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**Human Rights Council**  
**Working Group on Arbitrary Detention**

## **Opinions adopted by the Working Group on Arbitrary Detention at its ninety-second session, 15–19 November 2021**

### **Opinion No. 57/2021 concerning Stan Swamy (India)**

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,<sup>1</sup> on 12 May 2021 the Working Group transmitted to the Government of India a communication concerning Stan Swamy. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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<sup>1</sup> [A/HRC/36/38](#).

## Submissions

### *Communication from the source*

4. Stan Swamy was a citizen of India, who at the time of his detention was 83 years old. He usually resided at the Bagaicha training centre for Adivasi youth, Ranchi, Jharkhand, India.

5. The source states that Father Swamy was a Jesuit priest, social analyst and activist for the rights of indigenous people. He had spent decades defending civil rights and the right to self-determination of the indigenous Adivasi and Dalit people, working mostly on issues of displacement. According to the source, Father Swamy was an important mentor for generations of human rights defenders in Bangalore, Tamil Nadu, Jharkhand and other parts of the country.

6. The source also notes that Father Swamy suffered from Parkinson's disease which manifested in the simultaneous tremor of both his hands. On 11 September 2019 and on two previous occasions, he had also undergone hernia surgery.

#### a. Arrest and detention

7. According to the information received from the source, on 8 October 2020 at around 8 p.m., officials of the National Investigation Agency of India came to Father Swamy's residence at the Bagaicha campus. They did not show an arrest warrant or other decision by a public authority.

8. The source submits that Father Swamy initially refused to accompany the officials, after which he was pressured by the authorities to accompany them. Furthermore, no one at the Bagaicha campus was formally informed why the officials were removing him from the campus.

9. The source notes that on 27, 28, 29 and 30 July and on 6 August 2020, Father Swamy had already been interrogated by officials of the National Investigation Agency for over 15 hours at his residence. Apart from his biographical details and some factual information, several extracts were allegedly obtained from his computer implicating Father Swamy in a connection with Maoists. Father Swamy rejected all the files placed before him and stated that they had been copied onto his computer to implicate him.

10. After receiving no further information from the authorities for approximately six weeks, on 6 October 2020 Father Swamy was summoned to appear at the office of the National Investigation Agency in Mumbai. Father Swamy replied that he failed to see the need for further interrogations, given that he had already been interrogated for 15 hours, and that he was not in a position to undertake a journey of 1,700 km to Mumbai given his advanced age and fragile health. Nevertheless, he informed the officials of the National Investigation Agency that he was willing to be interrogated through videoconferencing. The source recalls that his arrest took place two days later.

11. The source further states that after his arrest Father Swamy was taken to the office of the National Investigation Agency in Ranchi. Once there, he was not allowed to meet with anyone from outside. On 9 October 2020, he was flown to Mumbai, despite his protests of being unable to travel due to his advanced age and fragile health. Father Swamy was not brought before any jurisdictional magistrate to obtain a transit remand before undertaking air travel to Mumbai from Ranchi.

12. The source adds that the authority who issued the warrant or decision for the arrest of Father Swamy was the National Investigation Agency. The relevant legislation applied is the Unlawful Activities Prevention Act, 1967, special case No. 414 arising out of RC-01/2020/NIA/MUM. Father Swamy was charged under sections 13, 16 and 18 of the Act, which prescribe punishment for unlawful activities, terrorist acts and conspiracies, respectively. Other charges were also pressed under sections 20, 38 and 39 of the Act, which deal with punishments regarding membership of and support for terrorist organizations. Father Swamy was further charged under the Indian Penal Code with criminal conspiracy and joint criminal liability (sections 120B and 34) and with sedition and waging war (sections 121, 121A and 124A).

13. The source states that on 9 October 2020, Father Swamy was brought before a Special National Investigation Agency judge and charged as an accused in the Elgar Parishad case, also known as the Bhima Koregaon case. The source explains that this case involved 15 other prominent human rights defenders who had been arrested over the period since June 2018. It is further explained that these arrests were carried out in connection with caste-based violence that broke out on 1 January 2018, during Elgar Parishad, a Dalit commemoration.

14. The source adds that the first investigation report that names Father Swamy was lodged in January 2018. In August 2018, his house on the Bagaicha campus was raided by the Pune police. It also notes that in an earlier petition before the Bombay High Court, the prosecution claimed that he was only a suspect and not an accused in the Elgar Parishad case.

15. According to the information received, Father Swamy was deprived of his liberty at Taloja jail, Navi Mumbai, Maharashtra, from 9 October 2020 until 5 July 2021.

16. On 26 November 2020, the National Investigation Agency court in Mumbai rejected Father Swamy's request for a straw, sipper bottle and winter clothes, which had been allegedly confiscated by the Agency at the time of his arrest. Father Swamy had lodged his request on 6 November 2020, explaining that he was unable to hold a glass due to his advanced Parkinson's disease. Furthermore, he suffered from a hearing impairment and severe pain in his lower abdomen as a result of two surgeries. He had also fallen in the jail on multiple occasions. On 29 November 2020, the Taloja jail authorities provided Father Swamy with a sipper bottle, following a public outcry over the refusal to provide him with adequate medical care.

17. On 22 October, 26 November, and 10 December 2020, Father Swamy's bail was rejected by the special National Investigation Agency court despite his frail health.

18. The source further states that on 22 March 2021, the special National Investigation Agency court in Mumbai again rejected Father Swamy's bail petition, arguing that there was sufficient evidence to prove his involvement in a "deep-rooted conspiracy". The next hearing on his medical bail request was expected to take place on 17 May 2021.

19. The source emphasizes Father Swamy's precarious health condition, which was likely to deteriorate in the overcrowded Taloja jail as a result of not receiving adequate care. It adds that his age and the fact that he was suffering from Parkinson's disease put him at increased vulnerability of contracting coronavirus disease (COVID-19).

b. Analysis of violations

20. The source submits that the deprivation of liberty of Father Swamy falls under categories I, II and V of the Working Group.

i. Category I

21. In relation to category I, the source argues that there was no legal basis for the detention of Father Swamy, as the officials of the National Investigation Agency arrested him in an irregular manner. On 8 October 2020, the three officials who picked up Father Swamy at his residence were not in uniform and were not wearing accurate, visible and clear identification or name tags designating them as National Investigation Agency officials; nor were they the same officials who had come earlier to Bagaicha to interrogate him.

22. The source further asserts that the National Investigation Agency officials did not show Father Swamy any warrant or summons. In addition, they were accompanied by the police. Since this departed from the previous practice followed by the Agency officials when Father Swamy was interrogated in July and August 2020, at which time they had presented their identity cards, Father Swamy initially refused to go with them. However, when the officials began to threaten the Director of the Bagaicha campus with arrest when he asked to see a warrant for the arrest of Father Swamy, he agreed to go with the officials, despite the lack of a warrant. No one from the Bagaicha campus was formally informed of the reasons why the authorities were taking Father Swamy away from the campus.

23. The source thus submits that at the time and place of his arrest, Father Swamy was not informed of the grounds of his arrest, as prescribed in sections 50 and 55 of the Indian

Code of Criminal Procedure and article 22 (1) of the Constitution; neither was he given an arrest memorandum upon his arrest, as mandated by the Supreme Court in the case of D.K. Basu. Furthermore, the details of his arrest were not communicated to anyone, as provided under section 41B of the Code of Criminal Procedure and the guidelines on arrest of the National Human Rights Commission of India.

24. The source recalls that the National Investigation Agency subsequently issued arrest memorandum No. 001100, dated 8 October 2020, which stated that an arrest had been made in case No. 414 arising out of RC-01/2020/NIA/MUM, dated 24 January 2020, and that the arrest had been carried out on 8 October 2020 at 9 p.m. at the National Investigation Agency office in Dhurva, Ranchi city, Jharkhand.

25. The source notes that the two witnesses named in the arrest memorandum are not members of the Jesuit community to which Father Swamy belonged, which raises doubts about the fact that the arrest memorandum was actually made at the time of the arrest, as provided in the law. There is also no proof, as required under the law, that it was countersigned by Father Swamy, with the time and date of the arrest. The source submits that the arrest memorandum was not prepared at the actual place of the arrest, but at a later time, and did not bear the name of witnesses to it.

26. The source also notes that Father Swamy was not arrested at Bagaicha campus in the presence of his lawyer, contrary to the subsequent statements of the National Investigation Agency. Reportedly, Father Swamy's lawyer only came to the National Investigation Agency office late on the night of 8 October 2020 upon being informed that Father Swamy had been forcibly abducted from the Bagaicha campus. He was then only asked to sign some papers relating to the personal search of Father Swamy.

27. The source reiterates the fact that once in the National Investigation Agency office in Ranchi, Father Swamy was not allowed to meet anyone from outside. Furthermore, despite his protests of being unable to travel owing to his advanced age and Parkinson's disease, he was flown to the headquarters of the Agency in Mumbai on 9 October 2020. Allegedly, he was not brought before any jurisdictional magistrate in order to obtain a transit remand before undertaking air travel, in violation of Indian law.

28. Moreover, according to the source, as the charge sheet in the case was filed the day after Father Swamy was arrested, it demonstrates that he was not required for any further investigation or interrogation in the case.

29. According to the source, this also shows that, until his arrest, Father Swamy had fully cooperated in the investigation and that, since the first investigation report was lodged in January 2018, he had not been perceived as a flight risk nor seen as a person interfering with the investigation either by doctoring documentary evidence or influencing witnesses.

30. The source also argues that this further demonstrates that the arrest during the lockdown period of Father Swamy, who was 83 years old and had fully cooperated all along in the investigation, was not viewed as a flight risk, nor perceived as interfering with investigation or evidence, was arbitrary and an abuse of the process of law.

ii. Category II

31. In relation to category II, the source submits that the deprivation of liberty of Father Swamy resulted from the exercise of universally recognized human rights, in particular the right to freedom of opinion, expression and association.

32. The source emphasizes that freedom of opinion and expression and of peaceful assembly are fundamental human rights enshrined in articles 19 and 20 of the Universal Declaration of Human Rights, articles 19 and 21 of the Covenant, to which India is a State party, and article 19 of the Indian Constitution. The source emphasizes that the Government must respect, protect and fulfil the right to hold and express opinions, including those that are not in accordance with its official policy, and to think and manifest personal convictions at odds with its official ideology, under the *jus cogens* of customary international law.

33. The source recalls that the Human Rights Committee, in its general comment No. 34 (2011), stated that restrictions on the freedom of expression must not be overbroad, conform

to the principle of proportionality, be appropriate to achieving their protective function, be the least intrusive instrument among those which might achieve their protective function and be proportionate to the interest to be protected. The source also notes that the value placed by the Covenant on uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

34. According to the source, given the fact that Father Swamy was a prominent Adivasi rights activist in Jharkhand State, his detention could be interpreted as retaliation for his work against land acquisitions and the forced displacement of indigenous communities, as well as alleged discrimination and human rights violations against them. Father Swamy had also been actively involved in advocating for the release of persons deprived of their liberty who were facing trial proceedings. According to the source, these persons, often called Maoists, were peacefully opposing mining and other extraction activities by national and transnational corporations.

35. The source states that the nature of the investigation by the National Investigation Agency seemed to not have any connection with the Bhima Koregaon case, in which Father Swamy was initially treated as a “suspected-accused” and, as a result, had his residence raided twice on 28 August 2018 and 12 June 2019. The source notes that although a first investigation report was lodged after the Bhima-Koregaon events against several individuals accused of promoting enmity against the State, Father Swamy’s name appeared nowhere in that report. On 6 June 2018, five human rights defenders were arrested in that connection but Father Swamy was not called for any enquiry or interrogation at that time.

36. The source claims that the National Investigation Agency attempted to establish personal links between Father Swamy and his organization and the Maoists. Father Swamy denied those allegations. Moreover, as noted by the source, he was never associated with the Bhima Koregaon protests nor had he attended those protests.

37. Furthermore, as claimed by the National Investigation Agency, several extracts from Father Swamy’s computer implicated him in connection with Maoists. In that regard, the source notes that Father Swamy’s electronic devices were seized during the two raids carried out by the authorities on 28 August 2018 and 12 June 2019, and that those devices were not indicated to him as containing any illegal content at the time.

38. The source further points out that on 28 August 2018, the Pune police, accompanied by a contingent of the Namkum police, a cyberexpert and a photographer, carried out a search of Father Swamy’s room at the Bagaicha campus. The police produced a search order in Marathi, a language which neither Father Swamy nor anyone else present could understand. The police authorities did not translate the order. The inventory of the articles seized, which Father Swamy was forced to sign, was also in Marathi. The source concludes that Father Swamy did not therefore have any knowledge of the articles seized at the time of the search, in violation of the Indian Code of Criminal Procedure.

39. The source also recalls that Father Swamy, apprehending the arrest, filed a quashing petition in the Bombay High Court. However, at the time of the hearing of the petition, the prosecution stated in court that Father Swamy was only a suspect and not an accused and therefore there was no intention of arresting him. The petition was thus disposed of. Despite this, on 10 June 2019 the Pune police again raided Father Swamy’s house at Bagaicha and seized a hard drive and a flash drive.

40. The source states that on 20 January 2020, the investigation was transferred to the National Investigation Agency by the Ministry of Home Affairs, after the change of government in the State of Maharashtra. After the case was transferred to the National Investigation Agency, the trial was transferred from the Pune court to the special National Investigation Agency court in Mumbai. A challenge to this action of transfer to the National Investigation Agency is pending adjudication before the Bombay High Court in a separate writ petition. The source argues that regardless of this, even if the investigation was transferred to the National Investigation Agency, the case ought to have been continued in Pune, as there are designated National Investigation Agency courts there.

41. The source also states that Father Swamy suffered mistreatment while in prison. It recalls the initial refusal of the authorities to provide him with a water sipper and a straw,

which he required because of his Parkinson's disease. On 29 November 2020, the special National Investigation Agency court in Mumbai rejected Father Swamy's request. The Taloja jail authorities ultimately provided him with a sipper bottle. The source further submits that placing Father Swamy in prison increased his risk of contracting COVID-19 and thus put his life at risk.

iii. Category V

42. Finally, in relation to category V, the source submits that while Father Swamy's deprivation of liberty resulted from his active exercise of civil and political rights, there is a strong presumption that his deprivation of liberty also constituted a violation of international law on the grounds of discrimination based on political or other views. In particular, the source argues that Father Swamy was being discriminated against on the basis of his status as a human rights defender and in violation of his right to equality before the law and equal protection of the law under article 26 of the Covenant. The source affirms that Father Swamy's political views and convictions regarding government policies and actions are at the centre of the present case.

43. The source states that a complaint was submitted to the authorities, who replied that after going through the facts collected from the National Investigation Agency, the allegations were denied by the agency. The authorities also allegedly reported that Father Swamy was arrested according to relevant procedures and that none of his human rights were violated. On 14 October 2020, the National Human Rights Commission directed officials of the National Investigation Agency in New Delhi to submit a detailed report on whether the arrest of Father Swamy was necessary and whether further interrogation could be held without taking him into formal custody and having him travel to Mumbai. On 26 October 2020, the authorities replied that all due procedures had been followed while arresting Father Swamy.

44. The source notes that Father Swamy had access to a lawyer of his choice. However, given the restrictions due to the COVID-19 pandemic, pretrial detainees were not allowed to physically meet with their lawyers, but instead had to rely on telephone conversations. The calls between Father Swamy and his lawyer were facilitated by an operator. As a result, the confidentiality of the exchanges between Father Swamy and his lawyer could not be guaranteed. Each call lasted about 10–15 minutes. Although Father Swamy was able to prepare his defence through his lawyer, he generally received information about his case first through media sources, before getting confirmation from his lawyer. It is further noted that Father Swamy was allowed to call two other people once every 10 days for fewer than 10 minutes.

*Response from the Government*

45. On 12 May 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 12 July 2021, detailed information about the situation of Father Swamy and to clarify the legal provisions justifying his detention, as well as its compatibility with the obligations of India under international human rights law, in particular with regard to the treaties ratified by the State.

46. The Working Group further called upon the Government to ensure Father Swamy's physical and mental integrity. In the current context of a global pandemic, and in accordance with the recommendations of the World Health Organization on 15 March 2020 concerning the response to COVID-19 in places of detention, the Working Group urged the Government to prioritize the use of non-custodial measures at all stages of criminal proceedings, including during the pretrial phase, during the trial and sentencing and after sentencing.

*Additional information received from the source*

47. On 5 July 2021, the Working Group received news from the source of the regrettable death of Father Swamy on that day. The source informed the Working Group that he had tragically died in custody after testing positive for COVID-19, having repeatedly been denied bail and shortly before his new bail plea hearing.

## Discussion

48. The Working Group thanks the source for its submission. The Working Group regrets that it did not receive a response from the Government. The Government did not request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

49. As a preliminary issue, the Working Group takes note that Father Swamy died while in custody having contracted COVID-19 in detention and is therefore no longer detained. There is no provision in the Working Group's methods of work that precludes consideration of a case in such circumstances. Indeed, the Working Group considers it necessary to render an opinion given that the allegations relating to Father Swamy's deprivation of liberty in India and his subsequent death in custody are serious and warrant further attention,<sup>2</sup> and that the case concerns important aspects of the criminal justice system in India.

50. In determining whether the deprivation of liberty of Father Swamy 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 a 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.<sup>3</sup>

### Category I

51. The source submits that on 8 October 2020, the officials of the National Investigation Agency who arrested Father Swamy at his residence neither presented him with an arrest warrant or summons, nor did they inform him of the grounds for his arrest. The source further submits that he was not provided with an arrest memorandum, as mandated by domestic jurisprudence. Further, when the Director of the Bagaicha campus (where Father Swamy resided) asked to see the arrest warrant, the officials threatened him with arrest as well, which is when Father Swamy agreed to go with the officials, despite the absence of an arrest warrant.

52. An arrest is arbitrary when carried out without informing the arrested person of the reasons for the arrest.<sup>4</sup> The authorities must invoke the legal basis for arrest and apply it through a warrant.<sup>5</sup> In the present case, the arresting officers did not present an arrest warrant at the time of arrest,<sup>6</sup> in violation of articles 3 and 9 of the Universal Declaration of Human Rights,<sup>7</sup> and article 9 (1) of the Covenant.<sup>8</sup> As a result, the authorities did not establish a legal basis for Father Swamy's arrest.<sup>9</sup> He was not informed of the reasons for his arrest at the time of his arrest, nor was he promptly informed of the charges, in violation of article 9 (2) of the Covenant, which provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for the arrest and shall be promptly informed of any charges. The failure to do so also violated principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group notes with

<sup>2</sup> See opinions No. 55/2018, para. 59, and No. 50/2017, para. 53 (c).

<sup>3</sup> [A/HRC/19/57](#), para. 68.

<sup>4</sup> See, for example, opinions No. 46/2019, para. 51, and No.10/2015, para. 34. See also [CAT/C/VNM/CO/1](#), para. 16.

<sup>5</sup> See, for example, opinions No. 46/2019, para. 51; No. 46/2018, para. 48; No. 36/2018, para. 40; and No. 10/2018, para. 45.

<sup>6</sup> Opinions No. 71/2019, para. 70, and No. 45/2019, para. 51.

<sup>7</sup> See, for example, opinions No. 3/2018, para. 43; No. 26/2018, para. 54; No. 82/2018, para. 29; and No. 37/2020, para. 52.

<sup>8</sup> It is not sufficient that there is a law under which the arrest is authorized, the authorities must invoke that legal basis and apply it through an arrest warrant. See, for example, opinions No. 36/2018, para. 40; No. 46/2018, para. 48; No. 44/2019, para. 52; and No. 45/2019, para. 51.

<sup>9</sup> See, for example, opinions No. 9/2019, para. 29; No. 44/2019, para. 52; 45/2019, para. 51; and No. 46/2019, para. 51.

concern the use of intimidatory tactics and threats by officials of the National Investigation Agency to effect the illegal arrest of Father Swamy.

53. The Working Group observes that the circumstances leading up to Father Swamy's arrest in October 2021 commenced in January 2018 when the first investigation report was lodged. Those events and the investigative steps are replete with procedural irregularities and explicit violations of domestic law. The Working Group finds credible the source's allegations in this regard, some of which are highlighted below:

- On 28 August 2021, during a search of Father Swamy's room on the Bagaicha campus, the police produced a search order in Marathi, a language which neither Father Swamy nor anyone else present could understand. The police also compelled him to sign the report-inventory of seized items, which was also in Marathi. These documents were not translated.
- The three officers of the National Investigation Agency who illegally arrested Father Swamy were not in uniform, nor were they wearing any accurate, visible or clear identification or name tags designating them as officials of the National Investigation Agency.
- An arrest memorandum for Father Swamy was issued after his arrest in violation of national law.
- The source submits that Father Swamy was not arrested in the presence of his lawyer. Reportedly, the lawyer arrived after the event, when he was asked to sign papers relating to a personal search of Father Swamy.
- The charge sheet was filed after Father Swamy was arrested.
- Father Swamy was flown to the headquarters of the National Investigation Agency in Mumbai on 9 October 2021, the day after his arrest, without being brought before a jurisdictional magistrate to meet the requisite procedural requirements for air travel. The source submits that this is a violation of domestic law. Father Swamy was compelled to take the flight, despite his protestations about his advanced age and Parkinson's disease.

54. These factors strengthen the Working Group's conclusion that Father Swamy's arrest and detention lacked a legal basis. The Government had the opportunity to rebut these allegations but did not do so.

55. Father Swamy was an 83-year-old Jesuit priest who suffered from Parkinson's disease, a hearing impairment and severe pain in his lower abdomen as a result of two surgeries. He had also fallen in the jail on multiple occasions. The source submits that he had fully cooperated all along in the investigation and was not viewed as a flight risk or as a person who would interfere with the legal process.

56. Article 9 (3) of the Covenant states that "it shall not be the general rule that persons awaiting trial shall be detained in custody". The Working Group recalls the view of the Human Rights Committee, as well as its own recurrent findings, that pretrial detention must be the exception and not the rule, should be ordered for as short a time as possible<sup>10</sup> and must be based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the case in question.<sup>11</sup>

57. In the present case, taking into account Father Swamy's age, frail health and various illnesses, the Working Group concludes that an individualized determination of his circumstances was absent and as a result his detention lacked a legal basis and was ordered in violation of article 9 (3) of the Covenant. In reaching this conclusion, the Working Group

<sup>10</sup> See, for example, opinions No. 57/2014, para. 26; No. 8/2020, para. 54; No. 5/2021, para. 43; and No. 6/2021, para. 50. See also Human Rights Committee, general comment No. 35 (2014), para. 38, and [A/HRC/19/57](#), paras. 48–58.

<sup>11</sup> [A/HRC/19/57](#), paras. 48–58.



notes that the Government did not submit any information to suggest that such a determination took place or to rebut the source's submissions.

58. For these reasons, the Working Group finds that the Government failed to establish a legal basis for Father Swamy's detention. His detention was arbitrary under category I.

#### Category II

59. The source submits that Father Swamy was detained as a result of exercising his rights to freedom of opinion, expression and association. The source further submits that as he was a prominent Adivasi and Dalit rights activist, his detention could be interpreted as retaliation for his work protesting against the forced displacement of indigenous communities and advocating for the release of persons deprived of their liberty.

60. The Working Group recalls that article 19 (2) of the Covenant provides that everyone has the right to freedom of expression and that this right is to include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice. That right includes political discourse, commentary on public affairs, discussion of human rights and journalism.<sup>12</sup> It protects the holding and expression of opinions, including those that are critical of, or not in line with, government policy.<sup>13</sup> The Working Group considers that Father Swamy's conduct fell within the right to freedom of opinion and expression protected under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant and that he was detained for exercising these rights. Moreover, Father Swamy's advocacy concerned matters of public interest. The Working Group therefore considers that he was detained for exercising his right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant.<sup>14</sup>

61. There is nothing to suggest that the permissible restrictions on the rights set out in article 19 (3) and 25 of the Covenant would apply in the present case. The Working Group is not convinced that prosecuting Father Swamy was necessary to protect a legitimate interest under these provisions. Importantly, there is no evidence to suggest that his actions called directly or indirectly for violence or could reasonably be considered to threaten national security, public order or public health or morals, or the rights or reputations of others. The Human Rights Council has called on States to refrain from imposing restrictions under article 19 (3) that are not consistent with international human rights law.<sup>15</sup> The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

62. In accordance with articles 1 and 6 (c) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and to draw public attention to the observance of human rights.<sup>16</sup>

63. Considering the source's submission that Father Swamy was a mentor for generations of human rights defenders across India, the Working Group expresses serious concern over the chilling effects of his arrest, detention and death in custody on other human rights defenders in India who are exercising their fundamental rights to freedom of expression and opinion in conducting their work.<sup>17</sup>

64. The Working Group concludes that Father Swamy's detention resulted from the peaceful exercise of his right to freedom of opinion and expression, as well as his right to take part in the conduct of public affairs, and was contrary to articles 19 and 21 of the

<sup>12</sup> Human Rights Committee, general comment No. 34 (2011), para. 11.

<sup>13</sup> See, for example, opinions No. 8/2019, para. 55, and No. 79/2017, para. 55.

<sup>14</sup> Human Rights Committee, general comment No. 25 (1996), para. 8 (noting that citizens may take part in the conduct of public affairs by exerting influence through public debate). See also, for example, opinions No. 9/2019, No. 45/2019, No. 44/2019, No. 15/2020 and No. 16/2020.

<sup>15</sup> Resolution 12/16, para. 5 (p).

<sup>16</sup> See also General Assembly resolution 74/146, para. 12.

<sup>17</sup> See, for example, opinions No. 9/2018, para 45, and No. 3/2019 para. 50.

Universal Declaration of Human Rights and articles 19 and 25 of the Covenant. His detention was arbitrary under category II.

### Category III

65. The source does not make submissions on due process and violations of the right to a fair trial under category III and submits that Father Swamy was able to prepare his defence. Nonetheless, noting the source's submission that the confidentiality of his communications with his lawyer could not be guaranteed, the Working Group recalls that the authorities should respect the privacy and confidentiality of communications between legal counsel and detainees, in conformity with article 14 (3) (b) of the Covenant.<sup>18</sup> The Working Group also stresses that in its deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies, it notes that in the light of the COVID-19 pandemic, States must ensure the availability of other ways for legal counsel to communicate with their clients, including secure online communication or "communication over the telephone, free of charge and in circumstances in which privileged and confidential discussions can take place".<sup>19</sup>

### Category V

66. Father Swamy advocated for the rights of the Adivasi and Dalit communities on issues relating to self-determination, land acquisition and their forced displacement. The source submits that Father Swamy was detained in retaliation for his work and that his detention was discriminatory on the basis of his status as a human rights defender.

67. The Working Group recalls several non-cumulative indicators that serve to establish the discriminatory nature of detention based on actual or perceived political opinion. These include the following: (a) the deprivation of liberty was part of a pattern of persecution against the detained person, including, for example, through previous detention; (b) other persons with similarly distinguishing characteristics have also been persecuted; or (c) the context suggests that the authorities have detained a person on discriminatory grounds or to prevent them from exercising their human rights.<sup>20</sup>

68. In the case of Father Swamy, as discussed above, his eventual arrest and detention were the culmination of a pattern of harassment against him, including repeated raids of his home, being interrogated for 15 hours and being asked to travel 1,700 km to be interrogated when he had expressed his willingness to be interrogated through videoconferencing. He was arrested the next day and compelled to make the journey, despite his protestations about his age and health.

69. The Working Group takes note of the source's submission that Father Swamy was charged in relation to the Elgar Parishad/Bhima Koragaon case, which also involved 15 other prominent human rights defenders who had been arrested over the period since June 2018. Father Swamy and the 15 other human rights defenders were the subject of a joint communication by special procedure mandate holders in June 2021.<sup>21</sup> Over the past three years, the High Commissioner for Human Rights and United Nations independent experts have repeatedly raised the cases of Father Swamy and the 15 other human rights defenders associated with these events with the Government of India and urged their release from pretrial detention.<sup>22</sup>

<sup>18</sup> See also the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 61 (1); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 18; 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, guideline 8; and the Basic Principles on the Role of Lawyers, principle 15.

<sup>19</sup> A/HRC/45/16, annex II, para. 21.

<sup>20</sup> See A/HRC/36/37.

<sup>21</sup> See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26468>.

<sup>22</sup> Ibid. See also <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25658> and OHCHR, press briefing notes on India, 6 July 2021.

70. Furthermore, in the discussion above concerning category II (paras. 59–64), the Working Group established that Father Swamy’s detention resulted from the peaceful exercise of his rights under international law. When detention results from the active exercise of civil and political rights, there is a strong presumption that the detention also constitutes a violation of international law on the grounds of discrimination based on political or other views.<sup>23</sup>

71. For these reasons, the Working Group finds that Father Swamy was deprived of his liberty on discriminatory grounds, that is owing to his status as a human rights defender and on the basis of his political or other opinion in seeking to hold the authorities accountable. His deprivation of liberty violated articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and was arbitrary under category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

#### Concluding remarks

72. The Working Group expresses great sadness that Father Swamy died due to COVID-19 on 5 July 2021 in custody, while arbitrarily detained, in circumstances that were utterly preventable.

73. The Working Group, in its communication to the Government on 12 May 2021, urged it to prioritize the use of non-custodial measures at all stages of criminal proceedings, including during the pretrial phase, in the current context of a global pandemic. Furthermore, the source submitted that placing Father Swamy in prison increased his risk of contracting COVID-19 and thus put his life at risk.

74. The failure of the Government to heed these prescient warnings led to Father Swamy’s avoidable death in custody. The source submits that while in Taloja central jail in Navi Mumbai, Father Swamy’s health deteriorated and he contracted COVID-19. Father Swamy suffered from Parkinson’s disease and various other ailments, as set out above. However, his repeated applications for bail were rejected, despite his deteriorating health. Father Swamy died as the Bombay High Court was considering an appeal against the rejection of his bail application. The Working Group is deeply disturbed by the source’s allegations that not only were Father Swamy’s repeated requests for bail denied, but that his request to access medical treatment once he had contracted COVID-19 was also initially denied. When the request was eventually granted, it was too late. The Working Group refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Independent Expert on the enjoyment of all human rights by older persons.

75. The Working Group also notes with grave concern the source’s submissions about Father Swamy’s treatment in Taloja central jail. The source submits that on 6 November 2020, Father Swamy filed a request for a straw, a sipper bottle and winter clothes, which had been allegedly confiscated by the National Investigation Agency at the time of his arrest. In his request, he explained that a sipper bottle was needed as he was unable to hold a glass due to his advanced Parkinson’s disease. The Working Group is shocked by the source’s submission that on 26 November 2020, the National Investigation Agency court in Mumbai rejected Father Swamy’s request. The source further submits that it was only following a public outcry over the refusal to provide him with adequate medical care that the Taloja jail authorities provided him with a sipper bottle on 29 November 2020. The Working Group is gravely disappointed that public outrage was required for Father Swamy to be treated with humanity. It recalls similar grave concerns about the treatment and conditions of detention of a human rights activist living with disabilities in its recent opinion concerning India.<sup>24</sup>

76. The Working Group recalls that it is the duty of all Governments to treat their detainees with humanity and respect for their inherent dignity as a human being, as stipulated in rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the

<sup>23</sup> See, for example, opinions No. 88/2017, para. 43; No. 13/2018, para. 34; and No. 59/2019, para. 79.

<sup>24</sup> Opinion No. 21/2021, para 96. The Working Group notes that Mr. Saibaba’s activism also concerned the Adivasi and Dalit communities.

Nelson Mandela Rules). According to article 10 (1) of the Covenant and rules 1, 24, 27 and 118 of the Nelson Mandela Rules, all persons deprived of their liberty must be treated with humanity and with respect for their inherent dignity, including through the enjoyment of the same standards of health care that are available in the community. In particular, rule 27 (1) of the Nelson Mandela Rules requires that all prisons ensure prompt access to medical attention in urgent cases and that prisoners who need specialized treatment or surgery be transferred to specialized institutions or civil hospitals.

77. The Working Group urges the Government to urgently conduct a thorough, effective and independent investigation into the circumstances that led to the death of Father Swamy while in custody. The investigation must include a detailed report by an independent expert on the medical and other care provided to Father Swamy after his arrest and must be conducted in a transparent manner with the full involvement of his family members and their legal and medical representatives.<sup>25</sup>

78. Father Swamy, a renowned human rights activist, who had dedicated decades of his life to fighting for social justice, paid the ultimate price for his activism – his own life. United Nations human rights experts have said that Father Swamy’s death in custody will forever remain a stain on the human rights record of India.<sup>26</sup> The Working Group agrees.

79. The Working Group would welcome the opportunity to work constructively with the Government to address arbitrary detention. The Working Group would welcome the opportunity to conduct a country visit to India and looks forward to a positive response to its request for a country visit dated 22 February 2018.

### **Disposition**

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

The deprivation of liberty of Stan Swamy, being in contravention of articles 2 (1), 9, 19, 25 and 26 of the International Covenant on Civil and Political Rights and 2, 3, 7, 9, 19 and 21 of the Universal Declaration of Human Rights was arbitrary and fell within categories I, II and V.

81. The Working Group considers that, taking into account all the circumstances of the case, in particular the death of Father Swamy in custody, the appropriate remedy would be to accord his family an enforceable right to compensation and other reparations, in accordance with international law.

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

83. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Independent Expert on the enjoyment of all human rights by older persons, for appropriate action.

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

### **Follow-up procedure**

85. 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:

<sup>25</sup> See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 34.

<sup>26</sup> See <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27313&LangID=E>.

(a) Whether compensation or other reparations have been made to Father Swamy's family;

(b) Whether an investigation has been conducted into the violation of Father Swamy's rights and his death in custody 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 India with its international obligations in line with the present opinion;

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

86. 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.

87. 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.

88. 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.<sup>27</sup>

*[Adopted on 16 November 2021]*

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<sup>27</sup> Human Rights Council resolution 42/22, paras. 3 and 7.