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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 16/2021 concerning Solomon Musa Tarfa, Mercy Solomon Tarfa and 16 minors whose names are known to the Working Group (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,¹ on 15 January 2021, the Working Group transmitted to the Government of Nigeria a communication concerning Solomon Musa Tarfa and Mercy Solomon Tarfa and 16 minors whose names are known to the Working Group. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability,

¹ A/HRC/36/38.



or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Solomon Musa Tarfa is a Nigerian national who was 54 at the time of his arrest. He usually resides in Kano State, Nigeria. Mr. Tarfa is the cofounder, chief executive officer and director of two orphanages based in Kano and Kaduna States, respectively. His wife is Mercy Solomon Tarfa.

a. Background

5. According to the source, in 1996 Mr. and Ms. Tarfa opened an orphanage called the Du Merci Centre to care for abandoned children in the Sabon Gari District of Kano City. The orphanage is located in a Christian district of the city where teenage girls are sometimes reportedly recruited as sex workers and abandoned once they become pregnant.

6. The source explains that the orphanage cares for children who were the result of unwanted pregnancies. It provides accommodation for young women who get pregnant out of wedlock and who would otherwise have had an abortion, until they give birth. Whenever possible, the young women are reconciled with their parents, who often initially reject them owing to social stigma. The orphanage adopts the child if he or she remains unwanted.

7. Reportedly, the owners of the orphanage counsel the girls and contact their parents to facilitate reconciliation. The orphanage documents the profile, status and effective adoption of each child, including the background to the adoption with signed statements and agreements with the parents evidenced in statements of undertaking to care for the children.

8. The source explains that the children live as a family with Mr. and Ms. Tarfa, who they reportedly regard as parents. The source specifies that the children are well cared for, well fed and attend some of the best schools. Several of them have graduated and gone on to marry or otherwise live independently of their adopted parents.

b. Arrest and detention

9. According to the source, on 19 December 2019, officers of the National Agency for the Prohibition of Trafficking in Persons descended on the orphanage and arrested Mr. and Ms. Tarfa. The source explains that one of the officials presented an identity card and stated that the officers had come to conduct an investigation. When the Agency officials began interrogating the children without the owners' consent, the children asked to speak to Ms. Tarfa. The source specifies that Ms. Tarfa was able to call her lawyer and inform him of the raid before she and her husband were arrested.

10. Later, Ms. Tarfa was given a form to fill in containing the words "accused/witness", to which she objected, asserting that no crime had been committed. She demanded to speak with her lawyer, and the Agency officials ordered her to follow them to their office for questioning. Upon arrival at their office, Mr. and Ms. Tarfa waited around five hours without being questioned. Their lawyer then arrived and requested an audience with the Agency's senior officer. He was denied access to the senior officer and was almost driven out of the office, but refused to leave.

11. At around 6 p.m., Mr. and Ms. Tarfa were asked to provide bail or remain detained throughout the weekend, despite the fact that there was no formal charge against them. Their lawyer advised them to accept the bail terms, since there was no clear idea of the Agency's motives. Although they were given stringent bail terms, they met the conditions by managing to put up a surety and agreeing to report to the Agency office twice a week. The Agency subsequently lifted the latter requirement after the couple provided records demonstrating how each of the children had come to their orphanage.

12. The source reports that, on 25 December 2019, some 25 armed officers of the Kano State Police Command stormed the orphanage, stating that the Kano State Commissioner of Police demanded that Mr. and Ms. Tarfa accompany them to the station for questioning. The

raid took place as Ms. Tarfa was preparing Christmas lunch for her family. After changing clothes, she returned to discover that 19 of the children aged between 3 months and 30 years old had been taken to the police station along with Mr. Tarfa and another of her relatives who was spending the holiday with them.

13. Mr. Tarfa and Ms. Tarfa's other relatives were reportedly detained at the Kano State Police Command headquarters in Bompai, while the children were asked to sign documents that had been written by the police, before being transferred to Nasarawa children's home, a government-run institution. Ms. Tarfa's relative was released on bail five days later.

14. The source explains that, while the police insisted during media interviews that the children were all minors, among them was a 30-year-old woman who is a university graduate, a 22-year-old man and a married woman who was over 22 and had been visiting for Christmas along with her 3-month-old child.

15. Mr. Tarfa allegedly remained in detention and was subsequently obliged to accompany officers as they raided the second orphanage, the Du Merci Centre in Kaduna State, on 31 December 2019 in a similar manner to the previous raid. Upon arrival, members of the press were present. The officers became agitated and declined to make any comments. They waited until the journalists left, at around 7 p.m., before transporting eight children to Kano, where they arrived at 2 a.m. The children, who had been given nothing to eat, were obliged to spend the night at a police station.

16. It is reported that Mr. Tarfa was then taken back to the place of detention. The initial allegation was that the Du Merci Centre was not licensed to operate. However, upon presentation of the orphanage's registration documents, the allegation was changed five days later to "criminal conspiracy" and "abduction", pursuant to the Trafficking in Persons Law (Prohibition) Enforcement and Administration Act of 2003 (amended in 2005 and re-enacted in 2015) and the Child Rights Act of 2003. According to the source, the crux of the matter appears to be that Mr. and Ms. Tarfa are allegedly suspected of converting Muslim children.

17. The source reports that Mr. Tarfa was first charged and brought before a judge on 3 January 2020, at the Chief Magistrate Court No. 29 in Kano. He was informed that he could be released on bail of 5 million naira (about \$13,800), as long as one of his sureties was a permanent secretary in a federal ministry in Abuja. Mr. Tarfa could not be released as the bail was excessive. Moreover, the stipulation that one of the sureties be a permanent secretary of a federal ministry was reportedly included in an effort to ensure that the bail terms would not be met. Indeed, there is very little chance that Mr. Tarfa, who lives in Kano State, would have known a permanent secretary in a federal ministry in Abuja well enough to vouch for him. The source adds that court documents showed no named complainant, stating only that a complaint had been received by the office of the Commissioner of Police.

18. A second application for bail and the return of the children to the Du Merci Centre was filed at the Kano State High Court on 6 February 2020. On 21 February 2020, the judge failed to attend court to deliver a decision on the review of the excessive bail terms, allegedly owing to illness.

19. On 3 March 2020, Mr. Tarfa was arraigned in the Kano State High Court by the Attorney General. The source states that Mr. Tarfa's lawyer again filed a suit at the Kano State High Court for a review of his bail on 3 March 2020; however, despite several letters being written to the court on the issue, the judge failed to schedule a bail hearing. In August, his lawyer met the judge in person and demanded a hearing date. The judge set a hearing for 15 October 2020, claiming that she would be on leave until then. However, the source reports that the judge had returned Mr. Tarfa's case file to the High Court Chief Judge for reassignment; the Chief Judge had also gone on leave without having reassigned the case.

20. Mr. Tarfa's bail review was due to be held on 12 May 2020. It is reported that the judge overseeing the case stated that the matter would be heard in full, witnesses on both sides would be called and judgment given the same day. However, no hearing was held on that date, possibly owing to the health situation relating to coronavirus disease (COVID-19).

21. The source reports that, on around 10 December 2020, Mr. Tarfa was released on bail after having spent almost a year in pretrial detention. That bail was allegedly granted because

Mr. Tarfa was finally able to meet the bail requirements; he has returned to his family. The source also indicates that the trial has now begun and the prosecution has called witnesses.

22. With regard to the children and individuals who were taken away from the orphanage, the source states that they were detained in the government-run orphanage, where their rights to freedom of religion or belief, education and parental care were effectively violated. The children who were old enough to go to school were allegedly prevented from doing so and have been threatened, mistreated and coerced to convert. The threats they have received from both staff and residents of the government-run home include statements against their religion.

23. Those children and individuals reportedly mounted several protests which were publicized, during which they complained of being unable to leave the grounds of the orphanage, to attend school or church, and about the unsatisfactory conditions in which they were being held. Two of them complained on camera of being threatened by the police for staging a protest. They also reportedly stated that they had by that time been held against their will for over two weeks and wanted to return to their home. Moreover, on 21 February 2020, one of them was physically assaulted by police officers in the presence of the Kano State Commissioner for Women's Affairs and Social Development. His telephone was seized and some of the audio files he had recorded about experiences at the government-run home were deleted. Then, on 15 March 2020, there was a disturbance at the gates of the home between the children and security guards when the children insisted on attending a church service. When the children forced their way out, the authorities called the police who raided several churches, interrupting the services in search of the children. All but six of them were found in an area close to the home, and the remaining six came back afterwards. Ms. Tarfa was reportedly informed of their whereabouts and she told them to return to the orphanage.

24. The source explains that, following those events, Mr. Tarfa's lawyer contacted the chairman of the Kano State chapter of the Christian Association of Nigeria to request that the children be placed in the Association's custody pending the settlement or conclusion of the case in court. In April, the Kano State Commissioner for Women's Affairs and Social Development finally agreed to release eight of the children and individuals. A further sixteen children whose names are known to the Working Group have not been released. In addition, one of the individuals who was arrested at the orphanage, who is 30 years old, remained with those children to look after the younger ones and ensure that they were not mistreated. However, it has been reported that she was later forced to leave and the remaining children are allegedly being treated extremely badly.

25. The source reports that on 20 December 2020, a fire broke out at Nasarawa children's home and one of the children suffered first degree burns to the face, hands and legs. It is alleged that the other children in the home are threatening the Tarfa children with assault and accusing them of having started the fire.

c. Legal analysis

26. The source states that Mr. Tarfa was arrested without a warrant. The initial reason communicated to him was that the orphanage was operating illegally. That reason was however altered once documentation was produced proving that the orphanage was duly registered with several relevant bodies in Kano State.

27. The source reports that, once the charge was changed to abduction and trafficking of minors, a media campaign was launched, seemingly by authorities in Kano State. According to the source, during a press conference on 16 January 2020, Mr. Tarfa was paraded before journalists alongside several armed robbers, as the police spokesperson from Kano State Command explained that Mr. Tarfa was involved in a baby-stealing enterprise with another individual who owned a maternity clinic close to the orphanage.

28. The source reports that those false allegations gained international attention when they were broadcast by the international media. The content summarizing the false accusations was altered in its English version after it was challenged by a member of the House of Lords of the United Kingdom of Great Britain and Northern Ireland. Nigerian media have claimed that a resident of the orphanage had been forcibly married there and have described the orphanage as a "baby making factory, allegedly for trafficking" and quoted the Kano State

Commissioner for Women's Affairs and Social Development as claiming there was "no record showing the existence of any Du Merci Children's Home in the state".

29. The source reports that it is not the first time that Mr. and Ms. Tarfa have been arrested in an attempt to close the orphanage. They were both initially detained in 2002 following a similar raid on the orphanage. On that occasion, Mr. and Ms. Tarfa were at home in Kano when eight armed policemen and a judge entered the home by force and shouted "court". The men said that they were a mobile court and the judge demanded to know who had authorized Mr. and Ms. Tarfa to run a Christian orphanage in Kano State. Ms. Tarfa asked whether Kano was no longer a part of the Federal Republic, to which the judge replied that Kano was a state in its own right. As the judge began to read his sentence from a document bearing the name of the Magistrates' Court and the magistrate's name, Ms. Tarfa argued that if it was truly a court of law, then they had the right to seek the services of a lawyer. She attempted to call her lawyer on her cell phone, but the judge snatched it away from her and continued reading the sentence. He informed Ms. Tarfa that although the couple would have received a fine and two months' imprisonment, because Ms. Tarfa had questioned his authority, the sentence was increased to a higher fine and two years' imprisonment.

30. The source explains that Mr. and Ms. Tarfa were then transported to Kano Central Prison, where they spent two days before being granted bail. For the next four months, the couple did not have access to their home or their children, who had been taken to the Nasarawa government-run home. The court did not hear the case, as the hearings were constantly being adjourned for different reasons. After four months, the Emir of Kano intervened by transferring the case from the Magistrates' Court to the High Court, which held two hearings within two weeks and delivered a judgment in favour of Mr. and Ms. Tarfa. The High Court was reportedly convinced beyond reasonable doubt that the orphanage was operating legally and provided a life-saving social service. The Chief Magistrate set aside the proceedings and judgment of the mobile court on 26 June 2002 and ordered the reopening of the orphanage.

31. The source argues that the current case is similar to that of 2002. The same judge who presided over the case in 2002 is presiding in Mr. Tarfa's current case at the High Court. Given the way in which the couple was treated in 2002, the source considers that there are legitimate concerns regarding judicial impartiality and conformity with fair trial standards. The excessive bail terms and constant adjournments of hearings have served to extend the period of pretrial detention and provide an indication that the trial may not respect due process.

32. The source further argues that the allegations that Mr. and Ms. Tarfa have used the orphanage to convert Muslim children stem from an incident in 2007, when the couple was persuaded to shelter a pregnant woman who had been evicted by her family due to stigma and was sleeping on the street. According to the source, the population of Kano State is predominantly Muslim. However, none of the children currently held in the Nasarawa children's home and whose rights, among others, to education and freedom of religion or belief are being denied, are from Muslim families.

33. The source considers that, given the existence of documentation that clearly disproves the charges against Mr. Tarfa, the excessive charges against him demonstrate malicious intent.

34. In this regard, the source states that the law provides for a matter to be struck out or dismissed for lack of diligent prosecution. However, to the source, there appears to be an attempt under way to influence the magistrate or obstruct the case by constantly not attending court. The case seems to be subjected to the practice of "forum shopping", whereby a party will look for a judge who can be influenced to render a favourable verdict. This occurs in cases in which there is a lack of sufficient evidence to secure a conviction. The source also recalls that the proof of liability in Nigerian criminal law is "proof beyond reasonable doubt", which is clearly lacking in the current case. While such decisions are generally overruled on appeal, they extend incarceration for those who are wrongfully accused.

Response from the Government

35. On 15 January 2021 the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group

requested the Government to provide, by 16 March 2021, detailed information about the current situation of Mr. and Ms. Tarfa and to clarify the legal provisions justifying their continued detention, as well as its compatibility with the obligations of Nigeria under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government to ensure Mr. and Ms. Tarfa's physical and mental integrity.

36. The Working Group regrets that it did not receive a response from the Government to the present communication. The Government did not request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work. The Working Group notes that this is the third case in past three years that has come before the Working Group concerning Nigeria and that the Government did not provide a response in any of these cases.² The Working Group urges the Government to engage constructively with it on all allegations relating to the arbitrary deprivation of liberty.

Discussion

37. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

38. Before proceeding to the examination of the source's submissions, the Working Group wishes to address as a preliminary issue the present situation of Mr. and Ms. Tarfa, noting that neither of them are currently detained. Nevertheless, the Working Group notes the serious nature of the submissions made by the source, the ongoing proceedings against Mr. Tarfa and the fact that his release is only conditional. Moreover, the case also involves serious allegations concerning the deprivation of liberty of 16 minors, some of whom are very young. Therefore, the Working Group shall proceed to consider the case, in accordance with paragraph 17 (a) of its methods of work.

39. In determining whether the deprivation of liberty of Mr. and Ms. Tarfa and the 16 minors whose names are known to the Working Group was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a *prima facie* case for breach of the international law 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

40. The Working Group notes that the source has made allegations concerning the deprivation of liberty of Mr. and Ms. Tarfa and the 16 minors whose names are known to the Working Group. The Working Group will examine each allegation in turn.

a. Allegations concerning Mr. and Ms. Tarfa

i. Category I

41. The source has submitted, and the Government has not contested, that Mr. and Ms. Tarfa were detained on 19 December 2019 when officers from the National Agency for the Prohibition of Trafficking in Persons entered their orphanage, stating that they had arrived to conduct an investigation. Mr. and Ms. Tarfa were requested to follow the officers to the police station, where Ms. Tarfa refused to complete a form containing the words "accused/witness" and demanded to speak to their lawyer. In the police station, the couple was interrogated and their lawyer, who had arrived at the police station in the meantime, was denied access to them. Mr. and Ms. Tarfa were then asked to bail themselves in the early evening of the same day, although no formal charges had been brought. Upon putting up a surety, the couple was released.

42. The police officers returned to the orphanage six days later, on 25 December 2019. Some 25 armed officers entered the orphanage, requesting Mr. and Ms. Tarfa to go to the police station for interrogation. Mr. Tarfa was taken to the police station and detained. He

² See opinions No. 81/2018 and No. 27/2020.

³ A/HRC/19/57, para. 68.

was presented before a judge on 3 January 2020. The judge set bail conditions at 5 million naira (about \$13,800) and requested that one of the sureties be a permanent secretary of a federal ministry in Abuja. As Mr. Tarfa was unable to meet those conditions, he remained in detention until 10 December 2020, when he was released on bail. The court proceedings against Mr. Tarfa are ongoing.

43. The source has also submitted that similar events occurred in 2002 when Mr. and Ms. Tarfa's orphanage was entered by eight police officers and a judge who claimed to constitute a mobile court, who proceeded to examine the legality of the orphanage's operation. When the judge proceeded to deliver what appears to have been a judgment, Ms. Tarfa objected, questioning the authority of the judge and the legality of the proceedings. She attempted to call a lawyer, but her telephone was snatched by the judge, who also imposed an increased fine and two years' imprisonment upon the couple. Mr. and Ms. Tarfa were then taken to the Kano Central Prison where they spent two days before being granted bail. The consideration of the case was continuously delayed until it was transferred to a High Court which acquitted Mr. and Ms. Tarfa of all charges, establishing beyond reasonable doubt that the orphanage was operating legally. None of those allegations are contested by the Government.

44. The Working Group recalls that a detention is arbitrary under category I if it lacks legal basis. As it has previously stated, for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law which may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.⁴

45. Indeed, international law on deprivation of liberty includes the right to be presented with an arrest warrant, which is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary detention under articles 3 and 9 of the Universal Declaration of Human Rights, article 9 (1) of the Covenant and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁵ Any form of detention or imprisonment should be ordered by, or be subject to the effective control of, a judicial or other authority under the law, whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence, in accordance with principle 4 of that Body of Principles.

46. In the present case, Mr. and Ms. Tarfa were both arrested on 19 December 2019 and although they were released on bail the same evening, the Working Group must emphasize that every deprivation of liberty, no matter how short its duration may be, must comply with the requirements of article 9 of the Covenant. Moreover, in the present case, had Mr. and Ms. Tarfa been unable to post the required bail, they would have remained in detention.

47. The Working Group considers that the detention of Mr. and Ms. Tarfa on 19 December 2019 violated their rights under article 9 (1) and (2) of the Covenant as they were detained without an arrest warrant or indeed without any explanation for their arrest. In arriving at this conclusion, the Working Group is particularly mindful that when required to post bail, Mr. and Ms. Tarfa were not charged with any offence, suggesting that there was no legal reason justifying their detention and the legality of the imposed bail is questionable.

48. Subsequently, Mr. Tarfa was arrested again on 25 December 2019 and once again, no arrest warrant was produced at the time of arrest nor reasons given, in breach of article 9 (1) and (2) of the Covenant. Thereafter, Mr. Tarfa was presented before a judge on 3 January 2020. Moreover, on this occasion the Working Group notes the uncontested submissions that upon the presentation of the orphanage registration documents, the charges against Mr. Tarfa were changed some five days later to "criminal conspiracy" and "abduction". The Working Group considers that this is further evidence of the authorities' failure to properly substantiate the legal basis and reasons for the arrest and detention of Mr. Tarfa, in violation of article 9 (1) and (2) of the Covenant.

49. Moreover, under article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge shall be brought promptly before a judge to exercise judicial power. As the

⁴ See, e.g., opinions No. 46/2017, No. 66/2017, No. 75/2017, No. 93/2017, No. 35/2018 and No. 79/2018.

⁵ Opinions No. 88/2017, para. 27; No. 3/2018, para. 43; and No. 30/2018, para. 39.

Human Rights Committee has noted, 48 hours is ordinarily sufficient to satisfy the requirement to bring a detainee “promptly” before a judge or other officer authorized by law following his or her arrest; any longer delay must remain absolutely exceptional and be justified under the circumstances.⁶

50. Equally, to establish that a detention is indeed legal, anyone detained has the right to challenge the legality of his or her detention before a court, as provided by article 9 (4) of the Covenant. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.⁷ This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law.⁸ Moreover, it applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.⁹ The Working Group also recalls that the right to bring proceedings applies in principle from the moment of arrest and any substantial waiting period before a detainee can bring a first challenge to detention is impermissible.¹⁰

51. In the present case, the Working Group notes the uncontested allegations that Mr. Tarfa was detained on 25 December 2019 and appeared before a judge nine days later, on 3 January 2020. The Government had the opportunity to explain the reasons for such a delay, but it has chosen not to do so. In these circumstances, the Working Group finds that the detention of Mr. Tarfa also violated article 9 (3) and (4) of the Covenant.

52. The Working Group recalls that it is a well-established norm of international law that pretrial detention shall be the exception and not the rule, and that it should be ordered for as short a time as possible.¹¹ Article 9 (3) of the Covenant provides that it shall not be the general rule that persons awaiting trial shall be detained, but release may be subject to guarantees to appear for trial and at any other stage of the judicial proceedings. It follows that liberty is recognized as a principle and detention as an exception in the interests of justice.¹²

53. In order to give effect to this principle, pretrial detention 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.¹³ The courts must examine whether alternatives to detention, such as bail, would render custodial measures unnecessary.¹⁴ According to the source, Mr. Tarfa was indeed granted bail, but the conditions of the bail were excessive,¹⁵ requiring that one of the sureties be a permanent secretary of a federal ministry in Abuja. Mr. Tarfa thus remained in detention until 10 December 2020. The Government had the opportunity to explain the conditions imposed upon Mr. Tarfa, but has chosen not to do so.

54. In the absence of such an explanation, the Working Group cannot accept that Mr. Tarfa’s pretrial detention was properly constituted in accordance with article 9 (3) of the Covenant. In making this determination the Working Group also notes the numerous bail hearings which were repeatedly rescheduled and the failure of the judge to provide a reasoned decision on the review of the bail conditions on 21 February 2020.

⁶ Human Rights Committee, general comment No. 35 (2014), paras. 32–33.

⁷ A/HRC/30/37, paras. 2–3.

⁸ Ibid., para. 11, and annex, para. 47 (a).

⁹ Ibid., annex, para. 47 (b).

¹⁰ Human Rights Committee, general comment No. 35 (2014), para. 42.

¹¹ Opinions No. 28/2014, para. 43; No. 49/2014, para. 23; No. 57/2014, para. 26; No. 1/2020, para. 53; No. 8/2020, para. 54; Human Rights Committee, general comment No. 35 (2014), para. 38; and A/HRC/19/57, paras. 48–58.

¹² A/HRC/19/57, para. 54.

¹³ Human Rights Committee, general comment No. 35 (2014), para. 38.

¹⁴ Ibid.; opinion No. 83/2019, para. 68; and A/HRC/30/37, annex, guideline 15.

¹⁵ Opinion No. 9/2017, para. 28.

55. The Working Group also notes the uncontested allegations about the detention of Mr. and Ms. Tarfa in 2002 when the couple spent two days in a prison before being released on bail. The arrest was, also in that instance, imposed through a procedure which does not satisfy the safeguards of article 9 as no warrant was presented. The Working Group therefore finds a violation of this provision.

56. Noting all of the above, the Working Group concludes that the arrest of Mr. and Ms. Tarfa in 2002 and on 19 December 2019, as well as the arrest of Mr. Tarfa on 25 December 2019, violated article 9 of the Covenant and therefore lacked legal basis. These detentions were arbitrary and fall under category I of the Working Group.

57. The Working Group also wishes to record its dismay at the manner in which the arrests on 19 December 2019 and 25 December 2019 were carried out, with numerous officers arriving at the orphanage and even armed officers being present during the second arrest. There is no evidence that either Mr. or Ms. Tarfa resisted arrest or were otherwise uncooperative with the requests of the police. In these circumstances, the authorities clearly appear to have exceeded the limits set by the requirement for the proportionate use of force.

ii. Category III

58. The Working Group notes numerous uncontested allegations concerning the due process rights of Mr. Tarfa. First, Mr. Tarfa spent nearly a year in pretrial detention, which the Working Group has already established violated his rights under article 9 (3) of the Covenant.

59. Moreover, the Working Group notes the uncontested allegations concerning numerous delays and postponements of hearings (see paras. 18–20 above) and is particularly disturbed that it was only the insistence of the defence counsel in August 2020 that ensured some progress with the proceedings, although the hearings could only commence in October 2020. The Working Group notes that the judge gave reasons for the delays, such as being on leave from August to October 2020. The Working Group must conclude there was a breach of the right to trial within a reasonable time and to be tried without undue delay under articles 9 (3) and 14 (3) (c) of the Covenant as a result of actions taken by the judge in the proceedings against Mr. Tarfa.

60. The Working Group recalls that the right of the accused to be tried without undue delay, provided for in article 14 (3) (c) of the Covenant, is designed not only to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice.¹⁶ However, what is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused and the manner in which the matter was dealt with by the administrative and judicial authorities.

61. The Working Group is mindful of the string of serious irregularities with regard to the arrest and charging of Mr. Tarfa, as noted above, the excessive bail conditions imposed and the repeatedly rescheduled bail hearings. None of these submissions have prompted a reply from the Government.

62. Moreover, Mr. Tarfa's lawyer repeatedly and insistently pursued the judge to secure a hearing and it is clear to the Working Group that without such persistence, the hearings would not have commenced when they eventually did. The Working Group recalls that article 14 (3) (c) encapsulates a right which all courts are duty bound to respect and implement, regardless of whether the defence lawyer and the defendant are pursuing it themselves.

63. The Working Group agrees with the Human Rights Committee that in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.¹⁷ This did not happen in Mr. Tarfa's case and the Working Group therefore finds a violation of articles 9 (3) and 14 (3) (c) of the Covenant.

¹⁶ Human Rights Committee, general comment No. 32 (2007), para. 35.

¹⁷ Ibid. See also *Sextus v. Trinidad and Tobago* (CCPR/C/72/D/818/1998), para. 7.2.

64. Furthermore, the Working Group is concerned about the uncontested allegation that Mr. Tarfa was paraded before journalists on 16 January 2020 alongside several armed robbers and that the police spokesperson from Kano State Command stated that Mr. Tarfa was involved in a baby-stealing enterprise. Also, following his detention, Mr. Tarfa had been obliged to accompany officers as they raided the Du Merci Centre in Kaduna State on 31 December 2019, in a similar manner to the previous raid. Upon arrival, members of the press were present.

65. The Working Group concurs with the view expressed by the Human Rights Committee in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, that it is a duty for all public authorities to refrain from prejudging the outcome of a trial, for example by abstaining from making public statements affirming the guilt of the accused (para. 30). The Working Group considers that the events of 16 January 2021 and those of 31 December 2019 had an adverse impact on Mr. Tarfa's right to a fair trial under article 14 of the Covenant.

66. The Working Group must place on record its serious concerns over the independence and impartiality of the proceedings against Mr. Tarfa. The source has alleged, and the Government has chosen not to contest, that the judge in the current proceedings is the same judge who was involved in the "mobile court" hearing against Mr. Tarfa in 2002, the judgment of which was subsequently overturned by the High Court.

67. Initially, the Working Group must underline that the proceedings of this mobile court, as described in the source's submissions, can never be said to satisfy the requirements of article 14 of the Covenant. Such fundamental safeguards as the equality of arms and the right to defence were entirely ignored during these proceedings as the source has described them and the Government has failed to rebut.

68. Turning to the allegations concerning the present proceedings, the Working Group recalls that, in its general comment No. 32 (2007), the Human Rights Committee indicated that the requirement of competence, independence and impartiality of a tribunal in the sense of article 14 (1) is an absolute right that is not subject to any exception (para. 19). The Committee further observed that:

The requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial (para. 21).

69. In the present case, the trial judge had a heavy involvement with the case of Mr. Tarfa in 2002, including delivering a judgment against Mr. Tarfa, sentencing him to two years' imprisonment and a fine, and snatching his telephone when Mr. Tarfa attempted to contact his lawyer. Noting that the circumstances of the two cases are very similar, in the view of the Working Group, the involvement of that judge in the current trial proceedings was incompatible with the requirement of impartiality under article 14 (1) of the Covenant.¹⁸ The Working Group refers the case to the Special Rapporteur on the independence of judges and lawyers for appropriate action.

70. Noting all of the above, the Working Group considers that the detention of Mr. Tarfa is arbitrary and falls under category III.

iii. Category V

71. The Working Group recalls that the deprivation of liberty is arbitrary under category V when it 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

¹⁸ See *Larrañaga v. Philippines* (CCPR/C/87/D/1421/2005).

other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings.

72. The Working Group considers that the present case reveals a pattern of behaviour on the part of the authorities towards Mr. and Ms. Tarfa whereby the couple has been singled out for their work at the orphanages. The Working Group also considers that they have been singled out because of their Christian faith and because they are running an orphanage in a predominantly Muslim area. In this regard, the Working Group recalls the uncontested allegation that during the mobile court proceedings in 2002, the judge demanded an explanation as to the authorization to run a Christian orphanage in Kano State (see para. 29 above).

73. The submissions provided by the source reveal no less than three separate instances of arrest, detention and trial, all following a similar pattern. The Working Group has already noted its dismay at the clearly disproportionate use of force during the arrests on 19 and 25 December 2019, but notes these repeated detentions as clear evidence of the authorities' attitude towards Mr. and Ms. Tarfa. This was also evident in the excessive bail conditions set for Mr. Tarfa, as examined by the Working Group above.

74. In these circumstances, the Working Group considers that the arrests of Mr. and Ms. Tarfa constitute discrimination based on their religion and other status in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. Their deprivation of liberty is arbitrary according to category V. The Working Group refers the case to the Special Rapporteur on freedom of religion or belief for appropriate action.

b. The situation of the minors

75. The Working Group turns to the source's uncontested allegation that 16 children, aged 4 to 13 years old, whose names are known to the Working Group, remain detained and are not allowed to return to the orphanage.

76. The Working Group is seriously disturbed at the circumstances under which the children were removed from the orphanage. First, on 19 December 2019 when officers of the National Agency for the Prohibition of Trafficking in Persons arrived at the orphanage, they proceeded to interrogate the children in the absence of their legal guardians, lawyers or even social workers.

77. Furthermore, on 25 December 2019, 19 children and young adults aged between 3 months and 30 years old were simply removed from the orphanage and taken to the police station, where the children were given papers to sign, once again in the absence of their legal guardians, lawyers or even social workers. The papers had been written by police officers, concerning the children's transfer to another children's home, run by the Government. The source has alleged that while the children were at the government-run home, they were prevented from attending school and religious ceremonies and were subjected to mistreatment, including harassment from other children. The children were also prevented from leaving the grounds of the orphanage by the security guards and when they managed to do so, the incident was reported to the police who searched for them, apprehended them and returned them to the same facility. The source reports that the police assaulted some of the children. None of those allegations have been addressed by the Government.

78. The Working Group recalls that detention of children should be used only as a measure of last resort and for the shortest appropriate period of time and should be subject to judicial review.¹⁹ The source has clearly stated that the children have been moved to an orphanage which they are not permitted to leave at will and that the grounds of that facility are guarded by security officers who have indeed prevented the children from attending church, for example. When some children did manage to leave the grounds, the police were called and they searched for them, apprehended them and returned them to the facility. The Working Group therefore considers that these children are deprived of their liberty within the meaning of article 9 of the Covenant.

¹⁹ Committee on the Rights of the Child, general comment No. 24 (2019), para. 11.

79. In making this determination, the Working Group is mindful that the children were placed in that facility after they were taken to a police station on 25 December 2019, where they were required to sign a document which appears to have been a request for transfer to the government-run orphanage. This is an appalling denial of the rights of the child and a failure on the part of the Government to respect the right of the child to be heard, in breach of article 12 of the Convention on the Rights of the Child. It is also a blatant disregard of the legal safeguards stipulated in article 9 (1) of the Covenant and article 37 (b) of the Convention on the Rights of the Child. The Working Group also wishes to emphasize the entirely inappropriate nature of the placement of the children in the police station.

80. This is also a denial of the children's rights under article 9 (4) of the Covenant and article 37 (d) of the Convention on the Rights of the Child. The Working Group reiterates that in order to establish that a detention is indeed legal, anyone detained has the right to challenge the legality of his or her detention before a court, as provided in article 9 (4) of the Covenant. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.²⁰ This right, which is in fact a peremptory norm of international law, applies to all forms and all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including detention of children for educational purposes.²¹ Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.²²

81. Noting all of the above, the Working Group concludes that the 16 minors whose names are known to the Working Group have been arbitrarily detained in violation of article 9 of the Covenant and their detention falls under category I.

82. The Working Group also notes its earlier conclusion that the detention of Mr. and Ms. Tarfa was based on discrimination on the basis of their religion. The Working Group considers that the same is true in the case of the 16 minors. It is evident that they have been moved to an orphanage of a different faith and when they have protested and sought to attend the church of their own religion, they have been prevented from doing so. In these circumstances, the Working Group finds that the detention of the 16 minors whose names are known to the Working Group was based on discrimination and violated articles 2 and 26 of the Covenant and was also arbitrary under category V.

83. Overall, the Working Group is obliged to place on record its deep frustration at the manner in which the Nigerian authorities have handled the present case, especially in relation to the children concerned. The authorities first attempted to interrogate them in the absence of their legal guardians, lawyers or social workers; the children then were told to sign documents the contents of which they clearly did not understand. They were forced to witness the arrests of their caretakers, Mr. and Ms. Tarfa, carried out by an excessive number of armed police officers. The children were then moved to an orphanage where they were not allowed to attend their school, take part in their religious ceremonies or even leave the grounds, and were subjected to abuse by both adults and other children, apparently based on their religion. It appears that some of the children were also separated, as on 31 December 2020, eight of them were transported to Kano, arriving at 2 a.m., without food or water and had to spend the night in a police station. All of these events must have been deeply traumatic for the children, some of whom are very young. The Working Group recalls that it is the paramount duty of every State to uphold the best interests of the child in every decision and action concerning a child, as provided in article 3 of the Convention on the Rights of the Child. The Working Group refers the case to the Special Representative of the Secretary-General on Violence against Children for appropriate action.

²⁰ A/HRC/30/37, paras. 2–3.

²¹ *Ibid.*, para. 11, and annex, para. 47 (a).

²² *Ibid.*, annex, para. 47 (b).

c. Final remarks

84. The Working Group recognizes that all States have the obligation to ensure that those responsible for having committed crimes are punished. It is also aware that many State and private orphanages provide a vital social service for children who would otherwise have no support or place to live. Nevertheless, trafficking and child exploitation is a pervasive problem in some orphanages around the world and it is the duty of all States to address it. In the present case, the Working Group did not consider or comment upon any issues relating to the orphanages themselves, but analysed the facts presented and concluded, in accordance with its mandate, that Mr. and Ms. Tarfa and the 16 minors whose names are known to the Working Group were detained in circumstances that violated their right to liberty. States must respect the provisions of the Covenant, violations of which have been identified in the present case.²³

Disposition

85. In view of the foregoing, the Working Group renders the following opinion:

- (i) The deprivation of liberty of Solomon Musa Tarfa, Mercy Solomon Tarfa and 16 minors whose names are known to the Working Group, being in contravention of articles 2, 3 and 9 of the Universal Declaration of Human Rights and articles 2, 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and V;
- (ii) The deprivation of liberty of Solomon Musa Tarfa, being in contravention of articles 10 and 11 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category III.

86. The Working Group requests the Government of Nigeria to take the steps necessary to remedy the situation of Mr. and Ms. Tarfa and the 16 minors whose names are known to the Working Group 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.

87. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. and Ms. Tarfa and the 16 minors whose names are known to the Working Group an enforceable right to compensation and other reparations, in accordance with international law. In particular, the Working Group considers that the 16 minors should be immediately released and that the best interests of the child should be the prime consideration in determining their future placement.

88. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. and Ms. Tarfa and the 16 minors whose names are known to the Working Group and to take appropriate measures against those responsible for the violation of their rights.

89. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on freedom of religion or belief and the Special Representative of the Secretary-General on Violence against Children, for appropriate action.

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

Follow-up procedure

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

- (a) Whether the 16 minors have been released and, if so, on what date;

²³ Opinion No. 1/2020, para. 74.

(b) Whether compensation or other reparations have been made to Mr. and Ms. Tarfa and the 16 minors whose names are known to the Working Group;

(c) Whether an investigation has been conducted into the violation of the rights of Mr. and Ms. Tarfa and the 16 minors whose names are known to the Working Group and, if so, the outcome of the investigation;

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

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

92. 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.

93. 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.

94. 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.²⁴

[Adopted on 7 May 2021]

²⁴ Human Rights Council resolution 42/22, paras. 3 and 7.