

Working Group on Arbitrary Detention

17 June 2021

Dear Mr. Bastimar,

I would like to refer to the 90th session of the Working Group on Arbitrary Detention, during which the Working Group adopted several opinions on cases of deprivation of liberty submitted to it.

In accordance with paragraph 18 of the Working Group's revised methods of work, I am sending to you, attached herewith, the text of Opinion No. 15/2021 (Islamic Republic of Iran and Turkey), adopted on 7 May 2021, regarding a case submitted by your organization.

In conformity with its revised methods of work, the Working Group transmits its Opinions to the source of the petitions, fort-eight hours after having transmitted it to the relevant Government.

This Opinion will be published on the website of the Working Group and reflected in its annual report to the Human Rights Council. In the meanwhile, we would encourage you to treat the information given to you by the Working Group on this matter with discretion.

Yours sincerely,



Lucie Viersma
Secretary
Working Group on Arbitrary Detention

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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninetieth session, 3-12 May 2021

Opinion No. 15/2021 concerning Ms. Nasibe Shamsaei (Turkey and Iran)

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 11 January 2021 the Working Group transmitted to the Governments of Turkey and Iran a communication concerning Ms. Nasibe Shamsaei. The Government of Iran did not reply to the communication on time, while the Government of Turkey replied to the communication on 10 March 2021. Both States are parties 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. Nasibe Shamsaei, born in 1984, is an Iranian national, architect and a women's rights activist. She usually resides in Teheran. Ms. Shamsaei fled from Iran to Turkey in February 2020 and faces deportation after being arrested in Istanbul.

5. According to the information received from 2016, Ms. Shamsaei engaged in virtual activities expressing her opinion against the compulsory use of hijab in Iran. In 2018, she climbed Iran's highest peak, Mount Damavand, and took off her scarf for a picture in solidarity with the Girls of Enghelab Street, who participated in protests against the compulsory hijab in 2017. After that, she continued her activities in the form of a civil protest in the city and crowded places, buses, and subways, in defense of political prisoners and protesting against the forced hijab. She was also seen in a "White Wednesdays" video, in which she was handing out white flowers to women passengers in the Tehran metro, to show solidarity with Nasrin Sotoudeh, a prominent human rights lawyer who was in prison.

6. Ms. Shamsaei was arrested at her home in Tehran, on 18 June 2019. Allegedly, the arresting officers did not show a warrant nor cited legislation or reasons for such deprivation of liberty. The source reports that, eight men and a woman, blindfolded and drove her to an unknown location. She was then charged with insulting the sanctities of Islamic society and colluding against national security, collaborating with dissident networks, and propaganda activity against the Government. She was transferred to solitary confinement in Evin Prison, for removing the hijab in public places and encouraging people to commit acts of denial and insulting the founder of the Islamic Republic.

7. Mr. Shamsaei allegedly spent 15 days in solitary confinement, undergoing repeated daily interrogations and psychological pressure and harassment. Her family was not aware of her whereabouts. She was then transferred to Qarchak Prison in Varamin.

8. In August 2019, the first trial hearing took place in Branch 28 of the Islamic Revolutionary Tribunal. Ms. Shamsaei was reportedly convicted of all charges and sentenced to 12 years in prison. The source claims that, during all this time, she was denied the right to a lawyer, and her family was prohibited from attending court. In addition, Ms. Shamsaei was forced to sign a paper without the opportunity of reading it, where it stated that she was unable to post bail.

9. After three weeks before the Court of Appeals, Mr. Shamsaei's sentence was suspended for 5 years. She was released on parole from Qarchak prison in Varamin in October 2019. Ms. Shamsaei went to recover her belongings at the Prosecutor's office, which were confiscated from her house on the first day, including laptops, mobile phones, hard drives, and passports. Once there, she found out that the Prosecutor had re-issued the 12 year prison sentence and that the 5 year suspension had been revoked/*74.

10. Ms. Shamsaei left Iran and entered Turkey through the mountains of the Maku border around May 2020. Once in Istanbul, she was kept hidden by a smuggler for 6 months, without contact with anyone, with the promise that she will be able to go to Europe to seek asylum. On 5 November 2020, Ms. Shamsaei was arrested by the Turkish police at the Istanbul airport with a fake passport, while she was trying to reach Europe.

11. Ms. Shamsaei was transferred to a location in Fatih, Turkey, where she endured inhuman treatment by unknown people and a very unpleasant and dirty atmosphere. She was then transferred to the Edirne deportation camp. On the second day in Edirne, she had to resist attempts to force her to sign a deportation order to return to her country.

a. Alleged violations in respect of Iran

i. Category II

12. The source claims that Iran has violated Ms. Shamsaei's right to freedom of expression under article 19 of the Covenant, which is also protected by article 19 of the Universal Declaration of Human Rights. Freedom of expression is essential for the full development of an individual and, in its General Comment No. 34, the Human Rights

Committee described this right as an indispensable element of democratic society and “the vehicle for the exchange and development of ideas.” Included in this freedom, according to the Committee, is “the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.”

13. Ms. Shamsaei allegedly expressed her views regarding hijab in the Islamic Republic of Iran in different forms and shapes. The source argues that expressing her opinion on the ban of hijab wearing and criticizing the Government cannot be classified as insulting nor propaganda against the government.

14. Though the right is not absolute, the source insists that there is no arguable basis for Iran’s violation of Ms. Shamsaei’s right to freedom of expression in this case. Article 19(3) of the Covenant provides that freedom of expression may be restricted only when both provided by law and necessary for the respect of the rights or reputations of others, protection of national security, or public order, health, or morals. The Human Rights Committee has interpreted this limitation narrowly, noting that such restrictions must not jeopardize the right itself. The Committee has reportedly held that government limitations must be for one of the enumerated purposes and must “meet a strict test of justification.”

15. According to the source, the Government has no legitimate grounds for restricting Ms. Shamsaei’s right to freedom of expression. As an anti-hijab activist, Ms. Shamsaei peacefully expressed her views and the Government failed to meet the strict requirements of article 19(3) of the Covenant. Thus, the source alleges that the rights of Ms. Shamsaei under article 19 were violated.

ii. Category III

16. The source claims that Iran’s detention of Ms. Shamsaei amounts to an arbitrary deprivation of liberty under category III. Due process is one of the tenets of the right to a fair trial. The minimum international standards of due process are established in the Covenant, the Universal Declaration, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the “Body of Principles”), and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the “Mandela Rules”).

17. Article 9(1) of the Covenant, which confirms the right to liberty and freedom from arbitrary detention, states, “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” This right is reiterated by Principles 2 and 36(2) of the Body of Principles and article 9 of the Universal Declaration. Article 9(2) of the Covenant requires that anyone who is arrested must be informed, at the time of arrest, of the reasons for his or her arrest and be promptly informed of any charges against him or her. The source informs that, under both Iran’s Constitution and Code of Criminal Procedure, an arrest warrant is a mandatory pre-condition to any arrest.

18. In the case of Ms. Shamsaei, it is alleged that no warrant was presented to her, at the time of her arrest. Hence, her rights under article 9(1) of the Covenant has been violated.

19. The source states that, according to article 9(3) of the Covenant, a detainee shall “be brought promptly before a judge or other officer authorized by law to exercise judicial power” to challenge the legality of his continued detention. The UN Human Rights Committee’s General Comment No. 35 provides that “a public prosecutor cannot be considered as an officer exercising judicial power” under article 9(3). Aside from acting as a guarantee against arbitrary detention, these provisions also safeguard other related rights, such as freedom from torture. Reportedly, under the Code of Criminal Procedure, an accused person can be detained for a maximum of 24 hours without a detention order, but a judge is required to issue a temporary detention order to detain an accused person for longer than 24 hours.

20. The source indicates that after Ms. Shamsaei’s arrest, on 18 June 2019, she was not brought promptly before a judge to challenge the legality of her detention. Rather, she only appeared before a judge after six months of detention. By denying Ms. Shamsaei prompt access to an unbiased judge to challenge the legality of her detention, Iran allegedly violated article 9(3) and 9(4) of the Covenant, and Principles 4, 11, 32(1), and 37 of the Body of Principles.

21. Article 14(3)(c) of the Covenant guarantees that every defendant shall have the right to “be tried without undue delay.” As stated by the Human Rights Committee, “[a]n important aspect of the fairness of a hearing is its expeditiousness,” and “in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.” In addition, this right “relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.” The right to be tried without undue delay is reiterated by Principle 38 of the Body of Principles. Article 37 of the Code of Criminal Procedure requires that all temporary detentions shall be reasonable and based on documents, stating in the order the reasons for the detention and the right for the detainee to object. Additionally, this law requires the judge to “renew the court order for temporary detention after a month, stating the reasons and providing documentation; otherwise the accused shall be released with proper bail.”

22. The source claims that Ms. Shamsaei was arrested on 18 June 2019 but her trial did not begin for six months. There was no basis for the long delay between Ms. Shamsaei’s trial and her initial hearing. As such, it is alleged that Iran violated article 14(3)(c) of the Covenant and Principle 38 of the Body of Principles.

b. Allegations in respect of Turkey

i. Category II

23. The source submits that Ms. Shamsaei has been deprived of liberty as a result of the exercise of her rights guaranteed by article 14 of the Universal Declaration of Human Rights, according to which everyone has the right to seek and to enjoy in other countries asylum from persecution.

24. The Republic of Turkey allegedly detained Ms. Shamsaei in Edirne removal centre of refugees on the grounds that she entered the territory illegally, namely without permission. Ms. Shamsaei’s intention was to seek asylum and she fled to Turkey from Islamic Republic of Iran due to the 12 year imprisonment sentence imposed on her. Ms. Shamsaei’s administrative arrest allegedly violated her rights contained under article 14 Universal Declaration of Human Rights.

ii. Category III

25. The source states that article 14(3)(d) of the Covenant guarantees the right to legal defence by stating that a criminal defendant has the right to “be tried in his presence, and to defend himself in person or through legal assistance of his own choosing. In addition, article 14(3)(b) of the Covenant guarantees a criminal defendant the right “to communicate with counsel of his own choosing. The UN Human Rights Committee has clarified that such guarantee requires that the accused is granted prompt access to counsel, and that “state parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention”.

26. The source claims that Ms. Shamsaei was not allowed to communicate with her lawyer when she was under administrative arrest in Edirne Removal Centre.

iii. Category IV

27. Finally, the source argues that Ms. Shamsaei is detained under administrative detention in Edirne Removal Centre of Refugees since 15 November 2020 until the time of submission of communication. She faces prolonged detention as a refugee and she was not granted any remedies. She filed a petition before the domestic court for her release from administrative detention, first and second instances court rejected the application. The prolonged administrative detention of Ms. Shamsaei allegedly violates her rights under category IV.

Response from the Government of Iran

28. On 11 January 2021 the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government of Iran to provide, by 12 March, detailed information about the

current situation of Ms. Shamsaei and to clarify the legal provisions justifying her detention, as well as its compatibility with Iran's obligations under international human rights law, and in particular with regard to the treaties ratified by the State.

29. The Working Group regrets that it did not receive a response from the Government of Iran to this communication on time. The Government did not request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work. The Government submitted a response on 1 June 2021, after the adoption of the present opinion.

Response from the Government of Turkey

30. On 11 January 2021, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government of Turkey to provide, by 12 March 2021, detailed information about the current situation of Ms. Shamsaei and to clarify the legal provisions justifying her continued detention, as well as its compatibility with Turkey's obligations under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Turkey to ensure her physical and mental integrity.

31. On 10 March 2021, the Government of Turkey submitted its reply. The Government explains that on 5 November 2020, Ms. Shamsaei was apprehended at Istanbul Airport on suspicion of forged exit stamps on her passport. In her interview made at the airport security, she stated that she entered Turkey illegally, that she purchased a forged passport back in Iran and that she herself used a forged stamp on her passport at the airport. The relevant Public Prosecutor's Office ordered her statement to be taken as a suspect for "counterfeiting official documents" offense.

32. Ms. Shamsaei's forged passport was confiscated, and her statement was taken in the presence of an interpreter. Prior to her making the statement, she was informed of her legal rights. Ms. Shamsaei did not request a defense counsel and confirmed the statement she earlier provided at the airport.

33. The Government explains that, on 6 November 2020, the Istanbul Directorate General of Migration Management issued a removal decision and ordered her administrative detention for breaching the rules of entry into and exit from Turkey, posing a threat to public order and risk of absconding, under the Law on Foreigners and International Protection. Ms. Shamsaei was informed of the decisions in Farsi via an interpreter. She did not appeal against the decisions. She was placed in Edirne Removal Centre by the Edirne Directorate General of Migration Management.

34. The Government states that in an interview with Ms. Shamsaei, on 15 November 2020, she specified that she did not face any violence or ill-treatment from the authorities in Turkey. Ms. Shamsaei also did not lodge an application in this manner to the relevant authorities. She was also able to meet with and represented by her lawyers when she was under administrative detention at Edirne Removal Centre.

35. On 15 December 2020, her administrative detention was terminated on the condition that she checks in to the removal centre every 2 weeks and she currently resides in Turkey.

36. The Government considers that Ms. Shamsaei's detention was not arbitrary and is in accordance with international human rights law. The Government underlines that Ms. Shamsaei is no longer in administrative detention and was able to apply for legal remedies and benefit from legal aid. The Government therefore submits that the allegations put forward in the communication letter should be dismissed.

Further comments from the source

37. The reply of the Government of Turkey was transmitted to the source for further comments which it submitted on 22 March 2021. In these, the source confirms that Ms. Shamsaei was released on 15 December 2020 but argues that immigration detention should be gradually abolished as migrants in an irregular situation have not committed any crime.

Hence, Ms. Shamsaei as a migrant in an irregular situation did not commit any crime by means of her entering Turkey, and should not have been detained.

38. The source also contests the decision of the Government to order administrative detention in this case, on the grounds of breaching the rules of entry into and exit from Turkey, posing a threat to public order and risk of absconding under the Law on Foreigners and International Protection. The source submits that if there must be administrative detention, the principle of proportionality requires it to be the last resort and strict legal limitations must be observed and judicial safeguards provided. According to the source, the Government, in the present case failed to show how the principle of proportionality was met, during the administrative detention of Ms. Shamsaei between 15 November and 15 December 2020. The fact that Ms. Shamsaei was released from administrative detention after she was detained for one month, does not preclude the Working Group to render an opinion as to whether the administrative detention was arbitrary or not.

39. The source reiterates that Ms. Shamsaei was sentenced to 12 years imprisonment in Iran and therefore, she fled to Turkey to seek asylum in a European country, for which she escaped to Turkey. However, despite that she is facing 12 years imprisonment in Iran, the Turkish Government issued a decision of removal on the grounds of her allegedly posing a threat to public order and risk of absconding under the Law on Foreigners and International Protection. The decision of removal is the result of the right to seek asylum, for which she fled Turkey attempting to go to a European country. The source submits that the right to seek asylum is a human right under article 14 of the Universal Declaration. However, due to the decision of removal by the Turkish Government and by not allowing her to leave Turkey to seek asylum in other countries, the Turkish Government has allegedly violated Ms. Shamsaei's rights under article 12(1) and 12(2) of the Covenant and article 14 of the Universal Declaration. Ms. Shamsaei reportedly did not apply for asylum protection in Turkey because Turkey is not a safe country for her, because many Iranians who fled Turkey have been deported back to Iran.

40. The source further argues that the principle of non-refoulement, prohibiting the return of a refugee to a territory where his or her life or freedom is threatened, is considered a rule of customary international law. As such it is binding on all States, regardless of whether they have acceded to the 1951 Convention or 1967 Protocol. A refugee seeking protection must not be prevented from entering a country as this would amount to refoulement. Accordingly, the source submits that issuing a removal decision is a 1

41. Turning to the Government's claim that Ms. Shamsaei was granted a lawyer and she did not claim any remedy, the source insists that it is incumbent on the Government to submit evidence proving that the right to a lawyer was granted. The source also highlights that the Government failed to submit evidence proving that Ms. Shamsaei did not claim any remedy.

42. The source concludes by requesting the Working Group to establish to find a violation of the rights submitted, including article 12 of the Covenant, arguing that Ms. Shamsaei must be released immediately and unconditionally and must be allowed to leave Turkey.

Discussion

43. Before proceeding to examine the allegations in relation to the two States, the Working Group must address a preliminary issue, noting that Ms. Shamsaei is no longer detained following her release from administrative detention in Turkey on 15 December 2020.

44. The Working Group considers that the application raises very serious allegations concerning the arrest, detention, trial and treatment of Ms. Shamsaei in Iran. Given the lengthy imprisonment, which is outstanding in relation to her, the Working Group has no doubt that Ms. Shamsaei would be detained should she return to Iran. Therefore, the Working Group shall proceed to consider the case vis-à-vis Iran in accordance with para 17 (a) of its methods of work.

45. Equally, although Ms. Shamsaei has been released, she was nevertheless detained in Turkey and the allegations raised by the source are serious. The Working Group therefore

shall proceed to consider the case also vis-à-vis Turkey, in accordance with para 17 (a) of its methods of work.

a. *Allegations in respect of Iran*

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

47. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government of Iran has chosen not to challenge the prima facie credible allegations made by the source.

48. The source has argued that the arrest and detention of Ms. Shamsaei was arbitrary and falls under categories II and III of the Working Group. The Working Group shall examine these allegations in turn.

i. Category I

49. While the source has not made submissions under category I, the Working Group observes that Ms. Shamsaei was arrested on 18 June 2019 and that no arrest warrant was presented to her. Upon arrest, she was taken to an undisclosed location where she was charged although it is unclear as to who was the authority charging her. The Government has chosen not to contest these allegations.

50. The Working Group recalls that a detention is considered arbitrary under category I if it lacks legal basis. As it has previously stated, for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law which may authorise the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant². Indeed, the international law protecting against arbitrary deprivation of liberty includes the right to be presented with an arrest warrant, which is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary detention, under articles 3 and 9 of the Universal Declaration of Human Rights, article 9 of the Covenant, as well as under principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.³ Detention, and any form of imprisonment, should be ordered by, or be subjected to the effective control of, a judicial or her authority under the law, whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence, in accordance with principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In the present case, Ms. Shamsaei was arrested without a warrant in clear violation of her rights under Article 9 (1) and (2) of the Covenant.

51. The Working Group notes the uncontested submissions that upon her arrest, Ms. Shamsaei was taken to an unknown location and that subsequently her family did not know of her whereabouts (par. 7 above).

52. The Working Group considers that this amounted to incommunicado detention and recalls its consistent jurisprudence confirming that holding persons incommunicado violates their right to be brought before a court under article 9(3) of the Covenant and to challenge the lawfulness of their detention before a court under article 9(4) of the Covenant (see e.g. Opinions Nos. 79/2017, 46/2017, 45/2017, 11/2018 and 35/2018). This view is consistent with that of the Human Rights Committee who in its General Comment No. 35 has argued that “[I]ncommunicado detention that prevents prompt presentation before a judge inherently violates paragraph 3 [of Article 9]”.⁴ The Working Group recalls that judicial oversight of

² See Opinion Nos. 79/2018, 35/2918, 93/2017, 75/2017, 66/2017, 46/2017.

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

⁴ Para 35.

detention is a fundamental safeguard of personal liberty⁵ and is essential in ensuring that detention has a legal basis. Given that Ms. Shamsaei was unable to contact anyone and especially her lawyer, which is essential safeguard to ensure the ability of any detainee to personally challenge their detention, her right to an effective remedy under article 8 of the Universal Declaration and article 2(3) of the Covenant was also violated.

53. Ms. Shamsaei was allegedly charged at this undisclosed location by an authority although it is unclear which authority was. Under no circumstances can the Working Group accept that all these events constituted a properly executed arrest whereby the legal safeguards to ensure Ms. Shamsaei's freedom from arbitrary detention as stipulated in Articles 9 (1) and (2) of the Covenant were observed. The Working Group therefore concludes that her detention violated Articles 9 (1) and (2) of the Covenant.

54. Furthermore, according to article 9(3) of the Covenant, anyone arrested or detained on a criminal charge shall be brought promptly before a judge to exercise judicial power. As the Human Rights Committee has noted, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee "promptly" before a judge or other officer authorized by law following his or her arrest; any longer delay must remain absolutely exceptional and be justified under the circumstances.⁶

55. Equally, to establish that a detention is legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged by article 9 (4) of the Covenant. The Working Group wishes to recall that according to the UN Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of their Liberty to Bring Proceedings before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.⁷ This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty,⁸ including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes'.⁹ Moreover, it also applies 'irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary'.¹⁰

56. In the present case, the Working Group notes the uncontested allegations that Ms. Shamsaei was arrested on 18 June 2019 but was not presented before the judicial authority until some months later when her trial commenced in August 2019. The Government had the opportunity to explain reasons for such a delay, but it has chosen not to do so. In these circumstances the Working Group finds that the detention of Ms. Shamsaei violated articles 9 (3) and (4) of the Covenant. It also violated her rights under article 8 of the Universal Declaration and Article 2 (3) of the Covenant as Ms. Shamsaei was denied an effective remedy.

57. Noting all the above, the Working Group concludes that the detention of Ms. Shamsaei is arbitrary under category I, as lacking a legal basis.

⁵ See 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 (the 'United Nations Basic Principles and Guidelines', A/HRC/30/37), para. 3.

⁶ Human Rights Committee, General comment No. 35, paras. 32-33.

⁷ A/HRC/30/37 at paras 2 and 3.

⁸ A/HRC/30/37 at para 11.

⁹ A/HRC/30/37 at para 47 (a).

¹⁰ A/HRC/30/37 at para 47 (b).

i. Category II

58. The source has submitted, and the Government has not contested, that Ms. Shamsaei was arrested, detained, tried, and sentenced to 12 years imprisonment purely for the exercise of her freedom of opinion and expression.

59. The Working Group recalls that freedom of opinion and freedom of expression as expressed in article 19 of the Covenant are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation stone for every free and democratic society.¹¹ The Human Rights Committee has further stated in the same general comment that the freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and that right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.

60. In the present case, the Government had the opportunity to explain the detention and subsequent charges against Ms. Shamsaei, but has chosen not to do so. The source, on the other hand, has explained her arrest and detention as being based on her activities as women's rights activist, taking active part in expressing her opinion against the compulsory use of hijab in Iran. There is no evidence that her activities have been anything but peaceful nor is there any evidence of her inciting others to violence.

61. It is therefore clear to the Working Group that the basis for the arrest and subsequent detention of Ms. Shamsaei was her freedom of opinion and expression. While freedom of expression is not an absolute right, the Human Rights Committee has stated in the above-mentioned general comment that, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Moreover, it stipulates that paragraph 3 of article 19 may never be invoked as a justification for the muzzling of any advocacy of multiparty democracy, democratic tenets and human rights. The permitted restrictions to that right may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. The Committee went on to stipulate that restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

62. The Working Group also considers that Ms. Shamsaei was arrested, detained, tried, and sentenced to 12 years imprisonment for peaceful exercise of her rights under article 18 of the Covenant, namely freedom of conscience and article 25, the right to take part in public affairs. Although the right to freedom of conscience also is not absolute, the Working Group notes that the permitted exceptions to the restrictions are the same as those under article 19 (3) of the Covenant examined above. Article 25 however does not permit any unreasonable restrictions to the right to participate in public affairs.

63. According to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and to draw public attention to the observance of human rights.¹² The source has demonstrated that Ms. Shamsaei was detained for the exercise of her rights under this Declaration. The Working Group has in the past concluded that being a human rights defender is a status protected by article 26 of the Covenant.¹³

64. The Working Group wishes to express its concern over the types of crimes that Ms. Shamsaei was charged with and appears to have been ultimately sentenced for which included such vaguely formulated offences as 'insulting the sanctities of Islamic society',

¹¹ General Comment No. 34 (2011).

¹² GA RES 53/144 annex, articles 1 and 6(c). See also GA RES 74/146, para. 12.

¹³ See e.g. Opinion Nos. 36/2020; 19/2018, 88/2017; 50/2017, 48/2017 and A/HRC/36/37, para. 49.

‘colluding against national security’, ‘collaborating with dissident networks’, and ‘propaganda activity against the Government’.

65. The Working Group reiterates that the principle of legality requires that laws be formulated with sufficient precision so that individuals may have access to and understand the law and regulate their conduct accordingly.¹⁴ The Working Group further notes that laws that are vaguely and broadly worded may have a deterrent effect on the exercise of the rights to freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities, as they have the potential for abuse, including the arbitrary deprivation of liberty.¹⁵ In the present case, the vaguely formulated offences of ‘insulting the sanctities of Islamic society’, ‘colluding against national security’, ‘collaborating with dissident networks’, and ‘propaganda activity against the Government’ were used to stifle the freedom of expression legitimately exercised by Ms. Shamsaei.

66. The Working Group consequently finds that the detention of Ms. Shamsaei resulted from her legitimate exercise of freedom of thought and conscience, opinion and expression, as well as participation in public affairs, as protected by articles 18, 19 and 25 of the Covenant and is therefore arbitrary, falling under category II. The Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

iii. Category III

67. Given its finding that the deprivation of liberty of Ms. Shamsaei is arbitrary under category II, the Working Group wishes to emphasize that her trial should not have taken place. However, the trial did take place and Ms. Shamsaei was sentenced to 12 years of imprisonment and the source has made numerous allegations concerning the violations of her fair trial rights, none of which are contested by the Government.

68. The Working Group initially notes the circumstances of Ms. Shamsaei’s arrest which involved numerous officials who blindfolded her and took her to an undisclosed location, following which she was transferred to a solitary confinement in Evin prison. Whilst in solitary confinement for 15 days, she was subjected to repeated daily interrogations and psychological pressure and harassment. These interrogations took place in the absence of Ms. Shamsaei’s lawyer and her family were not informed of her whereabouts. The Working Group notes the absence of response from the Government to any of these allegations.

69. The Working Group recalls that the right to legal assistance must be ensured from the moment of deprivation of liberty and, in the context of the criminal justice setting, prior to questioning by the authorities.¹⁶ Ms. Shamsaei’s right to legal assistance under article 14 (3) (b) was thus violated as she was repeatedly interrogated in the absence of her lawyer. This right as well as right under Article 14 (3) (d) was further violated when she was also denied legal assistance during her trial before Branch 28 of the Islamic Revolutionary Tribunal in August 2019.

70. Further, the treatment of Ms. Shamsaei during and following her arrest and gives rise to concern over the compliance of Iran with article 7 of the Covenant and the Working Group therefore refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

71. The source alleges that Ms. Shamsaei was held in solitary confinement for 15 days following her arrest. According to rule 45 of the Mandela Rules, the imposition of solitary confinement must be accompanied by certain safeguards. Solitary confinement must only be used in exceptional cases as a last resort, for as short a time as possible, subject to independent review, and authorised by a competent authority. These conditions do not appear to have been observed in the present case. The Working Group also recalls that prolonged solitary

¹⁴ See, for example, opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59.

¹⁵ Opinion No. 10/2018, para. 55.

¹⁶ A/HRC/45/16 at para 51.

confinement in excess of 15 consecutive days is prohibited under rules 43(1)(b) and 44 of the Mandela Rules.¹⁷

72. The Working Group further finds that the failure by the authorities to allow Ms. Shamsaei to notify her family of her whereabouts is a violation of principles 16 (1) and 19 of the Body of Principles. Further, although the source has not submitted that her trial was conducted behind closed doors, the Working Group also notes that Ms. Shamsaei's family was not allowed to be present at her trial and the Government has not provided any explanation for this. The Working Group reminds the Government that article 14 (1) of the Covenant requires trials to be conducted in public.

73. Finally, the Working Group considers that Ms. Shamsaei was not afforded the right to be tried without undue delay given that some six months elapsed between her arrest and trial. The reasonableness of any delay in bringing a case to trial must be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the authorities.¹⁸ The delay in bringing Ms. Shamsaei to trial was unacceptably long, given the Working Group's findings under category II above, and therefore in violation of articles 9(3) and 14(3)(c) of the Covenant. As noted, it is clear that Ms. Shamsaei should never have been detained for the peaceful exercise of her rights under international human rights law, and the delay in trying her was unacceptable.¹⁹

74. Noting all the above, the Working Group concludes that the detention of Ms. Shamsaei also falls under category III.

iv. Category V

75. Finally, the Working Group recalls that the deprivation of liberty is arbitrary under Category V when it 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. It also recalls that it applies a heightened standard of review in cases in which the freedom of expression and opinion is restricted or where human rights defenders are involved.²⁰

76. The present case concerns a prominent women's right activist in Iran who has actively engaged in many public campaigns and displays of her opposition to the compulsory wearing of hijab in Iran since at least 2016. Her activism was not welcomed by the authorities and in fact resulted in her being sentenced to 12 years imprisonment for what the Working Group has established above was mere peaceful exercise of her rights under articles 18, 19 and 25 of the Covenant. The Working Group also established that she was detained due to her status as human rights defender in violation of her rights under article 26 of the Covenant.

77. Furthermore, the Working Group also finds that Ms. Shamsaei was detained because of her gender. As a women's rights activist, she engaged in a gender-specific type of protest by taking off her hijab in public places.

78. Noting all the above, the Working Group finds that the detention of Ms. Shamsaei was due to her gender, the expressions of her opinions and her status as a human rights

¹⁷ Opinion Nos. 61/2020, para. 85; 52/2018, para. 79(d).

¹⁸ Human Rights Committee, General comment No. 35, para. 37 and General comment No. 32, para. 35.

¹⁹ Opinion No. 46/2019, para. 63 (the Working Group was not convinced that there was a category II violation and was unable to find that a 16-month delay before the trial was unreasonable). See also Opinion Nos. 16/2020 and 15/2020.

²⁰ See opinions No. 88/2017; 57/2017, para. 46; No. 41/2017, para. 95; No. 62/2012, para. 39; No. 54/2012, para. 29; and No. 64/2011, para. 20. Domestic authorities and international supervisory bodies should apply the heightened standard of review of government action, especially when there are claims of a pattern of harassment (see opinion No. 39/2012, para. 45). See also General Assembly resolution 53/144 (Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms), article 9 (3).

defender, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2(1) and 26 of the Covenant. Her deprivation of liberty is arbitrary according to category V. The Working Group refers this case to the Special Rapporteur on the situation of human rights defenders and Working Group on discrimination against women and girls for appropriate action.

v. Final remarks

79. In its 30-year history, the Working Group has found the Islamic Republic of Iran in violation of its international human rights obligations in over 40 cases.²¹ The Working Group is concerned that this indicates a widespread or systemic arbitrary detention in the country, which amounts to a serious violation of international law. The duty to comply with international human rights standards rests with all State organs, officers and agents. The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.²²

80. The Working Group considers that the present case involves serious human rights violations and has decided to refer the present case to the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran for appropriate action.

b. *Allegations in respect of Turkey*

81. The Working Group thanks the source and the Government of Turkey for their submissions.

82. In determining whether the deprivation of liberty of Ms. Shamsaei 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 and standards protecting against arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by either of the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).

83. The source alleges that the administrative detention of Ms. Shamsaei by the Turkish authorities from 15 November to 15 December 2020 was arbitrary, falling under categories II, III and IV.

84. In relation to allegations under category II, the source submits that Ms. Shamsaei was detained due to her legitimate exercise of the right to seek asylum. The Government however denies this and explains that Ms. Shamsaei was arrested due to having presented a passport with forged exit stamps in it. When questioned about this by the authorities at the Istanbul Airport, Ms. Shamsaei admitted to having entered Turkey illegally, with the help of people smugglers, to purchasing a forged passport and forging the requisite exit stamps herself, which prompted her detention as required by the law. The source contests this and argues that the detention of Ms. Shamsaei was disproportionate in the circumstances.

²¹ See decisions No. 1/1992, No. 28/1994 and No. 14/1996; and opinions No. 39/2000, No. 30/2001, No. 8/2003, No. 14/2006, No. 19/2006, No. 26/2006, No. 4/2008, No. 34/2008, No. 39/2008, No. 6/2009, No. 2/2010, No. 8/2010, No. 20/2011, No. 21/2011, No. 58/2011, No. 30/2012, No. 48/2012, No. 54/2012, No. 18/2013, No. 28/2013, No. 52/2013, No. 55/2013, No. 16/2015, No. 44/2015, No. 1/2016, No. 2/2016, No. 25/2016, No. 28/2016, No. 50/2016, No. 7/2017, No. 9/2017, No. 48/2017, No. 49/2017, No. 92/2017, No. 19/2018, No. 52/2018, No. 83/2018, No. 32/2019, No. 33/2019; No. 51/2019 and No. 83/2020.

²² A/HRC/13/42, para.30; and opinions No. 1/2011, para. 21; No. 37/2011, para. 15; No. 38/2011, para. 16; No. 39/2011, para. 17; No. 4/2012, para. 26; No. 38/2012, para. 33; No. 47/2012, paras. 19 and 22; No. 50/2012, para. 27; No. 60/2012, para. 21; No. 9/2013, para. 40; No. 34/2013, paras. 31, 33 and 35; No. 35/2013, paras. 33, 35 and 37; No. 36/2013, paras. 32, 34 and 36; No. 48/2013, para. 14; No. 22/2014, para. 25; No. 27/2014, para. 32; No. 34/2014, para. 34; No. 35/2014, para. 19; No. 36/2014, para. 21; No. 44/2016, para. 37; No. 60/2016, para. 27; No. 32/2017, para. 40; No. 33/2017, para. 102; No. 36/2017, para. 110; No. 51/2017, para. 57; and No. 56/2017, para. 72.

85. The Working Group recalls that article 14 of the Universal Declaration vests everyone with the right to seek asylum. However, Ms. Shamsaei was not seeking asylum in Turkey and indeed, was not detained for seeking to do so. By the source's own account, Ms. Shamsaei was detained because she presented a forged passport and following that, she was detained for one month before being released. In these circumstances, the Working Group considers that the Turkish authorities did not detain Ms. Shamsaei because of her legitimate exercise of the rights protected by international law but rather on the basis of a reasonable suspicion that she had violated the law by forging a passport. Her detention consequently does not raise an issue under category II.

86. The source has further submitted that the detention of Ms. Shamsaei falls under category III as during her administrative detention she was denied legal assistance. The Working Group notes that the Government has addressed these allegations specifically and explained the circumstances of her detention at the Istanbul Airport. The Government stipulated that an interpreter was called to assist Ms. Shamsaei, that her legal rights were explained to her with the assistance of an interpreter and that only following her declining legal assistance was her statement taken with the assistance of an interpreter. Thereafter the Government also contends that on 6 November 2020 when the deportation decision was taken, it was explained to her with the assistance of an interpreter and subsequently she was able to meet with and be represented by her lawyers when she was under administrative detention at Edirne Removal Centre. In its further comments the source does not contest any of this detailed submission but merely points out lack of evidence from the Government substantiating the material it had provided.

87. In these circumstances, noting the discrepancies between the submissions, the Working Group is unable to reach a conclusion concerning allegations in relation to Turkey under category III.

88. Finally, in relation to category IV, the source has also argued that this was an administrative detention of a migrant in an irregular situation and as such, should have been a measure of last resort. In the view of the source, the Government failed to act proportionately by detaining Ms. Shamsaei. The Government however denies this and reiterates that Ms. Shamsaei presented a forged passport at Istanbul Airport and freely admitted to having entered Turkey illegally, having engaged people smugglers to assist her, purchasing a forged passport and forging the requisite exit stamps.

89. As the Working Group has explained in its Revised Deliberation No 5: "Any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt."²³

90. This echoes the views of the Human Rights Committee who argued in paragraph 18 of its general comment No. 35 (2014) on liberty and security of person:

[A]sylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of a particular reason specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.

91. In the present case, Ms. Shamsaei was first detained after having presented a forged passport to the authorities at Istanbul Airport and thereupon admitting to having entered Turkey illegally, having engaged people smugglers to assist her, purchasing the said forged passport and forging the requisite exit stamps herself. Thereafter, from 15 November to 15 December 2021 she was detained administratively as a migrant in an irregular situation before being released on a condition of fortnightly reporting. The source has confirmed that Ms. Shamsaei has been released.

²³ Revised Deliberation No. 5, at para 12.

92. The Working Group recalls that category IV applies to cases of prolonged administrative detention of migrants without the possibility of administrative or judicial review. In the present case, the Working Group considers that the Turkish authorities did not act disproportionately by detaining her as the true nature of her being smuggled into the country and her stay in Turkey, including the full picture of the surrounding circumstances, had to be established.

93. Moreover, the decision to administratively detain Ms. Shamsaei was reviewed as she was released after a month of administrative detention, a period, which cannot be described as prolonged. Although it was submitted by the source and confirmed by the Government that during this time a deportation order was issued, the Working Group observes that it was never executed. Instead, Ms. Shamsaei was released. While it could be argued that such a release may have been enacted more speedily, for the Working Group to make such an assessment would require it to trespass into the sovereign domain of domestic authorities which it has consistently refrained from doing. The Working Group therefore considers that the detention of Ms. Shamsaei does not raise an issue under category IV.

94. The Working Group wishes to take this opportunity to remind the Government of Turkey of the absolute prohibition of non-refoulement. In the present case, noting the findings of the Working Group above clearly establishing that Ms. Shamsaei was subjected to arbitrary detention in Iran, it is the duty of the Government not to return Ms. Shamsaei to Iran. Indeed, doing otherwise would constitute a clear violation of the absolute prohibition of non-refoulement. The Working Group urges the Government to consider positively the wish of Ms. Shamsaei to leave Turkey for another European state. The Working Group refers the case to the Special Rapporteur on the human rights of migrants for appropriate action.

95. The Working Group also recalls that Article 10 of the Covenant requires that all persons deprived of their liberty are treated with respect for their human dignity and that this applies also to those held in the context of migration. As the Working Group has explained in its Revised Deliberation No. 5 (at para 38) “All detained migrants must be treated humanely and with respect for their inherent dignity. The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings.”

Disposition

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

a. In relation to Iran

The deprivation of liberty of Ms. Nasibe Shamsaei, being in contravention of articles 2, 3, 7, 8, 9, 10, 11 and 19 of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14, 18, 19, 25 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

b. In relation to Turkey

In the light of the foregoing, the detention of Ms. Nasibe Shamsaei in Turkey did not amount to arbitrary detention.

97. The Working Group requests the Government of Iran to take the steps necessary to remedy the situation of Ms. Nasibe Shamsaei 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.

98. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to cease all proceedings against her, quash her existing convictions and expunge her criminal record, if such exists; and accord her an enforceable right to compensation and other reparations, in accordance with international law.

99. The Working Group urges the Government of Iran to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Nasibe Shamsaei and to take appropriate measures against those responsible for the violation of her rights.

100. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to (i) the Special Rapporteur on the human rights of migrants; (ii) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; (iii) the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; (iv) Special Rapporteur on the situation of human rights in the Islamic Republic of Iran; (v) the Special Rapporteur on the situation of human rights defenders; and (vi) Working Group on discrimination against women and girls, for appropriate action.

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

Follow-up procedure

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

(a) Whether compensation or other reparations have been made to Ms. Nasibe Shamsaei;

(b) Whether an investigation has been conducted into the violation of Ms. Nasibe Shamsaei's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Iran with its international obligations in line with the present opinion;

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

103. 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.

104. 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.

105. 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.²⁴

[Adopted on 7 May 2021]

²⁴ See Human Rights Council resolution 42/22, paras. 3 and 7.