

OPINION No. 48/2005 (NAMIBIA)

Communication: addressed to the Government on 15 October 2004.

Concerning: John Samboma; Charles Samboma (alleged “Caprivi Liberation Army” commander); Richard Libano Misuha; Oscar Muyuka Puteho; Richard John Samati; Moises Limbo Mushwena; Thaddeus Siyoka Ndala; Martin Siano Tubaundule; Oscar Nyambe Puteho; Charles Mafenyeho Mushakwa; Fred Maemelo Ziezo; Andreas Mulupa, and Osbert Mwenyi Likanyi.

The State is a party to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 38/2005.)
2. The Working Group conveys its appreciation to the Government of Namibia for having forwarded the requisite information.
3. (Same text as paragraph 3 of Opinion No. 38/2005.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments.
5. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto, as well as of the observations by the source.
6. The source informed the Working Group that the above-mentioned 13 persons, all detained at Grootfontein Prison, 500 kilometres north of Windhoek, were part of a group of 120 individuals arrested for allegedly taking part in secessionist violence led by the “Caprivi Liberation Army”, which attacked Katima Mulilo, in the northeastern Caprivi region, on 2 August 1999. They were handed over to Namibia by Botswana and Zambian authorities between August 1999 and December 2002. They were put in secret detention during six months at the Grootfontein Military Base before appearing in court. Later, they were accused of high treason, murder and other offences in connection with the uprising.
7. They were released on 23 February 2004 following an order by Judge Elton Hoff at the High Court in Grootfontein. He ruled that his court did not have the jurisdiction to try the men because the circumstances under which they had been held were irregular, owing to the manner in which the 13 were detained in the territories of Botswana and Zambia and irregularly brought before court.
8. According to Judge Hoff, Namibian authorities had not merely been passive bystanders when the Botswana and Zambian authorities handed over the 13 persons to Namibia. Judge Hoff found that they had been delivered to Namibia through a process of disguised extradition dressed up as the deportation of supposedly illegal immigrants from other countries. In this irregular

process, Botswana and Zambia's extradition laws had not been adhered to. According to the source, a Namibian court cannot assume jurisdiction over persons who claim to have been brought unlawfully from abroad to be charged and put on trial. Proper extradition procedures were not followed when these persons were returned to Namibia from countries with which Namibia has standing extradition agreements. International law had thus been violated.

9. However, only a few minutes after their release, they were re-arrested and charged with common crimes such as assault, illegal possession of elephant tusks and theft of car keys. Owing to the lack of evidence, they were released the following day, but were detained again on 25 February 2004 and accused of the same charges which had previously been considered impossible to judge due to their irregular detention and the violation of the norms on extradition under international law.

10. The source alleges that the authorities bent the Namibian Constitution and laws to their own ends. Their five-year pretrial detention is in contravention of international norms for the following reasons:

- Proper extradition procedures were not followed;
- The detained persons were again accused of the same crimes for which the court had found they could not be tried;
- Their detention abroad and extradition to Namibia was irregular;
- The submitted evidence was inconsistent.

11. In its response, the Government stated that the Government of Namibia's respect for constitutionalism, rule of law, democracy and human rights is well known worldwide. Consequently, it was not correct to allege that the authorities bent the Namibian Constitution and laws to their own ends. The facts found by the High Court of Grootfontein (Supreme Court in the land of the case), put paid to the allegations raised by the communicators. As this High Court is of first instance, it would possibly be considered by the Supreme Court. As can be found in the Supreme Court judgement, the progress of the proceedings on the merits was checked by a series of interlocutory applications by the accused.

12. The Government adds that the trial resumed in February 2003 in Grootfontein. In May 2004, fatal car accidents bogged down the trial proceedings. One member of the State Prosecution team died and two others were seriously injured while travelling to Grootfontein from Windhoek. On 17 May 2005, the Prosecution requested the Court to move to Windhoek and to allow a new prosecution team to prepare for the trial. The Court should rule on the application for an adjournment by the prosecution.

13. The Government also reported that on 17 May 2005, the accused persons raised an objection that, since they are not Namibian but Caprivians, a Namibian court does not have the jurisdiction to try them for treason. Consequently, they lost their legal representation. According to the Government, the court should also rule on this point.

14. The source replies in commenting on the response from the Government and argues the following.
15. Some of the high treason suspects have been tortured physically and psychologically by police officers and have mutilated bodies and permanent scars. These persons have introduced civil claims against the perpetrators but the proceedings are still outstanding.
16. The children of the persons in detention have been dismissed from their schools and are deprived of education because of lack of financial assistance from their parents. This situation has been continuing for more than six years. Furthermore, the source also claims that all of their personal items which were left in the hands of police officers when arrested have been lost and compensation has not been granted for these losses. It is also stated that families of the detainees, when visiting them in prison or during court proceedings, are submitted to unreasonable searches and inhuman treatment.
17. The source further claims that the Government initiated a series of postponements by the prosecuting team, including delaying tactics, which have resulted in the worsening of their current detention. Their detention is also worsened by the inadequacy of the food they are being served, which has resulted in some persons being affected by diseases.
18. Finally, the source mentions that police officers have forcefully compelled their friends and relatives from Dukne Refugee Camp in Botswana to testify against them while these persons are being repatriated on a voluntary basis.
19. The petitioners, reportedly members of the Caprivi Liberation Army, were charged for high treason, murder, and other offences in connection with the attack on Katima Mulilo in August 1999. They consider themselves Caprivians and not Namibians, as they stated before the Court to challenge its jurisdiction.
20. Even though the first instance court sustained that they had been brought to Namibia irregularly, this judgment was challenged by the Namibian prosecutor in an appeal to the Supreme Court, which ruled to the contrary, that progress of the proceedings on the merits were by a series of interlocutory applications by the accused.
21. It is not in the mandate of the Working Group to substitute for national courts or to decide if the petitioners are guilty or innocent. It can only check if the guarantees relating to a fair trial under international standards binding on the State concerned have been complied with in the case under consideration.
22. As far as the right to be tried without undue delay is concerned, the Working Group recalls that when bail is denied because the accused are charged with serious offences, as it is in the case under consideration, they must be tried within a reasonable time. Excessive period of pretrial detention lead to a violation of both articles 9 (3) and 14 (3) (c) of the International Covenant on Civil and Political Rights, to which Namibia is party. The burden of proof for justifying that a case was particularly complex rests with the Government.

23. The Working Group notes that the Government doesn't contest the allegation of the source, that the accused have been detained for nearly six years without judgement on the merits of the charges brought against them. The Government recognizes that the trial resumed in February 2003 and since then has been postponed because in May 2004, a member of the State Prosecution team died and two other were seriously injured in a fatal car accident.

24. The Working Group considers such an argument too weak to justify more than a one-and-a-half-year delay to restart the trial of the accused, who have been detained for more than six years awaiting trial, especially when the source claims that the Government initiated a series of postponements by the prosecuting team, including delaying tactics. The Working Group is of the opinion that the right to be tried without undue delay obliges States to organize their judicial machinery in a manner that ensures an effective and speedy trial.

25. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Messrs. John Samboma, Charles Samboma (alleged "Caprivi Liberation Army" commander), Richard Libano Misuha, Oscar Muyuka Puteho, Richard John Samati, Moises Limbo Mushwena, Thaddeus Siyoka Ndala, Martin Siano Tubaundule, Oscar Nyambe Puteho, Charles Mafenyeho Mushakwa, Fred Maemelo Ziezo, Andreas Mulupa and Osbert Mwenyi Likanyi is arbitrary, being in contravention of article 14 of the International Covenant on Civil and Political Rights and falls under category III of the categories applicable to the consideration of cases submitted to the Working Group.

26. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of the above-mentioned persons.

Adopted on 30 November 2005.