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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 71/2021 concerning Sherwan Amin Naou, Kahdar Hammad Amin Zebari, Ayaz Karam Rachid, Hariwan Issa Mohammad and Mulla Shafan Saeed Omar Brushki (Iraq)

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 work¹ on 4 August 2021, the Working Group transmitted to the Government of Iraq a communication concerning Sherwan Amin Naou, Kahdar Hammad Amin Zebari, Ayaz Karam Rachid, Hariwan Issa Mohammad and Mulla Shafan Saeed Omar Brushki. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability,

¹ [A/HRC/36/38](#).



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. Sherwan Amin Naou, commonly known as Sherwan Sherwani, was born in 1983 in Erbil. He is an Iraqi Kurdish citizen and an independent journalist. He usually resides in Erbil.
5. Kahdar Hammad Amin Zebari is an Iraqi Kurdish citizen. He is a journalist from Akre.
6. Ayaz Karam Rachid is an Iraqi Kurdish citizen. He is a journalist and civil society activist. He usually resides in the city of Dohuk.
7. Hariwan Issa Mohammad is an Iraqi Kurdish citizen. He is a teacher and civil society activist. He usually resides in Simele.
8. Mulla Shafan Saeed Omar Brushki (Dosky) is an Iraqi Kurdish citizen. He is a political activist from Dohuk.

a. Context

9. The source points out that since March 2020, increasing repression has been reported of the activities of journalists, demonstrators and human rights activists who have voiced criticism of the handling by the Kurdistan Regional Government of the health and socioeconomic challenges faced by the region. Those with dissenting voices have faced intimidation, threats, harassment and arbitrary arrest and detention, following trials that did not, or only insufficiently, respect basic procedural guarantees. Furthermore, many of the activists and journalists who have been arbitrarily detained have also faced incommunicado detention, enforced disappearance for periods of up to three months and torture and/or other ill-treatment.

10. In mid-August 2020, a wave of protests erupted in the Kurdistan region against the deterioration in living conditions and the financial situation in the region, unpaid salaries of regional governmental employees and rampant corruption. During the demonstrations, the Kurdish security forces arrested numerous journalists, community activists, professors and other dissenting individuals and brought them to prisons and detention centres. There have been documented cases of individuals who were arrested.² Some of the arrested persons, like the five above-mentioned defendants, have faced targeted legal proceedings following their arrest, namely the use of legal provisions allowing for the pressuring of journalists and activists by threatening them with potentially severe punishment under criminal law. In order to curtail freedom of expression, the Kurdish authorities have primarily prosecuted media personnel and social media activists who are critical of the Kurdish authorities on the grounds of “misinformation” or “defamation”. In the present case, the authorities based their sentencing on allegations related to the security, stability and sovereignty of the Kurdistan region.

b. Background

11. According to the source, Mr. Sherwani is an independent journalist who mainly investigates and denounces cases of human rights violations and social injustice in Kurdistan, as well as political corruption within regional governmental institutions. He has also regularly participated in peaceful demonstrations to promote political and social rights in the Kurdistan region. He has covered the protests in the region and shared critical coverage on social media. In the past, Mr. Sherwani has been subjected to harassment and intimidation by the Kurdish authorities owing to his journalistic activities and was detained for those activities on the basis of defamation charges in 2012 and 2015.

² See United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), “Freedom of expression in the Kurdistan Region of Iraq” (May 2021), p. 9.

12. The source submits that the other four defendants were active in the Bahdinan region of Kurdistan. They also either covered or participated in anti-government protests. They have faced similar reprisals to Mr. Sherwani in the past, including being detained in police stations for several hours. For example, on 26 January 2019, the Kurdish Asayish security services arrested Mr. Rachid and Mr. Sherwani, as well as 50 other activists and journalists, as they were preparing to protest against the presence of Turkish forces in the Dohuk Governorate. They were subsequently released.

13. The source reports that all five defendants are known to be critical of the Kurdistan regional authorities. They were all arrested in autumn 2020 in the context of a crackdown by the Kurdish security forces on protest organizers and journalists.

14. On 10 February 2021 in a press conference, the Prime Minister of the Kurdistan Regional Government, Masrour Barzani, issued a statement regarding the activists and journalists who had been detained, stating: “These are not journalists, nor are they human rights activists, but a group of saboteurs involved in espionage and intelligence with foreign countries whose aim is to hit the security and stability of the Kurdistan region, bombing government institutions and diplomatic headquarters, kidnapping and assassinating foreigners in the region under the cover and dress of the press.” The source alleges that the statement was aimed at exerting pressure on the judiciary and is unsubstantiated.

c. Arrests

15. According to the source, Mr. Sherwani was arrested on 7 October 2020 at his home in Erbil by men in plain clothes who had their faces covered. The warrant that was presented to him did not indicate the reason for his arrest. Following his apprehension, Mr. Sherwani was forcibly disappeared for 19 days.

16. On 11 October 2020, the international advocacy coordinator of the Kurdistan Regional Government issued a tweet referring to a press release by the Kurdistan Democratic Party, the ruling party in the region, in which Mr. Sherwani was accused of receiving “foreign funding with the aim of destabilizing the country”, of endangering the lives of judges and of encouraging violence during anti-government protests.

17. The source alleges that Mr. Sherwani was kept in solitary confinement for 68 days and subjected to acts of torture by his interrogators, with the aim of forcing him to confess to the above accusations. He was also subjected to humiliating treatment and threats of sexual assault on his family.

18. On 26 October 2020, Mr. Sherwani’s lawyer was allowed to visit his client for the first time at the Gishti detention centre in Erbil run by the Asayish security services. Although the Kurdish authorities claim that Mr. Sherwani benefited from the assistance of a lawyer appointed by the Office of the Public Prosecution on 8 October 2020,³ the source affirms that he was only allowed to consult a lawyer of his own choosing in late October. Mr. Sherwani was reportedly in a poor psychological and physical state. His family was allowed to visit him for the first time three months after his arrest. He appeared sickly and pale and had lost a significant amount of weight after his release from solitary confinement.

19. On 27 November 2020, six special procedure mandate holders sent a letter to the Government of Iraq requesting information and/or comments on Mr. Sherwani’s alleged enforced disappearance and arbitrary detention.⁴ The Iraqi authorities responded on 29 December 2020, claiming that no coercion was involved in obtaining Mr. Sherwani’s confession, that he had not been held in solitary confinement and that the proceedings were “taking place in full respect of legal formalities and of the international obligations of Iraq”.⁵

20. The source alleges that on 6 September 2020, Mr. Zebari was arrested at his home by the Asayish security services, following his participation in anti-government protests. On 7 October 2020, Mr. Rachid was similarly arrested at his home in Dohuk province by the

³ See <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35830>, para. 3.

⁴ See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25730>.

⁵ See <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35830>.

Asayish, after participating in anti-government protests. On 22 October 2020, Mr. Mohammad was arrested at his home in Dohuk province by the Asayish, after participating in anti-government protests.

21. On 22 October 2020, Mr. Brushki was arrested at his home in Dohuk province, after participating in anti-government protests. He was detained incommunicado for the first two months. After two months, he was allowed to make a telephone call to his family to tell them that he was detained by the Asayish in Erbil.

22. According to the source, like Mr. Sherwani, the other four defendants were subjected to threats, as well as physical and psychological torture. They were forced to sign confessions containing self-incriminating statements. They were held in an overcrowded cell and were denied regular visits from their families and regular contact with their lawyers. Their lawyers were not present during the initial investigation.

d. First instance trial

23. On 15 February 2021, the trial at the second branch of the Erbil criminal court commenced. The defendants were accused of having gathered information and passed it on to foreign actors outside Iraq for money; having placed the lives of senior Kurdistan authorities and foreign officials at risk by gathering information about them; having collected arms in order to supply them to an unidentified armed group; and having supplied the Kurdistan Workers' Party with sensitive information. The defendants denied these charges and disputed the veracity of the statements that the prosecution presented as confessions. The defendants stated that the documents in question contained information that they had not provided or that had been obtained by coercion.

24. On 16 February 2021, the Erbil criminal court sentenced the defendants to six years' imprisonment, to be followed by placement under police surveillance for five years. Their mobile telephones, laptops and cameras were confiscated. The conviction was based on article 1 of Law No. 21 of 2003 of the Kurdistan Region of Iraq, which prohibits "acts prejudicial to the security, stability and sovereignty of the Kurdistan Region of Iraq". The punishment stipulated for the acts in question is "life or temporary imprisonment". Their sentence was also based on articles 47, 48 and 49 of the Iraqi Penal Code.

25. The source reports that only the defendants' lawyers, parliamentarians for the Al Tagheer block, two representatives of the United Nations Assistance Mission for Iraq (UNAMI) and representatives of the Committee to Protect Journalists were allowed to attend the trial. The defendants' families were not permitted to attend.

26. According to the source, observers of the two-day trial expressed serious concerns that basic fair trial guarantees were not upheld. Defence counsel were denied access to the case files and to key evidence, and were not given adequate time to prepare for the trial. The defendants' allegations that they were subjected to torture and that the Asayish had engaged in torture to extract confessions used against them were rejected by the court without conducting a thorough review of the allegations. In court, the lawyers raised the issue of torture, but were unable to obtain the medical reports to prove the allegations, as the defendants were referred to the court of first instance only after the signs of torture on their bodies had disappeared.

27. The source alleges that the key evidence used by the prosecution was provided by secret informants and that the judge and prosecutor repeatedly mentioned information from "secret informants", who did not appear in court, but which allegedly proved that the defendants were spies. The defendants' lawyers were not allowed to challenge the secret evidence used against the defendants by presenting rebuttal evidence or through cross-examination. In addition, members of the Kurdistan Region Security Council, which comprises all the security agencies operating in Kurdistan, including the Asayish and the intelligence agency Parastin, were present at the trial. This is likely to have had an intimidating effect on the defendants. Moreover, one of the defendants mentioned the name of a man from the Kurdistan Workers' Party (PKK) that the defendants were accused of having contacted and from whom they were supposed to have obtained pictures and information about officials from the region. When the judge asked to summon the man to testify, the Kurdistan Region Security Council members told the judge that he was a protected

witness who could not testify in open court. When the judge stated that the said defendant could testify behind closed doors, the Kurdistan Region Security Council members refused to comply.

28. The source submits that the prosecutors made broad and damning accusations, but backed those up only with vague assertions or none at all. The defendants were accused of having spied for the United States of America, based on alleged meetings with American diplomats in Erbil, in which they allegedly provided information regarding prisons and an intelligence agency. They were further accused of having obtained \$5,000 from an American association that runs programmes to support journalists and human rights defenders worldwide, allegedly in exchange for information about security personnel, prisoners and prison conditions. According to the source, observers raised concerns about the casting of routine interactions with diplomatic personnel and international organizations as suspicious, and emphasized that the evidence used against the defendants was circumstantial.

29. According to the source, the main evidence produced in court consisted of transcripts of conversations between the defendants on a social media chat group and voice recordings and photographs. These exchanges of information among the defendants were mostly examples of the defendants discussing government corruption. The transcript of the chats presented at trial did not contain any incriminating anti-State assertions and were mainly conversational in style. Mr. Sherwani explained in court that the social media groups were used to gather evidence about corruption, as well as poor services in the region, for his research for a book. The prosecutors presented photographs of what they considered sensitive material, alleging that the defendants took these as part of their activities as spies. However, at least one of the photographs (of the headquarters of a security agency) had been taken by Mr. Sherwani for a story in a local magazine in 2015.

e. Appellate proceedings

30. On 28 April 2021, the convictions and sentences of the defendants were upheld by the Court of Cassation. The decision was formally announced by the Court on 6 May 2021. The chamber of the Court of Cassation reviewing the decision was composed of the same judges sitting at the first instance court and the verdict largely repeated the judgment of the Erbil criminal court.

31. According to the source, in the verdict the Court states that the defendants had confessed to having created a group, headed by Mr. Sherwani, which intended to target sensitive areas and devices in the Kurdistan region to adversely affect the perception of security and stability and to harm political and military officials, as well as administrative and judicial bodies. The defendants had also allegedly confessed to having formed illegal links with foreigners for the purpose of conducting these sabotage activities. They admitted to having contacted the American and German consulates and to receiving money from them (this element is new as it does not appear in the verdict rendered by the Erbil criminal court); to having contacted the Kurdistan Workers' Party (PKK), including one man who is referred to below; to having obtained pictures and information about officials from the region and sending them to hostile authorities; and having provided those authorities with information about prisons and the headquarters of various services in the Kurdistan region. It is also indicated in the verdict that, in their confessions, the defendants stated that they had received \$5,000 from an American organization and had provided it with photographs of Peshmerga movements in the Shiladze subdistrict of Amadiya district in the Dohuk Governorate, as well as information about oil wells in the region. According to the ruling, the defendants also confessed to having instigated people inside and outside the region to contribute to their sabotage objectives, to having met the German Consul General in a hotel and to having subsequently travelled to the Dura area twice, under the lead of Mr. Sherwani.

32. The Court of Cassation stated that the trial verdict had established that photographs and information found on the laptop of Mr. Sherwani were pictures of administrative personnel and security officials in the Kurdistan region and that this had been acknowledged by the defendants' lawyers during the first instance hearing. However, according to the verdict of the first instance, the defendants' lawyers had alleged that the individual from the Kurdistan Workers' Party (PKK) (referred to above) was the one who had sent the defendants

the pictures with the intention of having them accused of taking the pictures. That individual is suspected of being an informant who was collecting information for the security agencies.

33. In its verdict, the Court of Cassation confirmed that the judgment of the Erbil criminal court was based on evidence, such as the confidential testimony of an informant, as well as documents, audio and video recordings, photographs, information and contacts with a Swedish organization shared between the defendants on social media, which the court had downloaded.

34. According to the Court of Cassation, in its verdict on the first instance proceedings the Erbil criminal court had also stated that the confessions made during the investigation stage had been made “freely, willingly and consciously, without pressure, coercion or temptation”. It noted that it had not been proven that any assault or torture had been perpetrated on the accused, as they had not obtained any medical reports showing the effects of torture and had not registered any complaints against those who had allegedly assaulted them. According to the ruling of the Court of Cassation, it had not been proven that the confessions were extracted by force or threat, thus the retraction of the confessions before the court would not help the defendants as their initial confessions before the investigative judge “had been closer to the event”. In its judgment, the Court stated that the evidence obtained was sufficient, including the confessions and the evidence obtained from a secret witness, to sentence the defendants. Three of the ruling five judges reportedly belonged to the Kurdistan Democratic Party, which is dominated by the Barzani family, and voted in favour of upholding the conviction, while the other two judges who voted in favour of overturning it were affiliated with the Patriotic Union of Kurdistan.

35. The source reports that the defendants are detained in Erbil central prison. In mid-June 2021, family members were able to visit them for 10 minutes for only the second time since their arrest. The defendants have been able to call their families every week for 3–5 minutes.

36. On 5 June 2021, the defendants’ lawyers requested a correction of the decision of the Court of Cassation, based on articles 266–269 of the Iraqi Criminal Procedure Code. However, on 27 June 2021, the Court of Cassation upheld the six-year prison sentences. The judges who replied to the request for correction were the same ones who had presided in the original trial and had reviewed their own decision as part of the Court of Cassation hearing the first appeal.

f. Analysis of violations

i. Category I

Arbitrary arrest

37. The source submits that Mr. Sherwani was not informed of the reason for his arrest in the warrant that was presented to him. It is not known whether the other defendants were presented with arrest warrants and if so, whether they detailed the reason for their arrest. Nevertheless, the circumstances of the arrest of all the defendants did not provide any reasonable cause for *flagrante delicto*. Mr. Sherwani’s arrest was unlawful and contrary to article 9 (2) of the Covenant, article 14 (3) of the Arab Charter on Human Rights and article 93 of the Iraqi Criminal Procedure Code, which stipulates that an arrest warrant must specify the type of offence to which it relates.

Right to be brought promptly before a judicial authority and the right to habeas corpus

38. The source submits that all the defendants were arrested in September or October 2020, but only brought before a judicial authority months later on 15 February 2021. By omitting to bring the defendants promptly before a judicial authority, the Kurdish authorities violated article 9 (3) of the Covenant, article 14 (5) of the Arab Charter on Human Rights and principles 4, 11 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

39. Furthermore, the source argues that the defendants’ right to challenge the lawfulness of their detention was impeded. Their detention from their arrest until 15 February 2021

violated their right to habeas corpus enshrined in article 9 (4) of the Covenant, article 14 (6) of the Arab Charter on Human Rights, and principles 11 and 32 of the Body of Principles.

Enforced disappearance and incommunicado detention

40. The source submits that Mr. Sherwani was forcibly disappeared and held incommunicado for 19 days after his arrest. Mr. Brushki was also forcibly disappeared and held incommunicado for two months. Their situation was further exacerbated by torture and inhuman or degrading treatment and, in the case of Mr. Sherwani, by solitary confinement. During this time, they were denied any contact with the outside world, including with family and their lawyers. Incommunicado detention impeded their right to habeas corpus.

Lex certa

41. The defendants were tried under article 1 of Law No. 21 of 2003 of the Kurdistan Region of Iraq, prohibiting “acts prejudicial to the security, stability and sovereignty of the Kurdistan Region of Iraq”. The source considers that this provision does not provide the legal certainty required by international standards. Such vague provisions allow for the criminalization of peaceful expression, enable arbitrary interpretation of the law and make it difficult for citizens to determine how to comply with the law. The detention of the defendants is based on a provision that fails to meet the *lex certa* principle owing to the ambiguity of the acts criminalized.

Nulla poena sine lege

42. The source recalls that one of the charges against the defendants relates to their visit to the American and German consulates in Erbil, arguing that the defendants cannot be accused of having committed illegal activities in merely visiting the consulates. The Kurdish authorities violated the principle of *nulla poena sine lege* enshrined in article 9 (1) of the Covenant and article 14 (2) of the Arab Charter on Human Rights, both stipulating that no one shall be deprived of their liberty except on grounds established by law.

ii. Category II

Prosecution for the exercise of rights

43. The source claims that the defendants were not officially charged in relation to their work as journalists and activists, but in relation to alleged activities endangering the security, stability and sovereignty of the Kurdistan region. Due to the lack of transparency with regard to some of the evidence used by the authorities to prosecute the defendants and the inconclusive character of the evidence examined in court, the source alleges that the defendants were prosecuted for the exercise of their rights to freedom of expression and peaceful assembly. That is reinforced by the previous harassment experienced by the defendants in relation to their activities as journalists and activists, as well as the general crackdown by the Kurdish authorities on journalists and activists in recent months.

Freedom of opinion and expression

44. The source emphasizes that the defendants are journalists and activists. Mr. Sherwani investigates and denounces human rights violations, social injustice and political corruption in the Kurdistan region and has regularly participated in and covered anti-government protests and shared critical coverage on social media. The other four defendants have also covered such demonstrations or participated in them to express their dissent regarding the policies of the Kurdish authorities.

45. Freedom of expression can only be restricted lawfully when the State can demonstrate the legality, necessity and proportionality of a restriction and if the latter serves to protect a specific legitimate objective. While the protection of national security or of public order constitute legitimate objectives, the peaceful expression of political dissent, as in the present case through the journalistic work of the defendants and their coverage of or participation in

anti-government protests, does not threaten national security or public order.⁶ The sharing of documents, audio and video recordings, photographs, information and contacts between the defendants on social media, as alleged by the court, falls within freedom of expression, as long as it has not been established that the objective of these exchanges was illegitimate.

46. The prosecution failed to establish a direct and immediate connection between the defendants' activities and a threat to national security or public order. The Kurdish authorities resorted to allegations of a threat to the security, stability and sovereignty of the region, when their real objective was to shield themselves from criticism by the Kurdish public and prevent the defendants from giving this criticism a platform through their journalistic and activist work.

47. Article 1 of Law No. 21 of 2003 of the Kurdistan Region of Iraq, modifying article 156 of the Iraqi Penal Code, criminalizes "acts prejudicial to the security, stability and sovereignty of the Kurdistan Region of Iraq".⁷ Such broad concepts are prone to be interpreted in an abusive manner that could violate freedom of expression and be used to punish legitimate criticism of government actions or policies.

48. In summary, the source considers that the allegations that the defendants had endangered the security, stability and sovereignty of Kurdistan are unsubstantiated and that the Kurdish authorities violated article 19 of the Covenant, article 32 of the Arab Charter on Human Rights, article 38 of the Iraqi Constitution and article 15 of the Constitution of the Kurdistan region. The press law in the Kurdistan region provides that a journalist shall not be investigated for reasons related to the practice of his or her profession, except in accordance with a judicial decision. Such punishment for the exercise of the fundamental right to freedom of expression intimidates activists, human rights defenders and media professionals and aims to stifle dissent among the Kurdish population more broadly.

Peaceful assembly

49. The source submits that the defendants either participated in the anti-government protests in order to demonstrate or to cover the protests at the time of their arrest. Messrs. Zebari, Rachid, Mohammad and Brushki were arrested following their participation in anti-government protests. While the source is not aware of whether Mr. Sherwani participated in demonstrations shortly before his arrest, he regularly attended peaceful demonstrations to promote political and social rights in the Kurdistan region. He covered the protests and shared critical coverage on social media, and has previously faced reprisals for those activities.

50. The Erbil criminal court and the Court of Cassation provided no credible evidence that the defendants had engaged in activities during or in view of the demonstrations that constituted criminal acts recognizable under international law. Accordingly, the defendants' right to peaceful assembly under article 21 of the Covenant, article 24 (6) of the Arab Charter on Human Rights, article 38 of the Iraqi Constitution and article 15 of the Constitution of the Kurdistan region, as well as their right to protection as monitoring and reporting participants, should have been respected and should not have resulted in their prosecution.

iii. Category III

Torture and ill-treatment

51. The source alleges that during their initial investigation, the defendants were exposed to torture and ill-treatment. Mr. Sherwani and Mr. Brushki were forcibly disappeared and placed in incommunicado detention for 19 days and two months, respectively. In addition, Mr. Sherwani was placed in solitary confinement for 68 days. The intention was to extract confessions from them, which were later used against them in court. The allegations of torture raised in court were dismissed by the Erbil criminal court and by the Court of Cassation without any investigation of the defendants' claims.

⁶ A/HRC/7/14, para. 22.

⁷ Available from <http://iraqlid.hjc.iq/LoadLawBook.aspx?page=1&SC=081020071870297&BookID=27990>.

52. As a result, the Kurdish authorities violated articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 7 of the Covenant, article 8 of the Arab Charter on Human Rights, article 37 (1) (c) of the Iraqi Constitution and article 11 of the Constitution of the Kurdistan region. By refusing to investigate the torture allegations, the authorities violated articles 5, 12 and 13 of the Convention against Torture, principle 33 (4) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 57 (2) and (3) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). By invoking statements made by the defendants under duress in the proceedings, the courts violated article 15 of the Convention against Torture.

Trial before an independent court

53. The source recalls that articles 12 and 13 (1) of the Arab Charter on Human Rights and the Basic Principles on the Independence of the Judiciary provide that every accused person shall have access to an independent and impartial judicial body. Article 19 of the Iraqi Constitution and article 57 of the Constitution of the Kurdistan region guarantee judicial independence.

54. In a press conference on 10 February 2021, the Prime Minister of the Kurdistan Regional Government issued a statement regarding the five individuals (see para. 14 above). It is suspected that the statement was aimed at exerting pressure on the judiciary.

55. The source submits that the region's two main political parties, the Kurdistan Democratic Party and the Patriotic Union of Kurdistan, have intervened in the judiciary, undermining its independence. The Government has been controlled by a coalition of both parties since the parliamentary elections of 2005. The two parties agreed to each appoint 5 of the 10 judges of the Court of Cassation. The presidents of the Erbil, Dohuk, Sulaimani and Garman appellate courts are members of the Kurdistan Democratic Party and the Patriotic Union of Kurdistan, and are selected by the two parties. The Kurdish judiciary is thus subordinate to the executive power. The defendants' right to a fair and public hearing by an independent and impartial tribunal was not respected.

Right to appeal

56. The source submits that the same judges who had ruled in the original trial at the Erbil criminal court reviewed their own sentencing as part of the Court of Cassation and did so again when responding to the request for a so-called correction of the Cassation decision, again as part of the Court of Cassation. Accordingly, the defendants were deprived of their right to have their conviction reviewed by a higher tribunal, contrary to article 14 (5) of the Covenant and article 16 (7) of the Arab Charter on Human Rights.

Right to legal counsel

57. The source alleges that the defendants did not have access to their lawyers during the initial investigation and visits by their counsel during their pretrial detention were only permitted on an irregular basis. The defendants' lawyers were not given adequate time to prepare for the trial. Once the trial started, defence counsel were denied access to their clients' case files, as well as to key evidence provided by a secret informant. The authorities violated article 14 (3) (b) of the Covenant, article 16 (2) and (3) of the Arab Charter on Human Rights, and principles 11 (1), 17 (1) and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Equality of arms

58. The source submits that the defendants were not allowed to challenge the evidence against them by presenting rebuttal evidence or through cross-examination. According to the source, the defendants were held in overcrowded cells and had been subjected to torture and other ill-treatment. These precarious conditions are likely to have negatively affected and weakened the defendants before the trial, which impaired the principle of equality of arms and made it impossible to ensure a fair trial. Furthermore, representatives of the Kurdistan Region Security Council were reportedly present in the courtroom during the trial, which is

likely to have had an intimidating effect on the defendants. Those representatives demonstrated limited consideration for the court proceedings, having refused the court's request to allow one of the defendants to testify, both in court and behind closed doors.

Response from the Government

59. On 4 August 2021, the Working Group transmitted the allegations to the Government of Iraq under its regular communication procedure. The Working Group requested the Government to provide detailed information by 4 October 2021 about the situation of Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki. The Working Group requested the Government to clarify the legal provisions justifying their continued detention, as well as its compatibility with international human rights law. It also called upon the Government to ensure the physical and mental integrity of the five individuals.

60. The Working Group regrets that it did not receive a response from the Government to this communication.⁸ The Government did not request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work.

Discussion

61. 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.

62. In determining whether the detention of Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case of breach of international law, constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.⁹ In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

Category I

63. The source alleges that Mr. Sherwani was arrested on 7 October 2020 at his home in Erbil by men in plain clothes who had their faces covered. According to the source, the warrant that was presented to Mr. Sherwani did not indicate the reason for his arrest. The source acknowledges that it is unknown whether Messrs. Zebari, Rachid, Mohammad and Brushki were presented with arrest warrants when they were arrested by the Asayish security services and if so, whether the warrants detailed the reason for their arrests. Nevertheless, the source notes that the circumstances in which all of the individuals were apprehended did not provide reasonable cause for their arrest in flagrante delicto. Notably, the Government did not submit any response to these allegations.

64. Article 9 (2) of the Covenant provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for their arrest. The reasons for arrest must be provided immediately upon arrest¹⁰ and must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.¹¹

65. The source has presented a credible case, which has not been rebutted by the Government, that the arrest warrant presented to Mr. Sherwani did not indicate the reason for his arrest and that he was not otherwise informed of the reason. Mr. Sherwani was arrested in violation of article 9 (2) of the Covenant. An arrest is arbitrary when it is carried out

⁸ While the Government responded to a previous communication from special procedure mandate holders on Mr. Sherwani's case, the Working Group's methods of work required a separate response to the regular procedure ([A/HRC/36/38](#), para. 23).

⁹ [A/HRC/19/57](#), para. 68.

¹⁰ Human Rights Committee, general comment No. 35 (2014), para. 27; and opinion No. 30/2017, paras. 58–59.

¹¹ Human Rights Committee, general comment No. 35 (2014), para. 25; and opinion No. 25/2018, para. 36.

without informing the arrested person of the reasons for the arrest.¹² Given the uncertainty acknowledged by the source as to whether arrest warrants detailing the reason for their arrests were served on the other four individuals, the Working Group is unable to make any findings relating to the legal basis of their arrests.

66. In addition, the source alleges that the five individuals were arrested in September or October 2020, but only brought before a judicial authority on 15 February 2021. According to article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge shall be brought promptly before a judge. As the Human Rights Committee has noted, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee “promptly” before a judge following his or her arrest; any longer delay must remain absolutely exceptional and be justified by the circumstances.¹³ In the absence of any information from the Government, the Working Group finds that Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki were brought before a judge months after their respective arrests, in violation of article 9 (3) of the Covenant. The Kurdish authorities failed to establish the legal basis of their detention in accordance with the Covenant.¹⁴

67. Similarly, the five individuals were not afforded the right to take proceedings before a court so that it might decide without delay on the lawfulness of their detention in accordance with article 9 (4) of the Covenant. The right to bring proceedings applies in principle from the moment of arrest and any substantial waiting period before a detainee can bring a first challenge to detention is impermissible.¹⁵ Moreover, the source alleges, and the Government has not denied, that Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki did not have access to their lawyers during the initial investigation and visits by counsel during their pretrial detention were only permitted on an irregular basis. They were therefore deprived of an essential safeguard that might have assisted them in taking proceedings before a court.¹⁶ Given that the five individuals were unable to challenge the legality of their detention, their 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.

68. The source asserts that Mr. Sherwani was forcibly disappeared and held incommunicado for 19 days after his arrest, and that Mr. Brushki was forcibly disappeared and held incommunicado for two months. The Working Group considers that holding persons incommunicado violates their right to challenge the lawfulness of detention before a court under article 9 (4) of the Covenant.¹⁷ Moreover, in the absence of any rebuttal from the Government, the Working Group finds that Mr. Sherwani and Mr. Brushki were disappeared¹⁸ and refers the present case to the Working Group on Enforced or Involuntary Disappearances. Enforced disappearances violate numerous substantive and procedural provisions of the Covenant, including articles 9 and 14, and constitute a particularly aggravated form of arbitrary detention that can have no legal basis.¹⁹ Mr. Sherwani and Mr. Brushki were also held outside the protection of the law in violation of article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.

69. Furthermore, it appears from the source’s account that the five individuals were first brought before a judicial authority when their trial commenced on 15 February 2021, rather than during their pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary, for such purposes as to

¹² Opinion No. 46/2020, para. 40; and [CAT/C/IRQ/CO/1](#), para. 14.

¹³ Human Rights Committee, general comment No. 35 (2014), para. 33.

¹⁴ [CCPR/C/IRQ/CO/5](#), paras. 33–34; [CAT/C/IRQ/CO/1](#), para. 14; and UNAMI and OHCHR, “Freedom of expression in the Kurdistan Region of Iraq”, p. 8 (noting the 24-hour period for judicial review of detention).

¹⁵ Human Rights Committee, general comment No. 35 (2014), para. 42; and 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), principle 8 and guideline 7.

¹⁶ Opinions No. 61/2020, para. 70, and No. 40/2020, para. 29; and Human Rights Committee, general comment No. 35 (2014), para. 46.

¹⁷ Opinions No. 36/2020, para. 53, and No. 16/2020, para. 62.

¹⁸ [A/HRC/16/48/Add.3](#), para. 21.

¹⁹ Human Rights Committee, general comment No. 35 (2014), para. 17; and opinion No. 37/2021, para. 65.

prevent flight, interference with evidence or the recurrence of crime.²⁰ Courts must examine whether alternatives to pretrial detention, such as bail, would render detention unnecessary.²¹ In the absence of any indication that an individualized hearing by a judicial authority took place, the pretrial detention of Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki was not properly constituted and had no legal basis.²²

70. Finally, the source claims that one of the charges against the five individuals relates to their visit to the American and German consulates in Erbil. According to the source, this charge violated the principle of *nulla poena sine lege* because merely visiting a consulate does not amount to an illegal activity. While the Working Group has previously found that detention is arbitrary when a person is punished for an act that is not a penal offence under national law,²³ it is not convinced that this principle applies in the present case. The information provided by the source suggests that the alleged visits and contacts with the consulates related to receiving money from them for the purpose of illegal activities (see para. 31 above). That is, the alleged criminal conduct appears to involve more than mere visits to the consulates. Whether such allegations were actually proven on the evidence is a different matter, and one for the national courts to determine.²⁴

71. The Working Group concludes that there is no legal basis for the detention of Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki and their detention is arbitrary under category I.

Category II

72. The source alleges that Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki were detained for exercising their rights to freedom of expression and peaceful assembly under articles 19 and 20 (1) of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant. The Government did not respond to these submissions.

73. According to the source, the five individuals are journalists and activists. Mr. Sherwani investigates and denounces human rights violations, social injustice and political corruption in the Kurdistan region and has regularly participated in and covered the anti-government protests on social media. Messrs. Zebari, Rachid, Mohammad and Brushki also covered these demonstrations or participated in them to express their disagreement with the policies of the Kurdish authorities.

74. Article 19 (2) of the Covenant provides that everyone has the right to freedom of expression; this right includes the freedom to seek, receive and impart information and ideas of all kinds. It includes political discourse, commentary on public affairs, discussion of human rights, and journalism through any media, such as the Internet.²⁵ It protects the expression of opinions that are critical of, or not in line with, government policy.²⁶

75. The Working Group considers that the conduct of the five individuals falls within the freedom of expression protected under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant and that they were detained for exercising that right.²⁷ In reaching this conclusion, the Working Group notes that the five individuals were alleged to have shared documents, audio and video recordings, photographs and contacts on social media. That conduct is protected by the right to freedom of expression. Moreover, at least one of the photographs shared had been taken by Mr. Sherwani for a story in a local magazine in 2015, some five years before his current arrest, suggesting that his detention was not

²⁰ Human Rights Committee, general comment No. 35 (2014), para. 38; and opinion No. 45/2016, para. 51.

²¹ Human Rights Committee, general comment No. 35 (2014), para. 38; and opinion No. 3/2019, para. 57.

²² Opinion No. 64/2020, para. 58.

²³ Opinions No. 10/2018, para. 54, No. 56/2012, paras. 28–30, and No. 4/2012, para. 20.

²⁴ Opinions No. 64/2019, para. 89, and No. 75/2018, para. 73.

²⁵ See opinions No. 65/2020, No. 46/2020 and No. 1/2020; and Human Rights Committee, general comment No. 34 (2011), paras. 11–12.

²⁶ Opinions No. 8/2019, para. 55, and No. 79/2017, para. 55.

²⁷ CCPR/C/IRQ/CO/5, paras. 39–40.

related to any pressing need to ensure the security, stability and sovereignty of the Kurdistan region.

76. Further, the five individuals were detained for denouncing human rights violations, commenting on issues of public interest, such as corruption, and participating peacefully in protests against government policies. In the view of the Working Group, they were detained for exercising their right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant.²⁸ Moreover, by taking part in a gathering of persons to convey a position on a particular issue, namely the anti-government protests, they were detained for exercising their right to peaceful assembly under article 20 (1) of the Universal Declaration of Human Rights and article 21 of the Covenant.²⁹ It does not appear to be coincidental that Messrs. Zebari, Rachid, Mohammad and Brushki were arrested following their participation in the protests.

77. There is nothing to suggest, and the Government has not argued, that the permissible restrictions on the rights set out in articles 19 (3), 21 and 25 of the Covenant apply in this case. The Government did not explain how prosecuting Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki was necessary to protect a legitimate interest under these provisions, nor how sentencing them to six years' imprisonment, followed by police surveillance for five years, was a proportionate response to their activities. Importantly, there is no evidence that their conduct or activities could reasonably be considered to pose a threat to national security, public order, public health or morals, or the rights or reputations of others.

78. Extreme care must be taken by States to ensure that the provisions relating to national security are crafted and applied in a manner that conforms to the strict requirements of article 19 (3) of the Covenant.³⁰ It is not compatible with those provisions to invoke such laws to suppress or withhold information of legitimate public interest that does not harm national security, or to prosecute journalists and activists for having disseminated such information.³¹

79. The Working Group finds that Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki were detained for the peaceful exercise of their rights to freedom of expression, to participate in the conduct of public affairs and to peaceful assembly. Their detention is arbitrary under category II. The Working Group refers the present case to the Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression and on the rights to freedom of peaceful assembly and of association.

80. Finally, the source submits that the five individuals were convicted under a vague and overly broad provision inconsistent with the *lex certa* principle, namely article 1 of Law No. 21 of 2003 of the Kurdistan region, which criminalizes “acts prejudicial to the security, stability and sovereignty of the Kurdistan Region of Iraq”.

81. The principle of legality requires that laws be formulated with sufficient precision that individuals can access and understand the law and regulate their conduct accordingly.³² Article 1 of Law No. 21 of 2003 provides no clear definition of acts that are “prejudicial” to the security, stability and sovereignty of the Kurdistan region and may, as in the present case, be used to punish legitimate criticism of the authorities. The Working Group reiterates that laws may be so lacking in detail of the conduct that may be penalized that it is impossible to invoke a legal basis justifying the deprivation of liberty.

Category III

82. Given its finding that the detention of the five individuals is arbitrary under category II, the Working Group emphasizes that no trial should have taken place. However, Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki were tried and sentenced on 15 and 16 February 2021. On 28 April 2021, their convictions and sentences were upheld by the Court of Cassation. On 27 June 2021, the Court of Cassation upheld their convictions again, despite

²⁸ Human Rights Committee, general comment No. 25 (1996), para. 8. See also opinions No. 16/2020 and No. 15/2020.

²⁹ Human Rights Committee, general comment No. 37 (2020), para. 12.

³⁰ Human Rights Committee, general comment No. 34 (2011), para. 30.

³¹ Ibid.

³² Opinion No. 41/2017, paras. 98–101.

their request for a so-called correction of the cassation decision. The information submitted by the source discloses fair trial violations throughout the first instance and appellate proceedings. The Government did not respond to the Working Group's regular communication.

83. The source alleges that the five individuals did not have access to their lawyers during the initial investigation, and visits by their counsel during their pretrial detention were only permitted on an irregular basis. For example, Mr. Sherwani was only allowed to consult a lawyer of his choosing in late October 2020. Furthermore, the lawyers of the five individuals were not given adequate time to prepare for the trial.

84. 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 must be provided without delay.³³ The failure to provide Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki with access to their lawyers from the outset of their detention, and regular access thereafter, seriously impaired their ability to prepare a defence. The inadequate time given to their lawyers to prepare for trial exacerbated the situation, particularly given the complex nature of such proceedings with multiple defendants. The right of the five individuals to adequate time and facilities for the preparation of their defence and to communicate with a lawyer of their choice under articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (b) of the Covenant was violated.

85. The source further alleges that once the trial commenced, defence counsel were denied access to the case files, as well as to key evidence provided by a secret informant. The judge and prosecutor repeatedly mentioned information from "secret informants", who did not appear in court, which allegedly proved that the five individuals were spies. The lawyers were not allowed to challenge the secret evidence used against the five individuals by presenting rebuttal evidence or through cross-examination.

86. Every individual deprived of liberty has the right to access material related to their detention.³⁴ However, that right is not absolute and the disclosure of information may be restricted if such a restriction is necessary and proportionate in pursuing a legitimate aim, such as protecting national security, and if the State has demonstrated that less restrictive measures would be unable to achieve the same result, such as providing redacted summaries that clearly point to the factual basis for the detention.³⁵ The Government did not provide any justification for denying access to the case files. That violated the rights of the five individuals under articles 10 and 11 (1) of the Universal Declaration of Human Rights and articles 14 (1) and 14 (3) (b) of the Covenant to a fair hearing and to adequate time and facilities for the preparation of a defence.³⁶

87. In addition, the prosecution and judge at the first instance court appear to have relied heavily on the information provided by a secret informant,³⁷ without allowing the defence the opportunity to challenge the evidence, in violation of the principle of the equality of arms under articles 14 (1) and 14 (3) (e) of the Covenant.

88. According to the source, on 10 February 2021 the Prime Minister of the Kurdistan Regional Government issued a statement regarding the five individuals, stating that: "These are not journalists, nor are they human rights activists, but a group of saboteurs involved in espionage and intelligence with foreign countries whose aim is to hit the security and stability of the Kurdistan region, bombing government institutions and diplomatic headquarters, kidnapping and assassinating foreigners in the region under the cover and dress of the press."

³³ United Nations Basic Principles and Guidelines, principle 9 and guideline 8; and [A/HRC/45/16](#), para. 51.

³⁴ *Ibid.*, principle 12 and guidelines 11 and 13.

³⁵ *Ibid.*, guideline 13, paras. 80–81.

³⁶ Opinions No. 78/2018, paras. 78–79; and No. 18/2018, para. 53.

³⁷ UNAMI and OHCHR, "Freedom of expression in the Kurdistan Region of Iraq", p. 12; and [CAT/C/IRQ/CO/1](#), para. 23.

89. It is the duty of public authorities to refrain from prejudging the outcome of a trial by abstaining from making public statements affirming the guilt of the accused.³⁸ The statement by the Prime Minister was made five days before the trial, undermining the prospects of a fair hearing, particularly given that the statement was reportedly intended to exert pressure on the court. As a result, the right of Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki to the presumption of innocence under article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant was violated.

90. Similarly, the five individuals were convicted and sentenced by the Erbil criminal court after a trial that lasted two days. That was an expeditious hearing for a matter involving multiple defendants and a serious alleged offence against State security that resulted in heavy sentences. A short trial for a serious criminal offence suggests that the individuals' guilt had been determined prior to the proceedings.³⁹ In the absence of an alternative explanation from the Government, the brief duration of the trial in this case strengthens the Working Group's conclusion that the five individuals were denied the right to the presumption of innocence.

91. In addition, the source indicates that only the lawyers, certain parliamentarians, two representatives of UNAMI and representatives of a non-governmental organization were allowed to attend the trial. The individuals' families were not permitted to attend. The Government has not argued that exceptions to the right to a public hearing were applicable. Accordingly, the Working Group finds that the exclusion of the family members impacted the public nature of the trial.⁴⁰

92. Furthermore, the source alleges that Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki were subjected to threats and physical and psychological torture during the initial investigation. The intention was to extract confessions, which were later used against them in court. The allegations of torture were dismissed by the Erbil criminal court and the Court of Cassation without investigating the claims.

93. The source has presented a credible case, which was not rebutted by the Government, that the five individuals were subjected to torture and ill-treatment. Their alleged treatment appears to violate article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant and articles 2 and 16 of the Convention against Torture, to which Iraq is a State party. The five individuals were reportedly held in overcrowded cells, which together with the alleged torture and ill-treatment, is likely to have negatively affected their ability to participate in their own defence. The Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

94. The source claims that Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki were coerced into providing confessions. They did not have access to their lawyers during the initial investigation and the confessions were subsequently used against them as evidence. Confessions made in the absence of legal representation are not admissible as evidence in criminal proceedings.⁴¹ The admission into evidence of a statement obtained through torture or ill-treatment renders the entire proceedings unfair, regardless of whether other evidence exists to support the verdict.⁴² The burden is on the Government to prove that the confessions were given freely,⁴³ but it has not done so.

95. The Kurdish authorities violated the right of the five individuals not to be compelled to confess guilt under article 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (g) of the Covenant. The use of a confession extracted under torture also violated article 15 of the Convention against Torture.⁴⁴ When the issue of torture was raised, the courts should have ordered an independent investigation. The failure to do so was contrary to the right to be tried by an independent and impartial tribunal under article 10 of the Universal

³⁸ Human Rights Committee, general comment No. 32 (2007), para. 30; and opinion No. 45/2019, para. 68.

³⁹ Opinion No. 15/2020, para. 78.

⁴⁰ Human Rights Committee, general comment No. 32 (2007), para. 29.

⁴¹ Opinion No. 41/2020, para. 70; [E/CN.4/2003/68](#), para. 26 (e); and [A/HRC/45/16](#), para. 53.

⁴² Opinion No. 41/2020, para. 70; [CCPR/C/IRQ/CO/5](#), paras. 29–30; and [CAT/C/IRQ/CO/1](#), para. 22.

⁴³ Human Rights Committee, general comment No. 32 (2007), para. 41.

⁴⁴ Opinion No. 28/2019, para. 70.

Declaration of Human Rights, article 14 (1) of the Covenant⁴⁵ and articles 12, 13 and 14 of the Convention against Torture.

96. There are other factors, unchallenged by the Government, that call into question the independence of the courts. Members of the Kurdistan Region Security Council were reportedly present in the courtroom during the trial. Their influence was so significant that they were able to refuse to comply with the court's request to allow one of the individuals to testify. Moreover, three of the five Court of Cassation judges, affiliated with the Kurdistan Democratic Party, upheld the conviction, while the other two judges, affiliated with the Patriotic Union of Kurdistan, voted in favour of overturning it. In such circumstances, the five individuals did not receive a fair hearing by an independent and impartial tribunal. The Working Group refers this case to the Special Rapporteur on the independence of judges and lawyers.

97. Finally, the source claims that the same judges who ruled in the trial at the Erbil criminal court reviewed their own sentencing as part of the Court of Cassation and did so again when responding to the request for a so-called correction of the cassation decision. That violated the right of the five individuals to have their convictions reviewed by a higher tribunal, contrary to article 14 (5) of the Covenant.⁴⁶

98. The Working Group finds that these fair trial violations are of such gravity as to give the detention of the five individuals an arbitrary character under category III.

Category V

99. While the source did not make any submissions under category V, the Working Group has decided to analyse the case under this category of its methods of work.

100. The Working Group has established under category II that the five individuals were detained for the peaceful exercise of their rights under international law. In those circumstances, there is a strong presumption that the detention also constitutes a violation of international law on the grounds of discrimination based on political or other views.⁴⁷ The Government did not rebut this presumption.

101. All five individuals are known to be critical of the Kurdistan authorities. They were all arrested in autumn 2020 in the context of a crackdown by the Kurdish security forces on protest organizers and journalists, and had all been previously detained for their activities. That suggests a pattern of targeting of these five individuals for their dissenting views.

102. The Working Group considers that Messrs. Sherwani, Zebari, Rachid, Mohammad and Brushki were detained on discriminatory grounds, namely for their political or other opinions, contrary to articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. Their detention is arbitrary under category V.

Concluding remarks

103. The source alleges that Mr. Sherwani was kept in solitary confinement for the first 68 days of his detention. Prolonged solitary confinement exceeding 15 consecutive days violates rules 43–45 of the Nelson Mandela Rules. According to rule 45, solitary confinement must only be used as a last resort, for as short a time as possible, subject to independent review and authorized by a competent authority.

104. The Working Group recalls the obligation of the Government of Iraq under article 10 (1) of the Covenant to treat all persons deprived of their liberty with humanity and respect for their inherent dignity. The Working Group also emphasizes the importance of ensuring regular contact with family members, which was reportedly limited during the initial detention of the five individuals, contrary to rule 58 of the Nelson Mandela Rules.

⁴⁵ Opinions No. 31/2020, para. 57, and No. 24/2020, para. 108.

⁴⁶ Human Rights Committee, *Salgar de Montejo v. Colombia*, communication No. 64/1979, paras. 9.1 and 10.4; and opinions No. 18/2018, para. 56, and No. 10/2007, para. 17.

⁴⁷ Opinions No. 4/2021, No. 59/2019, and No.13/2018.

Disposition

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

The deprivation of liberty of Sherwan Amin Naou, Kahdar Hammad Amin Zebari, Ayaz Karam Rachid, Hariwan Issa Mohammad and Mulla Shafan Saeed Omar Brushki, being in contravention of articles 2, 6, 7, 8, 9, 10, 11 (1), 19, 20 (1) and 21 (1) of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14, 16, 19, 21, 25 (a) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

106. The Working Group requests the Government of Iraq to take the steps necessary to remedy the situation of the five individuals 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.

107. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release the five individuals immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.⁴⁸ In the current context of the coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of the five individuals.

108. The Working Group urges the Government to ensure a full and independent investigation into the circumstances surrounding the arbitrary detention of the five individuals and to take appropriate measures against those responsible for the violation of their rights.

109. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to: (a) the Working Group on Enforced or Involuntary Disappearances; (b) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; (c) the Special Rapporteur on the rights to freedom of peaceful assembly and of association; (d) the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and (e) the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

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

Follow-up procedure

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

112. 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.

⁴⁸ [A/HRC/45/16](#), annex I.

113. 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.

114. 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.⁴⁹

[Adopted on 18 November 2021]

⁴⁹ Human Rights Council resolution 42/22, paras. 3 and 7.