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Human Rights Council
Working Group on Arbitrary Detention

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

Opinion No. 19/2021 concerning Theodory Faustine Giyan (United Republic of Tanzania)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work,¹ on 17 December 2020 the Working Group transmitted to the Government of the United Republic of Tanzania a communication concerning Theodory Faustine Giyan. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

¹ A/HRC/36/38.

Submissions

Communication from the source

4. Theodory Faustine Giyan is a Tanzanian citizen born in 1993. Mr. Giyan usually resides in Dar es Salaam, United Republic of Tanzania. He is a software developer at iPF Softwares. Mr. Giyan was responsible for developing digital solutions that drive human behaviour and engagement.

a. Arrest and detention

5. According to the source, on the night of 18 December 2019, unidentified police officers arrived at Mr. Giyan's residence in Dar es Salaam, and arrested Mr. Giyan without a warrant. They handcuffed, blindfolded and abducted Mr. Giyan, and forced him into a civilian vehicle. He was not informed of the reason for his arrest at this time.

6. The source explains that the next day, Mr. Giyan was transferred to the police force headquarters within the Ministry of Internal Affairs. The source specifies that torture has been reported at this location. Mr. Giyan was later transferred to Kilwa Road Police Station. His family was not immediately informed that he had been taken into custody, nor were they informed of his whereabouts.

7. The disappearance of Mr. Giyan was closely followed by the arrest of his friend, Tito Magoti.² Mr. Giyan's phone was allegedly used to send text messages to Mr. Magoti to lure him to a location before he was abducted.

8. On 20 December 2019, the Dar es Salaam Zone Police Commander released a press report indicating that Mr. Giyan had not been abducted but was in police custody. Despite the authorities acknowledging that they were holding Mr. Giyan in detention, his family, employer and legal representatives were still not informed of his whereabouts, nor were they permitted to speak with him. The source notes that the uncertainty of Mr. Giyan's whereabouts was heightened by a contradictory statement made by the regional police commander for Kinondoni, who alleged at the time that he had no knowledge of the arrest. From the time that he was initially detained until 23 December 2019, Mr. Giyan's place of detention remained unknown to his family and representatives.

9. The source also reports that Mr. Giyan was tortured while detained, including to provide information about another individual.

10. According to the source, during his detention Mr. Giyan was questioned about his use of social media (Twitter), and his association with a media owner and activist, as well as with the president of the Tanganyika Law Society and an opposition politician – all of whom are vocal critics of the Government of United Republic of Tanzania, and all of whom are reportedly currently facing various forms of retaliation for demanding government accountability and transparency.

11. It is reported that on 24 December 2019, Mr. Giyan was brought before the Kisutu Resident Magistrate's Court in Dar es Salaam, where he was charged with three counts of money laundering and organized crime, specifically: leading organized crime, contrary to paragraph 4(1) (a) of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act [Cap 200 R.E 2002], as amended; possession of a computer program designed for the purpose of committing an offence contrary to section 10(1) (a) of the Cyber Crimes Act, No. 14 of 2015 read in conjunction with paragraph 36 of the First Schedule and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act [Cap 200 R.E 2002], as amended; and money laundering contrary to sections 12(d) and 13(a) of the Anti-Money Laundering Act of 2006 read in conjunction with paragraph 22 of the First Schedule and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act [Cap 200 R.E 2002], as amended.

12. After the charges were read against him, Mr. Giyan was allegedly not permitted to enter a plea. Furthermore, the source explains that the charge of money laundering meant that

² Mr. Magoti was the subject of the Working Group's opinion No. 38/2020.

he was not eligible for bail. The source explains that the use of non-bailable financial crime charges is a common tactic in the United Republic of Tanzania and represents an illegal framing of cases to purposefully deny individuals access to bail.

13. Reportedly, prosecutors asked the Court for additional time to investigate the case against Mr. Giyan, on 7 January, 21 January and 4 February 2020. Since then, court mentions have been held on several occasions and the trial of Mr. Giyan has been adjourned multiple times,³ most recently to 19 August 2020.

14. Mr. Giyan is currently being detained at Segerea Remand Prison, having been transferred there on 24 December 2019. It is understood that the prison has a poor level of hygiene and that there is a lack of food available to detainees. Since his detention, Mr. Giyan's family has brought him food daily.

15. The source also reports that Mr. Giyan had no access to lawyers from March 2020, when the Government of United Republic of Tanzania banned access due to the coronavirus disease (COVID-19) pandemic, until very recently. In addition, due to being detained in an overcrowded Tanzanian prison, Mr. Giyan's health is at serious risk during the COVID-19 pandemic.

b. Legal analysis

16. The source states that the case of Mr. Giyan falls under categories I, II, III and V of the Working Group.

i. Category I

17. The source argues that there is no legal basis that can be invoked for Mr. Giyan's arrest and subsequent detention. This is due to the fact that Mr. Giyan was not arrested in accordance with Tanzanian domestic laws, as he was not arrested pursuant to a warrant issued under the Criminal Procedure Act indicating the legal basis for his arrest and subsequent detention. Moreover Mr. Giyan was not provided with reasons for his arrest immediately upon arrest, nor was he provided with prompt information about charges for any crimes, during the period between his initial arrest and detention, and 24 December 2019, when he was brought before a court.

18. Allegedly, no specific charges were explained when the police authorities acknowledged they were holding Mr. Giyan in detention. The source recalls that under the Universal Declaration of Human Rights and the Covenant it is insufficient that the reason given for detaining Mr. Giyan and depriving him of his liberty was merely for the purpose of investigation, particularly in circumstances where he was detained for five days before charges were laid. Indeed, the interrogation of Mr. Giyan was focused on his relations with other persons and he was not told that he was being detained in order to be investigated for any of the offences that he was ultimately charged with.

19. Therefore, the source considers that the circumstances of Mr. Giyan's arrest and detention violate international and domestic law, namely article 9 of the Universal Declaration of Human Rights and articles 9 (2) and 14 (3) of the Covenant, rendering Mr. Giyan's detention legally baseless and arbitrary under category I.

ii. Category II

20. In the case at hand, the source explains that Mr. Giyan was detained at approximately the same time as, and in conjunction with, Mr. Magoti, who is a known human rights defender. They were both charged at the same time and on the same charges. Given this connection, the source argues that Mr. Giyan's arrest, detention and charges should be subject to the same intense evidentiary review as those of a human rights defender.

21. As described above, Mr. Giyan was eventually charged with "leading organized crime", "possession of a computer program designed for the purpose of committing an

³ On 5 March, 20 March, 1 April, 16 April, 29 April, 14 May, 29 May, 12 June, 26 June, 8 July and 22 July 2020.

offence” and “money laundering”. These charges were, however, most likely based on his association with a known human rights defender, and his own activity on social media, rather than his involvement in the offences alleged. The detention of Mr. Giyan in retaliation for his speech and association with critics of the Government of United Republic of Tanzania therefore violates his right to freedom of expression and association through the imposition of criminal sanctions to prevent and punish speech.

22. The source argues that the pretextual nature of the charges against Mr. Giyan is especially evident from the fact that during detention, Mr. Giyan was apparently questioned about his use of social media (Twitter) and his association with other known government critics.

23. While articles 19, 20 and 22 (2) of the Covenant provide for limited exceptions to free speech and free association principles based on national security, public safety and public order, the source states that Mr. Giyan’s case does not fall under these exceptions. Indeed, even though Mr. Giyan’s detention on the purported charges of “leading organized crime”, “possession of a computer program designed for the purpose of committing an offence” and “money laundering” could, *prima facie*, fall within the exception of public safety or public order under article 19 (3) of the Covenant, the source recalls that “paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights”.⁴ To the source, it is clear that the Government’s primary motivation in regard to the detention of Mr. Giyan was to silence and punish him in relation to his activity on social media and his association with known critics of the Government. As previously noted, any purported threat to public order by Mr. Giyan that the Government might allege would be of a pretextual nature.

24. Therefore, the source considers that Mr. Giyan’s deprivation of liberty is arbitrary under category II.

iii. Category III

25. According to the source, although Mr. Giyan’s case has not yet reached the trial stage, the authorities have gravely violated several norms of international human rights law, including minimum standards of due process relating to fair trial and the treatment of detainees.

26. Firstly, the source reiterates that Mr. Giyan was arrested without a warrant – a violation of the Covenant in and of itself. Furthermore, at the time of his arrest, he was not informed of the reasons for his arrest. On 20 December 2019, a police commander issued a statement confirming that Mr. Giyan had indeed been arrested, however no additional information was given as to the reasons for his arrest. This is insufficient to constitute notification of the reasons for his arrest without delay.

27. Moreover, Mr. Giyan was detained for five days before he was eventually brought before a judge on 24 December 2019, and he only learned of the charges he was facing during this time in court. This is much longer than the duration of time considered to be “prompt”, both in relation to learning of the charges and being brought before a judge.

28. Notably, it is stated in article 14 (3) (a) of the Covenant that where an individual has been charged with a criminal offence, that individual shall be “informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”. Although Mr. Giyan has now been informed of the charges against him, according to the source, the charge sheet fails to meet the requirements of the Covenant by not providing in full the nature and cause of the charges that were laid against him. Furthermore, section 132 of the country’s Criminal Procedure Act specifies that “every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”. This provision ensures that the defence is able to adequately prepare for trial. To the source, the charge sheet demonstrates that there is insufficient information on the facts to support the allegations

⁴ Human Rights Committee, general comment No. 34 (2011), para. 23.

contained therein. As such, Mr. Giyan lacks the necessary information to adequately prepare for trial.

29. Secondly, the source recalls that it is stated in article 14 (3) (d) of the Covenant that anyone facing criminal charges has the minimum guarantee “to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require”. Yet, during the five days that Mr. Giyan was detained following his unlawful arrest and before he was brought before a court, he was interrogated by police officers. During this time, in clear violation of the international legal standards, he was denied access to legal counsel. In addition, due to government COVID-19 restrictions, his legal counsel was not able to visit Mr. Giyan from March 2020 until very recently.

30. Thirdly, the source reiterates the right of the accused to inform his family of his whereabouts, pursuant to principle 16 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In the case at hand, between 18 December and 24 December 2019 Mr. Giyan was detained with no access to his lawyer or his family. Neither his family nor any other chosen persons were promptly notified of his arrest and detention, nor told of his whereabouts. On the evening of 20 December 2019, the Dares Salaam Zone Police Commander released a press report indicating that Mr. Giyan had not been abducted but was in police custody with several other arrested individuals. However, the Police Commander did not disclose where he was being detained, meaning that Mr. Giyan’s family did not promptly know of his location.

31. In addition, the source explains that section 64 of the country’s Criminal Procedure Act makes it clear that an individual who is detained generally has the right to apply for bail and that the police officer is to inform the person of that right. However, section 148 (5) of the Criminal Procedure Act provides that a person cannot be admitted to bail if that person is charged with certain crimes, including “money laundering”, as contrary to the Anti-Money Laundering Act of 2006. This provision therefore permits a blanket denial of bail for certain crimes, in clear contradiction of the guidance in Human Rights Committee general comment No. 35 (2014)⁵ that pretrial detention should not be mandatory for all individuals charged with a particular crime, without regard to the individual’s circumstances. Having been charged with money laundering, Mr. Giyan is not entitled to bail in the United Republic of Tanzania.

32. Reportedly, in addition to being denied bail without reference to his circumstances, the hearing of his trial has been adjourned multiple times to permit the prosecution to continue its investigations, such that his pretrial detention is frequently extended. The denial of Mr. Giyan’s right to apply for bail, particularly in circumstances where his hearing has been postponed on a number of occasions and for a period of several months, is a violation of his due process rights as guaranteed under articles 9 and 10 of the Universal Declaration of Human Rights, articles 9 and 14 of the Covenant and principles 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The source further specifies that, in the United Republic of Tanzania, those charged with non-bailable offences, regardless of the frivolousness or spurious nature of such allegations, can spend years in pretrial detention.

33. Finally, the source reports that Mr. Giyan was tortured while detained, including in order to provide information about another individual, in violation of article 5 of the Universal Declaration of Human Rights and article 7 of the Covenant.

34. Due to the aforementioned reasons, the source considers that Mr. Giyan’s wrongful charges and continued detention lack any legal basis and violate international legal principles, thereby rendering his detention arbitrary under category III.

iv. Category V

35. The source explains that in view of article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant, as well as article 13 of the Constitution of the United

⁵ See para. 38.

Republic of Tanzania, discrimination based on divergent political opinions or other opinions such as those critical of the Government is a violation of international law. As previously submitted, the source claims that Mr. Giyan was targeted, arrested and detained on the basis of his expression of opinion, his perceived political opinion and his association with known critics of the Government. Mr. Giyan was interrogated for his association with individuals who have publicly engaged in activities that seek to hold the Government to account. In addition, the source reiterates that human rights defenders have been recognized by the Working Group as having protected status under article 26 of the Covenant.⁶ Mr. Giyan's association with a human rights defender, coupled with the fact that both cases are being tried together, should afford Mr. Giyan the same protection. His detention based on his association with a known human rights defender is therefore a violation of article 26 of the Covenant, giving Mr. Giyan's deprivation of liberty an arbitrary character under category V.

Response from the Government

36. On 17 December 2020, the Working Group transmitted the allegations made by the source to the Government through its regular communications procedure. The Working Group requested the Government to provide, by 16 February 2021, detailed information about the situation of Mr. Giyan and any comments on the source's allegations. The Government has not replied to the communication, nor did it 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

37. In the present case, the Working Group considers that the allegations made by the source are extremely serious. 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.

38. In determining whether Mr. Giyan's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.⁷ In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

39. The Working Group wishes to reaffirm that States have the obligation to respect, protect and fulfil all human rights and fundamental freedoms, including liberty of person, and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights, the Covenant, the International Convention on the Elimination of All Forms of Racial Discrimination, and other applicable international and regional instruments.⁸ Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled and obliged to assess the circumstances of the

⁶ See opinion No. 48/2017.

⁷ A/HRC/19/57, para. 68.

⁸ See General Assembly resolution 72/180, preambular para. 5; and Human Rights Council resolution 41/2, preambular para. 2; resolution 41/6, para. 5 (b); resolution 41/10, para. 6; resolution 41/17, preambular para. 1; resolution 43/26, preambular para. 13; resolution 44/16, preambular para. 25; resolution 45/19, preambular para. 9; resolution 45/20, preambular para. 2; resolution 45/21, preambular para. 3; and resolution 45/29, preambular para. 3. See also Commission on Human Rights resolution 1991/42, para. 2; and resolution 1997/50, para. 15; Human Rights Council resolution 6/4, para. 1 (a); and resolution 10/9, para. 4 (b); and opinions No. 41/2014, para. 24; No. 3/2018, para. 39; No. 18/2019, para. 24; No. 36/2019, para. 33; No. 42/2019, para. 43; No. 51/2019, para. 53; No. 56/2019, para. 74; No. 76/2019, para. 36; No. 6/2020, para. 36; No. 13/2020, para. 39; No. 14/2020, para. 45; and No. 32/2020, para. 29.

detention and the law itself to determine whether such detention is also consistent with the relevant provisions of international human rights law.⁹

Category I

40. The Working Group will first consider whether there have been violations under category I, which concerns deprivation of liberty without a legal basis.

41. According to the source, no specific charges were explained when the police authorities acknowledged that they were holding Mr. Giyan in detention contrary to the provisions of the Universal Declaration of Human Rights and the Covenant, which make it insufficient that the reason given for detaining an individual and depriving him of his liberty was merely for the purpose of investigation. In this particular case, Mr. Giyan was detained for at least five days before charges were laid, and the interrogation of Mr. Giyan was focused on his relations with other persons and he was not told that he was being detained in order to be investigated for any of the offences that he was ultimately charged with. This, according to the source, puts the arrest and detention Mr. Giyan in violation of international and domestic law, namely article 9 of the Universal Declaration of Human Rights and articles 9 (2) and 14 (3) of the Covenant, rendering Mr. Giyan's detention legally baseless and arbitrary under category I.

42. The submissions by the source that Mr. Giyan was arrested without a warrant issued under the Criminal Procedure Act, indicating the lack of legal basis for his arrest, and that he was not provided with reasons for his arrest immediately upon arrest, nor provided with information about charges for any crimes, during the period between his initial arrest and detention on 18 December 2019, and 24 December 2019, when he was brought before the Kisumu Resident Magistrate's Court in Dar es Salaam, have not been refuted by the Government. Likewise, the assertion that during his detention he was denied access to legal counsel and to his family has not been rebutted by the Government. As the Working Group has stated, according to principle 9 and guideline 8 of 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,¹⁰ 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 apprehension, and must be promptly informed of this right upon apprehension. Access to legal counsel should not be unlawfully or unreasonably restricted.¹¹

43. The Working Group has consistently stated that in order for a deprivation of liberty to be justified, it must have a legal basis. It is not sufficient for there to be a national law or practice authorizing the arrest and detention of a suspect. The authorities must invoke a legal basis consistent with international human rights standards, through an arrest warrant, and apply it to the circumstances of the case. This does not appear to have happened in the case of Mr. Giyan.¹²

44. International human rights law requires that arrests must be based on a duly issued arrest warrant in order to ensure the exercise of effective control by a competent, independent and impartial judicial authority, which is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights, article 9 of the Covenant, and principles 2, 4 and 10

⁹ See opinions No. 1/1998, para. 13; No. 82/2018, para. 25; No. 36/2019, para. 33; No. 42/2019, para. 43; No. 51/2019, para. 53; No. 56/2019, para. 74; No. 76/2019, para. 36; No. 6/2020, para. 36; No. 13/2020, para. 39; No. 14/2020, para. 45; and No. 32/2020, para. 29.

¹⁰ A/HRC/30/37, annex.

¹¹ *Ibid.*, paras. 12–15 and 67–71. See also Human Rights Committee, general comment No. 32 (2007), para. 34; and opinions No. 61/2020, para. 70; and No. 40/2020, para. 29.

¹² See, for example, opinions No. 93/2017, para. 44; No. 10/2018, paras. 45–46; No. 36/2018, para. 40; No. 46/2018, para. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51; No. 65/2019, para. 59; No. 71/2019, para. 70; No. 72/2019, para. 40; No. 82/2019, para. 74; No. 6/2020, para. 39; No. 11/2020, para. 37; No. 13/2020, para. 46; No. 14/2020, para. 49; No. 31/2020, para. 40; No. 32/2020, para. 32; No. 33/2020, paras. 53 and 71; and No. 34/2020, para. 44.

of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary.¹³ At the time when Mr. Giyan was arrested, there was no arrest warrant presented in respect of the arrest, in violation of article 9 (1) of the Covenant. Furthermore, the Working Group notes the un rebutted submission by the source that Mr. Giyan was not promptly informed of the basis for his arrest, in breach of article 9 (2) of the Covenant. The Working Group reiterates that, as in the present case, any deprivation of liberty without a valid arrest warrant is arbitrary and lacks legal basis.

45. The Working Group considers that the Government's failure to give reasons for the arrest at the time of Mr. Giyan's arrest and to promptly provide notification of the charges to him was in violation of his rights under article 9 (2) of the Covenant. Additionally, the Working Group notes that Mr. Giyan was arrested on 18 December 2019 and only brought before a magistrate six days later. International standards set out in the Working Group's jurisprudence prescribe that an arrested person should be brought before a judge within 48 hours.¹⁴ The Working Group thus finds that the Government has violated articles 3 and 9 of the Universal Declaration of Human Rights, principles 11, 37 and 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the 48-hour stipulation by the Human Rights Committee as regards article 9 (3) of the Covenant.

46. Furthermore, the Working Group notes that following his arrest, Mr. Giyan was kept in detention for six days without access to a lawyer or his family before he was brought to court on 24 December 2019. The Working Group notes that access to a lawyer from the outset of the detention is an essential safeguard to enable the person detained to challenge the legal basis of the detention.¹⁵ The Working Group has consistently found that holding persons incommunicado violates their right to challenge the lawfulness of the detention before a court under article 9 (3) and (4) of the Covenant.¹⁶ The Working Group considers that judicial oversight of deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.

47. The Working Group therefore concludes that Mr. Giyan's arrest and detention lacks a legal basis and is arbitrary under category I.

Category II

48. Mr. Giyan was charged with "leading organized crime", "possession of a computer program designed for the purpose of committing an offence" and "money laundering". According to the source, these charges were most likely based on his association with Mr. Magoti, who is a known human rights defender who was detained at approximately the same time and on the same charges. This connection, the source argues, means that Mr. Giyan's arrest, detention and charges should be subject to the same intense evidentiary review as those of a human rights defender; and that he was arrested for his own activity on social media, rather than his involvement in the offences alleged.

¹³ See, for example, decisions No. 1/1993, paras. 6–7; No. 3/1993, paras. 6–7; No. 4/1993, para. 6; No. 5/1993, paras. 6, 8 and 9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; and No. 44/1993, paras. 6–7. For more recent jurisprudence, see opinions No. 38/2013, para. 23; No. 48/2016, para. 48; No. 21/2017, para. 46; No. 63/2017, para. 66; No. 76/2017, para. 55; No. 83/2017, para. 65; No. 88/2017, para. 27; No. 93/2017, para. 44; No. 3/2018, para. 43; No. 10/2018, para. 46; No. 26/2018, para. 54; No. 30/2018, para. 39; No. 38/2018, para. 63; No. 47/2018, para. 56; No. 51/2018, para. 80; No. 63/2018, para. 27; No. 68/2018, para. 39; No. 82/2018, para. 29; No. 6/2020, para. 40; No. 11/2020, para. 38; No. 13/2020, para. 47; No. 14/2020, para. 50; No. 31/2020, para. 41; No. 32/2020, para. 33; No. 33/2020, para. 54; and No. 34/2020, para. 46.

¹⁴ Human Rights Committee, general comment No. 35 (2014), para. 33.

¹⁵ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 9 and guideline 8.

¹⁶ See, for example, opinions No. 79/2017, para. 49; No. 52/2019, para. 23; and No. 2020/38, para. 37. See also Human Rights Committee, general comment No. 35 (2014), para. 35.

49. To the source, it is clear that the Government's primary motivation in regard to the detention of Mr. Giyan was to silence and punish him in relation to his activity on social media and his association with known critics of the Government, and therefore violates his right to freedom of expression and association through the imposition of criminal sanctions to prevent and punish speech. This, according to the source, brings the violation under category II.

50. In order to find that a detention is arbitrary under category II, the Working Group must be satisfied that the deprivation of liberty concerned results from the exercise of one or another of the universally recognized human rights. In the present case, the right implicated is that of freedom of opinion and expression. Freedom of opinion and expression is a fundamental human right enshrined in article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.¹⁷ The Government must respect, protect and fulfil the right of individuals to hold and express opinions, including those that are not in accordance with its official policy, and to think and manifest personal convictions at odds with its official ideology, under the peremptory norms (*jus cogens*) of customary international law.¹⁸

51. The Human Rights Committee, in its general comment No. 34 (2011), has stated that restrictions on freedom of expression as envisaged in paragraph 3 of article 19 must not be overbroad, must conform to the principle of proportionality, must be appropriate to achieve their protective function and must be the least intrusive means available. It is worth noting that the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

52. On the facts as presented to the Working Group by the source, there is no tangible evidence to demonstrate that the criminal charges levelled against Mr. Giyan of "leading organized crime", "possession of a computer program designed for the purpose of committing an offence" and "money laundering" were designed to disguise the real motive attributed by the source to the Government of punishing or persecuting Mr. Giyan for his association with a human rights defender or for being a human rights defender in his own right. In the absence of further evidence demonstrating the violation of Mr. Giyan's exercise of his freedom of opinion and expression, the Working Group is unable to unequivocally conclude that the deprivation of Mr. Giyan's liberty resulted from his exercise of his freedom of opinion and expression. The Working Group accordingly does not find a category II violation.

Category III

53. The Working Group notes that the source alleges multiple violations of international human rights norms and standards in the arrest and detention of Mr. Giyan. These pertain to the minimum standards of due process regarding fair trial and treatment of detainees. The source recalls that Mr. Giyan was arrested without a warrant – a violation of the Covenant in and of itself, was not informed of the reasons for his arrest at the time of the arrest, was detained for five days before he was eventually brought before a judge on 24 December 2019, and only learned of the charges he was facing during that court appearance. This is much longer than the duration of time considered to be "prompt", in relation both to learning of the charges and to being brought before a judge.

54. Regarding the un rebutted facts as narrated by the source, the Working Group is in no doubt that the circumstances leading to the arrest of Mr. Giyan entailed a 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 United Republic of Tanzania. It is stated in article 14(3)(a) of the Covenant that where an individual has been charged with a criminal offence, the individual is to be "informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". Although Mr. Giyan was subsequently informed of the charges

¹⁷ *Kang v. Republic of Korea* (CCPR/C/78/D/878/1999), para. 7.2.

¹⁸ See opinions No. 94/2017, para. 59; No. 88/2017, para. 32; No. 83/2017, para. 80; and No. 76/2017, para. 62.

against him, according to the source, the charge sheet failed to meet the requirements of the Covenant by not providing in full the nature and cause of the charges laid against him. The Working Group agrees with the source that the charge sheet lacked sufficient information to enable Mr. Giyan to adequately prepare for trial.

55. Additionally, it is stated in article 14 (3) (d) of the Covenant that anyone facing criminal charges has the minimum guarantee “to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require”. Yet, during the five days that Mr. Giyan was detained following his arrest and before he was brought before a court, he was interrogated by police officers. During this time, in clear violation of the international legal standards, he was denied access to legal counsel.¹⁹

56. The Working Group finds a breach of article 14 (3) (b) of the Covenant and emphasizes that legal assistance should be available at all stages of criminal proceedings, namely during pretrial, trial, retrial and appellate stages, to ensure compliance with fair trial guarantees.²⁰ Moreover, the initial interrogation of Mr. Giyan in the absence of his lawyer violated his right not to testify against himself captured in article 14 (3) (g) of the Covenant.

57. In terms of article 9 (3) of the Covenant, pretrial detention should be the exception rather than the norm, and should be ordered for the shortest time possible.²¹ In other words, liberty is acknowledged under article 9 (3) of the Covenant as the core consideration, with detention merely as an exception.²² Detention pending trial must thus be based on an individualized determination that it is reasonable and necessary for such purposes as to prevent flight, interference with evidence or the recurrence of crime.²³

58. In addition, as the source explains, section 64 of the Criminal Procedure Act makes it clear that an individual who is detained generally has the right to apply for bail and that the police officer is to inform the person of that right. However, section 148 (5) of the Criminal Procedure Act provides that a person cannot be admitted to bail if that person is charged with certain crimes including “money laundering”, as contrary to the Anti-Money Laundering Act of 2006. This provision therefore permits a blanket denial of bail for certain crimes, in clear contradiction of the guidance in Human Rights Committee general comment No. 35 (2014) that pretrial detention should not be mandatory for all individuals charged with a particular crime, without regard to the individual’s circumstances. Having been charged with money laundering, Mr. Giyan is not entitled to bail in the United Republic of Tanzania.

59. Reportedly, in addition to being denied bail without reference to his circumstances, the hearing of his trial has been adjourned multiple times to permit the prosecution to continue its investigations, such that his pretrial detention is frequently extended. The denial of Mr. Giyan’s right to apply for bail, particularly in circumstances where his hearing has been postponed on a number of occasions and for a period of several months, is a violation of his due process rights as guaranteed under articles 9 and 10 of the Universal Declaration of Human Rights, articles 9 (3) and 14 (3) (c) of the Covenant and principles 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The source further specifies that, in the United Republic of Tanzania, those charged with non-bailable offences, regardless of the frivolousness or spurious nature of such allegations, can spend years in pretrial detention.

60. Finally, the source reports that Mr. Giyan was tortured while detained, including in order for him to provide information regarding another individual. The Working Group considers this to be in violation of article 5 of the Universal Declaration of Human Rights and article 7 of the Covenant. With regard to these allegations and in accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the

¹⁹ A/HRC/45/16, paras. 50–55.

²⁰ *Ibid.*, para. 53. See also A/HRC/42/39/Add.1, para. 54; 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, principle 9 and guideline 8.

²¹ A/HRC/19/57, paras. 48–58.

²² *Ibid.*, para. 54.

²³ Human Rights Committee, general comment No. 35 (2014), para. 38.

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

61. For the aforementioned reasons, the Working Group concludes that these violations of the right to a fair trial are of such gravity as to render Mr. Giyan's detention arbitrary under category III.

Category V

62. In regard to a category V violation, the source explains that, in view of article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant, as well as article 13 of the Constitution of the United Republic of Tanzania, discrimination based on divergent political opinions or other opinions such as those critical of the Government is a violation of international law. According to the source, Mr. Giyan was targeted, arrested and detained on the basis of his expression of opinion, his perceived political opinion and his association with a human rights defender. This, coupled with the fact that both cases are being tried together, should afford to Mr. Giyan the same protection as to human rights defenders, who are recognized by the Working Group as having protected status under article 26 of the Covenant.²⁴ The source concludes that Mr. Giyan's detention was based on his association with a known human rights defender, and is therefore in violation of article 26 of the Covenant, giving Mr. Giyan's deprivation of liberty an arbitrary character under category V.

63. The Working Group has already indicated that the source has not given sufficient details of Mr. Giyan's activities as a human rights defender and of such activities directly leading to his arrest and detention. What the source has done is to allege broadly that Mr. Giyan associated with a human rights defender. Even in the absence of a rebuttal from the Government, this does not provide a sufficient basis for the Working Group to hold that Mr. Giyan's detention was based on his political opinions as a human rights defender. The Working Group is therefore unable to making a finding of a violation under category V.

Concluding remarks

64. The information from the source indicates that between 18 December and 24 December 2019 Mr. Giyan was detained with no access to his lawyer or his family. Neither his family nor any other chosen persons were promptly notified of his arrest and detention, nor told of his whereabouts. On the evening of 20 December 2019, the Dar es Salaam Zone Police Commander released a press report indicating that Mr. Giyan had not been abducted but was in police custody with several other arrested individuals. However, the Police Commander did not disclose where he was being detained, meaning that his family did not promptly know of his location. This was in violation of the right of the accused to inform his family of his whereabouts (pursuant to principle 16 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment).

Disposition

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

The deprivation of liberty of Theodory Faustine Giyan, being in contravention of articles 3, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 2 (3), 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

66. The Working Group requests the Government of United Republic of Tanzania to take the steps necessary to remedy the situation of Mr. Giyan 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.

67. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Giyan immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global COVID-19 pandemic and the threat that it poses in

²⁴ See opinion No. 48/2017.

places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Giyan.

68. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of Mr. Giyan and to take appropriate measures against those responsible for the violation of his rights.

69. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

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

Follow-up procedure

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

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

72. 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.

73. 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.

74. 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.²⁵

[Adopted on 12 May 2021]

²⁵ Human Rights Council resolution 42/22, paras. 3 and 7.