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Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fifth session, 12–16 August 2019

Opinion No. 32/2019 concerning Saeed Malekpour (Islamic Republic of 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 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 8 April 2019, the Working Group transmitted to the Government of the Islamic Republic of Iran a communication concerning Saeed Malekpour. The Government has not replied to the communication. The Islamic Republic of Iran 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. Saeed Malekpour is a 44-year-old national of the Islamic Republic of Iran who holds the right to permanent residency in Canada. Prior to his detention, Mr. Malekpour was a freelance website designer, programmer and information technology expert. He created an open-source software program to improve the uploading of images to Internet sites. He had no criminal convictions prior to being arrested in the present case.

Background information

5. According to the source, in the mid-2000s, the Islamic Republic of Iran began a rigorous media censorship campaign to block access to the Internet and substitute it with an internally approved network. The aim was to regulate all online content so that it could be better censored and shielded from cyberattacks. In early 2011, the Chief of Police deployed cyberpolice throughout the country's cities to curb cyberthreats and restrict foreign content. In September 2011, the media announced that the Islamic Republic of Iran was amassing a "cyberarmy" of 250,000 people to battle Internet corruption and "external penetrations from the West". In early January 2012, Iranian Internet users were blocked from countless websites, as the cyberpolice began surveillance of Internet café users. After their usernames and digital footprints were tracked, over 30 million Iranians lost access to various Internet services.

6. The source reports that the Government has frequently detained and prosecuted Internet experts and journalists on vaguely defined national security charges. Those arrested have reportedly been subjected to severe torture, without access to legal counsel during the investigative phase of their detention. The source alleges that this campaign has targeted bloggers and information technology experts, as well as any efforts to promote and facilitate free-flowing information on the Internet. According to the source, as of January 2018, the Islamic Republic of Iran had arrested and detained about 30 individuals, most of whom had dual nationality. According to the Islamic Revolutionary Guard Corps, the widespread arrest of human rights activists was aimed at a network of individuals involved in corrupt Internet activities.

Arrest, detention and conviction

7. The source reports that, in October 2008, Mr. Malekpour embarked on a short trip to the Islamic Republic of Iran to visit his family. On 4 October 2008, shortly after his arrival, Mr. Malekpour was abducted and arrested near Vanik Square, in northern Tehran. In an operation to crack down on "immoral" or "un-Islamic" activities, plain clothes security agents from the Cybercrimes Unit of the Islamic Revolutionary Guard Corps grabbed Mr. Malekpour, and blindfolded and manhandled him into their car. One of the agents held Mr. Malekpour down, choking him to prevent him from calling for help.

8. The source alleges that the security agents did not present an arrest warrant at the time of Mr. Malekpour's arrest, nor did they provide a reason for the arrest. Mr. Malekpour was taken to an undisclosed location, referred to by his captors as the "technical office", where he was brutally beaten by several individuals. The source further alleges that Mr. Malekpour was forced to sign papers while still blindfolded, and without being told what he was signing. He was not permitted to contact his family or legal counsel.

9. According to the source, Mr. Malekpour was subsequently transferred to Ward 2A of Evin Prison, where he was kept in solitary confinement for approximately 320 days until 16 August 2009, in a cell less than 3.5 m². The source notes that the minimum acceptable size for a cell is 5.4 m²,¹ and submits that prolonged solitary confinement in such conditions is itself a form of torture. Mr. Malekpour slept on the floor and was kept blindfolded during the two occasions each day that he was permitted to leave the cell. He was not permitted to speak to other prisoners or his family, or consult with a lawyer.

¹ Prison Evaluation Checklist for Post-Conflict Settings.

10. The source alleges that Mr. Malekpour was beaten brutally on several occasions during his detention in Evin Prison. According to the source, he was beaten with cables and batons, under the guise of “interrogation”. During the beatings, Mr. Malekpour lost consciousness, at which point his captors would douse him with cold water in order to continue the beatings. The source claims that the beating was so severe on one occasion that it left Mr. Malekpour paralysed down one side of his body. Mr. Malekpour was taken to a civilian hospital under a false name and warned that if he disclosed the truth, he would be subjected to more severe forms of torture. Prior to Mr. Malekpour’s medical appointment, a member of the Islamic Revolutionary Guard Corps spoke with the doctor who subsequently refused to treat Mr. Malekpour, instead providing an official diagnosis of “stress”. On another occasion, Mr. Malekpour was stripped naked and held down while an interrogator from the Islamic Revolutionary Guard Corps threatened a serious act of sexual violence.

11. The source adds that, in January 2009, an interrogator from the Islamic Revolutionary Guard Corps fractured Mr. Malekpour’s jaw and broke several of his teeth. According to the source, the magistrate assigned to Mr. Malekpour’s case had overseen many of the torture sessions. Mr. Malekpour finally succumbed to the physical and psychological torture, and was forced to make a scripted confession on national television. While the Government claimed that the software program that Mr. Malekpour had developed was used by Persian pornographic websites, the source argues that this program was used on such websites without Mr. Malekpour’s knowledge.

12. According to the source, Mr. Malekpour was transferred to the general ward of Evin Prison, where he was allowed a small number of closely supervised family visits. On 21 December 2009, Mr. Malekpour was again placed in solitary confinement, where he remained until 8 February 2010.

13. Mr. Malekpour’s trial began on 29 November 2010. The source claims that, while Mr. Malekpour was represented by counsel, he was not permitted to speak with his lawyer until minutes before the trial began. Mr. Malekpour’s lawyer was not permitted to examine the evidence or to have other private consultations with Mr. Malekpour. In addition, Mr. Malekpour’s lawyer was given only limited access to the case file and was not permitted to make copies.

14. The Islamic Revolutionary Court admitted the recorded confession, ignoring Mr. Malekpour’s repeated claims that it had been extracted under torture and threats against his family. The Court dismissed the allegations of torture and other ill-treatment as lies. Furthermore, although Mr. Malekpour’s defence counsel asked the Court to allow an information technology expert to give evidence about the technical details of the software program, the Court did not permit it.

15. In December 2010, Mr. Malekpour was convicted and sentenced to death on the basis of the following offences under the Islamic Penal Code: (a) spreading corruption (art. 286); (b) insulting the Supreme Leader (art. 514); (c) insulting the President (art. 514); (d) insulting the sanctity of Islam (art. 513); and (e) spreading propaganda against the revolutionary system (art. 500). In June 2011, the Supreme Court of the Islamic Republic of Iran withdrew the death sentence and ordered a retrial. However, the source reports that the forced confession was again admitted into evidence during the retrial, and Mr. Malekpour was again sentenced to death in November 2011. The Supreme Court upheld the death sentence in January 2012. According to the source, the Government commuted Mr. Malekpour’s death sentence to life imprisonment in August 2013.

16. The source claims that Mr. Malekpour continues to be subjected to torture and periods of solitary confinement in Evin Prison. He has limited communication with his family and is in poor health. A lack of proper medical and dental care has exacerbated his difficulties with breathing and eating. In the last six months, Mr. Malekpour was urgently hospitalized on two occasions. The authorities refused to disclose to his family that he had been hospitalized and the nature of his ailments. His friends were able to locate him handcuffed to a hospital bed. Mr. Malekpour has since been returned to prison, despite his worsening health. He is being refused follow-up medical attention, which, according to his doctors, is urgently required. The source stresses that, under these conditions, Mr. Malekpour’s life is at risk. Mr. Malekpour has been deprived of his liberty for nearly 11 years.

17. Mr. Malekpour was the subject of two urgent appeals sent by several special procedure mandate holders on 31 December 2010 (IRN 38/2010) and 16 February 2012 (IRN 2/2012).² The Working Group regrets that no response has been received from the Government to these communications.

Legal analysis

18. The source submits that Mr. Malekpour's detention is arbitrary according to categories I, II, III and V.

19. In relation to category I, the source submits that the authorities have violated article 9 of the Universal Declaration of Human Rights, articles 9 (2) and 14 (3) of the Covenant, and article 32 of the Constitution of the Islamic Republic of Iran.³ In the present case, the Islamic Revolutionary Guard Corps arrested Mr. Malekpour and failed to inform him of the reasons for his arrest – either verbally or in writing – and failed to inform him of the charges against him until one year later, during his trial. No provisional dossier was sent to the judicial authorities. Mr. Malekpour was not brought before a magistrate until his trial, which was more than one year after his initial arrest.

20. In relation to category II, the source submits that Mr. Malekpour was detained for exercising his right to freedom of expression under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Mr. Malekpour was sentenced to death for the offence of spreading corruption by allegedly operating pornographic websites. The source recalls that, prior to October 2008, Mr. Malekpour designed a software program that could be used to efficiently display images on the Internet. He published the code for this software under a free and open-source licence, meaning that anyone in the world was free to use a copy to display images on their own website. A condition of the licence was that Mr. Malekpour was given credit as creator of the software. The source submits that Mr. Malekpour exercised his right to facilitate the imparting of information through a software program that he designed for general information, that is for uploading images chosen by others. Nonetheless, according to his interrogators, at some point, a third party incorporated the code into certain pornographic websites.

21. In relation to category III, the source submits that the Government violated Mr. Malekpour's right to a fair trial. According to the source, Mr. Malekpour was denied the following due process rights:

- (a) The right to be brought before a court within a reasonable time and without delay under article 9 (3) of the Covenant;
- (b) The presumption of innocence under article 11 of the Universal Declaration of Human Rights and article 14 (2) of the Covenant;
- (c) The right to freedom from torture and ill-treatment under article 5 of the Universal Declaration of Human Rights and article 7 of the Covenant, and the right not to be compelled to testify against oneself or to confess guilt under article 14 (3) (g) of the Covenant;
- (d) The right to a public hearing by an independent and impartial tribunal under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant;
- (e) The right to an effective remedy under article 8 of the Universal Declaration of Human Rights;
- (f) The right to adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing under article 14 (3) (b) of the Covenant.

² The second urgent appeal is available at:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=19839>.

³ According to the source, article 32 provides that “no one may be arrested other than in accordance with the procedure laid down by law. In case of arrest, charges with the reasons for the accusation must, without delay, be communicated to the accused in writing, and a provisional dossier must be forwarded to the competent judicial authorities within a maximum of 24 hours so that the preliminaries to the trial can be completed as swiftly as possible”.

22. According to the source, Mr. Malekpour's trial was unduly delayed for about one year. He was treated as guilty after being forced to confess under severe torture. Mr. Malekpour was tortured repeatedly for nearly one year, sometimes to the point of unconsciousness, through severe beatings with metal cables and batons. He was also kicked in the face and threatened with violent sexual assault and death. The purpose of this torture was to force a false confession, which was used to convict Mr. Malekpour of a capital offence. The admission into evidence of a statement obtained through torture renders the entire proceedings unfair. Mr. Malekpour was also not given sufficient time to communicate with his legal counsel or to prepare his defence effectively.

23. In relation to category V, the source submits that discrimination based on a person's country of residence or nationality violates article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. In the present case, Mr. Malekpour was targeted because he was a permanent resident of Canada. According to the source, the Islamic Republic of Iran and Canada first exchanged ambassadors in 1996, but Canada has since limited the scope of bilateral talks to human rights and nuclear issues. The source argues that this context explains Mr. Malekpour's situation. The verdict against Mr. Malekpour was discriminatory based on his being a permanent resident of Canada, as well as on other grounds, such as his career as a software engineer and computer programmer.

Response from the Government

24. On 8 April 2019, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 7 June 2019 about the current situation of Mr. Malekpour. The Working Group also requested the Government to clarify the legal provisions justifying his detention, as well as its compatibility with the obligations of the Islamic Republic of Iran under international human rights law. Moreover, the Working Group called upon the Government to ensure Mr. Malekpour's physical and mental integrity.

25. The Working Group regrets that it did not receive a response from the Government to this communication. The Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

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

27. 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 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.

28. The source alleges that the authorities did not comply with Iranian or international arrest procedures. According to the source, Mr. Malekpour was not presented with an arrest warrant at the time of his arrest on 4 October 2008, and was not informed at that time of the reasons for his arrest. In addition, the source alleges that Mr. Malekpour was only informed of the charges against him during his trial, more than two years after his arrest.⁴ Although it had an opportunity to do so, the Government did not challenge these allegations.

29. According to article 9 (1) of the Covenant, no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. In the

⁴ The source states that Mr. Malekpour was neither informed of the reasons for his arrest nor notified of the charges against him until his trial, which took place more than one year after his arrest. However, it appears that these procedural steps were taken more than two years after Mr. Malekpour's arrest. According to the source, Mr. Malekpour was arrested on 4 October 2008 and his trial commenced on 29 November 2010. The Working Group does not consider that this detail affects the credibility of the source's allegations.

present case, Mr. Malekpour was arrested without an arrest warrant and without being informed at that time of the reasons for his arrest, in violation of article 9 (1) and (2) of the Covenant. Moreover, he was not promptly informed of the charges against him, in violation of article 9 (2) of the Covenant. In order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law that may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant and by following other procedures, including providing the reasons for the arrest and giving prompt notification of any charges.⁵

30. The source further alleges that Mr. Malekpour was not brought promptly before a judge to challenge the legality of his detention. According to the source, Mr. Malekpour only appeared before a magistrate at his trial, which commenced on 29 November 2010, more than two years after his arrest. The Government has not challenged this allegation. This amounts to a clear violation of article 9 (3) of the Covenant. Furthermore, it appears from the information provided by the source that Mr. Malekpour was held incommunicado and for periods of prolonged solitary confinement, including from his arrest on 4 October 2008 until at least 16 August 2009. As the Working Group has consistently argued, holding persons incommunicado violates their right to challenge the lawfulness of detention before a court under article 9 (4) of the Covenant.⁶ Judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty⁷ and is essential in ensuring that detention has a legal basis. Given that Mr. Malekpour was unable to challenge his detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was also violated.

31. Finally, the Working Group considers that the charges under which Mr. Malekpour was convicted and initially sentenced to death, namely spreading corruption, insulting the Supreme Leader, insulting the President, insulting the sanctity of Islam and spreading propaganda against the revolutionary system under articles 286, 500, 513 and 514 of the Islamic Penal Code, are so vague and overly broad that it is impossible to invoke a legal basis for his deprivation of liberty. The Working Group has raised the issue of prosecution under vague and overly broad penal laws with the Government on several occasions.⁸ In addition, as the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.⁹ Mr. Malekpour could not have foreseen that the publication of an open-source software program would amount to criminal conduct under these provisions.

32. For these reasons, the Working Group finds that the Government failed to establish a legal basis for Mr. Malekpour's arrest and detention. His deprivation of liberty is therefore arbitrary under category I.

33. In addition, the source alleges that Mr. Malekpour was detained for the peaceful exercise of his right to freedom of expression under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. According to the source, Mr. Malekpour designed a software program that could be used to efficiently display images on websites. He published the code for this software under a free and open-source licence, so that anyone in the world could use it to display images on their own website. Mr. Malekpour was prosecuted because the program had been allegedly used by an unknown third party on pornographic websites, despite the fact that Mr. Malekpour had no knowledge that his program was being used in this way. Mr. Malekpour was deprived of his liberty for facilitating the imparting of

⁵ See, for example, opinions No. 46/2018, para. 48; and No. 36/2018, paras. 39–40.

⁶ See, for example, opinions No. 46/2017 and 45/2017.

⁷ See the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

⁸ See, for example, opinions No. 83/2018, para. 58; No. 52/2018, para. 78; No. 19/2018, para. 33; and No. 55/2013, para. 14.

⁹ See, for example, 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) on liberty and security of person, para. 22.

information through a software program.¹⁰ The Government has not offered any alternative explanation of the arrest, detention and prosecution of Mr. Malekpour.

34. The Working Group recalls 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 one's choice. The Working Group considers that Mr. Malekpour's publication of programming code through the medium of software to allow others to publish images online falls clearly within the boundaries of the right to freedom of expression protected under article 19 (2). Mr. Malekpour's actions in publishing the software allowed him and others who accessed the code to share images online. According to the Human Rights Committee, article 19 (2) protects all forms of expression and the means of their dissemination, including electronic and Internet-based modes of expression.¹¹ In the view of the Working Group, Mr. Malekpour did not authorize the use of the software in any criminal manner, and should not have been held responsible for how third parties may have used what was otherwise an innovative and innocuous software program.

35. There is nothing to suggest that the permissible restrictions on the right to freedom of expression set out in article 19 (3) of the Covenant would apply in the present case. The Government did not explain how prosecuting Mr. Malekpour was necessary to protect a legitimate interest under article 19 (3), such as respect for the rights or reputations of others, national security, public order, public health or morals. Furthermore, the Government did not demonstrate that Mr. Malekpour's conviction and sentence – which was originally one of capital punishment, but later commuted to life imprisonment – was a proportionate response to his designing and sharing of a software program. In any event, the Human Rights Council has called on States to refrain from imposing restrictions under article 19 (3) that are not consistent with international human rights law.¹² The Working Group has decided to refer this case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

36. The Working Group concludes that Mr. Malekpour's deprivation of liberty was the result of the peaceful exercise of his rights under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. His deprivation of liberty is therefore arbitrary under category II.

37. Given its finding that Mr. Malekpour's deprivation of liberty was arbitrary under category II, the Working Group emphasizes that no trial of Mr. Malekpour should have taken place. However, he was tried, convicted and subsequently sentenced (initially to death) in December 2010. In June 2011, the Supreme Court ordered a retrial. However, following the retrial, Mr. Malekpour was again sentenced to death in November 2011. The Supreme Court upheld this death sentence in January 2012. The Government commuted Mr. Malekpour's death sentence to life imprisonment in August 2013. The Working Group considers that the information submitted by the source discloses egregious violations of Mr. Malekpour's right to a fair trial during these lengthy proceedings. Although it had the opportunity to do so, the Government did not contest any of the alleged violations of the right to a fair trial.

38. The source alleges that Mr. Malekpour's trial was unduly delayed. As noted earlier, Mr. Malekpour was arrested on 4 October 2008, his trial began on 29 November 2010 and the judgment at first instance was issued in December 2010. He was therefore held in detention for more than two years prior to his trial and the judgment at first instance. According to article 9 (3) of the Covenant, such detention should be the exception rather than the rule, and as short as possible. The Working Group considers that holding Mr. Malekpour

¹⁰ See also A/67/369, para. 17.

¹¹ Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, paras. 11–12.

¹² Human Rights Council resolution 12/16, para. 5 (p). This provision specifically calls upon all States to refrain from imposing restrictions that are not consistent with article 19 (3), including on the free flow of information and ideas, and access to or use of information and communication technologies, such as the Internet.

for more than two years pending trial was excessively long, particularly given that no alternatives to detention appear to have been considered, as Mr. Malekpour was not brought before a court until his trial. His pretrial detention was not properly constituted or reviewed, and his rights between arrest and the judgment at first instance were not respected.¹³ The Government also failed to provide any justification for such lengthy detention prior to trial. As the source alleges, and the Government has not denied, the only evidence brought against Mr. Malekpour at his trial was his forced confession. It is unclear why the Government took so long to proceed to trial, as it does not appear to have required additional time to gather other evidence. Mr. Malekpour's right to be tried within a reasonable time under article 9 (3) and his right to trial without undue delay under article 14 (3) (c) of the Covenant were violated. Furthermore, Mr. Malekpour's right under article 14 (3) (a) of the Covenant to be informed promptly of the nature and cause of the charges against him was violated.

39. In addition, as noted earlier, it appears from the information provided by the source that, after initially being held in an undisclosed location, Mr. Malekpour was held incommunicado and in prolonged solitary confinement from his arrest on 4 October 2008 until at least 16 August 2009. According to the source, Mr. Malekpour was again placed in prolonged solitary confinement from 21 December 2009 until 8 February 2010. As a result, Mr. Malekpour was not able to challenge his detention because he was being held incommunicado and was therefore placed outside the protection of the law. The Working Group finds that this violated his right to be recognized as a person before the law under article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant. The incommunicado detention and solitary confinement of Mr. Malekpour also violated his right to contact with the outside world under principles 15 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and rule 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

40. The Working Group considers that Mr. Malekpour's prolonged incommunicado detention and solitary confinement reveals a *prima facie* breach of the absolute prohibition of torture as a peremptory norm of international law, of article 5 of the Universal Declaration of Human Rights and article 7 of the Covenant. Such treatment exacerbated the physical acts of violence inflicted upon Mr. Malekpour, and appears to have been motivated by an intention to place additional pressure on Mr. Malekpour to provide a confession. According to the General Assembly, prolonged incommunicado detention can itself constitute torture.¹⁴ In addition, prolonged solitary confinement exceeding 15 consecutive days violates applicable standards, such as rules 43 to 45 of the Nelson Mandela Rules. According to rule 45 of the Nelson Mandela Rules, the imposition of solitary confinement must be accompanied by certain safeguards. That is, 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 authorized by a competent authority. These conditions do not appear to have been observed in this case.¹⁵

41. Furthermore, the Working Group considers that the source has presented a credible *prima facie* case that Mr. Malekpour was, and continues to be, subjected to acts of physical torture. These acts allegedly included beatings with metal cables and batons (sometimes to the point of Mr. Malekpour losing consciousness or experiencing paralysis), kicking in the face and assault, which resulted in Mr. Malekpour suffering a fractured jaw and broken teeth. It also included Mr. Malekpour being stripped naked, held down and threatened with violent sexual assault, as well as threats to Mr. Malekpour's family. According to the source, Mr. Malekpour has not received adequate medical care to address the health problems arising from this treatment. The Working Group has decided to refer this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

42. Given the severity of the alleged torture, the Working Group considers it extremely unlikely that Mr. Malekpour would have been able to effectively assist with and participate

¹³ General comment No. 35, para. 37.

¹⁴ General Assembly resolution 68/156, para. 27. See also A/66/268, paras. 61 and 70–78; and A/63/175, paras. 56 and 77–85.

¹⁵ See also opinion No. 52/2018, para. 79 (d).

in his own defence during the initial trial and subsequent proceedings, thus adding to the conclusion that the alleged torture violated his right to a fair trial.¹⁶

43. The source alleges, and the Government has not denied, that as a result of this physical and psychological torture and ill-treatment, Mr. Malekpour made a scripted confession on national television. According to the source, this confession was the sole evidence used to convict Mr. Malekpour of a capital offence. The Working Group considers that the admission into evidence of a statement allegedly obtained through torture rendered the entire proceedings unfair.¹⁷ The burden is on the Government to prove that Mr. Malekpour's statement was given freely¹⁸ and it has not done so. As a result, Mr. Malekpour's right to be presumed innocent under article 14 (2) of the Covenant and his right not to be compelled to confess guilt under article 14 (3) (g) of the Covenant were violated.

44. The Working Group is alarmed at the source's allegation that the magistrate assigned to Mr. Malekpour's case had overseen many of the torture sessions. Similarly, the Working Group notes with great concern the allegation that the Islamic Revolutionary Court admitted Mr. Malekpour's confession at the first trial, despite Mr. Malekpour's repeated claims that it had been extracted under torture. According to the source, the Court dismissed the allegations of torture and other ill-treatment as lies. To make matters worse, the source alleges that the forced confession was again admitted into evidence during Mr. Malekpour's retrial, resulting in another death sentence in November 2011. At best, these allegations suggest indifference by the authorities to the immense suffering caused to Mr. Malekpour and, at worst, a determination to convict Mr. Malekpour and to have him executed. The Working Group considers that this conduct amounts to a violation of Mr. Malekpour's right to a fair hearing by an independent and impartial tribunal under article 14 (1) of the Covenant.¹⁹ It is also a serious violation of principle 6 of the Basic Principles on the Independence of the Judiciary, which requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. As the Working Group has stated, the revolutionary courts do not meet the standards of an independent and impartial tribunal.²⁰ The Working Group refers this case to the Special Rapporteur on the independence of judges and lawyers.

45. The apparent lack of independence of the Islamic Revolutionary Court in the case was also evident in the decisions made during Mr. Malekpour's initial trial. The source alleges that, although Mr. Malekpour's defence counsel asked the Court to allow an information technology expert to give evidence about the technical details of the software program, the Court did not permit it. In the absence of a justification from the Government, the Working Group finds that the refusal to allow Mr. Malekpour to call an expert witness in his defence violated his right under article 14 (3) (e) of the Covenant to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.²¹

46. Finally, the source claims that Mr. Malekpour was represented by counsel, but he was not permitted to speak with his lawyer until minutes before the trial began. In addition, Mr. Malekpour's lawyer was not permitted to examine the evidence or to have other private consultations with Mr. Malekpour. Mr. Malekpour's lawyer was given only limited access to

¹⁶ In opinion No. 29/2017, the Working Group stated that, although its mandate did not cover conditions of detention or the treatment of prisoners, it had to consider to what extent detention conditions could negatively affect the ability of detainees to prepare their defence and their chances of a fair trial (para. 63). See also opinions No. 53/2018, para. 77 (c); No. 52/2018, para. 79 (j); and No. 47/2017, para. 28; and E/CN.4/2004/3/Add.3, para. 33.

¹⁷ See opinions No. 52/2018, para. 79 (i); No. 34/2015, para. 28; and No. 43/2012, para. 51.

¹⁸ Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 41.

¹⁹ The Working Group has previously found that the failure by a judge to intervene when torture is evident amounts to a violation of the right to be tried by an independent and impartial tribunal under article 14 (1) of the Covenant. See opinion No. 29/2017, para. 65. While Mr. Malekpour's torture may not have been visible in the present case, his allegations of torture were clearly made and warranted further investigation. See also opinions No. 53/2018, para. 77 (b); and No. 46/2017, para. 25.

²⁰ E/CN.4/2004/3/Add.2, para. 65 (1). The Working Group considers that this finding remains current: see opinions No. 33/2019, para. 67; No. 52/2018, para. 79 (f); and No. 19/2018, para. 34.

²¹ General comment No. 32, para. 39.

the case file, and he was not permitted to make copies. The Working Group finds that Mr. Malekpour was denied access to legal assistance for the two years prior to his trial in November 2010. This violated his right to adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing under article 14 (3) (b) of the Covenant, as well as his right to present an effective defence through counsel of his choosing under article 14 (3) (d) of the Covenant. The absence of legal assistance was particularly grave in the present case given that Mr. Malekpour was facing, and indeed received, the death penalty.²² The Working Group recalls that all persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their apprehension, and such access shall be provided without delay.²³

47. The Working Group concludes that Mr. Malekpour's right to a fair trial was completely denied. Accordingly, the violation of Mr. Malekpour's fair trial rights is of such gravity as to give his deprivation of liberty an arbitrary character under category III.

48. The source alleges that Mr. Malekpour was arrested and detained on discriminatory grounds, namely his permanent resident status in Canada. According to the source, Mr. Malekpour was detained as a result of the broader political context involving the Islamic Republic of Iran and Canada, and his career as a software engineer made him a target for the authorities of the Islamic Republic of Iran. The Working Group considers that the source has established a *prima facie* case, which the Government has not challenged, that Mr. Malekpour was detained because of his permanent resident status. There is no evidence that Mr. Malekpour was involved in the operation of pornographic websites. Indeed, prior to his arrest, he had no criminal record and a death sentence (since commuted to life imprisonment) appears to be completely disproportionate.

49. In its jurisprudence, the Working Group has repeatedly found a practice in the Islamic Republic of Iran of targeting foreign nationals, dual nationals and Iranian nationals with permanent residence in another country for prosecution.²⁴ The Special Rapporteur on the situation of human rights in the Islamic Republic of Iran also recently recognized this pattern, noting that current estimates suggest that at least 30 foreign and dual nationals, as well as Iranians with permanent residency in another country, have been imprisoned since 2015.²⁵ The Working Group considers that the present case is part of that pattern. Mr. Malekpour was deprived of his liberty on discriminatory grounds, that is on the basis of his permanent residency status, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. His deprivation of liberty is arbitrary according to category V.

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

51. The Working Group wishes to express its grave concern about Mr. Malekpour's physical and psychological health, which is reported to be deteriorating. According to the source, Mr. Malekpour has difficulties with breathing and eating, and a lack of proper medical and dental care has exacerbated these problems. In the last six months, Mr. Malekpour has been urgently hospitalized on two occasions, but is being refused follow-up medical attention that is urgently required. Mr. Malekpour's treatment falls short of the standards set out, *inter alia*, in rules 1, 24, 25, 27 and 42 of the Nelson Mandela Rules. Given that Mr. Malekpour has been deprived of his liberty for nearly 11 years, the Working Group urges the Government to immediately and unconditionally release him, and ensure that he receives the necessary medical care.

²² *Ibid.*, para. 38.

²³ See the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 9 and guideline 8.

²⁴ See, for example, opinions No. 52/2018, No. 49/2017, No. 7/2017, No. 50/2016, No. 28/2016, No. 44/2015, No. 28/2013 and No. 18/2013. See also opinion No. 92/2017 (detention of an Iranian national with Swedish permanent residency permit).

²⁵ A/HRC/37/68, paras. 51–57. The Secretary-General has also expressed concern relating to such prosecutions in the Islamic Republic of Iran. See A/HRC/37/24, paras. 56–57.

52. The present case is one of a number of cases brought before the Working Group in recent years concerning the arbitrary deprivation of liberty in the Islamic Republic of Iran.²⁶ The Working Group notes that many of the cases involving the Islamic Republic of Iran follow a familiar pattern of arrest and detention that does not comply with international norms; lengthy detention pending trial with no access to judicial review; denial of access to legal counsel; incommunicado detention and solitary confinement; prosecution under vaguely worded criminal offences for the peaceful exercise of human rights; a closed trial and appeal by courts lacking in independence; disproportionately harsh sentencing; torture and ill-treatment; and denial of medical care. 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.²⁷

53. The Working Group would welcome the opportunity to work constructively with the Government to address arbitrary deprivation of liberty in the Islamic Republic of Iran. Given that a significant period of time has passed since its most recent country visit to the Islamic Republic of Iran in February 2003, the Working Group considers that it is now an appropriate time to conduct another visit. The Working Group recalls that the Government issued a standing invitation to all thematic special procedure mandate holders on 24 July 2002, and looks forward to a positive response to its previous request to visit made on 19 July 2019.

54. Finally, the Working Group notes with concern that the Government did not take the opportunity to respond to the serious allegations in this case, including that Mr. Malekpour – who has been deprived of his liberty for nearly 11 years – was denied a fair trial and repeatedly tortured. These circumstances demanded a compelling justification, which was not provided by the Government. As the human rights record of the Islamic Republic of Iran will be reviewed during the third cycle of the universal periodic review in November 2019, the Government may wish to seize the present opportunity to enhance its cooperation with the special procedures and to bring its laws into conformity with international human rights law.

Disposition

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

The deprivation of liberty of Saeed Malekpour, being in contravention of articles 2, 6, 7, 8, 9, 10, 11 and 19 of the Universal Declaration of Human Rights and articles 2 (1), 2 (3), 9, 14, 16, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

56. The Working Group requests the Government of the Islamic Republic of Iran to take the steps necessary to remedy the situation of Mr. Malekpour 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.

57. The Working Group considers that, taking into account all the circumstances of the case, in particular the grave risk of harm to Mr. Malekpour's physical and psychological well-being, the appropriate remedy would be to release Mr. Malekpour immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

58. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Malekpour, including the allegations that he was tortured, and to take appropriate measures against those responsible for the violation of his rights.

59. The Working Group requests the Government to bring its laws, particularly articles 286, 500, 513 and 514 of the Islamic Penal Code, into conformity with the recommendations

²⁶ See, for example, opinions Nos. 33/2019, 83/2018, 52/2018, 19/2018, 92/2017, 49/2017, 48/2017, 9/2017, 7/2017, 50/2016, 28/2016, 25/2016, 2/2016, 1/2016, 44/2015, 16/2015, 55/2013, 52/2013, 28/2013 and 18/2013.

²⁷ See, for example, opinion No. 47/2012, para. 22.

made in the present opinion and with the commitments made by the Islamic Republic of Iran under international human rights law.

60. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to: (a) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; (b) the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; (c) the Special Rapporteur on the independence of judges and lawyers; and (d) the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, for appropriate action.

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

Follow-up procedure

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

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

63. 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.

64. 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.

65. 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.²⁸

[Adopted on 12 August 2019]

²⁸ See Human Rights Council resolution 33/30, paras. 3 and 7.