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Opinion No. 58/2020 concerning Deniz Yengin and Heydar Safari Diman (Japan)*

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 9 April 2020 the Working Group transmitted to the Government of Japan a communication concerning Deniz Yengin and Heydar Safari Diman. The Government replied to the communication on 8 July 2020. 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,

* Seong-Phil Hong did not participate in the discussion of the present case.

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. Deniz Yengin, born in 1979, is a Turkish national and an asylum seeker in Japan, residing in Tokyo. The source reports that Mr. Yengin fled from intimidation, violence, discrimination and harassment in Turkey owing to his Kurdish ethnicity, his belief in Alevism (a minority branch of Islam) and his political opinion. He arrived in the city of Osaka on 15 May 2007.

5. According to the information provided, on 27 December 2007, he applied for asylum in Japan for the first time. However, it was denied on that and on two further occasions. Mr. Yengin is currently filing another asylum application. The source notes that, to the best of its knowledge, no Kurdish individual has ever been recognized as a refugee in Japan. The source notes that in Japan, the success rate of refugee recognition was 0.25 per cent in 2018.

6. The source reports that Mr. Yengin's wife is a Japanese national. They have been married since 2011. The source submits that, while their marriage should have been the grounds for the authorities to grant Mr. Yengin residency in Japan, that has not happened.

7. According to the source, on 16 June 2008, the supervising immigration inspector issued a deportation order against Mr. Yengin, which is still valid. Mr. Yengin was detained and held in the Higashi Nihon Immigration Detention Centre pursuant to that order on several occasions, including from 16 June 2008 to 19 January 2009, from 1 December 2009 to 18 August 2010, from 15 May 2016 to 2 August 2019 and from 16 August to 25 October 2019.

8. The source notes that Mr. Yengin's longest detention lasted more than three years and two months. During that period, his legal counsel submitted 10 applications for provisional release, the first on 7 March 2017. The authorities at the Immigration Detention Centre denied all those applications. The source explains that provisional release is the only effective means of releasing foreign nationals from the Immigration Detention Centre.

9. The source reports that, in order to mitigate the stress accumulated during his long-term detention, in January 2019, Mr. Yengin made a request to the staff of the Immigration Detention Centre to be given medication. They refused and ultimately, more than 10 staff members of the Immigration Detention Centre violently twisted Mr. Yengin's wrists and used other types of excessive force against him. Following the violence suffered by Mr. Yengin, his legal counsel filed a case against the Government claiming compensation. The hearing is still ongoing.

10. In May 2019, detainees at the Immigration Detention Centre, including Mr. Yengin, started a long-term hunger strike to protest against their detention. During the hunger strike, Mr. Yengin lost a significant amount of weight. Moreover, the source reports that Mr. Yengin attempted to commit suicide on at least four occasions.

11. In August 2019, when Mr. Yengin was temporarily released for two weeks, he was diagnosed with a mental disorder that frequently affects prison inmates. One of the causes is believed to be a reaction to the extreme stress built up during his long-term detention, including the cruel treatment.

12. On 7 November 2019, Mr. Yengin was detained again and placed in the Higashi Nihon Immigration Detention Centre. He was released on 23 March 2020. That was the most recent instance of his detention. There are concerns that the pattern of repeated detentions will resume.

13. The source notes that during his most recent detention, owing to the stress he had endured during detention, Mr. Yengiz experienced strong hallucinations and he attempted to commit suicide once again. The source submits that, had it not been for the repeated

instances of indefinite immigration detention, Mr. Yengin would not have suffered from such medical conditions.

14. Heydar Safari Diman, born in 1968, is an Iranian national. He holds a passport that was issued by the Iranian authorities in Tokyo on 15 May 2012, which expired on 16 May 2017. He is an asylum seeker in Japan and lived in a church in Tokyo.

15. According to the source, Mr. Safari Diman has spent nearly 30 years in Japan since November 1991. His legal status expired in February 1992 and he subsequently applied for refugee status, which was repeatedly denied. As he could not return to his home country for fear of persecution, he continued to apply for refugee status. The source reiterates that in 2018, the refugee recognition rate in Japan was 0.25 per cent.

16. The source reports that Mr. Safari Diman was first detained on 14 January 2010 because an order was issued for his deportation. He was kept in detention until 6 December 2010. On 8 June 2016, Mr. Safari Diman's provisional release was denied, leading to his detention once again, with no explanation from the authorities, and despite the ongoing procedure to challenge the denial of refugee status that he had filed.

17. According to the source, on 7 June 2019, after three years of detention in Higashi Nihon Immigration Detention Centre, Mr. Safari Diman started a hunger strike. The source reports that during the hunger strike, his health deteriorated significantly and he lost a considerable amount of weight, fainted and vomited blood.

18. The source submits that on 31 July 2019, after three years and one month in detention, Mr. Safari Diman was provisionally released for two weeks. The short period of the provisional release had a serious psychological impact on Mr. Safari Diman, who was diagnosed with a depressive state and several other related conditions.

19. The source reports that despite suffering from considerable stress, Mr. Safari Diman has not considered escaping. On 14 August 2019, following instructions from the authorities and expecting that the extension of provisional release would be granted, he presented himself at the Tokyo Immigration Services Bureau. However, he was again detained. The source notes that the immigration authorities detained him before any medical examination was carried out and presented no reason for his repeated detention.

20. The source reports that Mr. Safari Diman started a second hunger strike, refusing to drink water for a period of time. As a result, he lost a significant amount of weight and lost consciousness on several occasions. He had to take antidepressants and sleeping pills and could not take solid food. The source describes Mr. Safari Diman's condition as life threatening.

21. The source notes that since then, Mr. Safari Diman has been provisionally released and detained again twice; the most recent period of detention lasted from 21 January to 3 April 2020. Mr. Safari Diman was instructed to present himself to the immigration authorities on 1 May 2020. There are concerns that the pattern of repeated detention will resume.

Legal analysis

22. The source submits that the Immigration Bureau's repeated detentions of Mr. Yengin and of Mr. Safari Diman are arbitrary and fall under categories I and IV. The source also submits that their repeated detentions are an example of a wider pattern of such detentions in the context of immigration proceedings.

23. In relation to category I, the source asserts that the repeated detentions lack legal basis. It notes that international standards require that the reasons justifying detention of migrants without legal status, such as the risk of absconding, and the facilitation of the expulsion of an irregular migrant who has been served with a removal order must be clearly defined and exhaustively enumerated in national legislation. International standards also require that the need to detain should be assessed on an individual basis and should not be based on a formal assessment of the migrant's current migration status. The detention must comply with the principle of proportionality and, as such, automatic or mandatory detention in the context of migration is arbitrary.

24. The source recalls that, according to international standards, detention during migration proceedings must be justified as reasonable, necessary and proportionate in the light of the circumstances specific to the individual case. Such detention is permissible only for the shortest possible period, must not be punitive in nature and must be periodically reviewed as it extends over time. The indefinite detention of individuals during migration proceedings cannot be justified and is arbitrary.

25. The source reports that immigration detention in Japan, including detention pursuant to a deportation order, which is the case for both Mr. Yengin and Mr. Safari Diman, is governed by the Immigration Control and Refugee Recognition Act. Judicial approval or review is not required for such detention and a person who is subject to a deportation order can be deported pursuant to the deportation order (art. 52 (3) of the Act). In addition, the Act does not set out a maximum detention period or provide for the periodical review of continued detention.

26. The source thus submits that the Immigration Bureau, based on the above-mentioned provision of the Act, is following the policy that in principle, all foreign nationals for whom a deportation order has been issued should be detained for an indefinite term and the Immigration Bureau may decide whether to detain or release them at its discretion, without any approval or review by a judicial authority.

27. The source reports that, with regard to the procedures for provisional release, article 54 (2) of the Act provides that the director of the immigration detention centre or a supervising immigration inspector may grant provisional release to foreign nationals, taking into consideration such matters as circumstances, evidence produced in support of the application, character and the assets of the foreign national, upon payment by the foreign national of a deposit not exceeding 3 million yen, as provided for by a Ministry of Justice ordinance, and with conditions as may be deemed necessary, such as restrictions on the place of residence and area of movement and the obligation to appear in response to a summons.

28. The source emphasizes the fact that judicial approval is not required for that procedure and that the law does not establish the length of time within which the determination on the provisional release should be made. Furthermore, when a provisional release is denied, no reason for the denial is stated.

29. The source submits that there is no specific reason for the repeated detentions of Mr. Yengin and Mr. Safari Diman after their provisional release and that the detentions therefore did not meet the requirement of necessity or of a legal basis. No new conditions necessitating their detention have arisen and the Immigration Bureau has not provided any explanation proving otherwise. The source thus submits that their repeated detentions clearly did not comply with the principle of proportionality.

30. The source asserts that the need to repeatedly detain Mr. Yengin and Mr. Safari Diman was not assessed on an individual basis and that there was merely a formal assessment of their current migration status. The source submits that detention in the context of migration is therefore mandatory and indefinite in principle.

31. The source argues that the above-mentioned repeated detentions had an extremely negative impact on the human dignity of the two asylum seekers, who were released for a brief period after a long-term detention and then detained again. The two individuals were granted provisional release for a two-week period, during which they lived in constant fear of being detained again.

32. The source submits that the purpose of the repeated detentions was to produce a chilling effect on those undertaking a hunger strike while in detention, and to persuade the detainees to voluntarily return to their own countries, as well as to conceal the issue of prolonged detention by temporarily suspending the detention. The source explains that temporarily releasing the detainees resets the continuous detention period to zero and enables the authorities to shorten the statistical average of the detention period.

33. The source asserts that immigration detention is used as a punishment and as a means of indirectly coercing those who refuse deportation. It also serves as a preventive

measure, based on the discriminatory notion that migrants who do not have legal permission to stay in Japan pose a threat to public safety.

34. With regard to category IV, the source submits that international standards require that any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest possible period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity, if in doubt.

35. In addition, international standards require that any form of detention, including during migration proceedings, must be ordered and approved by a judge or other judicial authority. Anyone detained in the course of migration proceedings must be brought promptly before a judicial authority, before which they should have access to automatic, regular periodic reviews of their detention to ensure that it remains necessary, proportional, lawful and non-arbitrary.

36. The source states that Mr. Yengin and Mr. Safari Diman are asylum seekers who have been detained for prolonged periods of time before being provisionally released for two weeks and detained again. The source submits that the provisional release is in fact simply a temporary suspension of the detention and their detention can be deemed continuous from the time prior to the provisional two-week release.

37. The source states that there was no judicial approval of those detentions from the very outset. In addition, there was no administrative review available for the decision to detain the above-mentioned individuals again. Neither judicial approval nor review specific to the repeat detention is required by national law.

38. The source submits that timely, effective judicial remedies are not available. The only remedy against the administrative disposition denying an extension of the provisional release is to file an action for the revocation of the administrative disposition asserting that it constitutes an abuse of administrative discretion. Nevertheless, given that it is an ordinary judicial proceeding, it would take about one or two years for the court to reach a decision.

Response from the Government

39. On 9 April 2020, the Working Group transmitted the allegations from the source to the Government of Japan under its regular communications procedure. The Working Group requested the Government to provide, by 8 June 2020, detailed information about the current situation of Messrs. Yengin and Safari Diman. It also requested that the Government clarify the legal provisions justifying their continued detention, as well as the compatibility of their continued detention with Government's obligations under international human rights law, particularly with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Messrs. Yengin and Safari Diman.

40. On 18 May 2020, the Government requested an extension, as provided for in the Working Group's methods of work, which was granted with the new deadline of 8 July 2020. The Government submitted its reply on 8 July 2020. However, the original reply was submitted in Japanese and the translation was submitted later. The Government explained that the delay was due to the coronavirus disease (COVID-19) pandemic. Given the prevailing circumstances of the worldwide pandemic and the restrictions it had imposed globally, and noting the explanation provided by the Government in that case, the Working Group exceptionally accepted the reply as have been submitted on time.

41. In its reply, the Government confirms that the detentions of Mr. Yengin and Mr. Safari Diman were implemented appropriately based on national laws and regulations. In addition, both individuals were provisionally released and, as at 7 July 2020, have not been detained again.

42. The Government explains that more personal details cannot be provided, on the grounds of the provisions of article 8 of the Act on the Protection of Personal Information Held by Administrative Organs. However, the detentions of Messrs. Yengin and Safari Diman were implemented appropriately and do not conflict with the Covenant or any other

human rights treaties that Japan has ratified, nor do they fall under the category of arbitrary detention.

43. Regarding the Japanese legal framework applicable to the present case, the Government explains that a foreign national is never deported based on an arbitrary exercise of executive power. The Government recognizes that under international law, in general, a foreign national residing lawfully in the territory of a country may not be expelled from the country without going through procedures conducted in accordance with the law. Therefore, to provide for equitable control over residence of all foreign nationals residing in Japan, Japan established the Immigration Control and Refugee Recognition Act. In Japan, deportation of all foreign nationals is implemented based on the procedures stipulated in that Act and other relevant laws and regulations.

44. The Act contains a specific, exhaustive list of the grounds for deportation, such as illegal entry, illegal landing and overstaying; deportation is never implemented in other cases (art. 24). Moreover, prior to issuing a deportation disposition, fact-finding is conducted by an immigration inspector objectively, in the light of the results of an investigation. An objection may be filed with a special inquiry officer against the findings of the immigration inspector and with the Minister of Justice against the decision made by the special inquiry officer. Furthermore, even if the Minister finds that a filed objection is unreasonable, he or she may grant special permission to stay if he or she finds grounds to do so, comprehensively taking into consideration the foreign national's family situation and various other circumstances, on a case-by-case basis. A written deportation order, along with the reason for the deportation, is to be shown to a person subject to deportation (arts. 51 and 52 (3) of the Act). The person for whom the written deportation order has been issued may request a judicial review by filing an administrative lawsuit with a court, seeking revocation or the declaration of nullity of the order (Administrative Case Litigation Act, art. 3).

45. Furthermore, access to the judicial process is guaranteed since the authorities are required to inform the person subject to the disposition of both his or her right to file an action for revocation of administrative disposition and of the statute of limitations for filing an action (art. 46 of the Administrative Case Litigation Act). Thus, Japan has adopted a mechanism guaranteeing that foreign nationals are never deported from Japan in contradiction to the foreign national's will on the basis of the arbitrary exercise of executive power.

46. The Government therefore argues that the Immigration Control and Refugee Recognition Act ensures fair procedures and consideration for human rights and is fully compatible with the Convention relating to the Status of Refugees, the Covenant, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the other important international human rights treaties that Japan has ratified. In addition, Japan has a mechanism to ensure fulfilment of the obligations stipulated in the treaties, including those derived from the principle of non-refoulement.

47. The Government explains that a foreign national is never detained on the basis of the arbitrary exercise of executive power. An immigration control officer may, if he or she has reasonable grounds to believe that a foreign national staying in Japan falls under any of the grounds for deportation, detain the foreign national pursuant to a written detention order (art. 39 (1) of the Immigration Control and Refugee Recognition Act). "Reasonable grounds to believe" should not be based on the immigration control officer's subjective judgment; such grounds are required to be objective and reasonable to lead to suspicion. The objectiveness of a decision by the supervising immigration inspector on whether or not to issue a written detention order is also guaranteed as the decision is made based on the results of an investigation into violations of the Act by an immigration control officer, or based on a final and binding judgment of conviction in the criminal procedure pertaining to the foreign national concerned. Moreover, the above-mentioned administrative lawsuit may be filed against the issuance of a written detention order or a detention based on such an order, which means that the decision of the supervising immigration inspector is subject to judicial review in the lawsuit.

48. Nevertheless, according to the Government, even if a written detention order has been issued, the foreign national may not necessarily be detained. Depending on the foreign national's residence status in Japan and whether he or she has violated any laws or regulations subject to the deportation procedures, provisional release may be accorded before detention (art. 54 (2) of the Act). In such a case, the deportation procedures may be carried out without actual detention. Moreover, widespread use is made of the departure order system whereby a person who satisfies the requirement of voluntary appearance at an immigration services bureau or office with the intention of departing from Japan promptly and other necessary requirements is to be ordered to depart from Japan without any detention (arts. 24 (3) and 55 (2) of the Act). In 2019, the cases of 8,713 foreign nationals were dealt with subject to that system. In Japan, only people who are not subject to the departure order system or to provisional release before detention are to be detained.

49. The Government explains that a period of detention determined pursuant to a written detention order is relatively short as the period of detention can last 30 days in principle. It may be extended once for an additional 30 days only if there are unavoidable reasons for doing so (art. 41 of the Act). Furthermore, a person who has an objection to detention may file an action for revocation of each administrative disposition rendered in the deportation procedures and may, in addition, file a petition for stay of execution of a detention disposition. Where a petition for stay of execution of a detention disposition is filed, if the court finds that "there is an urgent necessity in order to avoid any serious damage", the court may, by an order, stay the execution of the detention promptly (art. 25 of the Administrative Case Litigation Act). Thus, judicial review is conducted in a prompt manner.

50. Furthermore, where a person detained pursuant to a written detention order, or the person's representative or family member, applies for provisional release, the Director of the Immigration Detention Centre or the supervising immigration inspector may accord provisional release to the person. They take into consideration such matters as the circumstances and evidence produced in support of the application, and impose certain conditions on the provisional release (art. 54 (2) of the Immigration Control and Refugee Recognition Act). Whether or not to accord provisional release is to be decided through a substantive examination conducted into the specific characteristics of each case, such as the suspected offence or the grounds for deportation, the detainee's character, age, behaviour and conduct, his or her family situation, the progress of an administrative lawsuit if it is pending, the progress of procedures for refugee recognition if it has been applied for, and the likelihood that the detainee will flee or violate conditions imposed on provisional release.

51. However, in a case where it is not appropriate to grant permission for provisional release, for example, where a foreign national is found to be likely to flee or has violated conditions imposed on provisional release, permission for provisional release or its extension may not be granted, or the permission for provisional release may be revoked, and therefore the foreign national may be detained again. In addition, even a person who is detained again due to revocation of permission for provisional release may subsequently be accorded provisional release and the person may be detained again on the same grounds as mentioned above.

52. The Government submits that, according to the Act, the deportation of a person for whom a written deportation order has been issued is to be implemented promptly. However, countries referred to in article 33 (1) of the Convention relating to the Status of Refugees, in article 3 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in article 16 (1) of the International Convention for the Protection of All Persons from Enforced Disappearance are excluded as deportation destinations (art. 53 (2) (i)–(iii) of the Act), which is compatible with the human rights treaties that Japan has ratified.

53. The Act stipulates that a period of detention may continue until such time as deportation becomes possible (art. 52 (5)). Deportation is to be implemented as promptly as possible in the first place (art. 52 (3)), and if a person for whom a deportation order has been issued wishes to leave Japan voluntarily in accordance with the deportation disposition, the detention is to end immediately (art. 52 (4)). Even if a person cannot be

deported immediately due to the person's refusal to depart or any other reason, upon application by the person, or the person's representative or family member, a substantive examination of provisional release is to be conducted in the light of the specific characteristics of each case. In practice, the provisional release system is operated flexibly until deportation is implemented.

54. The Government notes that, as at the end of December 2019, 942 persons were detained pursuant to written deportation orders, and 2,217 persons were granted provisional release. Thus, provisional release is granted to about 70 per cent of persons for whom written deportation orders have been issued; they were still in Japan as at the end of that month. Those figures show that the provisional release system is operated as flexibly as possible in Japan.

55. Furthermore, since there is no limitation on the timing or the number of times that an application can be made for provisional release, a detainee who thinks that they satisfy the requirements may make an application at any time. Even without an application being made by the detainee, in a case where provisional release is urgent and truly unavoidable, but where it is difficult for a detainee to make an application, provisional release is accorded ex officio based on the determination by the competent authority that there are adequate grounds for it.

56. The system in Japan ensures that the only persons who are detained for long periods are those for whom provisional release is deemed to be inappropriate because, for example, of the need to prevent their escape, including those who evade deportation and are likely to flee.

57. Incidentally, in Japan, a considerable percentage of detainees who evade deportation are in the course of applying for refugee recognition, and there are also a considerable number of detainees who have made applications several times. As at the end of December 2019, of the 649 detainees who were evading deportation, 391 (60 per cent) were in the course of applying for refugee recognition. Of those 392, 227 detainees (58 per cent) have made applications several times.

58. The Government takes note of the Working Group's revised deliberation No. 5 (A/HRC/39/45, annex), in which it states that when deportation is not implemented owing to an obstacle that is not attributable to a detainee who is evading deportation, the detainee must be released. The Government emphasizes that, in Japan, the only persons for whom periods of detention turn out to be long are those who present a flight risk and for whom grounds for provisional release cannot be found, given their refusal to depart from Japan of their own free will, regardless of their lack of residential status in Japan and the likelihood that they will flee or engage in other misconduct. If the Government allows such detainees to be provisionally released, regardless of the fact that the detention period becomes unavoidably long owing to those risks, the result would be the detainee's continued illegal stay in Japan, taking advantage of the absence of means to physically compel deportation. That would be inconsistent with the purpose of the Immigration Control and Refugee Recognition Act, which is to provide for equitable control over residence of all foreign nationals residing in Japan.

59. The Government notes that in several developed countries, including in Europe, no upper limit is set on the length of detention under laws and regulations. If the system in Japan as a whole is examined in a comprehensive manner and the practices of other countries are referred to, it is obvious that it is not appropriate to point out that arbitrary detention is implemented in Japan on the grounds that there may be persons in Japan for whom periods of detention turn out to be long as a result of those persons' refusal of deportation.

60. Turning to the treatment received in immigration detention facilities, the Government explains that, in accordance with the provisions of the Immigration Control and Refugee Recognition Act, the Regulation on the Treatment of Detainees was developed as a Ministry of Justice ordinance to secure appropriate treatment of detainees in immigration detention facilities. Personnel engaged in detention and care of detainees are required to treat detainees appropriately based on the regulation. In order to maintain safety and order in detention facilities and to ensure that detainees live undisturbed in detention

facilities, the regulation stipulates, inter alia, that detainees must not attempt to harm themselves. It also requires detention facility staff to take into consideration detainees' health and safety, stipulating that if a detainee contracts a disease or becomes injured, the detention facility staff must have the detainee diagnosed by a doctor and take appropriate measures, depending on the detainee's condition. Thus, necessary medical services are to be provided to a detainee without charge, unless the detainee refuses to receive them.

61. Furthermore, the Regulation on the Treatment of Detainees establishes the system for filing an objection and other relevant systems which serves as a mechanism to ensure appropriate treatment of detainees. Moreover, even though there are unavoidable reasons for detention, as long as immigration detention facilities are facilities for taking detainees into custody, the transparency of treatment should be secured in the facilities. The Government therefore established the Immigration Detention Facilities Visiting Committee, which conducts visits to immigration detention facilities, interviews detainees and makes recommendations to the directors of immigration detention facilities based on the results. The Committee reports on the operation of immigration detention facilities, such as the maximum capacity, the number of detainees and the structure of the management of the immigration detention facilities, as well as the provision of hygiene and medical care to the detainees, visits and the sending and receiving of correspondence, and any complaints filed by the detainees. The mechanism functions well to ensure the transparency of treatment under immigration control and improve the operation of immigration detention facilities.

62. Since the role of the Committee is to provide the directors of immigration detention facilities with opinions that reflect citizens' sound common sense, members of the Committee are appointed through, for example, nominations from public and private organizations in order to prevent the overrepresentation of any one professional group or organization. The participation of a wide range of persons from various fields, such as persons with relevant expertise, legal professionals, medical experts and international organization personnel is sought, thereby ensuring the fairness of the appointment method. Since the treatment of detainees is checked by committees composed of third parties through visiting immigration detention facilities and interviewing detainees, the transparency and appropriateness of the treatment of detainees are ensured.

63. With respect to a query from the Working Group on measures taken against COVID-19 at detention centres, the Government notes that the immigration detention facilities have responded to diseases based on the provisions of article 31 (preventive measures against infectious diseases) and article 32 (measures for patients with infectious diseases) of the Regulation on the Treatment of Detainees. For example, in the season when influenza becomes epidemic, measures are taken to ensure that personnel who come in and out of the detention facility wear masks and wash their hands. In the face of the new coronavirus pandemic, a new manual was drawn up on COVID-19 disease control at immigration detention facilities, following advice from professionals. Preventive measures against infection are taken at immigration detention facilities based on the manual. Specifically, various measures are taken at each detention facility, such as ensuring that personnel wear masks, wash their hands and take other infection prevention measures, and new detainees are held separately from others for about two weeks.

64. The provisional release system has been utilized in cases where it is deemed appropriate, based on comprehensive consideration of each detainee's state of health and other circumstances. Given the current situation, where deportation to some countries is impossible or difficult at a practical level due to the cancellation of flights owing to the COVID-19 pandemic, the provisional release system is more actively applied to detainees for whom provisional release can be accorded, in order to avoid overcrowding in detention facilities.

65. In relation to the source's allegation that the refugee recognition rate is only 0.25 per cent in Japan, the Government recognizes that the purpose of the communication is for the Working Group to consider whether or not the detentions of the foreign nationals referred to fall under the category of arbitrary detention, but not whether the foreign nationals should be recognized as refugees. Consequently, the Government makes no detailed statements on the issue, but emphasizes that in order to protect persons who are truly in need of protection, the Government operates its refugee recognition system appropriately.

When doing so, the Government fully examines each application and recognizes persons who should be recognized as refugees based on the definition stipulated in the Convention relating to the Status of Refugees. The refugee recognition system in Japan was established in coordination with the country's accession to the Convention and the Protocol relating to the Status of Refugees. Under the system, a person who is recognized as a refugee by the Minister of Justice through the prescribed procedures may be treated in a similar way to Japanese nationals with regard, for example, to eligibility for receiving the national pension, child rearing and welfare allowances.

66. In addition, on the premise that the detentions concerned do not fall under the category of arbitrary detention, the Government explains that, as mentioned above, there are currently a certain number of deportation evaders in Japan, and an increase in the number of such deportation evaders impairs the purpose of the deportation system and is becoming a major cause of prolonged periods of detention of persons subject to deportation. In order to fully examine measures to prevent such a situation from arising and the manner of detention, in October 2019, an expert meeting on detention and deportation was established under the Immigration Policy Discussion Panel, which is a private consultative group of the Minister of Justice. Discussion and examination of specific measures, including legislation, was conducted by experts and practitioners with relevant expertise on how detention and treatment should be conducted at immigration detention facilities.

67. The examination results will be put into a report entitled Proposals for Resolution of the Issue of Deportation Evasion and Long-term Detention. The report is scheduled to be submitted to the Minister of Justice in July 2020. The Immigration Services Agency will endeavour to examine the report promptly and to implement specific measures.

68. The Government therefore rejects the allegations and emphasizes that it has conducted the necessary reviews of systems concerning detention and deportation and their operation while paying attention to various opinions.

Further information from the source

69. The Government's reply was transmitted to the source for further comments, which the source submitted on 23 July 2020. In its reply the source reiterates the allegations, emphasizing that the Government has not addressed the individual cases of Messrs. Yengin and Safari Diman, but rather focused solely on explaining the legal framework applicable to their detention.

Discussion

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

71. 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).

72. As a preliminary issue, the Working Group notes that neither Mr. Yengin nor Mr. Safari Diman were detained at the time when the submissions were made. However, the Working Group notes that both individuals have been detained for considerable periods of time on numerous occasions over a decade. The present case also concerns important aspects of the legal framework surrounding detention immigration in Japan. Therefore, it shall proceed to consider the communication in accordance with paragraph 17 (a) of its methods of work.

73. As a further preliminary issue, the Working Group notes the Government's position that it is unable to provide information on the cases of Messrs. Yengin and Safari Diman because Japanese law does not permit publication of information regarding their cases. However, as the Working Group has previously stated in its jurisprudence relating to Japan, it is "not sufficient for the Government to argue that its national legislation prevents it from

providing a detailed explanation of the actions of the national authorities".[1] The Working Group elaborated on its reasoning as follows:

> Given that the Working Group was created to serve the needs of victims of arbitrary arrests and detention worldwide and for Member States to hold each other accountable, Member States must have intended for the mechanism to resolve the disputes brought by the victims. That was also the motivation of the Human Rights Council when it reminded States to cooperate fully with the Working Group, as it did most recently in its resolution 33/30.
>
> Therefore, a reply from the Government is normally expected by the Working Group within 60 days, during which appropriate inquiries may be carried out by the Government so as to furnish the Working Group with the fullest possible information. The contention by the Government that its national legislation prevents it from providing detailed information is incompatible with this requirement.[2]

74. The source has submitted that the detention of Messrs. Yengin and Safari Diman was arbitrary and falls under categories I and IV of the Working Group. The Government denies those allegations.

Category I

75. The Working Group recalls that it considers a detention to be arbitrary and to fall under category I if the detention lacks legal basis. In the present case, it observes that Messrs. Yengin and Safari Diman were repeatedly detained in accordance with the Immigration Control and Refugee Recognition Act, which allows detention pursuant to a deportation order without judicial approval or review. Moreover, article 54 (2) of the Act empowers the director of the immigration detention centre or a supervising immigration inspector to grant provisional release to foreign nationals, taking into consideration such matters as circumstances, evidence produced in support of the application, character and the assets of the foreign national, upon payment by the foreign national of a deposit not exceeding 3 million yen, as provided for by a Ministry of Justice ordinance, and with conditions as may be deemed necessary, such as restrictions on the place of residence and area of movement and the obligation to appear in response to a summons. Therefore, pursuant to the Act, both the detention and the release from such detention are ordered by the executive. However, the Act does not establish the length of time in which the determination on the provisional release should be made, thus giving the executive unlimited discretion.

76. The Working Group recalls that, even though detention may be authorized by domestic law, it nonetheless may be arbitrary since the notion of "arbitrariness" is not to be equated with "against the law", but rather interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[3] In the present case, both Mr. Yengin and Mr. Safari Diman were repeatedly detained, and never told the reasons for their detention or how long they would remain in detention. Although detention in the context of migration must be an exceptional measure of last resort,[4] based on an individualized assessment of the need to detain,[5] neither of them was ever assessed by the Japanese authorities. Neither did the authorities ever consider alternatives to detention, which they were obliged to do under international law.[6] In this regard, the Working Group notes the uncontested allegations concerning the bail levels to which those in immigration detention are subjected. The Working Group recalls that setting bail at excessively high levels which those subjected to detention in the course of immigration proceedings are unable to pay

[1] Opinion No. 70/2018, para. 32.
[2] Opinion No. 70/2018, paras. 32–33. See also Human Rights Council resolution 42/22, paras. 7 and 9; and A/HRC/36/38, para. 15.
[3] Human Rights Committee, general comment No. 35, para. 12.
[4] Revised deliberation No. 5, para. 12.
[5] Ibid., paras. 14, 19 and 22.
[6] Ibid., paras. 16 and 24. See also A/HRC/30/37, para. 111.

cannot be said to meet the requirement of alternatives to detention as, de facto, excessive bails do not provide a real alternative to detention for those who are detained.[7]

77. The Working Group finds it particularly concerning that both individuals had lived in Japan for very long periods of time prior to their detention – 13 and 30 years respectively – which should have been taken into consideration by the authorities. The Working Group is mindful that in its response, the Government has only provided information on the provisions of the Immigration Control and Refugee Recognition Act, without any details as to how the Act was applied to the specific circumstances of Messrs. Yengin and Safari Diman.

78. Furthermore, the Working Group is concerned about the unchallenged allegations that Mr. Yengin and Mr. Safari Diman were periodically granted temporary two-week or longer periods of release, which they spent in constant fear of being detained again. The Working Group deems that practice to be contrary to the fundamental principle requiring that any detention in the migration context be a measure of last resort and that it satisfy the requirements of necessity and reasonableness. As the Working Group explained in its revised deliberation No. 5 (para. 22):

> The element of reasonableness requires that the detention be imposed in pursuance of a legitimate aim in each individual case. This must be prescribed by legislation that clearly defines and exhaustively lists the reasons that are legitimate aims justifying detention. Such reasons that would legitimize the detention include the necessity of identification of the person in an irregular situation or risk of absconding when their presence is necessary for further proceedings.

79. Mr. Yengin and Mr. Safari Diman were never given an explanation of the reasons for their detention. Moreover, the Government did not provide any such explanation in its response. Indeed, the Working Group would struggle to accept that there could be any legitimate reasons justifying the detention of an individual for periods of between six months and three years over a decade with intermittent periods of release from detention. The Working Group therefore considers that, de facto, the Immigration Control and Refugee Recognition Act allows for indefinite immigration detention which is arbitrary as it cannot be reconciled with the obligations of Japan under article 9 (1) of the Covenant.

80. Moreover, the Working Group recalls that, according to 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, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[8] This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty,[9] to "all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including … migration detention, detention for extradition".[10] Moreover, it also applies "irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary".[11]

81. In the present case, Messrs. Yengin and Safari Diman were repeatedly detained owing to their migratory status over a decade for considerable periods of time. In none of those instances was either of them ever presented before a judicial authority to enable them to challenge the legality of their detention. The Working Group emphasizes that judicial oversight of any form of detention is a fundamental safeguard of personal liberty,[12] and is

[7] See opinion No. 49/2020.
[8] A/HRC/30/37, paras. 2–3.
[9] Ibid., para. 11.
[10] United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), para. 47 (a).
[11] Ibid., para. 47 (b).
[12] A/HRC/30/37, para. 3.

essential in ensuring that detention has a legal basis. This was denied to Messrs. Yengin and Safari Diman, in breach of article 9 (4) of the Covenant.

82. Consequently, the Working Group concludes that the repeated detention of Mr. Yengin and Mr. Safari Diman was arbitrary as lacking legal basis, falling under category I.

83. The Working Group expresses its serious concern over the compatibility of the Immigration Control and Refugee Recognition Act of Japan with the country's obligations under international law and the Covenant in particular. The Working Group urges the Government to promptly review this Act to ensure that it duly reflects the right to personal liberty of everyone.

Category II

84. Although the source has not made submissions under category II, the Working Group considers that the submissions reveal that the sole reason for the detention of Messrs. Yengin and Safari Diman was their seeking asylum in Japan and having lodged applications for the recognition of this status. This has not been challenged by the Government.

85. The Working Group reiterates that seeking asylum is not a criminal act; on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights.[13] The Working Group also reiterates that deprivation of liberty in the immigration context must be a measure of last resort and alternatives to detention must be sought to meet the requirement of proportionality.[14] Moreover, as the Human Rights Committee argued in its general comment No. 35 (2014) on liberty and security of person:

> Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security (para. 18).

86. In the present case, Messrs. Yengin and Safari Diman were repeatedly detained by the Japanese authorities without any reasons being provided for their detention. It is clear to the Working Group that this could not have been in pursuance to any of the legitimate aims such as to document their entry or to verify their identities. In fact, the Working Group is convinced that Messrs. Yengin and Safari Diman were detained purely for their legitimate and peaceful exercise of their right to seek asylum as enshrined in article 14 of the Universal Declaration. Their detention was therefore arbitrary and falls under category II.

Category IV

87. The Working Group recalls that detention is arbitrary and falls under category IV when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.

88. The Working Group has already recalled that the right to challenge the legality of detention belongs to anyone detained, including those detained in the context of migration, as were Messrs. Yengin and Safari Diman.

89. The Working Group notes that the Government has not challenged the claim that Messrs. Yengin and Safari Diman were repeatedly detained for periods ranging between six months and more than three years, over the space of a decade. The total time that Mr. Yengin has been detained is nearly five years and Mr. Safari Diman has been detained for nearly four and a half years. During this time, they have never been presented before a judicial authority to enable them to challenge the legality of their detention, as the Working

[13] See, for example, opinions No. 28/2017, No. 42/2017, No. 72/2017, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 7/2019, No. 74/2019 and No. 49/2020. See also revised deliberation No. 5, para. 9.

[14] A/HRC/10/21, para. 67. See also revised deliberation No. 5, paras. 12 and 16.

Group has already established. Nor was their detention subject to any form of periodic judicial review to ensure the continued legality of their detention, noting the changes in circumstances over time as required by international law.[15] The Working Group notes that, even in its late response, the Government has provided no explanation concerning the specific cases of Messrs. Yengin and Safari Diman.

90. Moreover, as the Working Group has already noted, detention in the course of migration proceedings must satisfy the cumulative elements of reasonableness, necessity and proportionality in each individual case.[16] This requires that individualized assessment is carried out in respect of each person to be detained in the context of migration. In the present case, neither Mr. Yengin nor Mr. Safari Diman were individually assessed to ascertain whether detention of each of them would be reasonable, necessary and proportionate in the light of the specific circumstances of their individual cases. The Working Group notes that detention was deemed appropriate for individuals who were so compliant with the requests of authorities that, even after several periods of detention, they still presented themselves to the authorities at the first request. Moreover, both had lived in Japan for decades and clearly neither presented a risk of absconding or a risk to society. The only reason for their continued repeated detention was the wish of the authorities to punish them for exercising their legitimate right to seek asylum. The Working Group observes that, in its response, the Government has failed to present any reasons for their repeated detention.

91. Furthermore, it is clear to the Working Group that either of them could be detained again at any time and once again find themselves in detention without any effective means to challenge the legality of their detention or any knowledge of when they might be released. In the view of the Working Group, they are therefore subjected to mandatory, indefinite detention in the migration context. The Working Group emphasizes that indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.[17] That is why the Working Group has required that a maximum period for detention in the course of migration proceedings must be set by legislation and that, upon the expiry of the period for detention set by law, the detained person must be automatically released.[18]

92. Consequently, the Working Group finds that Messrs. Yengin and Safari Diman were subjected to indefinite immigration detention, which is contrary to the obligations Japan has undertaken under international law, particularly article 9 of the Covenant. The Working Group therefore concludes that Messrs. Yengin and Safari Diman have been denied an effective remedy to challenge their detention in breach of articles 8 and 9 of the Universal Declaration and articles 2 (3) and 9 of the Covenant and that their detention is therefore arbitrary, falling under category IV.

Category V

93. Although the source has not made submissions under category V, the Working Group considers that the submissions warrant examination under this category as well.

94. The Working Group observes a pattern between the cases of Mr. Yengin and Mr. Safari Diman, as presented by the source and not contested by the Government, and the repeated detention of individuals with irregular migratory status who have applied for asylum status in Japan and continue to pursue these applications for years. Both Messrs. Yengin and Safari Diman have been in and out of immigration detention facilities in Japan since 2008 and 2010 respectively, which is an impermissibly long period of time, as the Working Group has already established. The only reason for this was their migratory status.

[15] Revised deliberation No. 5, para. 14.

[16] Ibid., para. 20.

[17] Ibid., para. 18, and opinions No. 42/2017, No. 28/2017 and No. 7/2019. See also A/HRC/13/30, para. 63.

[18] Revised deliberation No. 5, para. 25. See also A/HRC/13/30, para. 61, and opinion No. 7/2019.

95. The Working Group observes that in 2007, the Committee against Torture expressed its concerns over the lack of judicial review for asylum applicants in Japan and over the length of detention in the migration context, which the Committee observed can be long-term and even indefinite.[19] In 2013, during the subsequent review of the situation in Japan, the Committee against Torture once again repeated its concerns, and recommended that detention in the context of migration in Japan be used only as a measure of last resort.[20]

96. In 2014, the Human Rights Committee expressed its concern at the lack of an independent appeal mechanism with suspensive effect against negative decisions on asylum. It also expressed concern at the prolonged periods of administrative detention without adequate reasons being given and without independent review of the detention decision.[21] In 2018, the Committee on the Elimination of Racial Discrimination expressed its concern at the reportedly very low acceptance rate of asylum applications by the State party (19 out of 11,000 applications). It was also concerned by the detention of asylum seekers for indeterminate periods, without establishing fixed time limits for their detention.[22]

97. The Working Group observes that the issues raised by the source repeat the concerns of those treaty bodies, which span a decade. In its view, therefore, there is a pattern of adopting a discriminatory attitude towards individuals who seek asylum in Japan and the detention of Messrs. Yengin and Safari Diman, resulting from their migratory status, all of which is in breach of article 26 of the Covenant, falling under category V. The Working Group refers the case to the Special Rapporteur on the human rights of migrants for further action.

98. The Working Group expresses its concern over the reported health issues of Messrs. Yengin and Safari Diman. The unrebutted allegations by the source indicate that they have been diagnosed with severe mental health conditions and that there are concerns over their physical health resulting from the hunger strikes both men have undertaken. The arbitrary deprivation of liberty to which Messrs. Yengin and Safari Diman have been subjected, as the Working Group has hereby confirmed, is likely to have exacerbated their conditions. The Working Group calls upon the Japanese authorities to ensure that the right to health of Messrs. Yengin and Safari Diman is duly respected and safeguarded and that they receive all appropriate treatment and medication, free of charge. The Working Group refers the case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

99. The Working Group would welcome the opportunity to work constructively with the Government of Japan to address its serious concerns relating to arbitrary deprivation of liberty. On 30 November 2016, the Working Group sent a request to the Government to undertake a country visit and welcomes the engagement of the Government through the meetings the Working Group has held with the Permanent Mission of Japan to the United Nations Office and other international organizations in Geneva to discuss further the possibility of such a visit. On 2 February 2018, the Working Group sent a further request to the Government to undertake a country visit and hopes that it will receive a positive response from the Government as a sign of its willingness to enhance its cooperation with the special procedures of the Human Rights Council.

Disposition

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

> The deprivation of liberty of Deniz Yengin and Heydar Safari Diman, being in contravention of articles 2, 3, 8, 9 and 14 of the Universal Declaration of Human Rights and articles 2, 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, IV and V.

[19] CAT/C/JPN/CO/1, para. 14.
[20] CAT/C/JPN/CO/2, para. 9.
[21] CCPR/C/JPN/CO/6, para. 19.
[22] CERD/C/JPN/CO/10-11, para. 35.

101. The Working Group requests the Government of Japan to take the steps necessary to remedy the situation of Messrs. Yengin and Safari Diman without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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

103. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Messrs. Yengin and Safari Diman and to take appropriate measures against those responsible for the violation of their rights.

104. The Working Group urges the Government to review the Immigration Control and Refugee Recognition Act to ensure its compatibility with the obligations Japan has undertaken under the Covenant.

105. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the human rights of migrants and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, for appropriate action.

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

Follow-up procedure

107. 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 compensation or other reparations have been made to Messrs. Yengin and Safari Diman;

(b) Whether an investigation has been conducted into the violation of Messrs. Yengin's and Safari Diman's rights and, if so, the outcome of the investigation;

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

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

108. 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.

109. 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.

110. 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.[23]

[*Adopted on 28 August 2020*]

[23] Human Rights Council resolution 42/22, paras. 3 and 7.