 2023 and on 15 February 2024. 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).

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\* Miriam Estrada Castillo did not participate in the discussion of the case.

<sup>1</sup> A/HRC/36/38.



## 1. Submissions

### (a) Communication from the source

4. Artsiom Zharnak is a citizen of Belarus, born on 12 April 1993. His usual place of residence is in Minsk. Mr. Zharnak was the Chairperson of the Free Trade Union of Metalworkers.

#### (i) Context

5. According to the source, on 9 August 2020, presidential elections were held in Belarus. Reportedly, the campaign period before the election and the period after the announcement of the results were marked by numerous protests, violence against protesters, and the detention of the main presidential candidates.

6. The source reports that more than 30,000 people were detained during 2020, the vast majority for participation in an unauthorized mass event. Allegedly, peaceful protesters were subjected to unjustified and unlawful violence at the time of their detention and afterwards; between 9 August and 23 November 2020, more than 2,600 people were injured, and in addition, at least four people were killed during the protests.

7. The source alleges that between 2020 and 2023, the authorities failed to adequately investigate some 5,000 complaints of torture and other acts of ill-treatment perpetrated primarily by law enforcement agencies against peaceful protesters and others, who had been detained for expressing their dissent.

8. The source alleges that members and activists belonging to independent trade unions are a distinct category of targeted persons. Reportedly, following the 2020 elections, independent trade unions and their members participated en masse in peaceful assemblies and strikes, exercising freedom of expression against the election results.

9. The source explains that because the independent trade unions supported the opposition in 2020, the authorities have targeted independent trade unions and their members. Members of independent trade unions have been targeted for their exercise of the human rights guaranteed under the Covenant. In July 2022, the Supreme Court, on the basis of lawsuits filed by the Prosecutor General, ordered the closure of all independent trade unions.

#### (ii) Arrest and detention of Mr. Zharnak

10. The source explains that Mr. Zharnak was the Chairperson of the branch of the Free Trade Union of Metalworkers at “Minsk Automobile Plant” (MAZ), a State-owned company. Before that, he had been an activist of the Belarusian Trade Union of Radioelectronic Industry Workers.

11. Reportedly, after the 2020 presidential elections in Belarus, from 11 to 14 August 2020, Mr. Zharnak took part in the strike by MAZ workers. Additionally, on 17 August 2020, he participated in a peaceful assembly of MAZ workers.

12. The source adds that, in September 2020, Mr. Zharnak was elected Chairperson of the branch of the Belarusian Trade Union of Radioelectronic Industry Workers established by the MAZ workers. The union produced and distributed leaflets at the Minsk Automobile Plant about the situation in Belarus, criticizing the electoral process and alleging violations of human rights. It also coordinated the participation of MAZ workers in peaceful assemblies on weekends in Minsk and organized legal aid for workers who were allegedly detained while exercising their rights.

13. While he was the Chairperson, in October and November 2020, Mr. Zharnak took part in the nationwide strike that was initiated by the opposition party in Belarus, collecting signatures of workers in support of the strike which demanded the resignation of the President and the cessation of alleged violations of human rights. Mr. Zharnak was also allegedly one of the administrators of the “MAZ 97%” chat group on messaging channels, in which information about current affairs in Belarus, issues relating to MAZ employees, and activities of the opposition to the Government was disseminated.

14. The source reports that in early December 2020, Mr. Zharnak was illegally dismissed from the Minsk Automobile Plant, allegedly because of his trade union activism. Following this event, Mr. Zharnak remained a member of the Belarusian Trade Union of Radioelectronic Industry Workers. In that capacity, he worked to attract new members to the trade union, to identify violations and issues concerning labour safety, and to disseminate information.

15. In June 2021, the branch of the Belarusian Trade Union of Radioelectronic Industry Workers at the Minsk Automobile Plant was transferred to the Free Trade Union of Metalworkers, and Mr. Zharnak also became its Chairperson. In that capacity, Mr. Zharnak wrote appeals to the management of MAZ about improving labour conditions, among other tasks.

16. The source reports that Mr. Zharnak was arrested on 17 November 2021 in his apartment by the State Security Committee of the Republic of Belarus for Minsk. The source emphasizes that Mr. Zharnak has been detained since then, having been deprived of his liberty continuously for nearly two years.

17. The source reports that Mr. Zharnak was arrested on suspicion of committing the crime defined in article 361-1 (1) of the country's Criminal Code.

18. The source further reports that during the arrest, security officers arrived at Mr. Zharnak's apartment and demanded that he open the door, but he refused. It is reported that Mr. Zharnak called another member of the Free Trade Union of Metalworkers to advise of his arrest.

19. The source alleges that the officers were only able to enter Mr. Zharnak's apartment after obtaining the keys to the property from one of Mr. Zharnak's relatives. Reportedly, officers exerted psychological pressure on the relative and threatened to hurt Mr. Zharnak.

20. Reportedly, the officers presented Mr. Zharnak with a search warrant and a ruling to initiate criminal proceedings against him, but a copy of the documents was not given to him or his relatives. According to the source, Mr. Zharnak demanded the presence of his lawyer during the arrest and the search of his apartment, but that request was not granted.

21. The source adds that on 24 November 2021, the State Security Committee issued a resolution on the initiation of a criminal case against Mr. Zharnak, on the basis of article 342 (1) of the Criminal Code, which refers to the crime of organizing and preparing, or actively participating in, actions that seriously violate public order. Further changes in the grounds for the criminal prosecution have not been publicly reported by the authorities.

22. The source reports that after the expiration of the period of arrest, a pretrial preventive measure in the form of remand in custody was determined for Mr. Zharnak.

23. The source asserts that, on 13 October 2022, Mr. Zharnak was sentenced to four years of imprisonment under three articles of the Criminal Code, namely article 361 (3), which prohibits calls for actions aimed at harming the national security of Belarus, article 342 (1), which refers to organizing and preparing, or actively participating in, actions that seriously violate public order, and article 361-1 (1), which prohibits setting up or taking part in extremist formations.

24. It is reported that Mr. Zharnak has appealed the verdict to the Supreme Court, but the outcome of the appeal has not been disclosed. The source states that given that Mr. Zharnak remains deprived of his liberty in Correctional Colony No. 1 in Belarus, the Supreme Court has left the sentence intact.

(iii) *Legal analysis*

25. The source argues that Mr. Zharnak's arrest and detention violate articles 9, 14, 19, 21, 22 and 26 of the Covenant and are, thus, arbitrary, falling under categories I, II, III and V of the categories used by the Working Group when considering cases submitted to it.

26. Firstly, the source asserts that Mr. Zharnak was a victim of violations of article 9 (1) and (3) of the Covenant, which would amount to arbitrary detention under categories I and II of the Working Group.

27. The source asserts a lack of legitimate justification and legal basis for the pretrial detention of Mr. Zharnak. In this regard, the source recalls that under article 9 of the Covenant, detention must be reasonable and necessary in all circumstances,<sup>2</sup> and that the use of detention automatically, without the need to justify its reasonableness and necessity, does not meet these criteria. Relevant legislation must comply with article 9 of the Covenant.

28. Arrest is applied on the basis of article 126 of the country's Criminal Procedure Code. Although the exact justification for the arrest of Mr. Zharnak is unknown, under article 126 (1) he could have been arrested as a person suspected or accused of committing a crime "for which the law provides a penalty in the form of imprisonment for a term of more than two years ... provided that the goals of criminal prosecution cannot be achieved by applying a milder measure of restraint". Also, as Mr. Zharnak was suspected or accused of committing a crime against the State, under article 126 (1) he could have been remanded in custody solely on the basis of the gravity of the imputed crime.

29. The source argues that if Mr. Zharnak was arrested on the first possible ground, his pretrial deprivation of liberty was arbitrary because the authorities could not possibly have demonstrated that he posed a "present, direct and imperative threat" and that this threat could not have been "addressed by alternative measures".<sup>3</sup> Mr. Zharnak was accused or suspected of actions which effectively were the exercise of the freedoms of expression, peaceful assembly, and association. Thus, the pretrial deprivation of liberty imposed on him for the exercise of those rights was inherently in violation of article 9 (1) of the Covenant.<sup>4</sup> It was arbitrary under category II.

30. Moreover, it is argued that if Mr. Zharnak was arrested "solely on the basis of the gravity of the imputed crime", his pretrial deprivation of liberty was arbitrary because this legal provision does not comply with article 9 (1) of the Covenant, as it permits the automatic detention of persons, without the need to justify the reasonableness and necessity of detention in a specific case. It is argued that since the national law does not comply with article 9 (1) of the Covenant, any arrest based on that law lacks legal basis. Accordingly, if Mr. Zharnak was indeed arrested "solely on the basis of the gravity of the imputed crime", the deprivation of liberty was arbitrary under category I.

31. The source further argues that there were procedural violations during the pretrial detention of Mr. Zharnak. It states that after being arrested, on 17 November 2021, Mr. Zharnak was placed in pretrial detention. After the arrest, he was not brought before a judge "promptly", and his pretrial detention was not authorized by a judge. Thus, the pretrial detention was arbitrary under category I.

32. It is recalled that article 9 (3) of the Covenant determines that anyone arrested or detained on a criminal charge is to be brought promptly before a judge or other officer authorized by law to exercise judicial power. This condition applies in all cases without exception and does not depend on the choice of the detainee or whether the detainee has the opportunity to demand that it be complied with.<sup>5</sup> Forty-eight hours is usually sufficient to transport the individual concerned, as well as for the preparation of a court hearing; any delay beyond 48 hours must be exceptional and justified by specific circumstances.<sup>6</sup>

33. The source asserts that, in violation of article 9 (3) of the Covenant, Mr. Zharnak did not appear before a judge or other officer authorized by law to exercise judicial power within 48 hours. That happened because the country's criminal law does not provide for the immediate delivery of a detainee to a judge. Mr. Zharnak was detained by the security officers on 17 October 2021, but physically appeared before a judge for the first time almost a year later, on 13 October 2022. This did not comply with the requirement of bringing a detainee before a judge "promptly".

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<sup>2</sup> Human Rights Committee, general comment No. 35 (2014), para. 12.

<sup>3</sup> *Ibid.*, para. 15.

<sup>4</sup> *Ibid.*, para. 17.

<sup>5</sup> *Ibid.*, paras. 32 and 34.

<sup>6</sup> *Ibid.*, para. 33.

34. Moreover, the source recalls that in accordance with the Human Rights Committee's jurisprudence, a prosecutor cannot be considered an official authorized to exercise judicial power in accordance with article 9 (3) of the Covenant.<sup>7</sup>

35. In the present case, the source adds that it is unknown which authority authorized the pretrial arrest of Mr. Zharnak. According to article 126 (3) and (4) of the Criminal Procedure Code, the arrest could, allegedly, have been authorized either by a prosecutor or the Chairperson of the State Security Committee. However, the source argues that neither of these authorities is a judge or a body with judicial power, and that therefore, any pretrial deprivation of liberty by these authorities would be in violation of article 9 (3) of the Covenant.

36. Moreover, the source asserts that the detention was imposed on Mr. Zharnak because of his exercise of rights guaranteed by articles 19, 21 and 22 of the Covenant. It argues that the imprisonment for the crimes stipulated in articles 342, 361 and 361-1 of the Criminal Code, even in the absence of the text of the verdict, indicates that Mr. Zharnak is being detained because of his exercise of freedoms guaranteed under articles 19, 21 and 22 of the Covenant, namely the freedoms of expression, peaceful assembly, and association.

37. According to the source, since 2020, the Belarusian authorities have been extensively using article 342 (1) of the Criminal Code ("organizing and preparing, or actively participating in, actions that seriously violate public order") to punish participants in the peaceful protests of 2020 and 2021. The source submits, however, that this article should not be considered as "law" within the meaning of article 9 (1) of the Covenant, as it does not comply with the provisions, aims and objectives of the Covenant.<sup>8</sup> In particular, article 342 (1) of the Criminal Code permits penalties for peaceful exercise of the rights guaranteed under articles 19, 21 and 22 of the Covenant.

38. The source states that Mr. Zharnak was not charged with committing violent acts, and there is no evidence whatsoever that any of his actions have been violent. Thus, his continued detention for violation of article 342 (1) of the Criminal Code lacks legal basis and falls under category I. Presuming that Mr. Zharnak was sentenced under this article for taking part in a peaceful assembly, his detention also falls under category II.

39. The source uses the same reasoning to discuss Mr. Zharnak's detention for the crime set out in article 361-1 (1) (setting up or taking part in extremist formations) of the Criminal Code. According to the source, this provision is used by the authorities to detain their critics, who merely exercise their right to freedom of opinion, protected by article 19 of the Covenant.

40. Reportedly, Mr. Zharnak was prosecuted for the crime set out in article 361-1 (1) of the Criminal Code for allegedly calling for international sanctions against Belarus. It is reported that calls for sanctions were almost the only non-violent means of protecting human rights. Thus, even if Mr. Zharnak had called for international sanctions, these statements would have been protected by article 19 of the Covenant. Accordingly, his continued detention for violation of article 361 (3) of the Criminal Code is arbitrary under category II.

41. Moreover, the source recalls that article 361-1 (1) of the Criminal Code (setting up or taking part in extremist formations) criminalizes "the creation of an extremist formation ... or the leadership of such a formation or a unit within it". To define the concept of "extremism", the Criminal Code refers to Law No. 203-Z of 4 January 2007 on countering extremism. Article 1 (1) of Law No. 203-Z provides for an extremely broad definition of the term "extremism (extremist activity)", which includes 18 possible forms of activity aimed at "planning, organizing, preparing and committing encroachments on independence, territorial integrity, sovereignty, the foundations of the constitutional system, and public security".

42. According to the country's Ministry of the Interior, as at 27 September 2023 the authorities had recognized 151 informal groups as "extremist formations". The source

<sup>7</sup> *Likhovid v. Belarus* (CCPR/C/135/D/2703/2015), para. 7.3; and *Statkevich v. Belarus* (CCPR/C/133/D/2619/2015), para. 7.5.

<sup>8</sup> Human Rights Committee, general comment No. 16 (1988), para. 3.

submits that all of these groups are either Belarusian civil society organizations, or media, or follow opposition social media accounts.

43. The source notes that the “anti-extremism” legislation, including the term “extremist formation”, is used by the authorities to persecute political opponents. The source argues that under “anti-extremism” legislation, almost any realization of freedom of association, peaceful assembly or expression can be interpreted as an encroachment on rather abstract categories: “independence, territorial integrity, sovereignty, the foundations of the constitutional system, and public security”.

44. Therefore, argues the source, this “anti-extremism” legislation, in particular article 361-1 (1) of the Criminal Code, lacks the necessary legal clarity to be recognized as “law” in terms of article 9 (1) of the Covenant. Accordingly, it is submitted that anyone sentenced under article 361-1 (1) of the Criminal Code is detained without any legal basis.

45. It is submitted that although the exact reason for sentencing Mr. Zharnak under article 361-1 (1) of the Criminal Code is unknown, it follows from the above that his detention is without legal basis and thus arbitrary under category I.

46. Additionally, the source affirms that it is believed that Mr. Zharnak was sentenced under article 361-1 (1) of the Criminal Code also because of his participation in and administration of the “MAZ 97%” chat group on messaging channels. It is reported that on 24 May 2022, the Ministry of the Interior determined that the members of the “MAZ 97%” chat group constituted an “extremist formation”.

47. The source explains that in this chat group, workers exchanged information about daily events and organized their joint actions to protect their civil, political, social and economic rights. Thus, it is argued that the persons in the above-mentioned chat group were merely exercising their freedoms of expression and association with others, activities protected by articles 19 and 22 of the Covenant. The source concludes that, even if Mr. Zharnak was an administrator or a member of the “MAZ 97%” chat group, this activity would have been protected by articles 19 and 22 of the Covenant. Accordingly, his continued detention for violation of article 361-1 (1) of the Criminal Code is arbitrary under category II.

48. Mr. Zharnak’s activity as Chairperson of the branch of the Free Trade Union of Metalworkers at MAZ also cannot be considered to be the activity of an “extremist formation”, since the trade union protected the rights of workers. The source argues that the fact that after the 2020 presidential election, in addition to directly protecting the labour rights of workers, independent trade unions also demanded the cessation of alleged violations of human rights in Belarus, and new presidential elections, does not deprive them of the protection of article 22 of the Covenant, since the right to freedom of association is civil, political, social and economic. This follows from the international legal regulation of trade unions and from the concept of the continuity and interdependence of human rights.<sup>9</sup>

49. Furthermore, the source notes that an additional argument in favour of a broad understanding of the subject of the representative competence of trade unions is the definition of social justice as a common goal, the achievement of which is ensured by the International Labour Organization (ILO) as a specialized organization. This conclusion is also supported by ILO jurisprudence.

50. The source also argues that Mr. Zharnak’s detention is arbitrary under category III of the Working Group since it was imposed in violation of the principle of fair trial. The source alleges that the detention was determined by a judge who was not independent and impartial, and denounces the lack of a public hearing.

51. The source firstly points out to the lack of impartiality and independence of the judge. The source asserts that the independence of the country’s judges is not ensured at the legislative level, which means that all judges, including the judge in the case of Mr. Zharnak, are not independent and impartial within the meaning of article 14 of the Covenant.

52. The source recalls that article 14 of the Covenant establishes the requirements for the independence of judges, and asserts that these are not followed by the domestic law. Under

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<sup>9</sup> Vienna Declaration and Programme of Action, paras. 5 and 8.

article 14 of the Covenant, the requirement of independence relates to the manner and conditions of the appointment of judges, the guarantees of their irremovability, the conditions governing promotion, transfer, suspension and termination of their functions, and the actual independence of judges from political interference by the executive and legislative branches of Government.<sup>10</sup> Laws should establish clear procedures and objective criteria for the appointment, remuneration, retention, promotion, suspension and termination of judges, and for the disciplinary sanctions applicable to them.

53. According to article 84 (10) of the Constitution of Belarus, judges of the general courts are appointed by the President. By virtue of article 81 (3) of the Code on the Judiciary and the Status of Judges, the President appoints judges for a period of five years and then may reappoint them indefinitely or not reappoint them. In its concluding observations on Belarus, the Human Rights Committee drew attention to the fact that five years is too short a period to comply with the guarantee of irremovability of judges under the Covenant. In addition, the Code on the Judiciary and the Status of Judges does not provide for the possibility to appeal against the decisions of the President.<sup>11</sup> Moreover, article 81 (3) of the Code on the Judiciary and the Status of Judges does not set out clear and objective criteria on the basis of which judges may be reappointed, nor does it set out the criteria governing the term of office of reappointed judges.

54. Furthermore, the source explains that judges may be subject to disciplinary sanctions taken by the President, in accordance with article 102 of the Code on the Judiciary and the Status of Judges. Here too, the Code does not provide for the possibility to appeal against the decisions of the President.

55. The source recalls that under the Covenant, laws should establish clear procedures and objective criteria for the remuneration of judges.<sup>12</sup> It is noted that in Belarus, the salary of judges is not determined by a specific law, but by a decree of the President. The Human Rights Committee has expressed concern about this practice in its concluding observations on Belarus.<sup>13</sup>

56. The source notes that this context and the role of the President in the appointment of judges has been analysed and criticized by United Nations experts and the Human Rights Committee. On this matter, the Committee has pointed out that the President's role in the appointment of judges hinders the independence of the judiciary in Belarus and has called on the State to reconsider its role in this process in order to comply with article 14 of the Covenant. Additionally, in 2020, the Special Rapporteur on the situation of human rights in Belarus noted that "for almost three decades, Belarus has failed to ensure the independence of its judiciary" due to excessive control of the judiciary by the executive, which is evident in the appointment, tenure and dismissal procedures for judges.<sup>14</sup>

57. The source adds that, in 2022, the Special Rapporteur on the situation of human rights in Belarus also reported that while the country's judiciary had never been fully independent, in 2021 the authorities had further strengthened their control over the judiciary and the court system: the administration of justice had deteriorated, as the authorities systematically violated the right to a fair trial and used the judiciary and courts as repressive tools to suppress dissent.<sup>15</sup> This situation was also observed by the United Nations High Commissioner for Human Rights in 2023.<sup>16</sup>

58. The source concludes that the combination of the above-mentioned factors allows for the conclusion that judges in the country are not independent, and that, consequently, the judge who sentenced Mr. Zharnak was not impartial and independent. This is a direct

<sup>10</sup> Human Rights Committee, general comment No. 32 (2007), para. 19.

<sup>11</sup> [CCPR/C/BLR/CO/5](#), para. 39.

<sup>12</sup> Human Rights Committee, general comment No. 32 (2007), para. 19.

<sup>13</sup> [CCPR/C/BLR/CO/5](#), para. 39.

<sup>14</sup> See <https://www.ohchr.org/en/press-releases/2020/10/belarus-establishing-independent-judicial-system-should-top-agenda-future?LangID=E&NewsID=26423>.

<sup>15</sup> [A/HRC/50/58](#), para. 82.

<sup>16</sup> [A/HRC/52/68](#), para. 26.

indication of this judge's dependence on the executive, which resulted in this member of the judiciary not ruling impartially.

59. Furthermore, it is argued that there was no public hearing, as, reportedly, the court of first instance tried and sentenced Mr. Zharnak in camera. The exact reason for hearing the case in a closed session is unknown. Under article 14 of the Covenant, the right to a public trial may be restricted for reasons of morals, public order or national security, or where the interests of the private lives of the parties so require, or, to the extent strictly necessary in the opinion of the court, in special circumstances where publicity would prejudice the interests of justice.<sup>17</sup> Taking into account the nature of Mr. Zharnak's activities and the charges, there were no such circumstances in the present case. Therefore, the source concludes that holding the trial in camera was manifestly unjustified.

60. The source affirms that even in instances where the public is denied access to the trial, the judgment, including the main findings, the evidence and the legal reasoning, must be made public. Reportedly, in the case of Mr. Zharnak, only the operative part of the judgment, from which no main findings, evidence or legal reasoning were discernible, was announced, at a trial with limited public access. Thus, the source argues that Mr. Zharnak's right to a public trial, guaranteed by article 14 (1) of the Covenant, was violated.

61. The source concludes that rights of Mr. Zharnak to a fair trial were therefore violated, making his detention arbitrary under category III of the Working Group.

62. Lastly, according to the source, the detention of Mr. Zharnak was determined on the basis of discriminatory grounds, which makes it arbitrary under category V of the Working Group.

63. The source argues that Mr. Zharnak was detained because of his affiliation with and active membership of independent trade unions: the Belarusian Trade Union of Radioelectronic Industry Workers and the Free Trade Union of Metalworkers.

64. Reportedly, since 2020, the authorities have been targeting independent trade unions and their members. As a consequence, noting all of the above, and especially the fact that Mr. Zharnak is being detained for the peaceful exercise of his rights guaranteed under the Covenant, his detention is based on discrimination resulting from his political opinion and his status as an active member of an independent trade union, in violation of article 26 of the Covenant. This deprivation of liberty is therefore arbitrary under category V of the Working Group, concludes the source.

## **(b) Response from the Government**

65. On 27 October 2023, 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 26 December 2023, detailed information about the current situation of Mr. Zharnak and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Belarus 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 to ensure his physical and mental integrity.

66. The Government submitted its response on 27 December 2023 and on 15 February 2024, that is, after the established deadline. The response is therefore considered late, and the Working Group cannot accept the response as if it had been presented within the time limit. The Government did not request an extension of the time limit for its response, within the deadline, as is provided for in paragraph 16 of the Working Group's methods of work.

## **2. Discussion**

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

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<sup>17</sup> Human Rights Committee, general comment No. 32 (2007), para. 29.



68. In determining whether Mr. Zharnak's deprivation of liberty 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. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.<sup>18</sup> In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source within the prescribed time limit.

69. The source has argued that the detention of Mr. Zharnak is arbitrary and falls under categories I, II, III and V. The Working Group will proceed to examine these in turn.

**(a) Category I**

70. The Working Group notes the source's submission, not refuted by the Government in its late response, that Mr. Zharnak's pretrial detention, prolonged several times, was based solely on the gravity of the charges against him.

71. In this respect, 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.<sup>19</sup> Article 9 (3) of the Covenant provides that it is not to be the general rule that persons awaiting trial are detained, but 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. Moreover, although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the need to continue the deprivation of liberty cannot be assessed from this purely abstract point of view, taking into consideration only the gravity of the offence and using a stereotyped formula without addressing specific facts or considering alternative preventive measures.

72. In the present case, the Working Group considers that by failing to address specific facts or consider alternative preventive measures and by relying essentially on the gravity of the charges, the authorities have failed to properly justify Mr. Zharnak's pretrial detention which lasted approximately 11 months. In the absence of any argument to the contrary, the Working Group finds his detention to be in violation of article 9 (3) of the Covenant.

73. Moreover, according to article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge is to be brought promptly before a judge. As the Human Rights Committee has stated, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee "promptly" before a judge following his or her arrest, and any longer delay must remain absolutely exceptional and be justified under the circumstances.<sup>20</sup> In the present case, Mr. Zharnak was arrested on 27 November 2021 and according to the Government was not brought before a court until 7 December 2021. The Working Group considers that such a delay is contrary to article 9 (3) of the Covenant.

74. Accordingly, the Working Group concludes that the detention of Mr. Zharnak was arbitrary, falling under category I.

**(b) Category II**

75. The source alleges that the persecution of Mr. Zharnak was motivated by his opinions and his participation in peaceful assemblies. It refers to the imputation of the crimes under articles 342 and 361 of the Criminal Code, and stresses that it is a widely known fact that these provisions of the Criminal Code are used to persecute critics of the authorities.

<sup>18</sup> [A/HRC/19/57](#), para. 68.

<sup>19</sup> 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. See also Human Rights Committee, general comment No. 35 (2014), para. 38; and [A/HRC/19/57](#), paras. 48–58.

<sup>20</sup> Human Rights Committee, general comment No. 35 (2014), para. 33; and [CAT/C/GAB/CO/1](#), para. 10.

76. The Government states in its late reply that Mr. Zharnak has actively participated in destructive activities and unauthorized mass events with the objective of bringing about an unconstitutional change of power in Belarus. The Working Group notes that these imprecise submissions, which do not mention any concrete fact capable of justifying a restriction on his freedom of speech and freedom of conscience, only support the source's allegations.

77. The Working Group also notes that the charges against Mr. Zharnak were brought under articles 342 and 361 of the Criminal Code, and, in this regard, recalls that in its jurisprudence,<sup>21</sup> it has relied on the report of the European Commission for Democracy through Law (the Venice Commission), in which the Commission emphasized that article 342 of the Criminal Code criminalized group behaviour of a non-violent character, related to a mass demonstration, and stressed that the mere fact that the demonstration caused inconvenience to the public did not suffice to criminalize the participation of a person in such an event.

78. Equally, the Working Group has relied in its previous jurisprudence<sup>22</sup> on the report by the United Nations High Commissioner for Human Rights in which the High Commissioner noted that article 361 of the Criminal Code – another provision under which Mr. Zharnak was charged – had broadened the scope for persecuting those expressing dissenting views, and concluded that that provision had been used against those seeking to exercise their rights to freedom of expression, peaceful assembly and association and their right to participate in public affairs.<sup>23</sup>

79. In its late response, the Government has not submitted any new elements that would lead the Working Group to depart from its previous findings. Furthermore, the situation of Mr. Zharnak cannot be viewed in isolation and should be viewed against the backdrop of the arbitrary arrest and detention of government critics, civil society activists and human rights defenders in Belarus, as has recently been addressed in numerous opinions of the Working Group.<sup>24</sup>

80. In the absence of any explanation to the contrary and following the pattern identified by the Working Group and different human rights bodies, it is quite clear to the Working Group that in fact the basis for the arrest and subsequent detention of Mr. Zharnak was his exercise of freedom of expression and freedom of assembly, guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant, following the pattern identified by the Working Group. No indication of any violent behaviour on his part was presented to the Working Group.

81. The Working Group concludes that the arrest and detention of Mr. Zharnak is arbitrary and falls 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 and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, for appropriate action.

**(c) Category III**

82. Given its finding that the deprivation of liberty of Mr. Zharnak is arbitrary under category II, the Working Group wishes to emphasize that no trial should have taken place. Nevertheless, as the trial took place, and Mr. Zharnak was convicted, the Working Group will proceed with examination of the source's submissions concerning the denial of fair trial rights to Mr. Zharnak.

83. The source submits that Mr. Zharnak was not tried by an independent and impartial tribunal and that he did not have a public hearing. In its late reply, the Government merely asserts that the court concerned examined Mr. Zharnak's case objectively.

<sup>21</sup> Opinion No. 64/2023.

<sup>22</sup> Opinions No. 24/2022 and No. 64/2023.

<sup>23</sup> A/HRC/49/71, para. 68.

<sup>24</sup> See, for example, opinions No. 76/2023, No. 64/2023, No. 52/2023, No. 45/2023, No. 50/2021, No. 23/2021 and No. 39/2012.

84. In this context, the Working Group recalls that an independent and impartial tribunal is a *sine qua non* for the right to a fair hearing enshrined in article 10 of the Universal Declaration of Human Rights and article 14 of the Covenant. The notion of the separation of powers between the political organs of the Government and the judiciary, as well as the notion of safeguarding the independence of judiciary, have assumed growing importance. In this regard, the Working Group again refers to the report of the Special Rapporteur on the situation of human rights in Belarus, submitted to the Human Rights Council, covering the period at stake, pointing to the systemic restrictions on the independence of judges in Belarus, with judges being expected to implement the requests of the Prosecutor General, whose role is to implement the executive's repressive policy of harshly punishing dissent. Judges therefore often conduct a prosecution trial, denying defendants their rights to the presumption of innocence or to present witnesses in their defence. In the context of arrests and deprivation of liberty, consistent testimonies about delays in obtaining access to a lawyer and to other legal and procedural safeguards increase concerns. Lawyers are obliged to sign a non-disclosure agreement, which makes it difficult to have information on articles and charges.<sup>25</sup>

85. In view of these findings, as well as the Working Group's earlier jurisprudence covering the same context,<sup>26</sup> the Working Group concludes that Mr. Zharnak was not tried by an independent and impartial tribunal, contrary to article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

86. Furthermore, article 14 (1) of the Covenant provides that, in the determination of any criminal charge, everyone is to be entitled to a public hearing. Article 10 of the Universal Declaration of Human Rights similarly guarantees the right to a public hearing. As the Human Rights Committee has explained, the publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large.<sup>27</sup> Although the right to a public hearing is not absolute, it may only be restricted for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interest of justice, and, in the absence of such exceptional circumstances, a hearing must be open to the general public, including members of the media, without entrance being limited to a select group of people.<sup>28</sup>

87. It is alleged by the source that the authorities closed Mr. Zharnak's trial to the public and the media, in violation of the above-mentioned provisions. In its late reply, the Government merely states that the decision to conduct Mr. Zharnak's trial in camera was taken in accordance with the law, but provides no further explanation of this restriction. Given that no explanation was provided by the Government, the Working Group finds that the hearing of Mr. Zharnak's case behind closed doors violated his rights under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

88. In view of the above, the Working Group considers that the violations of Mr. Zharnak's right to a fair trial are of such gravity as to give his deprivation of liberty an arbitrary character, falling under category III.

**(d) Category V**

89. Finally, the source has also submitted that Mr. Zharnak is being prosecuted and imprisoned as a result of his role as one of the leaders of an independent trade union, which shows that he has been deprived of his liberty for reasons of discrimination based on political opinion. The Working Group has found, under category II, that Mr. Zharnak's detention resulted from his legitimate exercise of freedom of expression and freedom of assembly. 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

<sup>25</sup> A/HRC/47/49, para. 54.

<sup>26</sup> See, for example, opinion No. 64/2023.

<sup>27</sup> See the Committee's general comment No. 32 (2007), para. 28.

<sup>28</sup> *Ibid.*, para. 29.

of discrimination based on political or other views. Accordingly, the Working Group will examine the allegations under category V.

90. In its late reply, the Government suggested that Mr. Zharnak had organized unauthorized mass events in Minsk and disrupted the work of the public corporation MAZ, through social networks on the Internet, which implicitly supports the source's submissions.

91. The Working Group observes that it has already examined a number of cases in the context of the presidential elections in Belarus in 2020 that have been brought to its attention concerning the arrest and detention of those who have been part of the political opposition or who have exercised their right to speak against the incumbent President.<sup>29</sup> It also notes that these opinions reflect the findings of the report of the United Nations High Commissioner for Human Rights on the situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath.<sup>30</sup>

92. The Working Group thus observes a clear pattern of attitude displayed by the authorities towards Mr. Zharnak on the basis of his political opinion and of him acting as an opposition human rights defender. Noting all of the above and especially its findings under category II, the Working Group finds that the arrest and detention of Mr. Zharnak was based on discrimination resulting from his political opinion, in violation of article 26 of the Covenant. His detention is therefore arbitrary under category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights in Belarus, for appropriate action.

### **3. Disposition**

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

The deprivation of liberty of Artsiom Zharnak, being in contravention of articles 3, 9, 10, 19 and 20 of the Universal Declaration of Human Rights and articles 9, 14, 19, 22 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

94. The Working Group requests the Government of Belarus to take the steps necessary to remedy the situation of Mr. Zharnak 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.

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

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

97. 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 rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights in Belarus, for appropriate action.

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

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<sup>29</sup> Opinions No. 23/2021, No. 50/2021, No. 24/2022 and No. 43/2023.

<sup>30</sup> [A/HRC/49/71](#), para. 62.

#### 4. Follow-up procedure

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

100. 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.

101. 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 of any failure to take action.

102. 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.<sup>31</sup>

*[Adopted on 18 March 2024]*

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<sup>31</sup> Human Rights Council resolution 51/8, paras. 6 and 9.