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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020

Opinion No. 27/2020 concerning Omoyele Sowore (Nigeria)

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

2. In accordance with its methods of work (A/HRC/36/38), on 9 December 2019 the Working Group transmitted to the Government of Nigeria a communication concerning Omoyele Sowore. 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).



Submissions

Communication from the source

4. Omoyele Sowore is 48 years old and a citizen of Nigeria. He is a human rights defender, activist, journalist, former presidential candidate and founder of the citizen journalism web site Sahara Reporters. He has been an activist and a public critic of the Government of Nigeria since 1989, when he was a student at the University of Lagos.

5. According to the source, Mr. Sowore stood for election in the presidential elections in February 2019, and he gained support from the public early in the process, because he took a strong stance against corruption, wealth disparity, poverty and the failure of the Government to use oil resources to provide jobs for citizens. Following the re-election of the President of Nigeria, Mr. Sowore called for peaceful protests against the irregularities documented during the elections, as well as against political corruption. The President and his Administration have also faced criticism for their human rights record, in particular for the reported killings by State and non-State actors, extrajudicial executions, cases of arbitrary arrest and detention, torture and restrictions on the freedom of expression. Mr. Sowore began a movement, with the social media hashtag “Revolution now” (#revolutionnow), and called for nationwide peaceful protests to be held on 5 August 2019. On 1 August 2019, the Government placed Amnesty International on a security watch list for allegedly reproducing a message by the organizers of the protest on social media.

a. Arrest and detention

6. The source reports that, in the early hours of the morning of 3 August 2019, two days prior to the planned protests, Mr. Sowore was arrested at his hotel and held for days without being formally charged. After one of his family members gave an interview with Democracy Now calling for his release, the authorities immediately denied Mr. Sowore access to his family. Mr. Sowore was denied access to his family for over two months.

7. The Department of Security Services publicly stated that Mr. Sowore’s “call for a revolution” presented a threat of insurrection that warranted his arrest. The source notes that it was widely known by the public that Mr. Sowore’s call for a peaceful pro-democracy protest was not a call for undemocratic political insurrection, let alone a violent upheaval. There was no warrant for Mr. Sowore’s arrest, and he was detained in the custody of the Department for five days without being brought before a judge.

8. On 6 August 2019, the Department of Security Services sought an ex parte order from the Federal High Court in Abuja to detain Mr. Sowore for an additional 90 days, in order to conduct investigations, without formally charging him. On 8 August 2019, the Court granted the request to extend his detention, under section 27 (1) of the Terrorism Prevention Act, 2013, but permitting the Department to detain Mr. Sowore for 45 more days. The source states that the request was granted under an overly vague provision of the antiterrorism law from 2013. The Court refused to hear the motion to quash the 45-day detention order until 21 September 2019, the day the detention order expired.

9. Mr. Sowore was detained for a total of 48 days without formal charges being filed against him. On 20 September 2019, seven criminal charges were brought against him, including for the crime of cyberstalking for allegedly insulting the President of Nigeria online, treasonable felonies and money-laundering. To date, no evidence of any wrongdoing for those extremely serious charges has been produced by the authorities. The source notes that the authorities rely solely on Mr. Sowore’s lawful public statements and free exercise of his right to freedom of expression.

b. Bail conditions

10. The source reports that, on 24 September 2019, upon the expiry of the 45-day extension of his pretrial detention, a judge ordered the Department of Security Services to release Mr. Sowore on bail, on the condition that he surrender his passport. On 26 September 2019, Mr. Sowore met all conditions for release, but the authorities refused to comply. On 30 September 2019, Mr. Sowore pled not guilty to all seven charges. On 4 October 2019, after 62 days in the custody of the Department, a new judge on the case

reportedly unlawfully issued a new set of overly burdensome bail conditions. The new bail conditions were issued despite the previous order remaining in effect, without any amendments having been made by a superior court. Bail conditions were set and included the deposit of a sum of 100 million naira (\$280,000) and the requirement of two sureties who must reside in Abuja and have landed properties in the capital equal to the bail sum. Mr. Sowore is also restricted from talking to the press, engaging in protests and leaving Abuja, although he has no residence there.

11. The source notes that those conditions are unprecedented for the crimes for which Mr. Sowore is accused and effectively act as an order of detention. It is argued that, even if Mr. Sowore could meet the bail requirements, he would still be relegated to a state of de facto arbitrary detention, unduly restricting his activities and movement by forcing him to remain in Abuja.

12. According to the source, Mr. Sowore is still detained in a Department of Security Services detention facility in Abuja. On 21 October 2019, the domestic court partially amended Mr. Sowore's bail conditions to 50 million naira (\$140,000). The other conditions remain. Communication with his family living abroad continues to be denied, since a member of his family was interviewed by Democracy Now in September, and he has therefore not spoken to his family.

13. The source reports that, despite the burdensome bail conditions, on 4 November 2019, Mr. Sowore was ultimately able to meet all the requirements. On 6 November 2019, a judge of the Federal High Court issued an order for his release pending trial. However, more than one week after the court issued its order of release, the Department of Security Services refused to comply and continued to detain Mr. Sowore.

14. It is reported that that is the second court order of release that the Department of Security Services has summarily ignored, in further violation of Mr. Sowore's due process and fair trial rights. On 8 November 2019, Mr. Sowore announced that he would begin a hunger strike until he was released. On 12 November 2019, Nigerian security forces deployed excessive and deadly force against peaceful protestors and journalists who gathered outside of the headquarters of the Department demanding compliance with the court order for Mr. Sowore's release.

c. Analysis of violations

15. The source recalls that detention is arbitrary under category I when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty, and refers to article 9 (1) of the Covenant, article 9 of the Universal Declaration of Human Rights and principles 2 and 36 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Human Rights Committee has interpreted that right to mean that procedures for carrying out legally authorized deprivation of liberty should also be established by law, and States parties should ensure compliance with their legally prescribed procedures. Article 9 (1) of the Covenant requires compliance with domestic rules that define such procedures for arrest, including specifying when a warrant is required and permitting access to counsel.

16. Section 35 (3) of the Constitution of Nigeria states that any person who is arrested or detained is to be informed in writing within 24 hours of the facts and grounds of his or her arrest or detention. Section 35 (4) further provides that any person who is arrested or detained upon reasonable suspicion of having committed a crime is to be brought before a court within a reasonable amount of time, which is defined as up to 48 hours. Therefore, any time in excess of 48 hours that the accused spends in custody without being brought before a court constitutes unlawful arrest and detention.

17. The source submits that the authorities arbitrarily arrested Mr. Sowore on 3 August 2019 and that he has remained in detention ever since. Mr. Sowore's initial detention of five days exceeded the 48-hour constitutional limit and had no legal basis. Mr. Sowore's additional 45-day detention, granted under section 27 (1) of the Terrorism Prevention Act also exceeded the 48-hour constitutional limit and has no legal basis.

18. Section 27 (1) of the Terrorism Prevention Act provides that the court may, pursuant to an ex parte application, grant an order for the detention of a suspect under the Act for a period not exceeding 90 days, subject to renewal for a similar period until the conclusion of the investigation and prosecution of the matter that led to the arrest and detention. That section is contrary to the right to personal liberty guaranteed by the Constitution and exceeds the constitutional limit placed on pretrial detention. Furthermore, the Act is vague and fails to define which persons can be subject to that 90-day detention, circumventing the 48-hour constitutional limit. The source recalls that the Working Group has stated that, by using an extremely vague and broad definition of terrorism, antiterrorism laws bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention, with the consequence that a person pursuing a legitimate democratic opposition is at risk of becoming a victim in the application of such laws. By relying on overly vague provisions of law to subvert the protections against prolonged pretrial detention, enshrined in the Constitution and the obligations of Nigeria under international human rights law, the Government's detention of Mr. Sowore lacks any legitimate legal basis and is arbitrary under category I.

19. According to the source, the seven charges brought against Mr. Sowore cannot justify his pretrial detention because their overly broad construction and specific application to Mr. Sowore violate both domestic and international law. The source recalls that the right to freedom of opinion and expression is guaranteed by both domestic and international law, namely article 19 (2) of the Covenant, article 19 of the Universal Declaration of Human Rights and chapter 4, section 39 (1), of the Constitution.

20. The source further argues that the provisions of the Cybercrimes (Prohibition, Prevention, Etc.) Act, 2015, cannot be a legitimate basis on which to charge and detain Mr. Sowore, because they are vague, open to broad interpretation and are not formulated with sufficient precision to protect the fundamental right of freedom of expression.

21. Mr. Sowore faces one charge under section 24 (1) (b) of the Cybercrimes (Prohibition, Prevention, Etc.) Act for causing "insult, enmity, hatred and ill-will" to the President of Nigeria during his televised interview with Arise News. Section 24 (1) (b) makes it an offence for any person to knowingly or intentionally send a message or other matter by means of computer systems or networks that he or she "knows to be false for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, hatred, ill-will or needless anxiety to another".

22. The source notes that the Cybercrimes (Prohibition, Prevention, Etc.) Act fails to define the terms "annoyance", "inconvenience", "insult", "injury", "hatred", "ill-will" or "needless anxiety". Such vague terms leave room for broad interpretation at the discretion of those charged with its execution, in violation of article 19 of the Covenant and in violation of the Constitution. The restrictions on the right to freedom of expression must be "formulated with sufficient precision"; however, that section of the Act fails to uphold that standard.

23. The source notes that the Working Group has recognized that laws that are vaguely and broadly worded have a chilling effect on the exercise of freedom of expression, that such vague and broadly worded legislation violates article 15 of the Covenant and that any detention pursuant to proceedings that are incompatible with article 15 are necessarily arbitrary. The source concludes that section 24 (1) (b) of the Cybercrimes (Prohibition, Prevention, Etc.) Act therefore cannot be considered as meeting the requirements of a valid restriction prescribed by law and cannot be considered a legitimate restriction on the freedom of expression permissible under international law. Given that the provision used to detain Mr. Sowore before his trial is not a legitimate law, his detention is arbitrary under category I.

24. According to the source, Mr. Sowore is also charged with treasonable felony and conspiracy to commit a treasonable offence for allegedly "conspiring" to stage a revolution on 5 August 2019 with the aims of "removing the President and Commander-in-Chief of the Armed Forces of Nigeria during his term of office otherwise than by constitutional means". Mr. Sowore faces charges under section 41 (c), Treasonable felonies, of the Criminal Code, which defines the crime as follows: "to levy war against Nigeria in order by

force or constraint to compel the President to change his measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe any House of the National Assembly or any other legislature or legislative authority”.

25. The source submits that specific application of that charge to Mr. Sowore cannot be used to justify his continued detention. In calling for a peaceful protest on 5 August 2019, Mr. Sowore called for Nigerians nationwide to exercise their fundamental right to peaceful assembly by publicly mobilizing to voice their collective demand for a democratic government free of corruption and to protest the wealth disparity and poverty in the country. In the context of the “Revolution now” movement, Mr. Sowore never called for violence or the removal of the sitting President. The source argues that the authorities cannot point to any evidence to suggest that Mr. Sowore planned to “levy a war” against the Government of Nigeria. He has not been accused of training people to overthrow the Government or of having contact with soldiers or of any form of mobilization that would equate to the crime of treasonable felony of which he is accused.

26. The source notes that the authorities have claimed that Mr. Sowore’s use of the word “revolution” in his calls for peaceful protests demonstrates his intent for insurrection. However, the source argues that the use of the word “revolution” in Nigeria or elsewhere is not a crime. In 2011, the President and the ruling political party, the All Progressives Congress, called for a “revolution” similar to the one that had recently taken place in Egypt. Neither the President nor any member of the party was arrested or prosecuted or faced charges for the choice of words.

27. The source submits that Mr. Sowore has been targeted by the Administration for exercising his right to freedom of expression through his publicly critical views of the Government. In the application of section 41 (c) of the Criminal Code, the State is attempting to criminalize Mr. Sowore’s actions protected by the Constitution and the obligations of Nigeria under international human rights law. Given the lawful and protected actions underlying those charges, the source concludes that there is no legal basis for his detention and his continued detention is arbitrary under category I.

28. The source notes that, in addition, Mr. Sowore faces four counts of violating section 15 (1) of the Money Laundering (Prohibition) Act, 2011, for transferring various sums of money from various bank accounts, including his personal bank accounts to that of the account of Sahara Reporters, his citizen journalism web site. The charges state that he transferred funds with the “aim of concealing or disguising the illicit origin of the funds”.

29. The source asserts that the vague charge fails to identify which one of the various crimes Mr. Sowore is supposed to have committed in his transfer of those funds. Section 15 (1) of the Money Laundering (Prohibition) Act enumerates 21 crimes that can be associated with the crime of money-laundering, yet Mr. Sowore’s charging documents fail to list even one crime of which his wire transfers are purported to be in furtherance. Given that none of the crimes set out in section 15 (1) of the Act can be attributed to Mr. Sowore, there is no legal basis for his detention under that law, and his continued detention under it is arbitrary under category I.

30. The source argues that, on 4 October 2019, a new judge unlawfully set new, overly burdensome bail requirements that were so stringent and impossible to meet that they were seemingly designed as a punitive measure to ensure prolonged pretrial detention. Those punitive conditions were set despite the fact that the previous order by a Federal High Court Judge had not been overturned or amended by a superior court. The Lekki Forum of the Nigerian Bar Association has called for the new judge to recuse herself for her actions in unlawfully ignoring the previous release order.

31. Not only are those overly burdensome conditions vastly disproportionate to the facts of Mr. Sowore’s case, but the impracticality amounts to an effective refusal of bail and a de facto order of continued detention in an attempt to keep Mr. Sowore perpetually in custody. Should Mr. Sowore’s family find a way to meet those overly burdensome and punitive bail conditions, any release from the current detention facility, would still effectively result in a form of continued arbitrary detention of Mr. Sowore in a city in which he does not reside, in violation of his right to freedom of movement and with unlawful restrictions placed on his legitimate activities to promote and protect human rights. But for those overly

burdensome new conditions unlawfully set on Mr. Sowore's bail, he would have been freed from arbitrary detention under the original order of release.

32. With regard to category II, the source argues that the detention of Mr. Sowore is arbitrary because it resulted from the exercise of his fundamental right to freedom of opinion and expression and freedom of assembly, which are expressly protected under international and Nigerian law. The authorities arbitrarily arrested and detained Mr. Sowore in direct retaliation for his lawful exercise of his right to freedom of expression and his attempt to exercise his right to freedom of assembly.

33. Mr. Sowore was targeted for his continued criticism of the Government and his calls for a nationwide pro-democracy protest. In July 2019, Mr. Sowore openly criticized the Administration, calling for the end of oppression and of the corruption of the Government. Through his social media account, which has an audience of over 100,000 followers, he has continually critiqued the President for the repeated human rights violations of the Administration and for the suppression of dissenting voices. In early August 2019, Mr. Sowore posted about his concern that he was under surveillance by the Government as he prepared for the "Revolution now" protests. On 1 August 2019, the Government placed Amnesty International on a security watch list for allegedly reproducing a message by the organizers of the "Revolution now" protests, further demonstrating the Government's surveillance of Mr. Sowore, his movements and the Government's intention to quell any such peaceful protests critical of its actions.

34. In the early hours of the morning of 3 August 2019, two days prior to the planned protests, Mr. Sowore was arrested at his hotel and held for days without being formally charged. Immediately following the interview in September 2019 with Democracy Now in which a member of his family called for his release, telephone calls with his family were cut off, further punishing Mr. Sowore and violating his rights in retaliation for the lawful exercise of the right to freedom of expression by a member of his family. The Department of Security Services publicly stated that Mr. Sowore's call for a revolution presented a threat of "insurrection" that warranted his arrest, even though it was widely known that Mr. Sowore's call for a peaceful, pro-democracy protest was not a call for political insurrection or upheaval.

35. The source alleges that the attempts to prevent Mr. Sowore from continuing his political and social activism through arbitrary arrest, unlawful detention and baseless criminal charges is in line with the Government's broader history of attempting to suppress the free expression, free assembly and civic activism of human rights defenders and journalists. It constitutes a violation of articles 19 (2) and 21 of the Covenant, as well as chapter 4, sections 39 and 40, of the Constitution. Moreover, because of Mr. Sowore's status as a human rights defender and journalist, he enjoys special protection under international law with respect to his work to promote and protect human rights. Any government interference, such as arbitrary detention, which serves to restrict his speech or right to assembly is entitled to heightened scrutiny. It is his pro-democracy, anti-corruption and human rights work that motivated the Government to arbitrarily arrest and detain Mr. Sowore. The reasoning behind that detention cannot stand up to the strict scrutiny required, and the detention should be considered arbitrary under category II.

36. With regard to category III, the source argues that the authorities have violated Mr. Sowore's right to be detained only by virtue of a judicial order, contrary to article 9 (1) of the Covenant and principle 2 of the Body of Principles. Furthermore, section 35 (1) (a) of the Constitution reiterates such rights and states that no person is to be deprived of liberty, save by an execution of the sentence or order of a court. Mr. Sowore's arrest and subsequent detention was not accompanied by a warrant or judicial order.

37. Moreover, the source submits that articles 9 (2) and 14 (3) (a) of the Covenant and principles 10 and 13 of the Body of Principles provide that those who are arrested are to be informed of the reasons for their arrest and promptly informed of the charges brought against them. Section 35 (3) of the Constitution prescribes that those who are arrested or detained are to be informed in writing, within 24 hours, of the facts and grounds for their arrest or detention. There was no warrant for Mr. Sowore's arrest, and he was detained in the custody of the Department of Security Services for five days without being brought

before a judge. The Department did not officially charge him until 48 days after his arrest, violating his right to be informed of the reasons for his arrest.

38. The source submits that article 9 (3) and (4) of the Covenant protects an individual's right to challenge the legality of their continued detention.¹ Article 9 (3) requires that a detainee be brought promptly before a judge or other officer authorized by law to exercise judicial power, which applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity. The Human Rights Committee has interpreted "promptly" to be within about 48 hours, except in exceptional circumstances. Furthermore, section 35 (4) of the Constitution specifies that any person who is arrested or detained upon reasonable suspicion of having committed a crime is to be brought before a court within a reasonable amount of time, which is defined as up to 48 hours.

39. The source argues that the authorities violated Mr. Sowore's right to promptly be brought before a judge. Mr. Sowore was arrested on 3 August 2019 and was held for three days before being brought before a judge, which exceeds the time frame set out in the mandate that an accused detainee be brought before the court within 48 hours of arrest. On 6 August 2019, the Department of Security Services sought an ex parte order to detain Mr. Sowore for an additional 90 days to conduct investigations without formally charging him. That request was made under the vague antiterrorism legislation of 2013. On 8 August 2019, the court granted the Department 45 additional days. Mr. Sowore was detained for a total of three days before being brought before a judge and a total of 48 days without any formal charges being filed against him.

40. The source submits that article 9 (3) of the Covenant also encapsulates the right to release pending trial. The Human Rights Committee has found that detention pending trial must be based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime and that it should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.

41. Principles 38 and 39 of the Body of Principles set out that, except in special cases, a criminal detainee is entitled to release pending trial. The Human Rights Committee has held that pretrial detention should be the exception and that bail should be granted, except in situations in which the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The right to bail is also guaranteed under section 35 (1) of the Constitution, and the Nigerian courts have found that conditions attached to the granting of bail must not be suffocating, unbearable, unworkable or unduly burdensome.

42. The source argues that Mr. Sowore was denied due process first when the Department of Security Services failed to comply with the original release order, after Mr. Sowore had met the original bail conditions on 26 September 2019. He was denied due process again when a new judge unlawfully added new, overly burdensome bail requirements, despite the order of release still being in effect and without an amendment or nullification of the order by a superior court. The financial requirements in the new order are unduly burdensome on Mr. Sowore's family and impossible to meet. The requested deposit of 100 million naira, with two sureties who have landed properties in the capital, is greatly disproportionate to the crimes of which Mr. Sowore is accused. Mr. Sowore's bail conditions are out of step with the typical assignment of bail and demonstrate the Government's targeting of and attempt to silence Mr. Sowore. The 100 million naira attached to Mr. Sowore's bail for organizing a peaceful protest is comparable to bail amounts attached to individuals charged with far greater capital offenses. Furthermore, Mr. Sowore's bail conditions require that he remain in the city of Abuja as he awaits trial. The court was alerted that Mr. Sowore does not have a residence in Abuja. In restricting his movements to Abuja, the court, under the pretence of granting release, has essentially ensured Mr. Sowore's continued detention. The source submits that, by failing to grant Mr.

¹ See also principles 4, 11 (1), 32 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Sowore bail with conditions that are neither suffocating, unbearable, unworkable or unduly burdensome, the authorities violated his right to be released pending trial, prolonging his arbitrary detention.

43. The source submits that the authorities cut off all telephone communication between Mr. Sowore and his family, following the interview of his family member by Democracy Now on 4 September 2019, providing information on his detention and calling for his release. Prior to the interview, in August, the same family member was able to speak via telephone with Mr. Sowore, but not since. At the time of submission, two months had passed since that same family member was able to speak with him, far beyond a matter of days, the standard provided for in principle 15 of the Body of Principles. By cutting off all contact with his family during his detention, the authorities are violating Mr. Sowore's right to access to his family, contrary to article 17 of the Covenant and principles 15 and 19 of the Body of Principles.

44. The source alleges that the detention of Mr. Sowore is arbitrary under category V, due to his political opinions, political participation and status as a human rights defender and journalist. A detention is arbitrary when, in violation of international law, the detention is discriminatory on the basis of political or other opinions and it is aimed at or can result in ignoring the equality of human beings. Article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant further prohibit discrimination based on political or other opinion. Similarly, chapter 4, section 42 (1), of the Constitution guarantees equality before the law on the basis of political opinion.

45. According to the source, Mr. Sowore's charges stem from his call for nationwide protests against the Government and are a violation of his individual rights by the State. Mr. Sowore stood for election to the Presidency in February 2019 and made headlines when he claimed that the results were not credible. He continued to call for free and fair elections. In posts on his Twitter account, he criticized the President and his Administration for continuous human rights abuses, vote buying and other violations. The facts therefore indicate that Mr. Sowore was arrested in the light of his political opinions and activities; by extension, his detention is discriminatory based on his political opinions and his status as a journalist and human rights defender.

Response from the Government

46. On 9 December 2019, the Working Group transmitted the allegations made by the source to the Government through its regular communication procedure. The Working Group requested that the Government provide detailed information about the current situation of Mr. Sowore and any comments on the source's allegations, by 7 February 2020.

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

Discussion

48. 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.

49. The Working Group is aware that Mr. Sowore was released in late December 2019 on bail. Such a release is only temporary, and the case therefore still warrants consideration by the Working Group. In addition, the seriousness of the allegations is such that the Working Group considers it necessary to consider the case, in accordance with paragraph 17 (a) of its methods of work.

50. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

51. The source alleges that the deprivation of liberty of Mr. Sowore falls within categories I, II, III and V, and the Working Group will consider each category in turn.

52. Category I covers deprivation of liberty without invoking any legal basis. In its jurisprudence, the Working Group has considered that it is not sufficient that the legal ground exists in law, but the authorities must invoke it for the arrest and detention. In addition, as the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can understand the law, has access to it and can regulate his or her conduct accordingly.² Moreover, the Working Group considers that, in some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty. The Working Group finds that vaguely and broadly worded provisions, which cannot qualify as *lex certa*, could be used to deprive individuals of their liberty without a specific legal basis and violate the due process of law upheld by the principle of legality in article 11 (2) of the Universal Declaration of Human Rights.

53. In the present case, Mr. Sowore was arrested on 3 August 2019 without any arrest warrant and without due notice of the reasons for the arrest, in violation of article 9 (2) of the Covenant. In its general comment No 35 (2014) on liberty and security of person, the Human Rights Committee clearly stated that States parties must abide by the domestic time limits for presenting an arrested person before a judge, provided that such time frame remains within 48 hours.³ In the present case, although the domestic legal framework requires notice within 48 hours, it took five days for Mr. Sowore to be presented before a judge and for him to be afforded an opportunity to challenge his arrest and detention. The Working Group considers such a delay to be in violation of articles 9 (3) and 9 (4) of the Covenant.

54. Moreover, the Working Group notes that, at two different instances, an order for release on bail was issued but not enforced. In line with its practice, the Working Group recalls that any time an order for release, even for release on bail, is made and the detainee is not released, the subsequent detention becomes without legal ground.⁴ Maintaining a person in detention after release has been ordered by a court competent to exercise control over the legality of detention is a manifest violation of article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant and renders the detention arbitrary, because it lacks legal basis.

55. Mr. Sowore has been charged with various crimes, some of which are quite vaguely defined. The Working Group is concerned that the law failed to provide the elements of the crimes or clarity as to their meaning. In the present case, such vagueness seems to have been used to make an ordinary exercise of freedoms sound like a threat to national security and/or a terrorist act. However, the Working Group does not currently have sufficient information about that legal framework to determine conclusively its degree of conformity with international standards, in accordance with its jurisprudence.

56. For all those reasons, the Working Group concludes that, from the outset, on 3 August 2019, the arrest and detention of Mr. Sowore were arbitrary and fall within category I.

57. In the present case, there is no doubt that the core fact at the basis of the arrest and the detention is the call for nationwide protest, which the Government considered to be a threat to national security. Political rights, including the rights to participate in public affairs, freedom of opinion and expression and peaceful assembly, are essential in a political system, and they must be protected. Restrictions are possible but conceived in a limited manner. In that regard, the Working Group recalls that, in the Human Rights

² See, for example, opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59; and Human Rights Committee, general comment No. 35 (2014) on liberty and security of person.

³ Human Rights Committee, general comment No. 35, para. 33.

⁴ Opinions No. 9/2011, para. 38; No. 7/2011, paras. 15–17; No. 3/2011, para. 20; No. 3/2010, para. 6; No. 21/2007, para. 19; and No. 5/2005, para 19; decisions No. 45/1995, para. 6; and No. 61/1993, para. 6. See also Human Rights Committee, general comment No. 35, para. 22.

Committee's general comment No. 34 (2011) on the freedoms of opinion and expression, it stated that article 19 (3) of the Covenant set out specific conditions on imposing such restrictions, and it was only subject to those conditions that restrictions could be imposed. The restrictions must be provided by law, may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3 of the article and must conform to the strict tests of necessity and proportionality.⁵

58. Mr. Sowore stood for election to the Presidency and has developed a platform against corruption. He used his national visibility to mobilize members of civil society for a protest, and there is no evidence that he planned to undertake any violence. As the Working Group has previously noted, the reference to a revolution in his discourse is not sufficient to categorize his call as other than a peaceful protest.⁶ The Working Group recalls that Mr. Sowore was arrested just two days before the planned protests, while he had the right not only to freedom of opinion, expression and peaceful assembly, but also to participate in public affairs in his country. The Working Group concludes that his arrest and detention were designed to sanction him for the enjoyment of those freedoms and therefore are arbitrary and fall within category II.

59. Given its finding that the deprivation of liberty of Mr. Sowore is arbitrary under category II, the Working Group wishes to emphasize that, in such circumstances, no trial should have taken place. However, as Mr. Sowore has been detained and charged by the authorities, the Working Group will now consider whether the alleged violations of the right to a fair trial and due process were grave enough to give his deprivation of liberty an arbitrary character such that it falls within category III.

60. It is a well-established principle that anyone who is arrested and detained has the right to keep in contact with the outside world, especially the family and the legal representative of that person.⁷ In the present case, that right was violated. During the first five days, no such contact was allowed. Even after that initial period, contact between Mr. Sowore and his family was prevented by the authorities, in continuous violation of his rights.

61. In addition, Mr. Sowore's right to be heard was violated. Indeed, there was an ex parte procedure for a decision on his continuous detention on charges under the antiterrorism law, in violation of article 14 (1) of the Covenant, which guarantees the right to a fair and public hearing.

62. Moreover, bail was set so much higher than for other comparable criminal offences in the recent past that it is fair to consider that it was set to prevent Mr. Sowore's provisional release. The Working Group recalls its previous jurisprudence in which it has established that alternatives to detention should be realistic and that excessive and unrealistic bail conditions disregard the requirement to make detention an exception, in breach of article 9 of the Covenant.⁸

63. The Working Group is convinced that, in the present case, the judiciary demonstrated a lack of independence, given that a provisional release order was not complied with, even though Mr. Sowore met the conditions, another provisional release order was issued without due consideration of the previous one, the law enforcement agency again failed to comply with the release order, and the judiciary also failed to take any action against the agency. The Working Group is concerned about such disregard of the authority of the judiciary, in violation of the right to a fair trial and the rule of law. The Working Group notes that this is the second time it has made such an observation in relation to Nigeria, and it is concerned that this may point to a pattern of violations that

⁵ Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 22.

⁶ See opinion No. 83/2019.

⁷ See, for example, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 58; the Body of Principles, principles 15–19; 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.

⁸ See opinion No. 72/2017, para. 59.

affects legal certainty and puts citizens at risk of the arbitrary deprivation of their liberty.⁹ The Working Group therefore concludes that the violation of the right to a fair trial is so grave that it renders the detention of Mr. Sowore arbitrary within category III.

64. Category V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it is related to detention based on discrimination in violation of international law, and the Working Group notes that discrimination has been a pertinent issue in the present case. Mr. Sowore was arrested for having called for a nationwide peaceful protest, shortly before the day of said demonstration, as a way of preventing it. He was targeted as a political opponent who challenged the results of the presidential elections. Moreover, the overly burdensome bail conditions, disproportionate to those set in other recent comparable cases, are further evidence of discrimination, in violation of articles 2 (1), 3 and 26 of the Covenant. The Working Group concludes that the arrest and detention of Mr. Sowore are therefore arbitrary and fall within category V.

Disposition

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

The deprivation of liberty of Omoyele Sowore, being in contravention of articles 9 and 11 (2) of the Universal Declaration of Human Rights and articles 2, 3, 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

66. The Working Group requests the Government of Nigeria to take the steps necessary to remedy the situation of Mr. Sowore without delay and to 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 unconditionally release Mr. Sowore immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate unconditional release of Mr. Sowore.

68. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Sowore 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 the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the independence of judges and lawyers, 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. Sowore has been unconditionally released and, if so, on what date;
- (b) Whether all proceedings have been terminated against Mr. Sowore;

⁹ See opinion No. 81/2018, para. 33.

- (c) Whether compensation or other reparations have been made to Mr. Sowore;
- (d) Whether an investigation has been conducted into the violation of Mr. Sowore's rights and, if so, the outcome of the investigation;
- (e) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Nigeria with its international obligations in line with the present opinion;
- (f) 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.¹⁰

[Adopted on 1 May 2020]

¹⁰ See Human Rights Council resolution 42/22, paras. 3 and 7.