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

## **Opinions adopted by the Working Group on Arbitrary Detention at its ninety-third session, 30 March–8 April 2022**

### **Opinion No. 3/2022 concerning Freeman Mbowe (United Republic of Tanzania)**

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 2 November 2021 the Working Group transmitted to the Government of the United Republic of Tanzania a communication concerning Freeman Mbowe. The Government submitted a late response on 14 January 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);
  - (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. Freeman Mbowe is a Tanzanian citizen born in 1961. Mr. Mbowe is the leader of the Chama cha Demokrasia na Maendeleo political party, which is also known as Chadema.

a. Context

5. According to the source, Mr. Mbowe was arrested together with 15 other Chadema members ahead of a planned meeting on constitutional reform. He was then charged, along with three others, with several terrorism-related offences under the Prevention of Terrorism Act and the Economic and Organized Crime Control Act, of 2019. In particular, he was charged with conspiracy and provision of funds to commit terrorist acts.

b. Arrest and detention

6. Mr. Mbowe was reportedly arrested in the city of Mwanza, on 21 July 2021, a few hours before he was due to attend a Chadema party meeting to launch a campaign on constitutional reform. At or around 2.30 a.m., the police allegedly raided Mr. Mbowe's hotel and arrested him and 15 other Chadema officials and staff members. Mr. Mbowe was then transported from Mwanza to Oyster Bay Police Station, in Dar es Salaam. It is reported that he was blindfolded and shackled as he was taken away.

7. The source alleges that Mr. Mbowe was neither provided with an explanation nor a warrant for his arrest. The police confirmed that he was being detained and questioned, a day later. On or around 26 July 2021, the police made a public statement claiming that Mr. Mbowe had been arrested on suspicion of planning to kill government officials and planning and financing terrorist activities.

8. The source reports that on 26 July 2021, Mr. Mbowe was transferred to Kisutu Magistrates Court, in Dar es Salaam, for a first court appearance. He was charged with conspiracy to commit terrorist acts and indirectly funding terrorist acts, pursuant to section 4 (1) and (3) (i) (i), section 27 (c) and section 13 of the Prevention of Terrorism Act No. 21 of 2002, read together with sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act. Mr. Mbowe was not released on bail, as these are non-bailable offences. He remained in custody pending further court appearances.

9. According to the source, Mr. Mbowe was held in detention for five days with no access to his family or legal representation. He was eventually allowed to consult his lawyers when he was interviewed by the police, but elected not to provide information. The source further alleges that neither his family nor his lawyers were informed of Mr. Mbowe's first appearance in court.

10. Instead, on the day he was to appear in court, they were reportedly told that Mr. Mbowe was being taken to hospital. Given his lawyers' absence, Mr. Mbowe was unable to understand the charges brought against him, despite these being explained to him. In addition, the source claims that Mr. Mbowe was not immediately given a copy of the charge sheet and that no evidence was disclosed to the defence.

11. The source contends that Mr. Mbowe was mistreated and kept in poor conditions while in police detention. According to his lawyers, the police also conducted an illegal search of his family home, harassed his family, and took items from his home without any explanation or warrant.

12. Mr. Mbowe's lawyers have reportedly filed several applications. In particular, they claimed that the charge sheet was defective insofar as the alleged facts failed to disclose the mandatory link connecting Mr. Mbowe's acts to terrorism as defined in the Prevention of Terrorism Act. The judge overruled other objections, but acknowledged that the charge sheet did not disclose how the alleged facts advanced either a political, ideological or religious purpose as required by the Prevention of Terrorism Act, and therefore did not disclose an act of terrorism. As a result, the judge ordered the charges against Mr. Mbowe to be amended.

c. Legal analysis

13. The source submits that Mr. Mbowe's detention was arbitrary under categories I, II, III and V of the methods of work of the Working Group.

i. Category I

14. The source alleges that Mr. Mbowe was arrested without a warrant and without being informed of the reason for his arrest, in a manner inconsistent with the national laws of the United Republic of Tanzania. The source claims that this constitutes a violation of Mr. Mbowe's due process rights under the Constitution of the United Republic of Tanzania and under the country's Criminal Procedure Act. Indeed, under section 15 (2) (a) of the Constitution, individuals may only be deprived of their liberty in a manner that is prescribed by law. In this regard, the Criminal Procedure Act provides that arrests should be made subject to an arrest warrant that is based on sufficient evidence. The source notes that the authorities had ample time to seek an arrest warrant, given that the charge sheet reports that the alleged crimes were committed in 2020.

15. It is reported that Mr. Mbowe was detained for five days, without charge and without being presented before a court, in violation of sections 32 (1) and 33 of the Criminal Procedure Act. During that time, Mr. Mbowe was also allegedly denied access to a lawyer, even though the police had confirmed that he was being questioned. The source asserts that this constitutes a violation of section 53 of the Criminal Procedure Act, which prohibits a police officer from asking detainees questions unless they have been informed of their right to communicate with a lawyer or a friend.

16. Furthermore, the source claims that the shackling and blindfolding of Mr. Mbowe following his arrest and during the long car journey across the country to Dar es Salaam constitute a violation of section 15 of the Criminal Procedure Act, which provides that people under restraint shall be treated with humanity and respect for human dignity, and shall not be subjected to cruel, inhuman or degrading treatment.

17. Finally, the source submits that Mr. Mbowe's arrest fits a governmental pattern of disregarding due process procedures, especially in relation to the arrest of opposition figures, human rights defenders, journalists and civil society representatives.

18. For the above-mentioned reasons, the source concludes that Mr. Mbowe's detention was baseless and was arbitrary under category I.

ii. Category II

19. According to the source, Mr. Mbowe was arrested because of his advocacy for constitutional reform and his position as the leader of Chadema. The source argues that Mr. Mbowe's arrest violates his right to freedom of expression, freedom of association and freedom of assembly, as well as his right to fully participate in the running of his country, guaranteed under the Covenant and the African Charter on Human and Peoples' Rights.

20. Reportedly, Mr. Mbowe's arrest arose amidst increased discussion among Tanzanian citizens over constitutional reform. The source asserts that, the day preceding Mr. Mbowe's arrest, Tanzanian authorities decided to prohibit any unnecessary gatherings due to the coronavirus disease (COVID-19) pandemic. This decision was reportedly met with criticism and seen as a deliberate attempt to thwart opposition meetings.

21. The source observes that in recent years, the Government of the United Republic of Tanzania has come under criticism for its alleged crackdown on dissenting voices. The source stresses that, in addition to the other 15 members of Chadema briefly arrested alongside Mr. Mbowe, the authorities also arrested female members of the party in September 2021 while they were peacefully protesting against Mr. Mbowe's arrest. According to the source, despite the authorities' statement that Mr. Mbowe was facing charges of terrorism, unrelated to constitutional reform, the timing and the manner of his arrest, the reported disregard for his due process rights, and the alleged human rights record of the United Republic of Tanzania constitute evidence of the retaliative nature of his arrest.

22. Furthermore, the source notes that Mr. Mbowe had been arrested in the past based on the exercise of his fundamental freedoms as a member of the opposition Chadema party. The source considers that Mr. Mbowe's July 2021 arrest, detention and prosecution fit a pattern of judicial harassment, and violated his rights to freedom of expression, freedom of association and freedom of assembly, as well as his right to fully participate in the running of his country. The source adds that these rights are basic human rights, necessary to a free and just society.

23. Accordingly, the source concludes that Mr. Mbowe was detained in retaliation for his advocacy for constitutional reform, and that his detention was therefore arbitrary under category II.

iii. Category III

24. As stated by the source, Mr. Mbowe was not informed of the reasons for his arrest or the charges against him until he first appeared in court on 26 July 2021, five days after he was arrested. The source argues that this violated Mr. Mbowe's rights to be informed of the reasons for his arrest at the time of the arrest and to be promptly informed of the charges against him, guaranteed by article 9 (2) of the Covenant.

25. The source further claims that Mr. Mbowe was not promptly brought before a judge, contrary to article 9 (3) of the Covenant, principle N (5) of the African Commission on Human and Peoples' Rights Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the African Commission Guidelines) and principle 11 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In this regard, the source refers to several opinions of the Human Rights Committee, which explain that "promptly" means that delays should not exceed a few days from the time of the arrest, that 48 hours is ordinarily sufficient, and that a longer detention without judicial control unnecessarily increases the risk of ill-treatment.<sup>2</sup>

26. The source also contends that Mr. Mbowe's charge sheet contained insufficient information about the facts to support the allegations against him. Specifically, the source states that it was insufficiently precise in terms of time, location and scope, and that it lacked sufficient details about the criminal acts themselves. As a result, Mr. Mbowe lacked sufficient information to be able to prepare for trial. The source argues that the insufficiency of the charge sheet violated Mr. Mbowe's rights under article 14 (3) of the Covenant, which requires that individuals be informed promptly and in detail of the nature and cause of the charges against them. The source recalls that in its general comment No. 32 (2007), the Human Rights Committee stated that the charges should include the law as well as the alleged facts on which the charges are based. Reportedly, the High Court has since ordered the prosecution to amend the charges to reflect that Mr. Mbowe intended to advance a political, ideological or religious agenda.

27. Furthermore, the source notes that the right to legal representation is one of the cornerstones of a fair trial and is particularly important in the early stages of a person's arrest. The source alleges that Mr. Mbowe's right to legal representation was violated when he was presented in court for the first time, without his lawyers or prior consultation with them. The source argues that this constitutes a violation of article 14 of the Covenant, of principles 17, 18 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, of principle 3 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems and of principle N (2) of the African Commission Guidelines.

28. Moreover, according to the source, Mr. Mbowe was not afforded an opportunity to notify his family of his arrest and his location during his five-day detention in police custody,

<sup>2</sup> The source refers to the following opinions: *Kovsh v. Belarus* (CCPR/C/107/D/1787/2008), paras. 7.3–7.5; *Marques de Morais v. Angola* (CCPR/C/83/D/1128/2002), para. 6.3; *Terán Jijón v. Ecuador* (CCPR/C/44/D/277/1988), para. 5.3 (holding that five days does not satisfy the requirement of promptness under article 9 (3) of the Covenant); and *Freemantle v. Jamaica* (CCPR/C/68/D/625/1995), para. 7.4 (holding that four days does not satisfy the requirement of promptness under article 9 (3) of the Covenant). It also refers to CCPR/CO/74/HUN, para. 8.

contrary to the rights guaranteed under principle M (2) of the African Commission Guidelines and principle 16 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The source underlines that it is internationally recognized that the risk of torture and intimidation is more prevalent during incommunicado detention and the period immediately following the deprivation of liberty. The source adds that contact with family members immediately after detention is a fundamental safeguard against torture and other ill-treatment.

29. In addition, the source denounces the fact that section 148 (5) of the Criminal Procedure Act provides for a blanket denial of bail for certain crimes, including terrorism-related offences such as the one Mr. Mbowe is charged with. The source argues that this blanket denial of bail violated Mr. Mbowe's due process rights as guaranteed under article 14 of the Covenant and principles 11, 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The source adds that the blanket denial of bail provided for under section 148 (5) of the Criminal Procedure Act also violates individuals' general right to liberty under article 9 of the Universal Declaration of Human Rights, article 9 of the Covenant and article 6 of the African Charter on Human and Peoples' Rights.

30. It is submitted that the nature of the charges that were brought against Mr. Mbowe are part of a pattern by Tanzanian authorities of using non-bailable offences to target critics of the Government and keep them in pretrial detention indefinitely. As part of this alleged pattern, the accused person is reportedly coerced into signing a guilty plea and paying a hefty fine. In this regard, the source refers to a report to the Financial Action Task Force, in which the American Bar Association Center for Human Rights highlighted how the use by the United Republic of Tanzania of non-bailable offences constitutes a violation of regional and international law.

31. Moreover, the source argues that deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves and may deprive their families of support. The source claims that the right to liberty is closely linked to the right to be presumed innocent, protected under section 13 (6) (a) of the Constitution of the United Republic of Tanzania, and therefore favours the release of defendants pending adjudication of charges. According to the source, judges must determine the necessity of the detention based on factors such as the seriousness of the alleged crime, the weight of the evidence against the accused, the possibility that the accused will interfere with witnesses or evidence, and whether the accused poses a flight risk or a danger to the community, as detailed in the Human Rights Committee's general comment No. 35 (2014). The source stresses that pretrial detention should be a measure of last resort and should not last longer than is necessary, in accordance with rule 6 of the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and principle M (1) of the African Commission Guidelines. The source further refers to the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa, which also encourages the use of alternatives to imprisonment.

32. The source notes that in May 2020, the High Court ruled that the entirety of section 148 (5) of the Criminal Procedure Act was unconstitutional and that to deny a case-by-case determination of whether bail was appropriate risked denying a detainee the right to individual liberty and equality before the law. The High Court further held section 148 (5) to be too broad and susceptible to abuses and arbitrary decisions. However, in August 2020, the Court of Appeal reversed the lower court's decision, finding that while automatic refusal of bail denied certain liberties, such limitations were justified in the case of certain serious crimes.

33. According to the source, Mr. Mbowe should have been afforded the opportunity to seek pretrial release and have his request considered based on individualized factors. Therefore, the source considers that Mr. Mbowe's pretrial detention, without the possibility of release on bail, violated his right to be presumed innocent and was arbitrary under category III.

34. The source further contends that Mr. Mbowe's mandatory pretrial detention also violated his right to health, considering the World Health Organization's recommendation that States decongest prisons in light of the COVID-19 pandemic.

iv. Category V

35. The source submits that Mr. Mbowe's arrest is part of a systematic misuse of the criminal justice system to target political opposition. The source points to the fact that Mr. Mbowe was arrested multiple times in relation to his activities as a member of the opposition party. In 2018, Mr. Mbowe was arrested alongside other members of the Chadema party in relation to a gathering during a by-election campaign in Dar es Salaam. They were charged with numerous crimes and convicted of sedition in 2020. They were sentenced to five months in prison or a fine, until the Court of Appeal recently reversed their conviction. Following the October 2020 elections, Mr. Mbowe was once again arrested together with other opposition leaders, before being released a day later without charge.

36. The source argues that the Government of the United Republic of Tanzania uses physical attacks, arbitrary arrests and restrictive legislation to crack down on opposition members. It is reported that Mr. Mbowe had to be hospitalized following an attack in June 2020 which left him with a broken leg. Though his assailants were not identified, his party alleged that Mr. Mbowe had been the victim of a politically motivated attack. To date, no one has been arrested or held accountable for the incident.

37. In light of the timing of Mr. Mbowe's arrest, the violation of his due process rights, the reported misuse of non-bailable offences by Tanzanian authorities, and their alleged pattern of arresting critical voices, the source concludes that Mr. Mbowe's detention was arbitrary under category V.

*Response from the Government*

38. On 2 November 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 4 January 2022, detailed information about the current situation of Mr. Mbowe and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of the United Republic of Tanzania under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of the United Republic of Tanzania to ensure Mr. Mbowe's physical and mental integrity.

39. The Working Group regrets that the Government submitted a late reply on 14 January 2022 without having sought an extension of the deadline as per paragraph 16 of the Working Group's methods of work. The Working Group cannot accept this reply as if it had been submitted in a timely manner.

*Additional information from the source*

40. On 4 March 2022, the source informed the Working Group of the motion by the prosecution not to prosecute Mr. Mbowe. Reportedly, all charges against Mr. Mbowe were dropped and he was released unconditionally on the same day.

**Discussion**

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

42. The Working Group notes that Mr. Mbowe was reportedly released on 4 March 2022. However, in accordance with paragraph 17 (a) of its methods of work, the Working Group "reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned". In the present case, the Working Group is of the opinion that, in view of the seriousness of the allegations, it should proceed to render the opinion.

43. In determining whether Mr. Mbowe'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.<sup>3</sup> In the present case, the Government has chosen not to challenge in a timely fashion the prima facie credible allegations made by the source.

#### *Category I*

##### Arrest and pretrial detention

44. The source alleges that Mr. Mbowe was arrested on 21 July 2021 without a warrant and without being informed of the reason for his arrest, in a manner inconsistent with the national laws of the United Republic of Tanzania. According to the source, Mr. Mbowe was detained for five days without being informed of the charges against him. He was reportedly transferred to Kisumu Magistrates Court on 26 July 2021, for his first appearance, during which he was informed of the charges against him. The Government has chosen not to rebut these allegations in its late reply.

45. The Working Group considers that the source has established a credible prima facie case, which was not rebutted by the Government, that the authorities did not present an arrest warrant at the time of Mr. Mbowe's arrest, that they did not inform him of the reasons for his arrest, and that Mr. Mbowe was not informed of the charges against him until he first appeared before a judge, on 26 July 2021, five days after he was arrested.

46. The Working Group recalls that international law on detention 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 of person and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the Covenant, as well as principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>4</sup>

47. As the Working Group has stated, in order for a deprivation of liberty to be justified, it must have a legal basis.<sup>5</sup> It is not sufficient that there is a law that authorizes an arrest. The authorities must invoke that legal basis and apply it through an arrest warrant.<sup>6</sup> In the present case, the Working Group finds that the authorities did not present an arrest warrant at the time of Mr. Mbowe's arrest, in violation of articles 3 and 9 of the Universal Declaration of Human Rights, article 9 (1) of the Covenant and principles 2 and 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>7</sup>

48. Furthermore, article 9 (2) of the Covenant requires that anyone who is arrested not only be informed of the reasons for the arrest but also be promptly informed of any charges against them. As explained by the Human Rights Committee in its general comment No. 35 (2014), the obligation encapsulated in article 9 (2) has two elements: information about the reasons for the arrest must be provided immediately upon arrest<sup>8</sup> and the arrested individual must be promptly informed of the charges thereafter.

49. The Working Group finds that, in order to constitute a legal basis for deprivation of liberty, the authorities should have informed Mr. Mbowe of the reasons for his arrest, at the

<sup>3</sup> A/HRC/19/57, para. 68.

<sup>4</sup> 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; and No. 44/1993, paras. 6–7. For more recent jurisprudence, see opinions No. 21/2017, para. 46; No. 68/2018, para. 39; and No. 34/2020, para. 46.

<sup>5</sup> Opinion No. 18/2021, para. 39.

<sup>6</sup> Opinions No. 61/2020, para. 65; and No. 34/2020, para. 45.

<sup>7</sup> Opinions No. 37/2020, para. 52; and No. 33/2020, para. 54 (the presentation of an arrest warrant is procedurally inherent in articles 3 and 9 of the Universal Declaration of Human Rights); and A/HRC/29/26/Add.2, para. 51.

<sup>8</sup> See para. 27.

time of his arrest on 21 July 2021, and of the charges against him promptly.<sup>9</sup> The source argues, and the Government has not rebutted, that Mr. Mbowe was not informed of the reasons for his arrest at the time of his arrest, and was only made aware of the charges when he appeared before a judge for the first time, five days after the arrest. The Working Group therefore finds that Mr. Mbowe's arrest and detention violated articles 3 and 9 of the Universal Declaration of Human Rights, article 9 (2) of the Covenant and principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. His arrest was therefore devoid of any legal basis.<sup>10</sup>

50. The Working Group recalls that it is a well-established norm of international law that pretrial detention should be the exception and not the rule, and that it should be ordered for as short a time as possible.<sup>11</sup> As the Human Rights Committee has noted, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee "promptly" before a judge following his or her arrest; any longer delay must remain absolutely exceptional and be justified under the circumstances.<sup>12</sup>

51. In regard to Mr. Mbowe, who spent five days in detention before being brought before a judge, and noting the absence of any justification from the Government, the Working Group finds that Mr. Mbowe was not brought promptly before a judge, in violation of articles 3 and 9 of the Universal Declaration of Human Rights, article 9 (3) of the Covenant and principles 11, 37 and 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

#### Incommunicado detention

52. The source argues that Mr. Mbowe was held in detention for five days with no access to his family or legal representation. During that time, although the police had confirmed that Mr. Mbowe was being questioned, he was allegedly denied access to a lawyer. The source contends that Mr. Mbowe was not afforded an opportunity to notify his family of his arrest and his location during his five-day detention in police custody. The Government has chosen not to rebut these allegations in its late reply.

53. In the absence of a rebuttal by the Government, the Working Group considers that Mr. Mbowe was held incommunicado for five days after his arrest, between 21 and 26 July 2021.

54. As the Working Group has stated, holding persons incommunicado violates their right to be promptly brought before a judge or other officer authorized by law under article 9 (3) of the Covenant and to challenge the lawfulness of their detention before a court under article 9 (4) of the Covenant.<sup>13</sup> The Working Group recalls that judicial oversight of detention is a fundamental safeguard of personal liberty<sup>14</sup> and is essential in ensuring that detention has a legal basis.

55. The Working Group finds that Mr. Mbowe was denied the right to be promptly brought before a judge or other officer authorized by law and to bring proceedings before a court to challenge the legality of his detention, contrary to article 9 of the Universal Declaration of Human Rights, article 9 (3) and (4) of the Covenant and principle 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Given that Mr. Mbowe was not able to challenge his detention, he was denied the right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 of the Covenant.<sup>15</sup> He was also held outside the protection of the law for the first

<sup>9</sup> See, for example, opinion No. 10/2015, para. 34. See also opinions No. 46/2019, para. 51; No. 16/2020, para. 60; and No. 46/2020, para. 40.

<sup>10</sup> Opinions No. 46/2020, para. 40; No. 16/2020, para. 60; No. 46/2019, para. 51; and No. 10/2015, para. 34.

<sup>11</sup> Opinions No. 28/2014, para. 43; No. 49/2014, para. 23; No. 57/2014, para. 26; No. 1/2020, para. 53; and No. 5/2021, para. 43. See also Human Rights Committee, general comment No. 35 (2014), para. 38; and [A/HRC/19/57](#), paras. 48–58.

<sup>12</sup> See the Committee's general comment No. 35 (2014), para. 33.

<sup>13</sup> See, for example, opinions No. 45/2017, No. 46/2017, No. 79/2017, No. 11/2018, No. 35/2018 and No. 18/2021. See also Human Rights Committee, general comment No. 35 (2014), para. 35.

<sup>14</sup> [A/HRC/30/37](#), para. 3.

<sup>15</sup> Opinion No. 83/2021, para. 66.



five days of his detention, in violation of article 6 of the Universal Declaration of Human Rights and article 26 of the Covenant.

#### Non-bailable offences

56. The source has submitted that Mr. Mbowe was charged with conspiracy to commit terrorist acts and indirectly funding terrorist acts, pursuant to section 4 (1) and (3) (i) (i), section 27 (c) and section 13 of the Prevention of Terrorism Act No. 21 of 2002, read together with sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act. According to the source, as these charges are non-bailable offences, Mr. Mbowe could not be released on bail and remained in custody pending further court appearances. In its late reply, the Government submitted that Mr. Mbowe's arrest was not arbitrary insofar as he was charged with unlawful acts prohibited under Tanzanian law, some of which constituted unbailable offences.

57. In its jurisprudence, the Working Group has repeatedly confirmed that mandatory pretrial detention violates a State's obligations under international human rights law.<sup>16</sup> In particular, non-bailable offences violate the requirement under article 9 (3) of the Covenant that pretrial detention be an exceptional measure rather than the rule. Non-bailable offences also violate the requirement that pretrial detention be based on an individualized determination that it is reasonable and necessary in the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.<sup>17</sup> As the Human Rights Committee has stated, pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.<sup>18</sup>

58. In the case at hand, the Working Group finds that the automatic detention of Mr. Mbowe on the basis of non-bailable offences, with no individualized determination of the risk of flight, interference with the evidence or recurrence of the crime, and no consideration of less intrusive alternatives such as bail, electronic bracelets or other conditions, in accordance with the principle of necessity and proportionality, was devoid of legal basis. The Working Group refers the present case to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

#### *Category II*

59. The source alleges that Mr. Mbowe was detained for exercising his rights to freedom of expression, freedom of association and peaceful assembly, and freedom to participate in the running of his country, guaranteed by the Covenant and the African Charter on Human and Peoples' Rights. The Government submits that Mr. Mbowe's arrest was not linked to any political affiliation and was based on violations of Tanzanian laws. The Working Group notes that the Government has submitted no evidence supporting its allegations that Mr. Mbowe's actions violated national law, and neither did it specifically rebut the source's allegations that Mr. Mbowe was detained for the peaceful exercise of his rights.

60. The source submits that Mr. Mbowe's arrest in July 2021 came amidst increased discussions among Tanzanian citizens regarding constitutional reform and because of his advocacy for such reform as the leader of Chadema. The source reports that the day preceding Mr. Mbowe's arrest, Tanzanian authorities prohibited any unnecessary gatherings due to the COVID-19 pandemic. This decision was reportedly viewed as a calculated attempt to thwart opposition meetings.

61. The Working Group notes that article 19 (2) of the Covenant provides that "everyone shall have the right to freedom of expression; this right shall 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 choice." This right includes

<sup>16</sup> Opinions No. 8/2020, para. 77; and No. 64/2019, No. 14/2019, No. 75/2018, No. 61/2018, No. 53/2018, No. 16/2018, No. 24/2015 and No. 57/2014; [A/HRC/42/39/Add.1](#), paras. 36–38; and [A/HRC/19/57](#), paras. 48–58.

<sup>17</sup> Human Rights Committee, general comment No. 35 (2014), para. 38; and opinion No. 8/2020, para. 77.

<sup>18</sup> *Ibid.*

political discourse, commentary on public affairs, discussion of human rights, and journalism.<sup>19</sup> It protects the holding and expression of opinions, including those which are critical of, or not in line with, government policy.<sup>20</sup> The Working Group considers that Mr. Mbowe'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 that right. In reaching this conclusion, the Working Group notes that Mr. Mbowe was arrested alongside 15 other Chadema members, ahead of a planned meeting on constitutional reform. The Working Group also gives weight to the un rebutted allegation that Mr. Mbowe had been arrested in the past, based on the exercise of his fundamental freedoms as a member for the opposition Chadema party, and that Mr. Mbowe's arrests fit a pattern of arresting critical voices. It is noteworthy, as the source has pointed out, that in addition to the other 15 Chadema members briefly arrested alongside Mr. Mbowe, the authorities also arrested female members of the party in September 2021 while they were peacefully protesting against Mr. Mbowe's arrest.

62. Furthermore, Mr. Mbowe's advocacy for constitutional reform as a leader of Chadema 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>21</sup> Moreover, by planning to take part in a meeting of persons to discuss a position on a particular issue, namely constitutional reform in the United Republic of Tanzania, Mr. Mbowe was detained for exercising his right to peaceful assembly and association, guaranteed by article 20 of the Universal Declaration of Human Rights and articles 21 and 22 of the Covenant.<sup>22</sup>

63. There is nothing to suggest that the permissible restrictions on the above-mentioned rights set out in articles 19 (3), 21 and 25 of the Covenant apply to the present case. The Government did not explain how arresting, detaining and prosecuting Mr. Mbowe was necessary to protect a legitimate interest under these provisions or how it constituted a proportionate response to his activities. Importantly, there is no evidence to suggest that Mr. Mbowe's advocacy for constitutional reform called directly or indirectly for violence or could reasonably be considered to threaten national security, public order, public health or morals, or the rights or reputations of others. The Human Rights Council has called upon States to refrain from imposing restrictions under article 19 (3) that are not consistent with international human rights law.<sup>23</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.

64. The Working Group concludes that Mr. Mbowe's detention resulted from the peaceful exercise of his rights to freedom of opinion and expression and to peaceful assembly and association, as well as his right to take part in the conduct of public affairs, in violation of articles 19, 20 and 21 of the Universal Declaration of Human Rights and articles 19, 21, 22 and 25 of the Covenant. His detention was therefore arbitrary under category II.

### *Category III*

65. Given its finding that Mr. Mbowe's detention was arbitrary under category II, the Working Group emphasizes that no trial should have taken place in this matter. However, judicial proceedings were brought against Mr. Mbowe and the source has made allegations concerning violations of his fair trial rights. In its late reply, the Government asserts that Mr. Mbowe was answering charges in a court of law, which guarantees fairness, equality before the law and equal protection as enshrined in the law and the 1977 Constitution of the United Republic of Tanzania.

<sup>19</sup> Human Rights Committee, general comment No. 34 (2011), para. 11.

<sup>20</sup> Opinions No. 8/2019, para. 55; and No. 79/2017, para. 55.

<sup>21</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 opinions No. 16/2020, No. 15/2020, No. 45/2019, No. 44/2019, No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 40/2016, No. 26/2013, No. 42/2012 and No. 46/2011.

<sup>22</sup> Human Rights Committee, general comment No. 37 (2020), para. 12.

<sup>23</sup> Human Rights Council resolution 12/16, para. 5 (p).

66. The source has claimed that during the arrest and detention of Mr. Mbowe, a number of international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments, were violated. The source submits that the violations of Mr. Mbowe's right to a fair trial were of such gravity as to make his deprivation of liberty arbitrary under category III.

67. The source alleges that Mr. Mbowe was denied access to a lawyer even though the police confirmed that he was being questioned. The source asserts that this constitutes a violation of section 53 of the Criminal Procedure Act, which prohibits a police officer from asking detainees questions unless they have been informed of their right to communicate with a lawyer or a friend. The source further contends that neither his family nor his lawyers were informed of Mr. Mbowe's first appearance in court, and were instead told that Mr. Mbowe was being taken to the hospital on the day he was to appear in court. According to the source, the absence of Mr. Mbowe's lawyers resulted in his inability to understand the charges being brought against him, despite these being explained to him, and in the violation of article 14 of the Covenant, principles 17, 18 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 3 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems and principle N (2) of the African Commission Guidelines. The Government has merely stated that Mr. Mbowe was able to contest his arrest through his lawyer before the High Court, without directly responding to the allegations regarding the denial of legal representation during his questioning and first court appearance.

68. In the Working Group's view, the Government failed to uphold Mr. Mbowe's right to legal assistance at all times. The Working Group notes especially the denial of Mr. Mbowe's right to be visited by his lawyer and his family when he was held incommunicado for five days, contrary to principles 15, 18 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rules 43 (3) and 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). According to principle 9 and guideline 8 of 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,<sup>24</sup> 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 apprehension, and must be promptly informed of this right upon apprehension. Access to legal counsel should not be unlawfully or unreasonably restricted.<sup>25</sup> As the Working Group has previously stated, the presence of legal counsel during interrogations is an essential safeguard in ensuring that any admissions by an individual are made freely.<sup>26</sup> Giving prompt and regular access to family members as well as lawyers is an essential and necessary safeguard for the prevention of torture as well as for protection against arbitrary detention and against infringement of personal security.<sup>27</sup> The Working Group emphasizes that legal assistance should be available at all stages of criminal proceedings, namely during the pretrial, trial, retrial 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 and principle 11 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

69. The Working Group finds that the authorities violated Mr. Mbowe's right to access counsel immediately after he was arrested, and subsequently during his questioning and first court appearance. The Working Group considers that such violation substantially undermined

<sup>24</sup> [A/HRC/30/37](#), annex.

<sup>25</sup> *Ibid.*, paras. 12–15 and 67–71. See also Human Rights Committee, general comment No. 32 (2007), para. 34.

<sup>26</sup> Opinion No. 47/2021, para. 56. See also opinions No. 40/2012, No. 1/2014, No. 14/2019 and No. 59/2019, and [E/CN.4/2003/68](#), para. 26 (e).

<sup>27</sup> Opinions No. 10/2018, para. 74; No. 30/2018, para. 47; No. 35/2018, para. 39; No. 39/2018, para. 41; No. 47/2018, para. 71; No. 22/2019, para. 71; No. 36/2019, para. 56; No. 44/2019, paras. 74–75; No. 45/2019, para. 76; No. 56/2019, para. 83; No. 65/2019, para. 68; No. 6/2020, para. 54; No. 11/2020, para. 54; No. 31/2020, para. 51; No. 32/2020, para. 59; No. 33/2020, para. 87; No. 34/2020, para. 57; and No. 18/2018, para. 58.

and compromised Mr. Mbowe's capacity to defend himself in any subsequent judicial proceedings.

70. The Working Group also considers that non-bailable offences deprive a detainee of the right to seek alternatives to detention, such as bail, in violation of the right to be presumed innocent under article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant. The imposition of mandatory pretrial detention for certain offences reverses the presumption of innocence so that those subject to ongoing criminal proceedings are automatically detained without a balanced consideration of non-custodial alternatives to detention. Moreover, mandatory pretrial detention deprives judicial authorities of one of their essential functions as members of an independent and impartial tribunal, namely, assessing the necessity and proportionality of detention in each case.<sup>28</sup>

71. The Working Group thus concludes that the detention of Mr. Mbowe violated his rights to a fair trial and due process and that such violations were of such gravity as to render his detention arbitrary under Category III.

#### *Category V*

72. The source alleges that Mr. Mbowe's arrest is part of a systematic misuse of the criminal justice system to target political opposition, as evidenced by the fact that Mr. Mbowe has been arrested multiple times in relation to his activities as a member of the opposition party. The source explains that Mr. Mbowe was arrested alongside other members of the Chadema party in 2018, in relation to a gathering during a by-election campaign in Dar es Salaam, and charged with numerous crimes and convicted of sedition in 2020. Following the October 2020 elections, Mr. Mbowe was reportedly arrested again with other opposition leaders, before being released a day later without charge. In its late reply, the Government argues that Mr. Mbowe's arrest has no political connection and that there has been no formal complaint relating to his 2020 arrest.

73. The Working Group considers that Mr. Mbowe was targeted because of his peaceful activities, including voicing his opposition against the Government. Mr. Mbowe's political views and convictions are at the centre of the present case. Moreover, in the discussion above concerning category II, the Working Group established that Mr. Mbowe's detention had resulted from the peaceful exercise of his rights under international law. When a 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. The Working Group considers that Mr. Mbowe was discriminated against on the basis of his political views, in violation of his right to equality before the law and equal protection of the law under articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant.

74. In addition, the Working Group has previously determined that provisions that permit mandatory pretrial detention create two categories of defendants: those who are subject to criminal proceedings that do not require automatic detention and can benefit from alternative measures, such as bail; and those who, as in the case of Mr. Mbowe, are alleged to have committed criminal acts that do not allow for such alternatives.<sup>29</sup> The Working Group reiterates that such distinction is discriminatory against certain categories of criminal defendants, in a manner which ignores the equality of human beings, based on their "other" status, that is, being accused of a crime that does not allow for alternative measures to detention.<sup>30</sup>

75. For the above-mentioned reasons, the Working Group finds that Mr. Mbowe was deprived of his liberty on discriminatory grounds, that is, owing to his political or other opinion with regard to seeking to launch a campaign on constitutional reform. 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 therefore arbitrary under category V.

<sup>28</sup> Opinion No. 8/2020, para. 78.

<sup>29</sup> *Ibid.*, para. 81.

<sup>30</sup> See opinions No. 1/2018, No. 75/2018, No. 14/2019, No. 64/2019 and No. 8/2020.

*Concluding remarks*

76. The source alleges that following his arrest and during the long car journey across the country to Dar es Salaam, Mr. Mbowe was shackled and blindfolded, contrary to section 15 of the Criminal Procedure Act, which provides that people under restraint are to be treated with humanity and respect for human dignity, and are not to be subjected to cruel, inhuman or degrading treatment. The Government has chosen not to address these allegations in its late reply.

77. The source further contends that Mr. Mbowe was mistreated and kept in poor conditions while in police detention. In its late reply, the Government asserts that it maintained Mr. Mbowe's physical and mental integrity, that he was safe, sound and healthy, and that it took all measures necessary to protect individuals on remand, including Mr. Mbowe, against COVID-19.

78. International human rights law requires that detainees be protected from any practice that violates their right to be free from any act which could cause severe pain or suffering, whether physical or mental, and which is inflicted intentionally on a person. This is clearly stated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to the Committee against Torture, the right to freedom from torture and other ill-treatment or punishment is absolute. It applies in all circumstances, and it may never be restricted, including in times of war or states of emergency. No exceptional circumstances whatsoever, including threats of terrorism or another violent crime, may be invoked to justify torture or other ill-treatment. Such prohibition applies irrespective of the offence allegedly committed by the accused person.

79. The Working Group recalls that it is the duty of every State to treat those detained with humanity and with respect for the inherent dignity of the human person, in accordance with article 10 of the Covenant. Every detainee has the right to the highest attainable standard of physical and mental health. This right extends not only to timely and appropriate health care but also to underlying determinants of health, such as adequate food, water and sanitation. The Working Group recalls that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that the practice of blindfolding and hooding during interrogation sessions should be forbidden, as victims are rendered incapable of identifying their torturers, making the prosecution of torture virtually impossible.<sup>31</sup>

**Disposition**

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

The deprivation of liberty of Freeman Mbowe, being in contravention of articles 2, 3, 6, 7, 8, 9, 11, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 2, 9, 14, 19, 21, 22, 25 and 26 of the International Covenant on Civil and Political Rights, was arbitrary and falls within categories I, II, III and V.

81. The Working Group requests the Government of the United Republic of Tanzania to take the steps necessary to remedy the situation of Mr. Mbowe 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.

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

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

<sup>31</sup> E/CN.4/2002/76, annex I (recommendations of the Special Rapporteur), para. (f).

84. 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 and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for appropriate action.

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

#### **Follow-up procedure**

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

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

87. 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.

88. 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.

89. 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>32</sup>

*[Adopted on 30 March 2022]*

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<sup>32</sup> Human Rights Council resolution 42/22, paras. 3 and 7.