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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-sixth session, 18–22 November 2019

Opinion No. 83/2019, concerning Foly Satchivi (Togo)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 3 July 2019 the Working Group transmitted to the Government of Togo a communication concerning Foly Satchivi. The Government replied to the communication on 19 August 2019. 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).

* In accordance with paragraph 5 of the Working Group's methods of work, Sètondji Roland Adjovi did not participate in the discussion of the present case.



Submissions

Communication from the source

(a) Background

4. Foly Satchivi is a Togolese national who was born in 1995. He lives in the Hédzranawoé neighbourhood of Lomé. He is a human rights defender and the leader and spokesperson of the En Aucun Cas (Under No Circumstances) movement.

(b) Arrest and detention

5. According to the source, Mr. Satchivi was arrested by gendarmes at the headquarters of the civil society organization Novation Internationale in central Lomé on 22 August 2018. He was not shown any warrant at the time of his arrest and he was not told why he was being arrested. His home and the home of his mother and brother were searched, also without a warrant.

6. The source explains that the En Aucun Cas movement invited the media to a press conference at the headquarters of Novation Internationale on 22 August 2018, in order to give its opinion on the implementation of the road map of the Economic Community of West African States and on the political developments in Togo. As he was preparing to go to the press conference, Mr. Satchivi received a telephone call from the head of Novation Internationale, who informed him that a large number of gendarmes had been deployed to surround the headquarters of the organization, within a radius of 200 metres. The head of Novation Internationale added that, according to the commander who was leading the troops, the press conference could not be held because it had not been authorized by the relevant minister and because, according to the authorities, En Aucun Cas did not have appropriate authorization from the Ministry of Territorial Administration, Decentralization and Local Communities. Mr. Satchivi therefore asked the commander of the gendarmerie which authorities he needed to contact. He informed the members of En Aucun Cas, via an instant messaging application, that the press conference could not take place. He also informed the leaders of other human rights organizations of the situation. He was then advised to ask the commander of the gendarmerie whether the commander had a requisition and, if so, whether he should obtain a copy of it for the next stage of the proceedings.

7. The source reports that when Mr. Satchivi arrived at the office of the commander of the gendarmerie, the commander told him that the gendarmes did not have a requisition and invited him to contact the Minister of Territorial Administration, Decentralization and Local Communities or the Minister of Security and Civil Protection in order to resolve the situation. Mr. Satchivi asked the commander for permission to leave a message with the person in charge of the centre where the press conference was supposed to have been held, in order to ensure that journalists did not wait there in vain, and suggested that he be accompanied by gendarmes, who could make sure that he did not deliver any other messages to the person in question. The commander agreed to his proposal and two officers accompanied him. On the way, however, they were stopped by another gendarme, who answered a telephone call and then asked Mr. Satchivi to get into a vehicle. The commander told him that there had been a change in instructions. Mr. Satchivi was driven to the Investigation Unit, where he was met by the Director of the Unit, who said that reports indicated that he was a member of certain instant messaging groups that were in favour of the President of Togo losing his position and that the En Aucun Cas movement, especially its name, was a form of incitement. Mr. Satchivi said that, although he was a member of some instant messaging groups, he did not belong to any of the groups mentioned. Regarding the name of the movement, he noted that the language used by human rights activists could not be considered incitement.

8. The source reports that Mr. Satchivi then asked the Director of the Investigation Unit why he had been arrested. Without telling him the reasons for his arrest, the Director took him forcibly, under police and military escort, to the centre where the press conference was supposed to have been held, then to his home and lastly to his mother's home, so that each place could be searched.

9. According to the source, after Mr. Satchivi was deprived of his liberty by gendarmes and placed in detention by the prosecutor, he was then kept in detention under the

authorization of the investigating judge, at the request of the general prosecutor. When he appeared before the senior investigating judge on 23 August 2018, he was told that he was being prosecuted for forceful resistance to public officers executing the law or lawful orders, under article 498 of the Criminal Code, and for advocacy of offences, under subparagraphs 1 and 2 of the first paragraph of article 552 of the Criminal Code. The following day, the senior investigating judge informed him that the general prosecutor had requested that he also be charged with aggravated disturbance of public order, under article 495 of the Criminal Code.

10. According to the source, Mr. Satchivi was initially arrested for encouraging Togolese citizens to take part in peaceful demonstrations, dressed in red and black, in order to promote human rights and the rule of law in Togo. He was suspected of forceful resistance to public officers executing the law or lawful orders, aggravated disturbance of public order and advocacy of offences.

11. The source reports that Mr. Satchivi was kept in pretrial detention for four months. The authorities gave no explanation as to why he was detained for so long before being brought before a court. Furthermore, according to the source, Mr. Satchivi was not formally charged before he appeared in Lomé Criminal Court in January 2019 and, after his appearance, no official indictment was issued. His trial started on 9 January 2019 and the first hearing lasted for approximately six hours. At this stage, authorization was given for him to be kept in detention for an additional week. On 16 January 2019, Mr. Satchivi was sentenced to 36 months of imprisonment, 12 of which were suspended. Mr. Satchivi was then imprisoned in the civilian prison in Lomé.

12. The source reports that Mr. Satchivi lodged an appeal on 18 January 2019.

(c) Legal analysis

13. According to the source, Mr. Satchivi's detention is arbitrary under categories I, II and III and is contrary to the provisions of the Universal Declaration of Human Rights, the Covenant and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

(i) Category II

14. The source explains that Mr. Satchivi is a well-known human rights defender. He is the leader and spokesperson of En Aucun Cas, a movement for the defence of human rights that aims to raise public awareness of human rights issues in Togo, especially in rural areas, and to bring about a peaceful sociopolitical transition in the country through peaceful protest and other such means. Mr. Satchivi has continually called for improvement and change in Togo, placing particular emphasis on the rule of law and the promotion of human rights.

15. The source claims that Mr. Satchivi's detention in August 2018 was due to the organization of a press conference on the deterioration of the sociopolitical situation in Togo. As a result of his activism, Mr. Satchivi was arrested and detained arbitrarily while trying to exercise his right to freedom of expression and association for the improvement of Togolese society. The source asserts that the initial detention and current detention of Mr. Satchivi are an attempt by the Government of Togo to silence his peaceful activism in support of human rights, and that the Government's actions in this regard violate his rights to freedom of expression and freedom of assembly and association under articles 18, 19 and 20 of the Universal Declaration of Human Rights and articles 12, 18, 19, 21, 22 and 25 of the Covenant.

16. In addition, the source reports that the events involving Mr. Satchivi took place against a backdrop of repression of human rights defenders, which began as a result of the mass demonstrations in Togo that started in 2017.

(ii) Categories I and III

17. The source alleges that Mr. Satchivi was arrested and questioned by the Director of the Investigation Unit. However, he was not officially arrested at any point; instead, he was detained in vehicles in order to be questioned and then searched. After the questioning and

the searches, which, according to the source, violated Togolese law, including criminal procedure, and international law, Mr. Satchivi was once again placed in detention.

18. The source alleges that at no point during the events of 22 August 2018 was Mr. Satchivi officially arrested under a warrant or informed of the reason for his detention. No record of his arrest and detention was drawn up at that stage. The source claims that the way in which Mr. Satchivi was treated by the security forces violated article 9 of the Universal Declaration of Human Rights, article 9 of the Covenant and principles 2, 12 and 23 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

19. The source also alleges that the arrest and pretrial detention of Mr. Satchivi and the fact that he was not released on bail constitute violations of his right to a fair trial. These violations continued until his trial, which in turn violated articles 9 and 10 of the Universal Declaration of Human Rights, articles 9 and 14 of the Covenant and principles 11 (1) and 18 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

20. The source alleges, in particular, that Mr. Satchivi did not have adequate time for the preparation of his defence. On 7 January 2019, Mr. Satchivi was informed that he would stand trial on 9 January 2019. Thus, having spent around four months in pretrial detention, he was informed less than 48 hours before his first appearance in court that the hearing would actually be his trial. The Togolese Code of Criminal Procedure requires that accused persons be informed of the date of their trial at least 72 hours in advance. In addition, Mr. Satchivi could not notify his lawyers of the imminent trial date until 8 January 2019, leaving them with just one day to complete their preparations, which included gathering evidence, finding witnesses and deciding on a trial strategy. According to the source, this failure to allow enough time for the preparation of a defence constitutes a violation of Mr. Satchivi's right to a fair trial.

21. The source alleges that this lack of time was compounded by the fact that the correct procedure was not followed during the trial itself. Firstly, according to the source, the Togolese authorities used intimidation tactics on the day of the trial. A security cordon of around 500 police officers and gendarmes was set up around the court. The authorities were clearly trying to prevent members of the public from entering the courthouse and the courtroom. Apparently, several witnesses who had agreed to testify for the defence changed their mind as a result. Access to the courtroom was also severely restricted, undermining Mr. Satchivi's right to a public hearing. More specifically, members of his family were not allowed to enter the courtroom, even though they had valid identity documents. Only lawyers and a small number of journalists and observers from non-governmental organizations were given access. The hearing of 16 January 2019 reportedly took place in the same atmosphere of intimidation.

22. The source explains that the trial itself lasted six hours in total. Although in some cases a short trial might be considered fair, the source argues that the length of the trial in this case was not in line with fair trial standards, given the seriousness of the charges, the complexity of the case and the applicable penalty in the event of conviction. According to the source, the fact that the trial was short also resulted in a violation of the principle of equality of arms. The presiding judge gave Mr. Satchivi's defence counsel very little time, granting them just a few minutes to examine the evidence presented by the prosecution. They asked the judge several times to be given more time to examine the prosecution file but he refused almost every time. The judge occasionally allowed the defence counsel to ask further questions, imposing a time limit of 30 seconds. By contrast, the prosecution was granted unlimited speaking time.

23. The source also maintains that the prosecution evidence was inadequate and that any conviction based on that evidence was clearly unfair, which renders Mr. Satchivi's detention arbitrary. The prosecution did not call any witnesses and instead used Mr. Satchivi's comments in the press as evidence of forceful resistance to public officers executing the law or lawful orders, aggravated disturbance of public order and advocacy of offences. For example, the prosecutor produced a screenshot of a message signed "Foly", from which the telephone number was deliberately missing, from an instant messaging group called "End of Plan". The source claims that this message was obtained illegally. According to the prosecutor, the message showed that Mr. Satchivi, as the leader of the En Aucun Cas movement, had called on the people of Togo to wear red and black on 8 August

2018. The prosecutor claimed that this message was a call to rebel against the authorities. The defence rebutted this evidence by producing the original message, which had been posted on a social media page belonging to En Aucun Cas and which stated that wearing red and black was a peaceful way for citizens to express their discontent with the lack of respect for human rights and the rule of law in Togo.

24. The source claims that this evidence of a call to rebel against the authorities was in fact so weak that the prosecutor himself conceded that it was unreliable and should be rejected. The dispute between the parties therefore came down to whether asking Togolese citizens to wear red and black as they went about their activities was an offence. The source notes that, in other words, the prosecution evidence consisted of Mr. Satchivi's call for peaceful demonstrations to promote human rights and the rule of law in Togo. Such comments are fully in accordance with his right to freedom of expression and freedom of association. His statements in the national and international press fall under the protection of international human rights law. In the present case, there is nothing to suggest that it was necessary to restrict Mr. Satchivi's rights.

25. The source explains that after spending just six hours hearing the evidence in this case, the judge ordered a second hearing on 16 January 2019. At that hearing, the judge found Mr. Satchivi guilty and sentenced him to 36 months of imprisonment, 12 of which were suspended. The source reports that after Mr. Satchivi was convicted, his defence counsel did not receive a copy of the decision. The presiding judge gave no reason for the conviction or the sentence. Mr. Satchivi's defence counsel had to make do with a copy of the decision obtained by the prosecutor, and his ability to appeal was seriously limited as a result. Nevertheless, his defence counsel appealed against the conviction and the sentence on 18 January 2019. However, the source is not convinced that the appeal proceedings were properly conducted. The fact that Mr. Satchivi was not provided with any valid grounds for his conviction constitutes a violation of principle 11 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

26. As regards category III, the source claims that Mr. Satchivi did not know what he was being charged with until he appeared before the judge on 23 and 24 August 2018. Mr. Satchivi was not informed of his right to legal assistance or given access to any such assistance while he was being questioned or during the subsequent searches. According to the source, this constitutes a violation of article 14 of the Covenant and principles 10, 13 and 17 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

27. The source notes that Mr. Satchivi was held in pretrial detention for over four months and was not brought before a judge at any other time during that period. This is contrary to article 9 (3) of the Covenant, which regulates the use of pretrial detention and stipulates that anyone arrested must be brought promptly before a judge. Although his first appearance before a judge was in line with generally recognized standards, Mr. Satchivi was also entitled to trial within a reasonable time. A delay of over four months between the first appearance before a judge and the trial is considered a violation of articles 9 and 10 of the Universal Declaration of Human Rights, articles 9 and 14 of the Covenant and principle 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The source considers that the failure to hold a trial within a reasonable time renders Mr. Satchivi's detention arbitrary.

28. The source also claims that, while Mr. Satchivi was in pretrial detention, he requested three times to be released on bail, without success. His first and second requests were denied on the grounds that he had not yet been formally charged. According to the source, this is contrary to human rights because a lack of charges cannot justify a refusal to release someone on bail; on the contrary, it should mean that release on bail must be granted. The third request was refused by the judge on the basis of Mr. Satchivi's character and the political crisis that was raging in Togo at the time. According to the source, Mr. Satchivi was therefore kept in arbitrary detention solely because he was a human rights defender and not on the basis of any legal considerations. These refusals constitute a clear violation of his right to a fair trial, which is enshrined in 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.

29. Mr. Satchivi's case was the subject of a letter sent by two special procedure mandate holders on 24 October 2018 (AL TGO 3/2018).¹ The Working Group takes note of the Government's reply, dated 4 January 2019.²

Response from the Government

30. On 3 July 2019, the Working Group transmitted a communication concerning Mr. Satchivi to the Government. The Working Group requested the Government to provide further information on Mr. Satchivi's situation by 2 September 2019. The Government submitted its response on 19 August 2019.

31. The Government reports that on 22 August 2018, the day of the press conference, the head of the security forces who were on the premises notified Mr. Satchivi that he was prohibited from holding the press conference. According to the Government, Mr. Satchivi refused to comply and defied the ban by forcing his way on to the premises. He was arrested and a police investigation was opened. The investigation revealed several messages on social networks that had been written by Mr. Satchivi, in which he called on the Togolese people to rise up against "a bloodthirsty and incompetent regime and to dress in red or black in order to defy the institutions of the Republic". The Government also claims that Mr. Satchivi used these social networks to disseminate other messages, such as "The countdown has begun ...", "Whoever has eyes to see, let them see, and whoever has ears to hear, let them hear ...", "Our verdict is final ...", "Down with treachery!", "Down with the dictatorship!" and "Down with the savages!"

32. The Government then recalls the charges brought against Mr. Satchivi. It states that, following the police investigation, Mr. Satchivi was brought before the prosecution service of the Lomé Court of First Instance (a class one court) on 23 August 2018 and that, the same day, a judicial investigation was opened and a detention order was issued for forceful resistance to public officers executing the law or lawful orders, incitement to commit offences, and aggravated disturbance of public order. These acts are defined as punishable offences in article 495 (3), article 498 and subparagraphs 1 and 2 of the first paragraph of article 552 of Act No. 2016-027 of 27 October 2016, amending Act No. 2015-010 of 24 November 2015, establishing the new Criminal Code. Once the judicial investigation was complete, Mr. Satchivi was sent before the criminal court by the senior investigating judge to answer the charges mentioned above.

33. On 16 January 2019, Mr. Satchivi was tried, convicted and sentenced to 36 months of imprisonment, 12 of which were suspended, by the first criminal chamber of the Lomé Court of First Instance.

34. The Government maintains that the guiding principles of criminal procedure, namely independence, impartiality, the presumption of innocence, respect for the rights of the defence, reasonable time and the right to a public hearing were strictly observed throughout all stages of the proceedings against Mr. Satchivi. The Government notes that the rules governing the use of police custody were followed and that Mr. Satchivi was held in custody for less than 24 hours.

35. The judicial investigation was conducted rapidly, in spite of the appeals lodged by Mr. Satchivi against the decisions of the investigating judge. In fact, it took less than four months to complete all the pretrial steps. Mr. Satchivi hired a lawyer and submitted two requests for release on bail, both of which were dealt with by the investigating judge within the time frame established by law. Acting through his lawyer, Mr. Satchivi lodged an appeal with the indictments chamber against the ordinance of 27 August 2018 denying his request for release on bail; the indictments chamber confirmed the investigating judge's decision in Judgment No. 155/18 of 19 September 2018. None of Mr. Satchivi's requests for release on bail went unanswered.

36. Lastly, the Government explains that, after the judicial investigation whereby the investigating judge had, through various investigative measures, gathered evidence relating to the charges, Mr. Satchivi was accompanied by several defence lawyers at his trial on 9 January 2019. Moreover, Mr. Satchivi was entirely free to challenge the verdict that was

¹ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24128>.

² <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34464>.

handed down, using the available remedies. The Government argues that the proceedings brought against Mr. Satchivi did not, in any way, impede the freedom of assembly and expression that all citizens enjoy in accordance with national law and the international instruments to which Togo is a party, including the Covenant. Moreover, the decision to prohibit Mr. Satchivi from holding a press conference on 22 August 2018, with which he failed to comply, was justified by the fact that he had not notified the competent authorities of the press conference in accordance with article 6 of Act No. 2011-010 of 16 May 2011 on the conditions governing the exercise of freedom of assembly and peaceful public demonstrations.

Further information from the source

37. The source notes that the Government's response confirms that there were security forces on the premises where the press conference was to be held, on 22 August 2018, and that Mr. Satchivi was arrested the same day, supposedly because the press conference had not been authorized. However, the Government does not explain why security forces were deployed to the site of a press conference even though there were no signs of violence. Nor does it mention Mr. Satchivi's attempts to resolve the situation amicably.

38. The source also stresses that Mr. Satchivi did not put up any verbal or physical resistance to the security forces. None of the officials who were on the premises gave evidence against him in the criminal proceedings or filed a complaint against him.

39. According to the source, the messages supposedly posted on social media by Mr. Satchivi seem to be the only grounds for his arrest and detention. However, the source denies that these messages were found on Mr. Satchivi's telephone and maintains that they were produced by the prosecution. At the hearing, the prosecution failed to prove that Mr. Satchivi had written the messages.

40. The source states that the first message is a screenshot of a message published on an online discussion platform from a telephone number that does not belong to Mr. Satchivi. According to the source, this fact was not investigated, even though it took the authorities four months to bring the case to court. The second message is a distorted version of a statement posted on the web page of the En Aucun Cas movement, calling on people to dress in red or black on 8 August 2018 and to take part in a rally on 11 August 2018. Neither of these events took place, because they were banned by the authorities. The source notes that when the statement was posted online, none of the members of En Aucun Cas were summoned or arrested; yet, the prosecution claimed in Mr. Satchivi's case file that the publication of the statement was likely to cause serious disturbance to public order and was intended as incitement to rebel against the authorities.

41. The source asserts that, even if these messages were written by Mr. Satchivi – a claim that it contests – messages of this kind, including the call to “rise up against an incompetent regime”, do not constitute an offence. Rather, they are the kind of statements that are commonly made by activist groups. In addition, wearing red and black is a peaceful way for citizens to express their discontent with the lack of respect for human rights and the rule of law in Togo.

42. The source argues that the Government seems to be saying that Mr. Satchivi was detained on the grounds that he had not notified the authorities of the press conference. Although Togolese law states that the authorities must be notified of public demonstrations on private premises, this provision excludes meetings and events that are held on a regular basis, such as the press conferences organized by this movement. The prohibition of the press conference was therefore a breach of national and international law. Under Togolese law, a press conference may be prohibited only if it is likely to cause a disturbance of public order and only after the matter has been discussed. Moreover, the officers in charge had not received a requisition to prohibit the press conference. In any case, the authorities' decision to sentence Mr. Satchivi to 3 years' imprisonment for supposedly failing to obtain the appropriate authorization is unreasonable.

43. According to the source, the Government maintains that Mr. Satchivi was assisted by a lawyer during the hearing but does not mention him receiving any such assistance while he was being questioned or during the judicial investigation. On 23 August 2018, the investigating judge informed Mr. Satchivi that he was being investigated on suspicion of forceful resistance to public officers executing the law or lawful orders. On 24 August 2018,

the prosecutor submitted an application requesting that the investigation be extended to include acts of aggravated disturbance to public order, which, according to the source, shows that the judge knew from the start of the proceedings how serious the charges were but failed in his obligation to provide legal counsel. This failure constitutes a violation of article 14 of the Covenant and principles 10, 13 and 17 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Government's response confirms that Mr. Satchivi spent four months in pretrial detention and sought several times to be released on bail, without success. The source notes that the Government has not explained why Mr. Satchivi was not released on bail. Under international law, there was no reason for his requests to be refused.

44. The source also notes that its allegations regarding the illegal searches conducted by the authorities are not contested by the Government. During the illegal search of Mr. Satchivi's house, a copy of the opening speech that was to be given at the press conference was seized. However, it was never added to the case file, which, according to the source, shows that the press conference was in no way intended to disturb public order. The Government has not responded to the arguments that Mr. Satchivi did not have adequate time for the preparation of his defence and that during his trial, which was conducted hastily, the prosecution presented insufficient evidence of guilt in an atmosphere of intimidation.

45. The source informed the Working Group that Mr. Satchivi's case was heard on appeal in October 2019 and that his sentence was reduced. Mr. Satchivi was then granted a presidential pardon, and released on 16 October 2019.

Discussion

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

47. The Working Group welcomes the release of Mr. Satchivi. In accordance with paragraph 17 (a) of its methods of work, the Working Group reserves the right to render an opinion on whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. It is alleged that Mr. Satchivi suffered serious human rights violations and, in particular, that he was detained for exercising his rights peacefully. The Working Group considers that it is important to render an opinion in this case.

48. In determining whether Mr. Satchivi's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence regarding how 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. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.³

49. The source maintains that Mr. Satchivi was arrested on 22 August 2018 without a warrant and that he was not told the reasons for his arrest, even though he requested an explanation from the Director of the Investigation Unit. The Government notes in its response that Mr. Satchivi was informed by the police that he was prohibited from holding the press conference but refused to comply and forced his way into the building, where he was arrested. However, the Government has not responded to the source's allegations regarding the lack of arrest warrant and the failure to comply with the obligation to provide reasons for the arrest. In the absence of a specific response from the Government, the Working Group deems the information provided by the source to be credible.

50. Article 9 (1) of the Covenant stipulates that no one may be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Moreover, article 9 (2) of the Covenant establishes that anyone who is arrested must be informed, at the time of arrest, of the reasons for the arrest. Mr. Satchivi was arrested without a warrant, in violation of article 9 (1) of the Covenant. As the Working Group has previously stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal

³ A/HRC/19/57, para. 68.

basis and apply it to the circumstances of the case through an arrest warrant.⁴ In addition, Mr. Satchivi was not informed of the reasons for his arrest, in violation of article 9 (2) of the Covenant. The Working Group considers that an arrest is arbitrary when it is made without the arrested person being informed of the reasons for the arrest.⁵

51. The source also claims that Mr. Satchivi's home and the homes of two members of his family were searched without a warrant. The Government has not responded to this allegation. The source notes that during the illegal search of Mr. Satchivi's home, a copy of the opening speech that was to be given at the press conference was seized. The source acknowledges, however, that the content of this speech was never presented as evidence at the trial. In its jurisprudence, the Working Group has established that detention is arbitrary when evidence obtained without a search warrant is used in judicial proceedings.⁶ In this case, the fact that Mr. Satchivi's home and the homes of members of his family were searched without a search warrant supports the Working Group's conclusion that the authorities did not follow the necessary investigative procedures in order to ensure that Mr. Satchivi's detention had a legal basis.

52. The source also claims that Mr. Satchivi did not know what he was being charged with until he appeared before the judge on 23 and 24 August 2018. On 23 August 2018, the investigating judge informed Mr. Satchivi that he was being prosecuted for forceful resistance to public officers executing the law or lawful orders and for advocacy of offences, under articles 498 and 552 of the Criminal Code. On 24 August 2018, the prosecutor submitted an application requesting that he also be charged with aggravated disturbance to public order, under article 495 of the Criminal Code. Article 9 (2) of the Covenant stipulates that anyone who is arrested must be promptly informed of any charges against him or her. It is important to fulfil this requirement in order to ensure that arrested persons have sufficient information to challenge the legal basis of their detention.⁷ In this case, Mr. Satchivi was informed of the charges of forceful resistance to public officers executing the law or lawful orders and advocacy of offences the day after his arrest and of another charge the following day. In these circumstances, the Working Group is unable to conclude that there was a violation of the obligation to promptly inform arrested persons of the charges against them under articles 9 (2) and 14 (3) (a) of the Covenant.

53. Mr. Satchivi spent more than four months in detention between his first appearance before a judge, on 23 August 2018, and his first trial hearing before Lomé Criminal Court, on 9 January 2019. He was not brought before a judge at any other time during that period. The source asserts that, under article 9 (3) of the Covenant, anyone arrested on a criminal charge must be brought promptly before a judge. The source acknowledges that this standard was met insofar as Mr. Satchivi was first brought before a judge on 23 August 2018, but maintains that Mr. Satchivi was denied his right to trial within a reasonable time. The Government confirms in its response that the rules governing the duration of police custody were followed and that Mr. Satchivi was held in custody for less than 24 hours after his arrest. The Government also notes that the proceedings were conducted rapidly.

54. The Working Group considers that judicial oversight of deprivation of liberty is a fundamental safeguard of personal liberty⁸ and is essential in ensuring that detention has a legal basis. Mr. Satchivi was brought before a judge the day after his arrest, in accordance with article 9 (3) of the Covenant.⁹ However, after an initial determination has been made that pretrial detention is necessary, there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives, such as release on bail.¹⁰ According to the information submitted by the source, while Mr. Satchivi was in pretrial detention, he requested three times to be released on bail, without success.

⁴ See opinions No. 46/2019, No. 33/2019, No. 9/2019, No. 46/2018, No. 36/2018, No. 10/2018 and No. 38/2013.

⁵ Opinion No. 46/2019, para. 51; and opinion No. 10/2015, para. 34.

⁶ See opinions No. 33/2019, No. 31/2019, No. 83/2018, No. 78/2018 and No. 36/2018.

⁷ See, for example, opinion No. 83/2018, para. 46; opinion No. 52/2018, para. 69; and opinion No. 46/2018, para. 48. See also Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 30.

⁸ A/HRC/30/37, para. 3.

⁹ Human Rights Committee, general comment No. 35, para. 33.

¹⁰ *Ibid.*, para. 38.

The Government notes in its response that Mr. Satchivi submitted two requests for release on bail, both of which were duly examined by the investigating judge, and that he appealed against the refusal to order his release.¹¹ The Working Group considers that, while Mr. Satchivi was in pretrial detention, the legality of his detention was subject to judicial review.¹²

55. The Working Group notes that the Government arrested Mr. Satchivi without a warrant and without informing him of the reasons for his arrest. The Government failed to establish a legal basis for Mr. Satchivi's detention, which was therefore arbitrary under category I.

56. The source claims that Mr. Satchivi was arrested and detained because he was planning to hold a press conference on 22 August 2018 in order to discuss the implementation of the road map of the Economic Community of West African States and the deterioration of the political situation in Togo. According to the source, Mr. Satchivi's detention results from the peaceful exercise of his rights to freedom of expression, assembly and association, which are guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the Covenant.

57. The Government asserts that the proceedings brought against Mr. Satchivi do not result from the exercise of the rights enshrined in Togolese law and the international instruments to which Togo is a party. Mr. Satchivi was convicted of forceful resistance to public officers executing the law or lawful orders, aggravated disturbance of public order and advocacy of offences, under articles 495, 498 and 552 of the Criminal Code. The Government asserts that Mr. Satchivi was prohibited from holding the press conference because he had not notified the competent authorities in accordance with the law that governs public demonstrations in Togo.

58. Mr. Satchivi's conviction seems to have been based on certain messages that he allegedly posted on social media. According to the Government, he called on the Togolese people to rise up against "a bloodthirsty and incompetent regime" and to dress in red or black in order to protest against the institutions of the Republic. The source denies that these messages were found on Mr. Satchivi's telephone and notes that, in any case, calling on people to rise up against a regime and to wear certain colours is a peaceful way to express discontent with the Government's human rights record.

59. The Working Group recalls that article 19 (2) of the Covenant guarantees the right to freedom of expression. This right includes political discourse, commentary on public affairs and discussion of human rights.¹³ It protects position-taking and the expression of opinions, including those that are critical of government policy or are not in keeping with it.¹⁴ The Working Group considers that Mr. Satchivi's act of calling a press conference to discuss the political situation in Togo and the alleged posting of messages on social media are both covered by the right to freedom of opinion and expression that is protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.

60. Similarly, the Working Group is of the opinion that by calling a press conference on the political situation in Togo and by posting non-violent comments on social media, as he is alleged to have done, Mr. Satchivi exercised his right to take part in the conduct of public affairs.¹⁵ Moreover, the source reported – and the Government did not contest – that before his arrest, Mr. Satchivi informed the members of the En Aucun Cas movement and the

¹¹ According to the Government, Mr. Satchivi appealed against the ordinance of 27 August 2018 denying his request for release on bail. On 19 September 2018, the indictments chamber confirmed the investigating judge's decision not to order his release.

¹² Other questions relating to the pretrial detention of Mr. Satchivi, such as whether there was an individualized review of his detention and whether his right to trial within a reasonable time was respected, are examined in connection with category III.

¹³ Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 11.

¹⁴ Opinion No. 8/2019, para. 55; and opinion No. 79/2017, para. 55.

¹⁵ According to paragraph 8 of general comment No. 25 (1996) of the Human Rights Committee on participation in public affairs and the right to vote, citizens may take part in the conduct of public affairs by exerting influence through public debate. See also opinions No. 45/2019, No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 40/2016 and No. 26/2013.

leaders of other organizations that the press conference would not take place. It is clear that quite a few people were expected at this gathering. Mr. Satchivi was arrested because he tried peacefully to exercise his right of assembly with those people. The Working Group considers that Mr. Satchivi was detained for having exercised his rights under articles 20 and 21 of the Universal Declaration of Human Rights and articles 21 and 25 (a) of the Covenant.

61. The Working Group has taken into account the Government's argument that the prohibition of the press conference was justified by the fact that Mr. Satchivi had not notified the competent authorities. However, the Working Group respectfully subscribes to the conclusion of other special procedure mandate holders that freedom of peaceful assembly is a right, not a privilege, and that its exercise should not be subject to prior authorization by the authorities.¹⁶

62. Moreover, there is nothing to suggest that the restrictions that may be applied to the rights exercised by Mr. Satchivi, under articles 19 (3), 21 and 25 of the Covenant, would be applicable in this case. The Government has not demonstrated that the prosecution of Mr. Satchivi was necessary in order to protect a legitimate interest or that his sentence was a proportional response to his activities. The Government has not convincingly explained how the press conference organized by Mr. Satchivi or the messages that he allegedly posted on social media constituted forceful resistance to public officers executing the law or lawful orders and aggravated disturbance of public order. The Human Rights Council has called on States to refrain from imposing restrictions under article 19 (3) of the Covenant that are not consistent with international human rights law.¹⁷ The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

63. According to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders), everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights, and to meet or assemble peacefully for this purpose.¹⁸ Mr. Satchivi was detained for having exercised the rights set forth in the Declaration on Human Rights Defenders, in violation of his right to equality before the law and to the equal protection of the law without any discrimination, which is enshrined in article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.¹⁹

64. The Working Group concludes that Mr. Satchivi's detention was arbitrary under category II.

65. Given its finding that Mr. Satchivi's detention was arbitrary under category II, the Working Group emphasizes that Mr. Satchivi should never have been tried.

66. The Working Group considers that the information provided by the source discloses multiple violations of Mr. Satchivi's right to a fair trial. Most of the source's allegations were not specifically addressed by the Government in its response,²⁰ which merely stated that the guiding principles of criminal procedure, namely independence, impartiality, the presumption of innocence, respect for the rights of the defence, the holding of a trial within a reasonable time and the right to a public hearing were strictly observed at all stages of the proceedings.

67. The source maintains that Mr. Satchivi requested three times to be released on bail, without success. His first and second requests were denied on the grounds that he had not yet been formally charged. According to the source, a lack of charges cannot justify a refusal to release someone on bail; on the contrary, it should mean that release on bail must

¹⁶ A/HRC/31/66, paras. 21 and 23. See also A/HRC/20/27, para. 29.

¹⁷ A/HRC/RES/12/16, para. 5 (p).

¹⁸ A/RES/53/144, annex, articles 1, 5 and 8. See also A/RES/70/161, para. 8.

¹⁹ See, for example, opinions No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 79/2017 and No. 75/2017.

²⁰ Any comments made by the Government regarding the source's allegations are mentioned in the discussion.

be granted. The third request for release on bail was refused by the judge on the basis of Mr. Satchivi's character and the political crisis that Togo was going through at the time. The Government acknowledges that Mr. Satchivi requested to be released on bail but does not discuss the grounds on which his requests were denied by the judge.

68. According to article 9 (3) of the Covenant, pretrial detention should be the exception rather than the rule. It must 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. This determination should include the examination of alternatives to pretrial detention, such as release on bail.²¹ In this case, the judge took into account factors that were not relevant when deciding whether or not to release Mr. Satchivi on bail and failed to conduct an individualized assessment of his situation, in violation of article 9 (3) of the Covenant.²²

69. According to the source, Mr. Satchivi was held in pretrial detention for more than four months after his arrest. The source asserts that this detention constituted a violation of his right to be tried within a reasonable time and without undue delay, under articles 9 (3) and 14 (3) (c) of the Covenant. The Government, meanwhile, states that the investigation was conducted rapidly and that the judge fulfilled all his obligations during those four months, including by responding to Mr. Satchivi's requests for release on bail.

70. The Working Group recalls that the reasonableness of any delay in bringing a case to trial has to be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused and the manner in which the matter was dealt with by the authorities.²³ In this instance, the Working Group is unable to conclude that the four-month delay between Mr. Satchivi's arrest in August 2018 and his trial in January 2019 was unreasonable, especially as the case involved a number of serious charges.

71. The source also claims that Mr. Satchivi was not informed of his right to legal assistance or given access to any such assistance while he was being questioned or during the preliminary investigation. Although the Government mentions that Mr. Satchivi was assisted by counsel when he submitted his requests for release on bail and during the trial, it does not say anything about the investigation. The Working Group recalls that all persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and must be given access to such assistance without delay. Upon apprehension, all persons must be promptly informed of this right.²⁴ The fact that Mr. Satchivi was not informed of his right to be assisted by counsel constitutes a violation of article 14 (3) (b) of the Covenant.²⁵ Mr. Satchivi was also entitled to be informed of this right under article 14 (3) (d) of the Covenant.

72. The source claims, in addition, that Mr. Satchivi did not have adequate time for the preparation of his defence. On 7 January 2019, he was informed that his trial would begin on 9 January 2019, and he could not inform his lawyers of the trial date until 8 January 2019. As a result, the defence counsel had just one day to prepare for the trial. The Government has not responded to this allegation. Given the seriousness of the charges, the Working Group considers that this length of time was not sufficient and that Mr. Satchivi's rights under article 14 (3) (b) of the Covenant were violated.

73. According to the source, the authorities used intimidation tactics during Mr. Satchivi's trial and restricted access to the courtroom, including by deploying a contingent of around 500 police officers to the area surrounding the courthouse. The authorities tried to prevent members of the public from entering the courtroom, which caused witnesses for the defence to refuse to testify. Members of Mr. Satchivi's family were not allowed to enter the courtroom; only lawyers and a small number of journalists and observers from non-governmental organizations were granted access. The Government has not responded to

²¹ Human Rights Committee, general comment No. 35, para. 38.

²² Opinion No. 45/2016, para. 51.

²³ Human Rights Committee, general comment No. 35, para. 37; and Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 35.

²⁴ A/HRC/30/37, annex, principle 9 and guideline 8.

²⁵ CCPR/C/TGO/CO/4, para. 19; and CAT/C/TGO/CO/3, para. 10.

these allegations. The Working Group considers that these measures undermined Mr. Satchivi's right to a public hearing, which is enshrined in article 14 (1) of the Covenant. In addition, Mr. Satchivi was presented to the court in a way that suggested he might pose a high security risk and was thus deprived of his right to be presumed innocent under article 14 (2) of the Covenant.²⁶

74. The source reports that the trial was marred by irregularities. The hearing lasted for six hours, which was a very short time given the seriousness of the charges and the complexity of the case. The evidence against Mr. Satchivi was also clearly insufficient. Furthermore, the principle of equality of arms was violated because the judge did not give Mr. Satchivi's lawyers enough time to challenge the evidence presented by the prosecution. According to the source, they asked the judge several times to be given more time to examine the prosecution file but the judge refused almost every time. He occasionally allowed the defence counsel to ask further questions, imposing a time limit of 30 seconds. By contrast, the prosecution was granted unlimited time to present its case. The Government has not responded to these allegations.

75. The Working Group notes that, given the seriousness of the criminal charges, the fact that the trial was so short suggests that Mr. Satchivi's guilt had been decided upon before the hearing and that he was denied his right to be presumed innocent.²⁷ Moreover, the Working Group considers that the court of first instance did not meet the standard of an independent and impartial tribunal in accordance with article 14 (1) of the Covenant. The Working Group has decided to refer this case to the Special Rapporteur on the independence of judges and lawyers.

76. The source reports that the judge gave no reason for Mr. Satchivi's conviction or his sentence. His lawyers did not receive a copy of the decision and had to make do with a copy provided by the prosecutor; his ability to appeal was limited as a result. The Government, meanwhile, states that Mr. Satchivi was free to use the available remedies. The Working Group recalls that the right to have one's conviction reviewed can only be exercised effectively if the convicted person has access to a duly reasoned, written judgment of the trial court.²⁸ Consequently, although Mr. Satchivi managed to lodge an appeal, his right to have his case reviewed by a higher tribunal, under article 14 (5) of the Covenant, was in fact severely restricted.

77. The Working Group concludes that these violations of the right to a fair trial are of such gravity as to give Mr. Satchivi's detention an arbitrary character under category III.

78. Lastly, the source claims that Mr. Satchivi was targeted because of his activities as a well-known human rights defender. He is the spokesperson for *En Aucun Cas*, a movement that aims to raise public awareness of human rights issues in Togo. The source asserts that Mr. Satchivi's detention should be viewed in the broader context of the repression of human rights defenders by the Togolese authorities, which began after the major demonstrations in 2017.

79. Having examined the information provided by the two parties, the Working Group is convinced that Mr. Satchivi was detained by the Togolese authorities in an attempt to silence his peaceful activism. As mentioned above, Mr. Satchivi's third request for release on bail was refused by the judge on the basis of his character and the political crisis in Togo, not on legitimate grounds such as a risk of flight. The Working Group considers that this amounts to authorizing the detention of Mr. Satchivi on the basis of his role as a human rights defender. The authorities made sure that Mr. Satchivi was placed in detention and punished, by deploying a large number of police officers to within 200 metres of the place where the press conference was to be held on 22 August 2018. They also set up a security cordon of approximately 500 police officers around the courthouse during Mr. Satchivi's trial.²⁹

²⁶ Opinion No. 36/2018, para. 55; opinion No. 79/2017, para. 62; and opinion No. 40/2016, para. 41. See also Human Rights Committee, general comment No. 32, para. 30.

²⁷ See opinions No. 45/2019, No. 46/2018, No. 45/2018, No. 36/2018 and No. 75/2017.

²⁸ Human Rights Committee, general comment No. 32, para. 49. See also opinion No. 27/2019, paras. 78–79; and opinion No. 14/2017, para. 55.

²⁹ Opinion No. 79/2017, para. 68.

80. The Working Group has taken into account the conclusions of other United Nations human rights bodies. In its concluding observations on the third periodic report of Togo, the Committee against Torture stated that it was deeply concerned at reports of repeated attacks against political opponents and human rights defenders seeking to exercise their right to freedom of association or expression and that it was alarmed by reports of the intimidation, arrest and arbitrary detention of human rights defenders.³⁰ The Committee referred specifically to members of the En Aucun Cas movement who had been arbitrarily detained.³¹

81. For these reasons, the Working Group considers that Mr. Satchivi was deprived of his liberty on discriminatory grounds, that is, on account of his status as a human rights defender and his political opinions. His deprivation of liberty violates articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and is therefore arbitrary under category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

82. Lastly, the Working Group would welcome the opportunity to visit Togo in order to assist the Government in its efforts to combat the arbitrary deprivation of liberty. On 14 June 2018, the Working Group submitted a written request to the Government for a country visit, which, if accepted, would allow the Working Group to visit Togo for the first time. Since Togo is currently a member of the Human Rights Council, this is an opportune time for the Government to invite the Working Group to conduct a visit, and the Working Group looks forward to receiving a positive response to its request.

Disposition

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

The deprivation of liberty of Foly Satchivi, being in contravention of articles 2, 7, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 2, 9, 14, 19, 21, 25 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

84. The Working Group requests the Government of Togo to take the steps necessary to remedy the situation of Mr. Satchivi 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.

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

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

87. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the independence of judges and lawyers, and the Special Rapporteur on the situation of human rights defenders, for appropriate action.

88. The Working Group encourages the Government to incorporate the Model Law for the Recognition and Protection of Human Rights Defenders into its domestic legislation and to ensure its implementation.³²

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

³⁰ CAT/C/TGO/CO/3, para. 34.

³¹ Ibid.

³² Available at https://www.ishr.ch/sites/default/files/documents/05_jan2017_english_model_law_all.pdf.

Follow-up procedure

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

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

91. 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.

92. 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.

93. 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.³³

[Adopted on 22 November 2019]

³³ Human Rights Council resolution 42/22, paras. 3 and 7.