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Human Rights Council Working Group on Arbitrary Detention

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

Opinion No. 20/2021 concerning Douglas Tumuhimbise, Andrew Kibalama, Saddam Kateregga, Raj Jjuuko, Kelvin Kugonza, Denis Ssamula, Abbey Gwanvu, Henry Mukiibi, Kareem Yiga, Harris Tevin Kifuba, Jabel Tushabomwe, Ivan Kawooya, Ashiraf Walugembe, Jackson Mayanja, James Tendibwa, Mark Muhereza, Joel Oketch, Ronald Ssenyonga and Rodney Sheema (Uganda)

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 30 December 2020 the Working Group transmitted to the Government of Uganda a communication concerning Douglas Tumuhimbise, Andrew Kibalama, Saddam Kateregga, Raj Jjuuko, Kelvin Kugonza, Denis Ssamula, Abbey Gwanvu, Henry Mukiibi, Kareem Yiga, Harris Tevin Kifuba, Jabel Tushabomwe, Ivan Kawooya, Ashiraf Walugembe, Jackson Mayanja, James Tendibwa, Mark Muhereza, Joel Oketch, Ronald Ssenyonga and Rodney Sheema. The Government replied to the communication on 18 February 2021. 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);

¹ A/HRC/36/38.



(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. Douglas Tumuhimbise, Andrew Kibalama, Saddam Kateregga, Raj Jjuuko, Kelvin Kugonza, Denis Ssamula, Abbey Gwanvu, Henry Mukiibi, Kareem Yiga, Harris Tevin Kifuba, Jabel Tushabomwe, Ivan Kawooya, Ashiraf Walugembe, Jackson Mayanja, James Tendibwa, Mark Muhereza, Joel Oketch, Ronald Ssenyonga and Rodney Sheema are nationals of Uganda. At the time of their arrest, these 19 individuals were between the ages of 19 and 32 years old and are either gay, bisexual or transgender.

a. Context

5. The source explains that, although the Constitutional Court nullified the Anti-Homosexuality Act in 2014, consensual same-sex sexual conduct is still illegal under a colonial-era provision in the Penal Code that criminalizes “carnal knowledge of any person against the order of nature” and provides for a penalty of up to life imprisonment. Moreover, although the law does not expressly restrict the freedoms of expression or of peaceful assembly on the basis of sexual orientation or gender identity, the Government has severely restricted such rights for lesbian, gay, bisexual and transgender persons.

6. The law does not prohibit discrimination against lesbian, gay, bisexual and transgender persons in housing, employment, nationality laws or access to government services. Such persons face discrimination, legal restrictions, societal harassment, violence, and intimidation. The authorities allegedly perpetuate violence against lesbian, gay, bisexual and transgender persons, block meetings organized by such persons and activists and routinely arbitrarily arrest and detain them. Police officers also reportedly continue to carry out forced anal examinations on men and transgender women accused of consensual same-sex conduct.

7. The source also reports that, in recent months, violence and discrimination against lesbian, gay, bisexual and transgender persons have reached alarmingly high levels. In 2019, some Members of Parliament had reportedly planned to introduce a bill that would criminalize “promotion and recruitment” by lesbian, gay, bisexual and transgender persons, and would include the death penalty for “grave” consensual same-sex sexual acts. Mass arrests of lesbian, gay, bisexual and transgender persons were also reported.

b. Arrest and detention

8. According to the source, on 29 March 2020, the Mayor of Nsangi and security officers raided a shelter for lesbian, gay, bisexual and transgender persons run by the Children of the Sun Foundation in the town of Kyengera. During the raid, the officers arrested 23 individuals, including the 19 individuals who are the subjects of the communication, without presenting any warrant. Thirteen of the arrested individuals were residents of the shelter. Five of the non-shelter residents were visiting from another shelter, one was a guest of a resident and one was a resident nurse. The source claims that the police targeted this shelter and arbitrarily arrested the individuals because of their real or perceived sexual orientation and gender identity.

9. According to a police statement made the day after the arrest, the individuals were reportedly arrested for violating the stay-at-home orders and social distancing directives put in place in Uganda to curb the spread of coronavirus disease (COVID-19). The source explains that on 21 March 2020, the President of Uganda issued a detailed directive on

preventative measures to be taken against the spread of the virus. The directive specifically ordered people to stay at home and prohibited gatherings of more than 10 people.

10. It is reported that these individuals were arrested for allegedly violating these directives, and were charged with engaging in “negligent acts likely to spread infection of disease”, in violation of section 171 of the Penal Code, and with “disobedience of a lawful order”, under section 117 of the Penal Code, although the charge under section 117 was later dropped.

11. The source specifies that, after holding all 23 individuals in custody for one night, the police released 4 of them on 30 March 2020 on health grounds. The remaining 19 individuals were arraigned and remanded to Kitalya prison until 28 or 29 April 2020.

12. According to the source, the police raided the shelter and arrested the individuals for violating the President’s directive, even though at the time of their arrest they were in complete compliance with the COVID-19 restrictions. As explained above, 13 of the currently detained individuals were shelter residents and were peacefully in their residence when the police raided their home and arrested them. The remaining six, although non-shelter residents, were also in compliance with the law, because, although the President’s directive set limits on the number of people allowed for a gathering, it did not establish limits on the number of individuals permitted in a private home or shelter.

13. In its initial statement following the arrests, the police claimed that they had raided the shelter and subsequently arrested the individuals for violating the COVID-19 restrictions. However, reports later revealed that the police charged the individuals with engaging in “carnal knowledge” in violation of section 145 of the Penal Code, which criminalizes same-sex sexual relations.

14. The source reports that the police charged the individuals under this provision although they did not witness anyone engaging in sexual relations at the time of the raid and arrests. Local media footage of the raid recorded neighbours of the shelter and leaders of the area stating that they were worried about the “homosexual behaviour” of the young people in the shelter. The footage also reportedly showed the Mayor of Nsangi whipping and verbally lashing out at two of the shelter residents while forcing them to admit that they were homosexual.

15. It is also reported that, after the arrests, a search of the shelter was conducted in order to find “evidence of homosexuality”. Some of the items recovered and kept as evidence included several bottles of an antiretroviral drug regimen commonly used as a pre-exposure prophylaxis, two oral HIV self-testing kits and several condoms.

16. The source further explains that while, following their arraignment before the Chief Magistrate at Mpigi on 31 March 2020, the charge against the 19 individuals of “disobedience of a lawful order” contrary to section 117 of the Penal Code was dropped, the individuals were remanded to Kitalya prison until 28 or 29 April 2020.

17. The Uganda Prisons Service reportedly denied the 19 individuals access to their lawyers. The lawyers then challenged the legality of that denial in the High Court, which granted a certificate of urgency in the matter. The lawyers also filed a bail application before the Chief Magistrate Court of Mpigi at Nsangi, however no date was set for the hearing.

18. The source adds that a hearing scheduled for 28 April 2020 did not take place. The 19 individuals were not brought to court for the hearing and neither the magistrate nor the prosecutor appeared. If found guilty under section 171 of the Penal Code, the individuals could face up to seven years in prison.

c. Legal analysis

19. The source claims that the detention of the 19 individuals constitutes an arbitrary deprivation of their liberty under categories I, III and V as set forth by the Working Group.

i. Category I

20. The source first claims that the detention of the 19 individuals is arbitrary under category I, as the charges against them are without merit and cannot be used as a lawful basis to justify their continued detention.

21. It is reported that the 19 individuals were charged with engaging in “negligent acts likely to spread infection of disease” in violation of section 171 of the Penal Code. The source argues that the specific application of these charges against all 19 individuals cannot justify their pretrial detention because the acts proscribed in the statute cannot be attributed to their actions and their detention thus lacks sufficient legal basis.

22. The source reiterates that the police claimed that all 19 individuals had violated section 171 of the Penal Code by gathering in a school-like dormitory setting within a small house, clearly disobeying pandemic-related directives on social distancing, in particular the ban on gatherings of more than 10 people. The source submits that these charges cannot be attributed to the individuals because, contrary to the police’s claims, they were in compliance with the restrictions established by the President ordering people, with the exception of cargo transporters, to stay inside their homes. The source argues that the individuals were actually in compliance with the directive at the time of their arrest. Although the President’s directive set limits on the number of people allowed for a gathering, it did not establish limits on the number of individuals permitted in a private home or shelter.

23. Therefore, the source considers that the authorities are attempting to criminalize the individuals’ lawful presence in their private dwelling. Given that the 19 individuals were in compliance with the President’s directives, they cannot be found to be in violation of section 171 of the Penal Code. Therefore, there is no legal basis for their detention under the cited provision and their continued detention under section 171 of the Penal Code is arbitrary under Category I.

ii. Category III

24. The source reports that the 19 individuals have been denied access to their lawyers since their arrest. Owing to the COVID-19 restrictions on movement, all travel by private car and public transport, except by persons performing essential services, is banned. When the lawyers of the 19 individuals filed an application with the Ministry of Works and Transport to visit their clients, it was rejected. The rejection effectively denied the individuals the right to communicate with their lawyers as required under international human rights law, specifically pursuant to article 14 (3) (b) and (d) of the International Covenant on Civil and Political Rights. The right to counsel is also guaranteed under section 28 (3) (d) of the Constitution, which provides that every person who is charged with a criminal offence must “be permitted to appear before the court in person or, at that person’s own expense, [be represented] by a lawyer of his or her choice”.

25. The source adds that the Uganda Prisons Service also officially denied the 19 individuals access to their lawyers. The lawyers then challenged the legality of that denial of access in the High Court, which granted a certificate of urgency in the matter. The lawyers also filed a bail application before the Chief Magistrate Court of Mpigi at Nsangi, however no date was set for the hearing. Finally, on 12 May 2020, the High Court ordered that the lawyers be granted reasonable access to the 19 individuals.

26. Moreover, the source claims that the 19 individuals were forced to appear before a magistrate the day after their arrest without their legal counsel present, in violation of international human rights law and the Constitution. Uganda has thus violated the individuals’ right to counsel, an element of the right to a fair trial.

27. Therefore, the source considers that the detention of the 19 individuals has failed to meet the minimum standards of due process under both international law and the Constitution and is therefore arbitrary under category III.

iii. Category V

28. According to the source, the detention of the 19 individuals is due to their sexual orientation and/or gender identity and is therefore arbitrary under category V.

29. In that regard, the source argues that although both international and Ugandan law (specifically article 26 of the Covenant and article 21 of the Constitution) guarantee freedom from discrimination and equal protection under the law, the Government arbitrarily arrested and detained the 19 individuals because of their real or perceived sexual orientation and gender identity.

30. The source reiterates that in the initial statement following the arrests, the police claimed that they had raided the shelter and subsequently arrested the individuals for violating the COVID-19 restrictions and therefore had intended to charge them with violating sections 171 and 117 of the Penal Code. However, reports later revealed that the police had initially charged the individuals with engaging in “carnal knowledge”, in violation of section 145 of the Penal Code. The source specifies that the police charged the individuals under section 145 even though they did not witness anyone engaging in sexual relations at the time of the raid and arrests. Local media footage of the raid recorded neighbours of the shelter and leaders of the area stating that they were worried about the “homosexual behaviour” of the young people in the shelter. The footage also showed a mayor whipping and verbally lashing out at two of the shelter residents while forcing them to admit that they were homosexuals.

31. It is also reported that, after the arrests, a search of the shelter was conducted in order to find “evidence of homosexuality”. Some of the items recovered and kept as evidence included several bottles of an antiretroviral drug regimen commonly used as pre-exposure prophylaxis, two oral HIV self-testing kits and several condoms.

32. In the source’s view, the facts demonstrate that the Ugandan authorities are using measures aimed at containing the spread of COVID-19 to further marginalize and target already vulnerable populations, in particular lesbian, gay, bisexual and transgender persons.

33. Moreover, the source states that the authorities have offered no reasonable or legitimate purpose for the differential treatment of the 19 individuals currently detained. Since the implementation of COVID-19 prevention measures, there have been no reports of raids on other shelters, private homes or businesses similar to that of the raid on the Children of the Sun Foundation shelter. The source submits that the 19 individuals were arrested under the guise of enforcement of COVID-19 prevention measures, even though they were complying with the President’s directives. This demonstrates that the arrests serve no legitimate or objective purpose, but are rather a pretext for targeting and detaining lesbian, gay, bisexual and transgender persons based on their real or perceived sexual orientation and gender identity and for further restricting the rights and freedoms that are to be enjoyed by all individuals in Uganda, irrespective of sexual orientation or gender identity. In this regard, the source recalls that the Working Group has repeatedly emphasized that deprivation of liberty on the basis of sexual orientation and gender identity is arbitrary and prohibited under international law.²

34. Therefore, the source argues that the authorities’ discriminatory actions are in direct contradiction with international law. In continuing to deprive the 19 individuals of their liberty under baseless charges, solely because of their sexual orientation and gender identity, the actions of the Government are discriminatory and in violation of the equal protection guarantees under article 26 of the Covenant and article 7 of the Universal Declaration of Human Rights. As a result, the source considers that the detention of the 19 individuals is arbitrary under category V.

Response from the Government

35. On 30 December 2020, the Working Group transmitted the allegations from the source to the Government through its regular communications procedure. The Working Group requested the Government to provide, by 1 March 2021, detailed information about the current situation of the 19 individuals and any comments on the source’s allegations. The Government responded to the communication on 18 February 2021. In its response, the Government gave the background and circumstances regarding the arrest of the 19

² See, for example, opinion No. 14/2017.

individuals, stressing the measures it had taken to mitigate the impact of the COVID-19 pandemic, including the development of guidelines and standard operating procedures.

36. The Government describes as baseless, unfounded and unacceptable the allegations from the source suggesting that the Government was targeting lesbian, gay, bisexual and transgender persons for discrimination and persecution on the grounds of their sexual orientation. It asserts that, to the contrary, all people in Uganda are treated equally under the law, which is non-discriminatory.

37. On 18 March 2020, the Government announced a series of measures under the standard operating procedures designed to curb the spread of COVID-19. The measures were non-discriminatory and applied to all segments of society. The arrest of the 19 individuals was a result of the violation of the COVID-19 rules as covered by the standard operating procedures. In defiance of those procedures, the individuals had converged in a rented dormitory in the town of Nkokonjeru. This had raised the concern of members of the local community, who informed the police. The police, in carrying out its mandate to enforce the public health (COVID-19) guidelines, raided the dormitory and arrested the 19 individuals for conduct likely to spread a dangerous disease contrary to the laws of Uganda. The Government denied the source's allegation that the individuals were arrested at a shelter for lesbian, gay, bisexual and transgender persons, as there are no such shelters in Uganda.

38. The Government further states that following their arrest, the 19 individuals were arraigned before the Chief Magistrate Court in Nsangi and charged with the offence of committing neglectful acts likely to spread infection of a disease contrary to section 171 of the Penal Code. They were remanded to Kitalya prison on 31 March 2020. The individuals were released on 19 May 2020, when the charges against them were dropped following a directive from the Government to reduce the number of people in prisons in the context of the pandemic.

39. The Government clarifies that, contrary to the assertion by the source, the 19 individuals were not charged under section 145 of the Penal Code in relation to their sexual orientation.

40. The Government also explains that the 19 individuals were admitted into prison wards together with other inmates in accordance with legal guidelines. However, within two weeks of their incarceration, complaints emerged from other inmates regarding the sexual practices of the 19 individuals. The prison authorities investigated the concerns and established that the 19 individuals were engaging in same-sex sexual acts, in violation of the prison rules. Those individuals were then separated in different wards in an effort to stop them from engaging in the illegal acts, and the individuals confirmed to have been engaged in the acts were warned against continuing those activities.

41. The Government denies the allegation from the source that the 19 individuals were denied access to legal representation, stating that on 8 May 2020 their legal representatives in fact wrote to the Director of Public Prosecutions asking for a review of the charges against them. On 15 May 2020, two lawyers from the non-governmental organization Human Rights Awareness and Promotion Forum visited Kitalya prison with a letter granting them permission to have access to the inmates to provide them with legal aid. The prison authorities welcomed the lawyers and accorded them space to meet with their clients. No complaint was raised by the lawyers regarding any denial of access to their clients.

42. The Government dismisses as baseless and unfounded the allegation that the 19 individuals were tortured. It states that neither the individuals nor their lawyers raised any complaint of torture between the time of the detention and the release of the individuals.

43. In closing, the Government states that it is fully aware of its obligations with regard to the promotion and protection of human rights and that its commitment to the promotion of human rights draws from its experience and history, which it believes is important for the country and its people. Measures it has taken to promote the observance of human rights in Uganda, include the establishment of the Uganda Human Rights Commission and the integration of a human rights approach in all its development plans. It denies any suggestion that lesbian, gay, bisexual and transgender persons are subjected to discrimination.

Additional comments from the source

44. On 19 February 2021, the Working Group requested the source to provide comments on the Government's response. The source provided comments in a communication addressed to the Working Group.

45. The source claims that the Government failed to provide any evidence or argument to rebut the allegations; wilfully ignored certain material aspects of the source's submission; and directly admitted to violating the rights of the 19 individuals based on their real or perceived sexual orientation and gender identity.

46. The source maintains that the detention of these 19 individuals constitutes arbitrary detention of their liberty under categories I, III and V for the reasons presented in its petition. In short, the detention was arbitrary under category I because it was not founded on any legal justification; under category III, because it failed to meet minimum international standards of due process; and under category V, because the Government targeted the individuals on the basis of their real or perceived sexual orientation and gender identity.

47. According to the source, it had demonstrated in its petition how the Mayor of Kyengera, Hajji Abdul Kiyimba, and officers of the Uganda Police Force had raided a shelter for lesbian, gay, bisexual and transgender persons run by the Children of the Sun Foundation on 29 March 2020. During the raid, the officers violently arrested a number of people, including the 19 individuals, under a thinly veiled guise of upholding COVID-19 prevention measures. The government agents targeted a shelter known for being a space for lesbian, gay, bisexual and transgender persons, and arbitrarily arrested and subsequently detained the 19 individuals because of their real or perceived sexual orientation and gender identity.

48. The source maintains that the arrest and continued detention of the 19 individuals described above is an egregious violation by the Government of the following rights under various provisions of the Constitution and international law: the right to be free from arbitrary detention; the right to due process; and the right to equal protection under the law and freedom from discrimination.

49. The source notes that after multiple failed attempts at gaining access to the 19 individuals in order to provide legal representation, Human Rights Awareness and Promotion Forum lawyers commenced proceedings before the High Court against the Attorney General of Uganda and the Commissioner General of Prisons to enforce the constitutional right of the individuals to due process and a fair trial. The suit was filed on 24 April 2020 and the High Court issued a ruling on 12 May 2020 granting the lawyers access. Three lawyers were able to gain access to the individuals on 15 May 2020. The Director of Public Prosecutions formally withdrew the charges against the 19 individuals. Following this, the Magistrate Grade I of the Chief Magistrate Court of Mpigi at Nsangi ordered the release of the 19 individuals. They were released on 19 May 2020. On 5 June 2020, the High Court entered a judgment in favour of Human Rights Awareness and Promotion Forum in the main civil suit, holding, in part, that the Government had violated the rights of the 19 individuals to a fair trial and to liberty guaranteed under the Constitution, among others, when it denied them access to their lawyers. Each of the 19 individuals was awarded 5 million Uganda shillings as compensation. The funds have yet to be paid out by the State.

50. The Attorney General later applied to set aside the decision, arguing that the State had not been given an opportunity to be heard during the hearing of the application, as the State had been prevented by COVID-19 transport restrictions from being represented. The court dismissed this application on 21 December 2020, thus the ruling and the award of compensation remain valid.

51. The source also informs the Working Group that following the release of the 19 individuals, Human Rights Awareness and Promotion Forum lawyers commenced a lawsuit against the Ugandan authorities over the systematic torture of the individuals during their detention at the Kitulya prison and the Nkokonjeru police post. The 19 individuals endured taunting, flogging, an anal examination in one case, scalding, and denial of access to food, sanitary facilities and medication, among other things. The case has come up for hearing twice before the High Court, and was scheduled to come up again on 9 March 2021. The source further informs the Working Group that Human Rights Awareness and Promotion

Forum also filed a criminal case under the Prevention and Prohibition of Torture Act at the Chief Magistrate Court of Wakiso against the Mayor of Kyengera, Hajji Abdul Kiyimba, and a prisons officer, Principal Officer Philimon Woniala, for their roles in the torture of the 19 individuals. The case was dismissed by the Court on 19 January 2021.

52. The source asserts that, by virtue of its response, the Government argues that the above-mentioned laws and COVID-19 directive empowered the Government and officers of the Uganda Police Force to forcibly raid the Children of the Sun Foundation shelter. However, the Government wilfully fails to identify specific provisions of the laws and the directive that empowered its actions on 29 March 2020. The source submits that no interpretation of the provisions of these laws and directive provide the Government with the authority to raid, arrest and detain individuals who are at a place they call home.

53. The source submits that the Penal Code criminalizes unlawful and negligent acts that are likely to spread the infection of any disease, but does not empower the police to raid a private home as part of an enforcement measure without a determination that there is indeed a likelihood of a spread of the infection of a disease. The Public Health Act provides for the power of the police officers to inspect premises but only when “generally or specially authorised in writing by the chief medical officer, medical officer of health or local authority”. This provision does not empower the police to raid premises without authorization, and arrest people and detain them, as was the case with the 19 individuals. Similarly, the directive referenced in the Government’s response empowers medical officials or other persons to enter premises “on the written instruction of a medical officer”.³ Rule 2 (1) (e) of the amended directive provided that public meetings, including political rallies, conferences and cultural related meetings were banned until 19 May 2020.⁴ The directive contains no provision for invasive raids, arrests or detentions.

54. The Government’s response, according to the source, provided no evidence or argument to suggest that the 19 individuals or the shelter hosted or planned to host a public meeting as described by the rule. The source reiterates its argument that the Government’s directive required all Ugandans, save for essential workers, to stay at home. The directive did not establish limits on the number of individuals permitted in a private home or shelter. Therefore, the 19 individuals were in compliance with the directive having been at home at the time of the raid and at all times relevant to this case.

55. A careful examination of the relevant provisions of the above-mentioned laws and directive show that the Government, not the 19 individuals, breached the laws when it raided the home of the individuals and arrested and detained them, all without authorization. First, the law only permits the inspection of clearly identified premises and not raids of homes or the arrest of persons in their home. Second, there is no suggestion in the response of the Government that the police had written authorization to inspect the shelter as prescribed by the law. The Government could not have had written authorization for the raid or the arrest and detention of the 19 individuals, as that would be *ultra vires*. Third, the conduct of the Government during the raid and arrest as described by the source does not support the claim that the raid was a COVID-19 enforcement measure.

56. The government agents did not wear personal protective equipment and there were no medical officers in their company. In addition, according to the Government’s response, after their arrest, the 19 individuals were admitted into prison wards together with other inmates in breach of the COVID-19 protocols – no tests were conducted, and there was no screening or quarantine. In any case, after months of delay and unnecessary adjournments, the Government withdrew the charges against the 19 individuals without adducing any evidence to substantiate its case.

57. The source argues that the actions of the Government were illegal and carried out with prejudice. In the absence of a legal basis for the raid and the arrest and lengthy detention of law-abiding citizens who were in full compliance with the Government’s stay-at-home directive, the defence of the Government fails. The Working Group must discountenance the

³ Uganda, The Public Health (Control of COVID-19) Rules, 2020, 24 March 2020, sect. 6 (1).

⁴ Uganda, The Public Health (Control of COVID-19) (Amendment No. 2) Rules, 2020, 8 May 2020.

Government's flawed argument and hold that the detention of the 19 individuals was arbitrary under category I.

58. The source further submits that the Government's response in fact supports the allegation that the right of the 19 individuals to due process was violated. The Government agrees that the individuals did not have access to their lawyers or any form of legal representation for most of their time in detention, contrary to international law and the Constitution. The Government states that the individuals were charged, and were remanded to Kitalya prison on 31 March 2020. The Government further states that on 15 May 2020, two lawyers from Human Rights Awareness and Promotion Forum visited Kitalya prison with a letter granting them permission to have access to the inmates to provide them with legal aid, and that the prison authorities welcomed the lawyers and accorded space to hold the meeting with their clients. The Government thus confirms that the first time the individuals had access to their lawyers or any legal representation was on 15 May 2020 – 47 days after their arrest. The Government did not provide any justification for this gross violation of the due process rights, because none exists.

59. After the 19 individuals were forced to appear before a magistrate, on 31 March 2020, without their legal counsel present, the lawyers at Human Rights Awareness and Promotion Forum made efforts to gain access and provide legal support to their clients without success. Subsequently, the lawyers filed an application with the Ministry of Works and Transport (the agency in charge of issuing permits for movements during the COVID-19 lockdown) to visit their clients but it was rejected, effectively denying all 19 individuals the right to communicate with their lawyers. The final administrative efforts of the lawyers failed when the Uganda Prisons Service officially denied the lawyers' application for access to the 19 individuals.

60. The lawyers challenged the Government's denial of access to the 19 individuals before the High Court and obtained an order declaring the action of the Government unconstitutional and compelling the Government to grant the lawyers access. The Government granted the lawyers access to the individuals only following the order of the High Court. This implies that but for the court order, the Government would have sustained the violation of the 19 individuals' rights to due process and fair trial *ad infinitum*. By preventing the individuals from gaining access to their lawyers or any other lawyer, the Government violated their right to counsel, an element of the right to a fair trial. Therefore, the detention failed to meet the minimum standards of due process under both international law and the Constitution. The Working Group must therefore find that the detention of the 19 individuals was arbitrary under category III.

61. As regards the Government's response that the detention of the 19 individuals was not due to their sexual orientation and/or gender identity, the source states that the Government supports the source's argument that the Government arrested and detained the individuals because of their real or perceived sexual orientation and/or gender identity. The source reiterates that reports revealed that the police initially charged 23 individuals with engaging in "carnal knowledge" in violation of section 145 of the Penal Code, which criminalizes same-sex sexual relations.

62. The source notes that the Government claims that the prison authorities received complaints from other inmates regarding the 19 individuals' sexual practices and that investigations confirmed that some of the individuals were breaching prison rules by engaging in same-sex sexual acts. Although only some of the individuals allegedly breached the prison rules, the Government states that it punished all 19 individuals by separating them into different wards – a clear act of discrimination. Furthermore, the Government offers no reasonable or legitimate purpose for targeting and raiding a shelter known to house lesbian, gay, bisexual and transgender Ugandans during a government-imposed lockdown. The discriminatory actions of the authorities are in direct contradiction with international law and the opinions expressed by the Working Group. In depriving the 19 individuals of their liberty under baseless charges, solely because of their sexual orientation and gender identity, the actions of the Government were discriminatory and in violation of the equal protection guarantees under article 26 of the Covenant and article 7 of the Universal Declaration of Human Rights. As a result, their detention was arbitrary under category V.

Discussion

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

64. In determining whether a person's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a *prima facie* case for breach of international 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.⁵ In the present case, the Government of Uganda did, through its response, challenge the *prima facie* allegations made by the source.

65. As a preliminary observation, the Working Group takes note that 19 individuals were released from custody following the dropping of all of the charges against them. However, given that they were allegedly subjected to serious human rights violations, the Working Group considers that it is important to render its opinion, as it has done previously in similar situations.⁶

66. It now remains for the Working Group to assess the two conflicting versions so as to ascertain whether the detention of the 19 individuals was arbitrary under category I, category III and/or category V, as argued by the source. The Working Group shall proceed to examine the allegations in turn.

Category I

67. The Working Group notes the submission by the source that on 29 March 2020, the authorities raided a shelter in Kyengera housing lesbian, gay, bisexual and transgender persons. A total of 23 individuals, including the 19 individuals who are the subjects of the present case, were arrested during the raid. The source states that the arrest was carried out without a warrant. Of the 23 persons arrested, 13 were residents of the shelter. Five of those who were not residents of the shelter were visiting from another shelter, one was a guest of one of the residents and one was a resident nurse. The source claims that the police targeted this shelter and arbitrarily arrested the individuals because of their real or perceived sexual orientation and gender identity.

68. There are conflicting statements as to the reasons of the arrest, with the initial police statement stating that the 19 individuals were arrested for violating the COVID-19 restrictions. According to the source, later reports revealed that the police had charged the individuals with engaging in "carnal knowledge", in violation of section 145 of the Penal Code, which criminalizes same-sex sexual relations.

69. In its response, the Government acknowledged the raid and the arrests of the 19 individuals and stated that the arrests were made pursuant to the established law and COVID-19 rules designed to prevent the spread of the pandemic, but did not speak specifically to the question of whether the arrests were made pursuant to an arrest warrant, nor did it state whether some of the persons arrested in the raid were resident at the shelter in question. The Government stated that the individuals involved had been arrested for allegedly engaging in "negligent acts likely to spread infection of disease" in violation of section 171 of the Penal Code and "disobedience of a lawful order", under section 117 of the Penal Code.

70. On the basis of the different positions submitted, the Working Group finds that no arrest warrants were presented at the time of the arrest of the 19 individuals. It recalls that the burden is on the Government to rebut any allegation of impropriety that may bring an arrest or detention into conflict with international human rights law. That burden has not been discharged.

71. As the Working Group has repeatedly stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a national law authorizing the arrest. Rather, the authorities must invoke a legal basis consistent with international human rights

⁵ A/HRC/19/57, para. 68.

⁶ See, for example, opinion No. 36/2020, para. 47.

standards and apply it to the circumstances of the case. This does not appear to have been the case in the situation involving the 19 individuals.⁷

72. International human rights law includes the right to be presented with an arrest warrant to ensure the exercise of effective control by a competent, independent and impartial judicial authority, which is procedurally inherent in the right to liberty and security and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights, article 9 (1) of the International Covenant on Civil and Political Rights and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁸ The Working Group reiterates that any deprivation of liberty without a valid arrest warrant, as in the present case, is therefore a breach of article 9 (1) of the Covenant.

73. The 19 individuals remained in remand at Kitalya prison in pretrial detention for 29 or 30 days. The Working Group recalls that in accordance with article 9 (3) of the Covenant, pretrial detention should be the exception rather than the norm, and should be ordered for the shortest time possible.⁹ In other words, liberty is acknowledged under article 9 (3) of the Covenant as the core consideration, with detention merely as an exception. Detention pending trial must thus be based on an individualized determination that it is reasonable and necessary for such purposes as to prevent flight, interference with evidence or the recurrence of crime.¹⁰ In regard to the 19 individuals who spent four weeks at Kitalya prison, the Working Group finds that the Government violated article 9 (3) of the Covenant, articles 3 and 9 of the Universal Declaration of Human Rights, and principles 11, 37 and 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

74. Furthermore, the Working Group recalls that access to a lawyer from the outset of detention is an essential safeguard to enable the detainee to challenge the legal basis for the detention.¹¹ The Working Group considers that the 19 individuals were not able to challenge their detention under article 9 (4) of the Covenant and articles 9, 10 and 11 of the Universal Declaration of Human Rights, as they did not have access to a lawyer when they appeared before the magistrate. Given that the 19 individuals were not able to challenge their detention, their right to an effective remedy under article 2 of the Covenant and article 8 of the Universal Declaration of Human Rights was also violated.

75. The Working Group thus concludes that the detention of the 19 individuals lacked a legal basis and was therefore arbitrary and falls under category I.

⁷ See, for example, opinions No. 93/2017, para. 44; No. 10/2018, paras. 45–46; No. 36/2018, para. 40; No. 46/2018, para. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51; No. 65/2019, para. 59; No. 71/2019, para. 70; No. 72/2019, para. 40; No. 82/2019, para. 74; No. 6/2020, para. 39; No. 11/2020, para. 37; No. 13/2020, para. 46; No. 14/2020, para. 49; No. 31/2020, para. 40; No. 32/2020, para. 32; No. 33/2020, paras. 53 and 71; and No. 34/2020, para. 45.

⁸ The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary. See, for example, decisions No. 1/1993, paras. 6–7; No. 3/1993, paras. 6–7; No. 4/1993, para. 6; No. 5/1993, paras. 6 and 8–9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; and No. 44/1993, paras. 6–7. For more recent jurisprudence, see opinions No. 38/2013, para. 23; No. 48/2016, para. 48; No. 21/2017, para. 46; No. 63/2017, para. 66; No. 76/2017, para. 55; No. 83/2017, para. 65; No. 88/2017, para. 27; No. 93/2017, para. 44; No. 3/2018, para. 43; No. 10/2018, para. 46; No. 26/2018, para. 54; No. 30/2018, para. 39; No. 38/2018, para. 63; No. 47/2018, para. 56; No. 51/2018, para. 80; No. 63/2018, para. 27; No. 68/2018, para. 39; No. 82/2018, para. 29; No. 6/2020, para. 40; No. 11/2020, para. 38; No. 13/2020, para. 47; No. 14/2020, para. 50; No. 31/2020, para. 41; No. 32/2020, para. 33; No. 33/2020, para. 54; and No. 34/2020, para. 46.

⁹ A/HRC/19/57, paras. 48–58.

¹⁰ Human Rights Committee, general comment No. 35 (2014), para. 38.

¹¹ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), principle 9 and guideline 8.

Category III

76. To support the claim that the detention of the 19 individuals constituted arbitrary detention under category III, the source reports that the individuals were denied access to their lawyers until a court ruling granted such access. When the lawyers of the individuals filed an application with the Ministry of Works and Transport to visit their clients it was rejected, thus effectively denying the individuals the right to communicate with their lawyers as required under international human rights law, specifically pursuant to article 14 (3) (b) and (d) of the Covenant. The right to counsel is also guaranteed under section 28 (3) (d) of the Constitution, providing that every person who is charged with a criminal offence must “be permitted to appear before the court in person or, at that person’s own expense, [be represented] by a lawyer of his or her choice”.

77. The source claims that the 19 individuals were forced to appear before a magistrate the day after their arrest without their legal counsel being present, in violation of international human rights law and the Constitution, more specifically their right to counsel, an element of the right to a fair trial. This, according to the source, made the detention of the individuals arbitrary under category III.

78. The source alleges that the Uganda Prisons Service reportedly denied the 19 individuals access to their lawyers. The lawyers challenged the legality of the denial of access to lawyers in the High Court, which issued a ruling on 12 May 2020 granting the lawyers access. Three lawyers were able to gain access to the individuals on 15 May 2020.

79. In its response, the Government rejects the allegation from the source that the 19 individuals were denied access to legal representation, stating that on 8 May 2020 the legal representatives of the individuals in fact wrote to the Director of Public Prosecutions asking for a review of the charges against the individuals. On 15 May 2020, two lawyers from Human Rights Awareness and Promotion Forum visited Kitale prison with a letter granting them permission to have access to the inmates to provide them with legal aid. The prison authorities welcomed the lawyers and accorded them space to meet with their clients. No complaint was raised by the lawyers regarding any denial of access to their clients.

80. The Working Group is not in any doubt that, based on the evidence presented, the 19 individuals were denied access to their lawyers until the court ruled otherwise.

81. In the Working Group’s view, the Government failed to respect the 19 individuals’ right to legal assistance at all times. The Working Group emphasizes that legal assistance should be available at all stages of criminal proceedings, namely, during the pretrial, trial, re-trial and appellate stages, to ensure compliance with fair trial guarantees. Any denial of access to lawyers is thus a breach of article 14 (3) (b) of the Covenant.

82. The Working Group considers that this violation substantially undermined and compromised the capacity of the 19 individuals to defend themselves in any subsequent judicial proceedings. As the Working Group has stated, persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and must be promptly informed of this right upon apprehension. Access to legal counsel should not be unlawfully or unreasonably restricted.¹²

83. The Working Group has already found that the Government denied the 19 individuals access to their lawyers until the High Court directed it to recognize their right to legal representation. The Working Group has also stated that denial of legal representation constituted a violation of the core right to a fair trial. The Government did not address the aspect of the individuals appearing without counsel a day after their arrest. The initial appearance of the individuals before a court in the absence of their lawyers violated their right under article 14 (3) (d) of the Covenant.

84. For the reasons given in the foregoing paragraphs, the Working Group concludes that the violations of the right to a fair trial were of such gravity as to give the detention of the 19 individuals an arbitrary character under category III.

¹² Ibid., principle 9 and guideline 8.

Category V

85. The source reports that in its initial statement following the arrests, the police claimed that it had raided the shelter and subsequently arrested the individuals for violating the COVID-19 restrictions and therefore intended to charge them with violating sections 117 and 171 of the Penal Code. However, reports later revealed that the police initially charged the individuals with engaging in “carnal knowledge”, in violation of section 145 of the Penal Code, which criminalizes same-sex sexual relations. The source specifies that the police charged the individuals under this provision even though the police did not witness anyone engaging in sexual relations at the time of the raid and arrests. Local media footage of the raid recorded neighbours of the shelter and local leaders stating that they were worried about the “homosexual behaviour” of the young people in the shelter. The footage also showed a mayor whipping and verbally lashing out at two of the shelter residents while forcing them to admit that they were homosexual.

86. It is also reported that, after the arrests, a search was reportedly conducted at the shelter in order to find “evidence of homosexuality”. Some of the items recovered and kept as evidence included several bottles of an antiretroviral drug regimen commonly used as a pre-exposure prophylaxis, two oral HIV self-testing kits and several condoms. The Government did not in its response specifically respond to those allegations.

87. In the source’s view, these facts demonstrate that the Ugandan authorities are using measures aimed at containing the spread of COVID-19 to further marginalize and target already vulnerable populations, in particular lesbian, gay, bisexual and transgender persons. The Government denies using the COVID-19 measures to further any other agenda, let alone to marginalize or discriminate against any segment of society.

88. Moreover, the source states that the authorities offered no reasonable or legitimate purpose for the differential treatment of the 19 individuals currently detained. Since the implementation of COVID-19 prevention measures, there have been no reports of raids on shelters, private homes or businesses similar to that of the raid on the Children of the Sun Foundation shelter. The source submits that the individuals were arrested under the guise of enforcement of COVID-19 prevention measures, even though they were complying with the President’s directives. This demonstrates to the source that the arrests serve no legitimate or objective purpose, but are rather a pretext for targeting and detaining lesbian, gay, bisexual and transgender persons based on their real or perceived sexual orientation and gender identity and for further restricting the rights and freedoms that are to be enjoyed by all individuals in Uganda, irrespective of sexual orientation or gender identity. In this regard, the source recalls that the Working Group has repeatedly emphasized that deprivation of liberty on the basis of sexual orientation and gender identity is arbitrary and prohibited under international law.¹³

89. Therefore, the source argues that the authorities’ discriminatory actions are in direct contradiction with international law. In continuing to deprive the 19 individuals of their liberty under baseless charges, solely because of their sexual orientation and gender identity, the actions of the Government are discriminatory and in violation of the equal protection guarantees under article 26 of the Covenant and article 7 of the Universal Declaration of Human Rights. As a result, the source considers that the detention of the 19 individuals is arbitrary under category V. The Government maintains that all measures taken were within the regulations intended to curb the spread of COVID-19 and were applied equally across all people of Uganda, and that the 19 individuals merely had circumstantially found themselves in a situation that put them in conflict with the COVID-19 rules.

90. From the facts as presented by the source and as responded to by the Government, the Working Group finds that the perceived sexual orientation of the 19 individuals was a motivating factor in the arrest and treatment of those individuals, as evidenced not only by the change of the charges against the individuals but also by the fact that police arrested both those who actually resided in the shelter and could thus not have been in violation of the COVID-19 measure, and those who were merely visiting. From the manner in which the operation at the shelter was conducted, the Working Group discerns a discriminatory attitude

¹³ See, for example, opinion No. 14/2017.

with respect to those perceived to be lesbian, gay, bisexual and transgender and anyone “associated” with them.

91. The Working Group reiterates that emergency measures or powers enacted to address public health emergencies must be exercised with respect to the principle of equality and non-discrimination based on the grounds of birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability or any other status.¹⁴ Such measures and powers must take into account the disparate impact upon vulnerable groups who already experience disadvantage, including persons with disabilities, older persons, minority communities, indigenous peoples, people of African descent, internally displaced persons, persons affected by extreme poverty, homeless persons, migrants and refugees, persons who use drugs, sex workers and lesbian, gay, bisexual, transgender, intersex and gender-diverse persons, who may not have the same capacity to comply with health directives (such as isolation at home, self-funded quarantine in hotels, or requirements not to attend work or to pay fines or bail), and may be deprived of their liberty as a result.¹⁵

92. In view of the foregoing observations, the Working Group is of the view that the detention of the 19 individuals also amounted to a violation under category V.

93. The Working Group takes this opportunity to recall that deprivation of liberty on the basis of sexual orientation is arbitrary and prohibited under international law.¹⁶

Disposition

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

The deprivation of liberty of Douglas Tumuhimbise, Andrew Kibalama, Saddam Kateregga, Raj Jjuuko, Kelvin Kugonza, Denis Ssamula, Abbey Gwanvu, Henry Mukiibi, Kareem Yiga, Harris Tevin Kifuba, Jabel Tushabomwe, Ivan Kawooya, Ashiraf Walugembe, Jackson Mayanja, James Tendibwa, Mark Muhereza, Joel Oketch, Ronald Ssenyonga and Rodney Sheema, being in contravention of articles 2, 3, 7, 8, 9, 10, 11 and 19 of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14, 19 and 26 of the International Covenant on Civil and Political Rights, was arbitrary and falls within categories I, III and V.

95. The Working Group requests the Government of Uganda to take the steps necessary to remedy the situation of the 19 individuals without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

96. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord the 19 individuals an enforceable right to compensation and other reparations, in accordance with international law.

97. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention and treatment of the 19 individuals and to take appropriate measures against those responsible for the violation of their rights.

98. The Working Group requests the Government to bring its laws into conformity with the present opinion and with the commitments made by Uganda under international human rights law.

99. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity for appropriate action.

¹⁴ Deliberation No. 11 (A/HRC/45/16, annex II), para. 26.

¹⁵ Ibid., para. 27.

¹⁶ See, for example, opinions No. 7/2002, No. 22/2006, No. 42/2008, No. 25/2009 and No. 14/2017.

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

Follow-up procedure

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

- (a) Whether compensation or other reparations have been made to the 19 individuals;
- (b) Whether an investigation has been conducted into the violation of the rights of the 19 individuals and, if so, the outcome of the investigation;
- (c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Uganda with its international obligations in line with the present opinion;
- (d) Whether any other action has been taken to implement the present opinion.

102. 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.

103. 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.

104. 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.¹⁷

[Adopted on 12 May 2021]

¹⁷ Human Rights Council resolution 42/22, paras. 3 and 7.