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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-ninth session, 23–27 November 2020

Opinion No. 91/2020 concerning Safoora Zargar (India)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 22 July 2020 the Working Group transmitted to the Government of India a communication concerning Safoora Zargar. The Government has not replied to the communication. 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).

Submissions

Communication from the source

4. Safoora Zargar is an Indian national and was 27 years old at the time of her detention. She is a student at Jamia Millia Islamia, a university in New Delhi. She also serves as a media liaison officer for the Jamia Coordination Committee, a students' group that was involved in organizing peaceful protests against the Citizenship (Amendment) Act, 2019. Ms. Zargar resides in New Delhi.

5. The source reports that Ms. Zargar was arrested at her residence in New Delhi on 10 April 2020 at around 3.30 p.m. Ms. Zargar was removed from her house by 10 to 12 men and 1 woman, none of them in uniform. No written warrant was produced.

6. Reportedly, Ms. Zargar was subsequently informed that she had been detained under First Investigation Report 59/2020, which was registered on 6 March 2020, by the Special Cell Police Station, Lodhi Colony. She was taken to the Special Cell Police Station and detained there. However, at 10.30 p.m., she was arrested at the Special Cell Police Station under First Investigation Report 48/2020, which was issued on 24 February 2020, by the Jaffrabad Police Station, North-East Delhi. The charges in this document did not require remand, given that the charges are bailable and the alleged offences carried a maximum penalty of less than seven years' imprisonment. She was detained for that night at the Special Cell Police Station. The source specifies that Ms. Zargar was not named in either of the above-mentioned reports.

7. The source also specifies that relevant legislation applied includes the Indian Penal Code and the Prevention of Damage to Public Property Act, as well as the Arms Act and the Unlawful Activities (Prevention) Act. More precisely, Jaffrabad Police Station First Investigation Report No. 48/2020 quotes offences under the following sections of the Indian Penal Code: 188 (disobedience to order duly promulgated by public servant), 353 (assault or criminal force to deter public servant from discharge of his duty), 283 (danger or obstruction in public way or line of navigation), 341 (punishment for wrongful restraint), 109 (punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment), and 147 (punishment for rioting) read with section 34 (acts done by several persons in furtherance of common intention).

8. On 13 April 2020, the metropolitan magistrate's court, Karkardooma District Court, granted bail to Ms. Zargar under First Investigation Report No. 48/2020 with the observation that given her pregnancy, she needed proper medical care and that most of the offences levelled against her were bailable in nature. The Court also relied on the judgment of the Supreme Court of India (Writ Petition (Civil) No. 1 of 2020) regarding decongestion of jails due to the coronavirus disease (COVID-19) pandemic.

9. On 13 April 2020, after the release of Ms. Zargar was ordered under First Investigation Report No. 48/2020, she was immediately rearrested under First Investigation Report No. 59/2020. The latter report quotes Indian Penal Code sections 147 (punishment for rioting), 148 (rioting armed with a deadly weapon), 149 (every member of unlawful assembly guilty of offence committed in prosecution of common object) and 120B (punishment of criminal conspiracy).

10. Additionally, this report mentions 18 more offences, under Indian Penal Code sections 302 (punishment for murder), 307 (attempt to murder), 124A (sedition), 153A (promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony), 186 (obstructing public servant in discharge of public functions), 53 (punishments), 395 (dacoity), 427 (mischief causing damage to the amount of 50 rupees), 435 and 436 (mischief by fire or explosive substance), 452 and 454 (house trespass), and 109 and 114 (punishment of abetment).

11. Furthermore, sections 3 and 427 (mischief causing damage to public property) of the Prevention of Damage to Public Property Act and sections 25 and 27 of the Arms Act were added later, at an unknown date. Sections 13, 16, 17 and 18 of the Unlawful Activities (Prevention) Act (punishment for unlawful activities, punishment for terrorist acts,

punishment for raising funds for terrorist acts, and punishment for conspiracy) were added on 21 April 2020.

12. The source claims that this was done to make bail even more difficult to obtain and to obstruct any reasoning on the grounds of Ms. Zargar's poor health. The additions took place after the Metropolitan Magistrate observed on 20 April 2020 that the charges against Ms. Zargar were unclear and the police response was "cryptic and superficial".

13. On 24 April 2020, a bail petition by Ms. Zargar was rejected by Patiala House Court in New Delhi on the grounds that the charges levelled against her were of a very grave nature and triable only by a sessions court. The source also notes that one of the alleged co-accused in the original First Investigation Report No. 59/2020 was released on bail on 13 March 2020, six days after being arrested and after having been kept in police custody.

14. Subsequently, on 2 May 2020, Ms. Zargar's counsel withdrew the bail application due to the hostile attitude of the duty judge, in order to prevent a rejection of the application from adversely impacting an appeal in higher courts.

15. On 4 June 2020, another bail petition by Ms. Zargar was rejected by the trial court of Patiala House Court in New Delhi. The Additional Sessions judge reportedly found no merits in the bail petition.

16. On 17 June 2020, Ms. Zargar's legal counsel challenged the trial court order denying her bail, before Delhi High Court. On 22 June 2020, Delhi High Court adjourned a fourth bail hearing for Ms. Zargar. Reportedly, the police, in its status report, objected to Ms. Zargar's bail, stating that she was part of the "conspiracy not only to cause disaffection but also the use of any means to cause death, injury and loss to persons". It is claimed in the status report that the main aim was to uproot the Government through violent means by instigating riots and unrest throughout the country. One of the compelling reasons cited by Delhi Police to keep Ms. Zargar in custody was that she is allegedly one of the main conspirators, and main instigators, behind the riots. The police also stated that pregnancy was no reason to grant her bail and that 39 births had taken place in Delhi prisons in the past 10 years.

17. On 23 June 2020, Delhi High Court granted Ms. Zargar bail on humanitarian grounds. She was therefore released on bail on 24 June 2020. The lawyers for Delhi Police stated that they had no objection to Ms. Zargar's bail on humanitarian grounds. The judge granted Ms. Zargar bail against a bond of Rs 10,000 on condition of her not indulging in activities that would violate the law or hamper the investigation. In addition, she must obtain the court's permission before leaving Delhi and be in touch with the investigating officer every 15 days by telephone.

18. The source recapitulates that Ms. Zargar was detained on 10 April 2020 at the Special Cell Police Station, from 11 to 14 April 2020 at Jaffrabad Police Station and from 14 to 15 April 2020 at the Special Cell Police Station, and since 15 April 2020 at Tihar Jail No. 6 in Delhi. Police custody was ordered twice by the Duty Metropolitan Magistrate of Patiala House Court and judicial custody once by the Jail Magistrate at the Tihar jail.

19. The source submits that Ms. Zargar has been falsely implicated for inciting violence that took place in Delhi on 23–26 February 2020, alleged involvement in terrorist activities, and delivering speeches at peaceful protests against the recently passed Citizenship (Amendment) Act.

20. The source explains that the Citizenship (Amendment) Act grants citizenship to Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan who entered India by 31 December 2014 if they have lived in India for six years. The source argues that the Act violates article 14 of the Constitution of India, which guarantees the right to equality. This, according to the source, also implies that individuals with religious affiliations outside of the six named above, including Muslims and atheists, will not be eligible for citizenship under the conditions of the Citizenship (Amendment) Act.

21. The source adds that the First Investigation Reports under which Ms. Zargar was detained do not name her as a defendant, and neither are there any specific charges against her apart from the allegation of delivering inflammatory speeches.

22. The source submits that the detention of Ms. Zargar falls under category I of the Working Group. It argues that there is no legal basis for Ms. Zargar's detention, as the police arrested her in an irregular manner and made her sign blank sheets of paper while she was in the Special Cell Police Station. She was detained for an alleged offence for which she is not named, and the complainant in that case is the police. The basis of information on which the police filed the First Investigation Report is mentioned as being secret informers. She was later arrested under another First Investigation Report lodged at another police station, which allegedly demonstrates misuse of the law by the police to target her.

23. Moreover, the source argues that given the medical condition of Ms. Zargar, there was no necessity for her urgent arrest, however serious the charges. As soon as she was granted bail under First Investigation Report No. 48/2020, she was rearrested under First Investigation Report No. 59/2020. The source submits that this demonstrates the intention of the authorities to keep her in custody for longer.

24. Furthermore, the source states that the offences pertaining to the Prevention of Damage to Public Property Act, the Arms Act and the Unlawful Activities (Prevention) Act were only added after her arrest, as was her bail under the original First Investigation Report, and after the Duty Metropolitan Magistrate of Patiala House Court expressed doubts about the police's versions of the fresh charges against her. The source adds that the Unlawful Activities (Prevention) Act – the principal Indian anti-terrorist legislation – allows police to detain suspects indefinitely without conviction under vague and overly broad provisions. Therefore, it is impossible to invoke a legal basis justifying her deprivation of liberty. The source also recalls that there has been a general pattern of detaining activists under the provisions of the Unlawful Activities (Prevention) Act, thus limiting their recourse to justice.

25. Finally, the source asserts that at the bail hearing before the sessions court on 2 May 2020, Ms. Zargar's counsel withdrew the bail application, reportedly due to the hostile attitude of the duty judge, in order to prevent a rejection of the application from adversely impacting an appeal in higher courts. The bail rejection order mentions no grounds, only the fact of withdrawal of the application by counsel.

26. According to the source, the lockdown due to COVID-19 has made a difficult situation worse for Ms. Zargar, as hearings were not held in courts but in the jail complex, making it difficult for lawyers to appear. On 30 April 2020, the National Human Rights Commission issued directions to the Tihar jail authorities to respond within four weeks regarding Ms. Zargar's detention conditions, given that she was pregnant, had been denied medical care and a special diet, had not been allowed to meet and communicate with her family and lawyers and had been kept in solitary confinement since 10 April 2020.

27. The source further argues that the deprivation of liberty of Ms. Zargar results from the exercise of universally recognized human rights, in particular the right to freedoms of opinion, expression and peaceful assembly. Given the fact that Ms. Zargar was critical of the passing of the Citizenship (Amendment) Act, as a woman human rights defender engaged in public protests against the Citizenship (Amendment) Act, and a media liaison officer for the Jamia Coordination Committee, her detention can be interpreted as an attempt to suppress her dissent by intimidating her and others associated with the Jamia Coordination Committee.

28. The source asserts that freedoms of opinion and expression and of peaceful assembly are fundamental human rights enshrined in articles 19 and 20 of the Universal Declaration of Human Rights, articles 19 and 21 of the Covenant¹ to which India is a State party, and article 19 of the Constitution of India.

29. According to the source, the Government must respect, protect and fulfil the right to hold and express opinions, including those that are not in accordance with its official policy, and to think and manifest personal convictions at odds with its official ideology, under the peremptory *jus cogens* norms of customary international law.² The Human Rights Committee, in its general comment No. 34 (2011), stated that restrictions on freedom of expression must not be overbroad, and must conform to the principle of proportionality, be appropriate to

¹ *Yong-Joo Kang v. Republic of Korea* (CCPR/C/78/D/878/1999), para. 7.2.

² Opinion No. 13/2018, para. 29.

achieve their protective function, be the least intrusive instrument among those which might achieve their protective function, and be proportionate to the interest to be protected.

30. The source specifies that the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain. Furthermore, the source states that the application of vague and overly broad provisions adds weight to the conclusion that Ms. Zargar's deprivation of liberty falls within category II.³

31. Furthermore, it is argued that while Ms. Zargar's deprivation of liberty has resulted from the active violation of civil and political rights, there is a strong presumption that the deprivation of liberty also constitutes a violation of international law on the grounds of discrimination based on political or other views.⁴

32. The source proceeds to assert that, in particular, Ms. Zargar is being discriminated against on the basis of her status as a human rights defender and in violation of her right to equality before the law and equal protection of the law under article 26 of the Covenant.⁵ The source asserts that Ms. Zargar's political views and convictions regarding the Government's policies and actions are at the centre of the present case.

33. The source submits that Ms. Zargar's detention was arbitrary under categories I, II and V.

Analysis of violations

i. Category I

34. There is no legal basis for Ms. Zargar's detention, as the police arrested her in an irregular manner and made her sign blank sheets of paper while she was in the Special Cell Police Station. She was detained for an alleged offence for which she is not named, and the complainant in that case is the police. The basis of information on which the police filed the First Investigation Report is mentioned as being secret informers. She was later arrested under another First Investigation Report lodged at a different police station, which allegedly demonstrates misuse of the law by the police to target her.

35. Moreover, given her medical condition, there was no necessity for an urgent arrest of the student activist, however serious the charges. As soon as she was granted bail under First Investigation Report No. 48/2020, she was rearrested under First Investigation Report No. 59/2020. This clearly shows the mala fide intentions of the authorities and Delhi Police to keep her in custody for longer. Furthermore, the offences pertaining to the Prevention of Damage to Public Property Act, the Arms Act and the Unlawful Activities (Prevention) Act were only added after her arrest, as was her bail under the original First Investigation Report, and after the Duty Metropolitan Magistrate of Patiala House Court expressed doubts about the police's versions of the fresh charges against her. The principal Indian anti-terror law – the Unlawful Activities (Prevention) Act – allows the police to detain suspects indefinitely without conviction under vague and overly broad provisions. Therefore, it is impossible to invoke a legal basis justifying her deprivation of liberty. The source also recalls that there has been a general pattern of charging activists under the provisions of the Unlawful Activities (Prevention) Act, thus limiting their recourse to justice.

36. Finally, at the last bail hearing before the sessions court on 2 May 2020, Ms. Zargar's counsel withdrew the application, reportedly due to the hostile attitude of the duty judge, in order to prevent a rejection of the application from adversely impacting an appeal in higher courts. The bail rejection order mentions no grounds, only the fact of withdrawal of the application by counsel.

³ Ibid.

⁴ Opinions No. 88/2017, para. 43; and No. 13/2018, para. 34.

⁵ Opinion No. 45/2016.

ii. Category II

37. The current deprivation of liberty of Ms. Zargar results from the exercise of universally recognized human rights, in particular the right to freedoms of opinion, expression and peaceful assembly. Given the fact that Ms. Zargar was critical of the passing of the Citizenship (Amendment) Act, as a woman human rights defender engaged in public protests against the Citizenship (Amendment) Act, and a media liaison officer for the Jamia Coordination Committee, her current detention can clearly be interpreted as another move to curb her dissent by intimidating her and others associated with the Jamia Coordination Committee.

38. Freedoms of opinion and expression and of peaceful assembly are fundamental human rights enshrined in articles 19 and 20 of the Universal Declaration of Human Rights, articles 19 and 21 of the Covenant⁶ and article 19 of the Constitution of India. The Government must respect, protect and fulfil the right to hold and express opinions, including those that are not in accordance with its official policy, and to think and manifest personal convictions at odds with its official ideology, under the peremptory *jus cogens* norms of customary international law.⁷

39. The Human Rights Committee, in its general comment No. 34 (2011), stated that restrictions on freedom of expression must not be overbroad, and must conform to the principle of proportionality, be appropriate to achieve their protective function, be the least intrusive instrument among those which might achieve their protective function, and be proportionate to the interest to be protected. It is worth noting that the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain. Furthermore, the application of vague and overly broad provisions adds weight to the conclusion that Ms. Zargar's deprivation of liberty falls within category II.⁸

iii. Category V

40. While Ms. Zargar's deprivation of liberty has resulted from the active violation of civil and political rights, there is a strong presumption that the deprivation of liberty also constitutes a violation of international law on the grounds of discrimination based on political or other views.⁹ In particular, Ms. Zargar is being discriminated against on the basis of her status as a human rights defender and in violation of her right to equality before the law and equal protection of the law under article 26 of the Covenant. Ms. Zargar's political views and convictions regarding the Government's policies and actions are at the centre of the present case.

Response from the Government

41. On 22 July 2020, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting the Government to provide detailed information by 21 September 2020 about the situation of Ms. Zargar.

42. The Working Group regrets that it did not receive a response from the Government, and neither did the Government request an extension of the time limit for its reply, as is provided for in the Working Group's methods of work.

Discussion

43. In the absence of a response from the Government, the Working Group has decided to render the present opinion, on the basis of all the information submitted to it, in conformity with paragraph 15 of its methods of work.

⁶ *Yong-Joo Kang v. Republic of Korea* (CCPR/C/78/D/878/1999), para. 7.2.

⁷ Opinions No. 94/2017, para. 59; No. 88/2017, para. 32; No. 83/2017, para. 80; and No. 76/2017, para. 62.

⁸ Opinion No. 13/2018, para. 29.

⁹ Opinions No. 88/2017, para. 43; and No. 13/2018, para. 34.

44. In determining whether Ms. Zargar's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

45. As a preliminary issue, the Working Group notes that Ms. Zargar has been released on bail. The Working Group nevertheless notes that, in accordance with its methods of work (para. 17 (a)), it "reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned". In the present case, the Working Group considers that the allegations made by the source are extremely serious. Therefore, it proceeds to deliver its opinion.

i. Category I

46. According to the source, Ms. Zargar's detention was without legal basis. She was detained for an alleged offence for which she is not named, and the complainant in that case is the police. The information that the police used in order to file the First Investigation Report was said to be from "secret informers". Ms. Zargar was granted bail in relation to the original First Investigation Report. The source alleges that she was rearrested shortly thereafter, under another First Investigation Report lodged at a different police station: a demonstration, according to the source, of the mala fide intentions of the authorities to keep her in custody through misuse of the law by the police.¹⁰ The Working Group also notes that Ms. Zargar was arrested on 10 April 2020 by approximately 13 plain-clothed officers. In the Working Group's view, the disproportionate manner in which Ms. Zargar was arrested indicates an attempt to intimidate a student activist.

47. The source argued that in view of Ms. Zargar's medical condition, there was no urgency for her arrest as a student activist. Furthermore, additional offences were added to the original ones after her arrest, as was her bail under the original First Investigation Report. The source also contended that the principal Indian anti-terrorist law allowed the police to detain suspects indefinitely without conviction under vague and overly broad provisions. Therefore, it was impossible to invoke a legal basis justifying the deprivation of her liberty; the source also recalled that there had been a general pattern of charging activists under the provisions of the Unlawful Activities (Prevention) Act, thus limiting their recourse to justice.

48. Even if it is accepted that Ms. Zargar's arrest was undertaken strictly in accordance with national law and procedure which allow the method employed in her arrest and detention, this fact in itself does not make an otherwise arbitrary pretrial detention regular. The Working Group recalls that it has repeatedly stated in its jurisprudence that even when the detention of a person is carried out in conformity with national legislation, such law must also be consistent with the relevant provisions of international law.¹¹

49. Furthermore, according to article 9 (3) of the Covenant, pretrial detention should be the exception rather than the norm, and should be ordered for the shortest time possible.¹² In other words, liberty is acknowledged under article 9 (3) of the Covenant as the core consideration, with detention merely as an exception.¹³ Detention pending trial must thus be based on an individualized determination that it is reasonable and necessary for such purposes as to prevent flight, interference with evidence or the recurrence of crime.¹⁴ Information provided to the Working Group in the present case suggests that Ms. Zargar was pregnant at

¹⁰ The Working Group has previously considered cases where the police have placed people in a situation of recurrent detention as a manifest abuse of process – an action with no legal basis. See opinions No. 59/2020, para. 68; and 37/2018, para. 32.

¹¹ See, for example, opinions No. 50/2018, No. 37/2018, No. 20/2018, No. 1/2018, No. 79/2017, No. 50/2017, No. 42/2012 and No. 46/2011.

¹² A/HRC/19/57, paras. 48–58.

¹³ *Ibid.*, para. 54.

¹⁴ Human Rights Committee, general comment No. 35 (2014), para. 38.

the material time. She was arrested on 10 April 2020 but not brought to court until three days later on 13 April 2020. The Working Group recalls that according to the Human Rights Committee, 48 hours is ordinarily sufficient to bring an individual before a judicial authority, and any longer delay must remain absolutely exceptional and be justified under the circumstances.¹⁵

50. Additionally, the source alleges that the lockdown due to COVID-19 made a difficult situation worse for Ms. Zargar, as hearings were not held in courts but in the jail complex, making it difficult for lawyers to appear. On 30 April 2020, the National Human Rights Commission issued directions to the Tihar jail authorities to respond within four weeks regarding Ms. Zargar's detention conditions, given that she was pregnant, had been denied medical care and a special diet, had not been allowed to meet and communicate with her family and lawyers and had been kept in solitary confinement since 10 April 2020. The Working Group thus finds that there was a violation of the article 9 (4) of the Covenant.

51. There is no suggestion that if not detained she would flee from prosecution. The Working Group is concerned that the exigencies of the time did not appear to warrant the detention of Ms. Zargar, more so after bail had initially been granted.

52. What is clear to the Working Group, in the present case, is that there was no personalized reflection on Ms. Zargar's circumstances, nor was there any consideration of alternatives to detention. Her pretrial detention, having not been reviewed for appropriateness, lacked legal justification.

53. At the last bail hearing before the sessions court on 2 May 2020, Ms. Zargar's counsel withdrew the application, reportedly due to the hostile attitude of the duty judge, in order to prevent a rejection of the application from adversely impacting an appeal in higher courts. The bail rejection order mentions no grounds, only the fact of withdrawal of the application by counsel.

54. Lastly, the source submits that the offences pertaining to the Prevention of Damage to Public Property Act, the Arms Act and the Unlawful Activities (Prevention) Act were only added after her arrest, as was her bail under the original First Investigation Report, following the Duty Metropolitan Magistrate expressing misgivings about the police's versions of the fresh charges against her. The Unlawful Activities (Prevention) Act under which the additional charges were made allows for suspects to be detained indefinitely without conviction under vague and overly broad provisions. The source further alleges that there has been a general pattern of charging activists under the provisions of the Unlawful Activities (Prevention) Act, thus limiting their recourse to justice.

55. The charge of making inflammatory speech which Ms. Zargar faced may be inconsistent with an individual's freedom of expression in that it criminalizes speech and acts of information-sharing guaranteed under the Universal Declaration of Human Rights and the Covenant. This is particularly so in the face of the Government's failure to provide information regarding this issue. The Working Group has previously noted that prosecution under vague and overly broad laws offends the principle of legality.¹⁶ This principle requires that laws be framed with sufficient precision so that the individual can access and understand them, so as to enable him or her to regulate his or her conduct accordingly.¹⁷ Ms. Zargar might not reasonably have foreseen that the exercise of her right to freedom of expression to communicate ideas through her peaceful activities would amount to criminal conduct under those provisions.

56. Furthermore, the Working Group considers that the source has established a credible prima facie case, which was not rebutted by the Government, indicating that the authorities failed to present a warrant at the time of the arrest of Ms. Zargar. There were no circumstances

¹⁵ Ibid., para. 33.

¹⁶ Opinions No. 45/2019, para. 54; No. 9/2019, para. 39; No. 46/2018, para. 62; No. 36/2018, para. 51; No. 35/2018, para. 36; No. 40/2016, para. 36; No. 26/2013, para. 68; No. 27/2012, para. 41; and No. 46/2011, para. 22.

¹⁷ Opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59; and Human Rights Committee, general comment No. 35 (2014), para. 22.

that would provide a reasonable cause for an arrest in flagrante delicto.¹⁸ It is not sufficient for there to be a law that authorizes an arrest. The authorities must invoke that legal basis and apply it through an arrest warrant.¹⁹ In the present case, the arresting officers did not present a warrant at the time of arrest, in violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant. For the reasons articulated, the Working Group finds that the Government failed to establish a legal basis for Ms. Zargar's detention. Her detention was thus arbitrary under category I.

ii. *Category II*

57. The source submits that Ms. Zargar's detention is arbitrary because she was arrested and detained for exercising her freedom of expression in circumstances that did not fall within permissible restrictions on fundamental liberties. The arrest and detention was, according to the source, in violation of article 19 of the Covenant and article 19 of the Universal Declaration of Human Rights.

58. The Working Group considers that charges under the provisions of the Prevention of Damage to Public Property Act, the Arms Act and the Unlawful Activities (Prevention) Act, which Ms. Zargar faced for the peaceful exercise of right to freedoms of opinion, expression and peaceful assembly as a woman human rights defender, cannot be regarded as consistent with the Universal Declaration of Human Rights or the Covenant.²⁰

59. The Working Group notes that article 19 (2) of the Covenant provides that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". This right includes political discourse, commentary on public affairs, discussion of human rights, and journalism.²¹ It protects the holding and expression of opinions, including those which are critical of, or not in line with, government policy.²² The Working Group considers that Ms. Zargar's conduct fell within the right to freedom of opinion and expression protected under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant and that she was detained for exercising these rights.

60. Moreover, Ms. Zargar's alleged involvement in delivering speeches at peaceful protests against the Citizenship (Amendment) Act concerned matters of public interest. The Working Group considers that she was detained for exercising her right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant.²³

61. The Working Group holds that the Government is bound under international human rights law to respect and uphold the right to hold and express opinions, including those that are not in accordance with its official policy. Any restrictions on freedom of expression must not be overbroad, and must conform to the principle of proportionality, be appropriate to achieve their protective function, be the least intrusive instrument among those which might achieve their protective function, and be proportionate to the interest to be protected.²⁴

62. There is nothing in the circumstances of Ms. Zargar's case to suggest that the permissible restrictions on the rights set out in articles 19 (3) and 25 of the Covenant would apply. There is no evidence to suggest that Ms. Zargar's criticism of the Government called

¹⁸ Opinion No. 9/2018, para. 38.

¹⁹ Opinions No. 46/2019, para. 51; No. 46/2018, para. 48; No. 36/2018, para. 40; and No. 10/2018, para. 45.

²⁰ Opinions No. 45/2019; No. 9/2019; No. 46/2018; No. 36/2018; No. 35/2018; No. 40/2016; No. 26/2013; No. 27/2012; and No. 46/2011. See also A/HRC/41/7, paras. 38.73 and 38.171.

²¹ Human Rights Committee, general comment No. 34 (2011), para. 11.

²² Opinions No. 8/2019, para. 55; and No. 79/2017, para. 55.

²³ Human Rights Committee, general comment No. 25 (1996), para. 8 (noting that citizens may take part in the conduct of public affairs by exerting influence through public debate); and opinions No. 16/2020, No. 15/2020, No. 45/2019, No. 44/2019, No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 40/2016, No. 26/2013, No. 42/2012 and No. 46/2011.

²⁴ Human Rights Committee, general comment No. 34 (2011).

directly or indirectly for violence or could reasonably be considered to threaten national security, public order, public health or morals, or the rights or reputations of others. The Human Rights Council has called upon States to refrain from imposing restrictions under article 19 (3) of the Covenant that are not consistent with international human rights law.²⁵ Accordingly, 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.

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.²⁶ Ms. Zargar was clearly detained for exercising her rights under this Declaration. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.²⁷

64. The Working Group concludes that Ms. Zargar's detention resulted from her peaceful exercise of the right to freedom of opinion and expression, as well as of the right to take part in the conduct of public affairs, and was contrary to article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. Her detention was therefore arbitrary and fell under category II.

iii. Category V

65. The Working Group considers that Ms. Zargar was targeted for discrimination on the basis of her status as a human rights defender and in violation of her right to equality before the law and equal protection of the law under article 26 of the Covenant. The Working Group considers that Ms. Zargar's political views and beliefs regarding the Government's policies and actions are at the heart of the present case. Furthermore, in the discussion above regarding category II, the Working Group has established that Ms. Zargar's detention resulted from the peaceful exercise of her rights under international law. In these circumstances, there is a strong presumption that the detention also constitutes a violation of international law on the grounds of discrimination based on political or other views.²⁸

66. The Working Group finds that Ms. Zargar was deprived of her liberty on discriminatory grounds, owing to her status as a human rights defender, and on the basis of her political or other opinion regarding the Citizenship (Amendment) Act. Her deprivation of liberty violated articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and was arbitrary under category V. Accordingly, the Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

Disposition

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

The deprivation of liberty of Safoora Zargar, being in contravention of articles 2, 3, 7, 8, 9, 10, 11, 19, 20 and 21 (1) of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14, 19, 25 (a) and 26 of the Covenant, was arbitrary and fell within categories I, II and V.

68. The Working Group requests the Government of India to take the steps necessary to remedy the situation of Ms. Zargar without delay and bring it into conformity with the

²⁵ Human Rights Council resolution 12/16, para. 5 (p).

²⁶ General Assembly resolution 53/144, annex, arts. 1 and 6 (c). See also General Assembly resolution 74/146, para. 12.

²⁷ Opinions No. 16/2020, No. 15/2020, No. 45/2019, No. 44/2019, No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 79/2017 and No. 75/2017.

²⁸ Opinions No. 59/2019, para. 79; No. 13/2018, para. 34; and No. 88/2017, para. 43.

relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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

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

71. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for appropriate action.

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

Follow-up procedure

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

74. 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.

75. 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.²⁹

[Adopted on 27 November 2020]

²⁹ Human Rights Council resolution 42/22, paras. 3 and 7.