United Nations A/HRC/WGAD/2012/57

General Assembly

Distr.: General
9 August 2013
English
Original: French

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fifth session, 14–23 November 2012

No. 57/2012 (Burundi)

Communication addressed to the Government on 7 September 2012

Concerning: Anita Ngendahoruri

The Government has not replied to the communication.

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the former Commission on Human Rights. It clarified and extended the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed that mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work (A/HRC/16/47, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. 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 the detainee) (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 International Covenant on Civil and Political Rights (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 for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Anita Ngendahoruri, resident of Coline Gatamo, in the Rango commune of Kayanza Province, was arrested on 20 March 2011.

4. Ms. Ngendahoruri was taken into police custody after the death of her three-and-half-year-old child. The child reportedly died of natural causes as the result of an illness about which she regularly consulted staff at the health centre in Knini, which is also in the Rango commune. It was during a consultation at the centre that the child died.

5. According to the source, Ms. Ngendahoruri has a medical certificate issued by the centre stating that her child died of natural causes. That document is currently in Ms. Ngendahoruri's home.

6. On her way home from the health centre, Ms. Ngendahoruri, in a state of panic caused, in particular, by her being physically and emotionally exhausted, placed her child's body in the bush before going to tell her family what had happened, an act that in itself is not a criminal offence under Burundi law. Ms. Ngendahoruri was taken into custody shortly afterwards.

7. Following her arrest on 20 March 2011, Ms. Ngendahoruri was held in police custody for 58 days.

8. A provisional arrest and detention warrant, accusing her of child abandonment under article 513 of the Criminal Code, was issued on the day of her arrest. Article 513 of the Criminal Code states: "Whoever endangers or abandons a child or an individual who is incapable of fending for him or herself on account of his or her physical or intellectual condition, or causes a child or such an individual to be in danger or abandoned, shall *ipso facto* be punished: (1) with a prison sentence of between 2 months and 1 year and a fine of 20,000 francs if the act is perpetrated in a non-isolated place; and (2) with a prison sentence of between 1 and 3 years and a fine of 50,000 francs if the act is perpetrated in an isolated place. These penalties shall be doubled if the person responsible is the parent or legal guardian of the child or the incapacitated individual. Endangerment or abandonment involving a mutilation or an infirmity shall be punished with a prison sentence of 10 years. If the endangerment or abandonment results in the death of the child or individual, the person responsible shall be punished with a 20-year prison sentence."

9. On 6 June 2011, Ms. Ngendahoruri was brought before the *tribunal de grande instance* (court of major jurisdiction) of Kayanza, which issued a pretrial detention order so that the accused would remain at the disposal of the court. An order dated 17 May 2011 had marked the end of Ms. Ngendahoruri's detention in police custody and the beginning of her pretrial detention. Since her arrest, Ms. Ngendahoruri has never stopped telling the authorities that in her home there was a medical record stating that her child had died of natural causes. Neither the police nor the prosecution service would go to her house to collect that record. No inquiry was opened to determine the cause of her child's death or the

child's state of health prior to death. An inquiry would have made it possible to substantiate the mother's claims about the consultations at the Knini health centre.

10. At the beginning of 2012, thanks to the intervention of a non-governmental organization (NGO), Ms. Ngendahoruri was at last assigned a defence attorney. On 14 February 2012, at which time she was still being held under the same pretrial detention order, Ms. Ngendahoruri, through her recently appointed lawyer, filed an application with the public prosecutor of Kayanza Province for release on bail.

11. On 9 August 2012, Ms. Ngendahoruri was brought once again to court to have the lawfulness of her detention decided by a judge. At that hearing, the aforementioned court of Kayanza postponed the case sine die because the witnesses summoned by the prosecution had not appeared.

12. Ms. Ngendahoruri's defence attorney insisted that the judge should rule on the lawfulness of her detention pending trial as requested in the petition he had filed on 14 February 2012. Despite the lawyer's insistence, the judge refused to rule on Ms. Ngendahoruri's bail application.

13. The source argues that the deprivation of liberty of Ms. Ngendahoruri is arbitrary since it has no legal basis, as explained below:

(a) Police custody:

(i) The Burundi Code of Criminal Procedure defines police custody as "the act of detaining a person for a specific reason and period, either in the place of arrest or in a facility belonging to the police or the security forces, in order to further a mission of the criminal investigation service or the justice system" (Code of Criminal Procedure, art. 58, para. 1);

(ii) Police custody may not exceed seven days, calculated by the hour, unless the public prosecution service decides that it is essential to extend it, in which case the maximum duration is twice that period (Code of Criminal Procedure, art. 60, para. 1). Article 61 of the Code of Criminal Procedure also specifies that the placement of a person in custody must be logged by the criminal investigation officer in charge, and that log must include, in addition to the officer's family name, given name, office and rank, the identity of the detainee, the date, time and place of the questioning, the nature of and reasons for detention, the circumstances in which the detainee was brought before the officer and informed of his or her rights and allowed to exercise them, the date and time at which detention ended, as well as its duration, and the action taken upon its termination. The log must also specify the location or locations where the detainee was held in custody;

(iii) The log is presented for signature to the detainee, who may request that his or her comments be added. If he or she refuses or is unable to sign the log, those circumstances and the reasons for them must be mentioned in the log. If the detainee agrees to sign but does not know how to write, the signature may be replaced by any other sign or mark of personal identification commonly considered to be equivalent;

(iv) After her arrest on 20 March 2011, Ms. Ngendahoruri was eventually brought before the court of Kayanza on 6 June 2011, which ordered that she be remanded in custody pending trial so that she would remain at the disposal of the court. Ms. Ngendahoruri had at that time been in police custody for 58 days, in other words, more than seven times the maximum period permitted by law. The source concludes that the detention of Ms. Ngendahoruri in police custody from 20 March to 6 June 2011 had no legal basis and was consequently arbitrary.

(b) Detention pending trial:

(i) Article 9, paragraph 1, of the International Covenant on Civil and Political Rights establishes the principle, partially echoed in article 39 of the Constitution of Burundi, that no one shall be deprived of his or her liberty except in accordance with the law. Article 9, paragraph 3, of the Covenant states that: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." Thus it "shall not be the general rule that persons awaiting trial shall be detained in custody", but the exception calls for a restrictive interpretation of the circumstances in which a person can be placed and maintained in pretrial detention;

(ii) Under article 71 of the Code of Criminal Procedure, the accused may not be placed in detention pending trial unless there is sufficient proof of guilt and the acts of which the individual has been charged involve an offence that is punishable by law with a prison sentence of at least 1 year (para. 1). Article 71 also states that detention pending trial may be ordered only if it is the sole means of averting the risk of conspiracy, preserving public order, protecting the accused, stopping the accused from offending or reoffending, or guaranteeing that the accused remains at the disposal of the court (para. 2);

(iii) Article 72 of the Code of Criminal Procedure states that when the conditions for placing a person in pretrial detention have been met, the public prosecutor may place the accused under a provisional arrest and detention warrant (para. 1). Within 15 days of the issue of such a warrant, the accused must be brought before a judge, who decides whether the accused is to be remanded into custody or released (para. 2). Article 73 of the Code of Criminal Procedure states that a judge from the competent court must rule on the pretrial detention within 48 hours of becoming seized of the matter;

(iv) Article 75, paragraph 1, of the Code of Criminal Procedure provides that pretrial detention orders are valid for 30 days, commencing on the date of issue. At the end of that period, pretrial detention may be extended, by means of a substantiated decision, on a month-by-month basis, for as long as it remains in the public interest. According to the Supreme Court of Burundi, if the public prosecution service fails to apply for the extension of a pretrial detention order within the 30-day deadline established in article 75 of the Code, applications for extensions become inadmissible and the accused must be released on bail (ruling of the Supreme Court of Burundi in the case RMPG 50/NJ.B of 4 October 2006);

(v) With regard to the notion "in the public interest" mentioned in article 75, paragraph 1, of the Code of Criminal Procedure, the source refers to the case law of the Working Group on Arbitrary Detention, according to which the lack of a clear indication of what a notion means in a legal text is incompatible with article 9 of the International Covenant on Civil and Political Rights (see, for example, Opinion No. 21/2010 (Egypt));

(vi) The source maintains that this consideration should be applied mutatis mutandis to the interpretation of the phrase "guaranteeing that the accused remains at the disposal of the court", found in article 71, paragraph 2, of the Code of Criminal Procedure, which has been interpreted very loosely by the Burundi judiciary. The lack of a clear indication as to what this phrase means has resulted in repeated abuses and the almost systematic recourse to detention pending trial. In practice, it is apparent that article 71 of the Code of Criminal Procedure is not correctly applied by Burundi magistrates. In the absence of judicial oversight, this

poor practice means that 60 per cent of the prison population in Burundi are on remand awaiting trial (see *RCN justice et démocratie, Étude sur le fonctionnement de la chaîne pénale au Burundi*, February 2011, p. 107). This leads to prison overcrowding and conditions of detention "which amount to inhuman and degrading treatment" (Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, Burundi, adopted on 20 November 2006 (CAT/C/BDI/CO/1), para. 17);

(vii) After being held in police custody illegally for over six weeks, Ms. Ngendahoruri was held in pretrial detention for 20 days without ever appearing in court for a judge to rule upon the lawfulness of her detention;

(viii) Ms. Ngendahoruri was eventually brought before a judge of the court of Kayanza on 6 June 2011, which ordered that she be remanded in custody pending trial so that she would remain at the disposal of the court;

(ix) Even if one considered it in the public interest to keep Ms. Ngendahoruri in custody, the pretrial detention order of 6 June 2011 was valid only until 5 July 2011 and should have been renewed on a month-by-month basis if doing so had been deemed to be in the public interest (Code of Criminal Procedure, art. 75, para. 1). The failure to abide by the procedures for prolonging detention should have resulted in the immediate release on bail of the accused (ruling in the case RMPG 50/NJ.B of 4 October 2006);

(x) On 14 February 2012, at which time she was still being held under the same expired pretrial detention order, Ms. Ngendahoruri applied, through her lawyer, to the public prosecutor of Kayanza Province to be released on bail;

(xi) The bail application stated that the pretrial detention of Ms. Ngendahoruri was unlawful because it was based on an order that had long since expired, i.e. the pretrial detention order of 6 June 2011. In effect, Ms. Ngendahoruri had then been in detention for 253 days under an order that had been valid for a maximum of 30 days;

(xii) It was not until 9 August 2012, i.e. 400 days after the expiration of the detention order of 6 June 2011, that Ms. Ngendahoruri was eventually brought before a judge before whom she could appeal against the unlawfulness of her detention;

(xiii) At that hearing, despite the best efforts of Ms. Ngendahoruri's lawyer, the judge refused to rule on the application for bail and postponed the case sine die on the grounds that the prosecution witnesses were not present;

(xiv) Consequently, the source asks the Working Group to declare the detention of Ms. Ngendahoruri since 6 July 2011 (the date on which the pretrial detention order of 6 June 2011 expired) to be arbitrary.

14. The source's claim that the deprivation of the liberty of Ms. Ngendahoruri is arbitrary is based on the non-compliance of the justice system with international standards regarding the right to a fair trial:

(a) The first sentence of article 14, paragraph 1, of the International Covenant on Civil and Political Rights guarantees in general terms the right to equality before courts and tribunals. That right guarantees, in addition to the principles mentioned in the second sentence of article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination. Equality of arms means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable

grounds, not entailing actual disadvantage or other unfairness to the defendant (Human Rights Committee, general comment No. 32 (2007), paras. 7, 8 and 13);

(b) The source draws attention to the position of the Working Group on Arbitrary Detention, which stresses in paragraph 69 of its annual report of 2004 (E/CN.4/2005/6) that "one of the fundamental principles of due process of law is equality between the prosecution and the defence". The Working Group also underscores in its report that:

> "Where conditions of detention are so inadequate as to seriously weaken the pretrial detainee and thereby impair equality, a fair trial is no longer ensured, even if procedural fair-trial guarantees are otherwise scrupulously observed."

(c) According to article 6, paragraph 1, of the Burundi Code of Criminal Procedure, agents of the criminal investigation service may seize items anywhere that may be confiscated by law and that might be useful for convicting or exonerating the accused;

(d) Article 31, paragraph 2, of the Code of Criminal Procedure states that police officers and agents of the criminal investigation service are under the authority of the State Prosecutor. The State Prosecutor can commission them to collect all the information and to carry out all the inquiries he or she considers necessary for ensuring the proper administration of justice;

(e) In this case, neither the police nor the public prosecution service investigated the exonerating circumstances, not even to determine the cause of death of the child of the accused, the state of the child's health prior to death or the mother's claims about the visits made to the health centre in Knini. From the outset, the accused specifically told the authorities that she had a medical certificate which confirmed that she had visited the centre and recorded her child's illness, but both the police and the prosecution service systematically refused to let her produce that piece of evidence, which was in her home;

(f) Behaviour of this kind violates the principle of equality of arms and, consequently, violates article 14 of the International Covenant on Civil and Political Rights. Also, since the hearing held on 9 August 2012, the court of Kayanza has refused to follow up on the bail application filed by the detainee's lawyer on 14 February 2012;

(g) According to the source, refusing to rule on such an application, which was filed on the basis of article 75 of the Code of Criminal Procedure (which requires pretrial detention orders to be renewed every 30 days), constitutes a denial of justice, particularly since the judge was, in keeping with the case law of the Supreme Court cited above, obliged to immediately release the accused when he saw that the pretrial detention order had not been duly extended;

(h) It should be noted that article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights provides that the State must assign legal assistance to the accused if the accused does not have sufficient means to pay for it;

(i) In this case, the State did not assign a lawyer to the accused, who was charged with an offence that incurs a prison sentence of 20 years. If an NGO had not intervened, a lawyer would probably never have been assigned to defend the accused. On those grounds, the source alleges that Burundi violated article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights. Given the seriousness of the violation of the right to a fair and just trial, the source urges the Working Group to declare the detention of Ms. Ngendahoruri arbitrary.

Response from the Government

15. The Working Group notes with regret that the Government of Burundi has not provided information that would allow it to ascertain the Government's position regarding the allegations made.

Discussion

16. Ms. Ngendahoruri was arrested on 20 March 2011 in the Rango commune of the Kayanza Province, where she lived. She was accused of abandoning the body of her three-and-half-year-old child. She claims that she had always lavished care on her child and that she has a medical certificate in her home stating that the child died of natural causes. The justice authorities of Burundi have made no effort to see that record. Overwhelmed by what she had just been through, she had left her child's body in the bush.

17. Ms. Ngendahoruri was held in police custody for 58 days, from 20 March to 17 May 2011 before an arrest and detention warrant was issued. However, the source claims that a provisional arrest and detention warrant was issued on the same day as her arrest. On 6 June 2011, the detainee was questioned for the first time. On that occasion, the court of Kayanza remanded her in custody pending trial. The order dated 17 May 2011 marked the end of Ms. Ngendahoruri's detention in police custody and the beginning of her detention pending trial.

18. She has on countless occasions asked the prosecution service and the police to collect the medical certificate showing that her child died of natural causes from her home, something that the judicial authorities have not done. The court has also not ordered an investigation into the cause of her child's death or the state of her child's health prior to death.

19. The accused did not have the benefit of legal counsel during the first part of the proceedings. It was not until the beginning of 2012 that she had a defence lawyer. The State did not offer her legal assistance as it was obliged to do.

20. The proceedings were also flawed in other ways: a hearing was suspended because the prosecution did not attend; the public prosecution service failed to ensure that the laws on imprisonment were properly applied; and the prosecution never produced any evidence to support its allegations. On 9 August 2012, the court of Kayanza postponed the case sine die because the witnesses summoned by the prosecution had not appeared.

21. The State Prosecutor never admitted any of the bail applications filed by the defence even though, under article 60 of the Code of Criminal Procedure of Burundi, police custody may not exceed seven days unless the public prosecution service decides that it is essential to extend it by another seven days.

22. The facts of the case constitute a violation of the rights of any person placed in detention, in particular, the right to be brought promptly before a judge (Covenant, art. 9, para. 3); to be presumed innocent (Universal Declaration of Human Rights, art. 11, para. 1, and Covenant, art. 14, para. 2); to be tried without undue delay (Covenant, art. 14, para. 3 (c)); to an effective remedy before the courts to defend his or her rights (Universal Declaration, art. 8 and Covenant, art. 9, para. 4); to be informed promptly of the nature and cause of the charges against him or her (Covenant, art. 14, para. 3 (a)); to be released pending trial, notwithstanding any guarantees to appear for trial (Covenant, art. 9, para. 3); and to a defence attorney, provided by the State if he or she lacks the means to pay for one (Covenant, art. 14, para. 3 (d)).

Disposition

23. The violation of these rights means that the detention of Ms. Anita Ngendahoruri is arbitrary in nature.

24. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

> The detention of Ms. Ngendahoruri is arbitrary under category III of the methods of work of the Working Group.

25. Consequently, the Working Group recommends that the Burundi Government order the immediate release of Ms. Ngendahoruri and ensure that she receives appropriate reparation for the damage suffered as a result of her detention.

[*Adopted on 20 November 2012*]