

**Human Rights Council
Working Group on Arbitrary Detention****Opinions adopted by the Working Group on Arbitrary
Detention at its seventy-third session (31 August-4 September
2015)****No. 25/2015 regarding Émile Bisimwa Muhirhi (Democratic
Republic of the Congo)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.

2. In accordance with its methods of work (A/HRC/30/69), on 18 May 2015, the Working Group transmitted to the Government of the Democratic Republic of the Congo a letter regarding Émile Bisimwa Muhirhi. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

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

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

Submission

Communication from the source

4. Émile Bisimwa Muhirhi, born on 3 November 1983 in Chirindja, has been working in Bukavu since February 2014 as a consultant for non-profit organizations in partnership with Action pour le développement intégral de Cinjira (Action for the comprehensive development of Cinjira) and Ligue africaine pour le changement (African League for Change).

5. The source reports that, around 6 a.m. on 17 December 2014, Mr. Bisimwa was arrested at his home by several officers of the National Intelligence Agency, South Kivu branch, dressed in sportswear, including Honoré Kakule Katembo, an intelligence officer in the city of Bukavu. Mr. Bisimwa was not shown an arrest warrant or informed of the charges against him. When asked by a neighbour, the officers, who had not identified themselves as such, said they belonged to the National Intelligence Agency.

6. The source indicates that Mr. Bisimwa was taken to the premises of the National Intelligence Agency, where a detective, Mr. Kakule, punched him in the right cheek and ordered two detainees (called Didas and Nshimiye) to beat him and detain him in a “6 cell” (a small, cupboard-like compartment not quite the size of a person). In this cell, he had to remain in the same position and could not sit down or move about.

7. At around 10 a.m., Mr. Bisimwa was questioned by Mr. Kakule in the latter’s office. At Mr. Kakule’s request, Mr. Bisimwa enumerated all the goods he had recently bought, including a house purchased jointly with a co-owner in August 2013. Mr. Kakule then hit him on the head with a book and accused him of stealing US\$ 172,844 from his cousin Désiré Citunga Chirhakarhula in order to purchase these goods, including the aforementioned house.

8. From the end of 2012 to 15 February 2014, Mr. Bisimwa worked with Mr. Citunga in a business transferring money from Misisi to Bukavu. When Mr. Bisimwa found another job in February 2014, the two separated amicably following a general evaluation of the business on 15 February 2014. However, the ledgers that Mr. Bisimwa said would prove his innocence have disappeared.

9. Mr. Kakule then forced Mr. Bisimwa to sign a statement that he had not been given the opportunity to read beforehand. When he insisted on reading the document before signing it, Mr. Kakule ordered him to lie on his stomach and beat him on the back and buttocks with another military police officer’s baton.

10. According to the information received, Mr. Bisimwa’s wife went to the premises of the National Intelligence Agency in Bukavu on 18 December 2014. In exchange for a payment to the officers, she was able to see him, but only for one minute. Throughout her husband’s detention, she was able to send him food, also in exchange for money, but only one meal per day. Mr. Bisimwa was not given access to a lawyer.

11. The source alleges that Mr. Bisimwa observed Mr. Citunga arriving at the premises every morning, accompanied by Mr. Kakule, and giving money to the military police officers on numerous occasions.

12. On 19 December 2014, Mr. Kakule telephoned Mr. Bisimwa's wife, telling her to pay the US\$ 500 that the director of the National Intelligence Agency had demanded for the release of her husband. Mr. Bisimwa telephoned his wife to ask her to prepare the money and the title deed of their house in order to secure his release and end the torture. Mr. Kakule went to see Mr. Bisimwa's family members, threatening to continue the torture if he did not receive the money.

13. The source reports that, a few days later, Mr. Bisimwa's father was present at the confrontation between Mr. Bisimwa and Mr. Citunga at the premises of the National Intelligence Agency on the orders of Mr. Kakule. Mr. Kakule beat Mr. Bisimwa, who was lying on the floor, for 20 minutes. Mr. Bisimwa's right arm was severely beaten with a baton, so that the joints of his hand were bent back. At the end of the interrogation, Mr. Kakule once again forced him to sign documents that he had drafted without giving Mr. Bisimwa the opportunity to familiarize himself with the content.

14. At the end of December, Mr. Bisimwa's wife paid Mr. Kakule US\$ 80, then another US\$ 480, but he was not released.

15. The source states that, following the arrest of her husband, Mr. Bisimwa's wife contacted a lawyer by the name of Mr. Charles Cubaka. Mr. Cubaka was refused access to Mr. Bisimwa and did not receive any reply from the National Intelligence Agency to requests for his release or his transfer to the prosecution service in order to be brought before a judge. On 20 December 2014, Mr. Cubaka, acting on behalf of Mr. Bisimwa, filed a criminal complaint against Mr. Citunga with the general prosecution service of Bukavu for arbitrary arrest and detention and damages, citing the incidents of torture. For fear of direct reprisals against Mr. Bisimwa, the complaint does not mention the role of Mr. Kakule. The Prosecutor General handed the case to Detective Cidundaganya.

16. On 14 January 2015, Mr. Bisimwa was transferred to the Bukavu prosecution service. Although Congolese law stipulates that police custody cannot exceed 48 hours before a case is handed over to a judge, Mr. Bisimwa was held for 28 days without access to his lawyer, Mr. Cubaka, whom he met for the first time on that day. Mr. Bisimwa was immediately placed under provisional arrest by the Advocate General, Mulongoyi Kasongo, pursuant to article 28 (2) of the Decree of 6 August 1959 on the Code of Criminal Procedure. Mr. Bisimwa was transferred to Bukavu central prison and, on 15 January 2015, was heard again by Mulongoyi Kasongo, in the presence of his lawyer, Mr. Cubaka, at which time he described incidents of torture.

17. On 19 January 2015, Mr. Cubaka wrote to the Prosecutor General, requesting release on bail. Mr. Citunga opposed the request in a letter to the Prosecutor General.

18. Under article 28 (3) of the Code of Criminal Procedure, Mr. Bisimwa should have been brought before the competent judge for a decision on the extension of his detention within five days of being placed under provisional arrest. In fact, this was done on 27 January 2015, or 13 days after the issuance of the provisional arrest warrant. On that day, the Bukavu magistrate's court, in the absence of Mr. Cubaka, ordered Mr. Bisimwa placed in pretrial detention. On 17 February 2015, Mr. Cubaka filed a request for release on bail with the Bukavu magistrate's court, which was contested by Mr. Citunga. On 19 February 2015, the magistrate's court rejected the request on the grounds that there was credible evidence of Mr. Bisimwa's guilt. On 20 February 2015, Mr. Cubaka appealed the magistrate court's decision. In early March, the Bukavu *Tribunal de Grande Instance* (court of major jurisdiction) upheld the lower court's decision and rejected Mr. Cubaka's appeal.

19. Since no action had been taken on the criminal complaint filed on 20 December 2014 against Mr. Citunga, on 27 February 2015, Mr. Cubaka submitted to the Bukavu *Tribunal de Grande Instance* a direct summons for Mr. Kakule and Mr. Citunga in

relation to allegations of torture and arbitrary detention. At the opening hearing on 19 March 2015, Messrs. Kakule and Citunga's lawyers submitted preliminary objections, including one relating to the need for prior authorization from the director of the National Intelligence Agency to bring proceedings against the two men, on the grounds of *exceptio obscuri libelli*. The *Tribunal de Grande Instance*, which has reserved judgement on the case, has yet to rule on the objections raised.

20. According to the information received, Mr. Bisimwa remains in detention at Bukavu central prison. The detention conditions are appalling and could undermine his physical and emotional well-being, especially his health, given the ill-treatment to which he was subjected. Mr. Bisimwa has not received appropriate care.

21. The source alleges that the proceedings against Mr. Bisimwa have been marred by significant irregularities, inasmuch as the National Intelligence Agency is responsible for cases related to State security and the offence of which he is accused does not come under this category. It follows that the Agency has never had the authority to arrest or detain Mr. Bisimwa.

22. The source indicates that Mr. Bisimwa has not benefited from legal safeguards, such as a fair trial, given that he was arrested without a warrant and without being informed of the reasons for his arrest; that he was held at the premises of the National Intelligence Agency in a tiny cell for 28 days, despite the fact that the law provides for a maximum detention period of 48 hours before a person is brought before a judge; and that he did not have access to his lawyer during those 28 days. Once he was handed over to the prosecution service and placed under provisional arrest, he had to wait 13 days rather than the statutory maximum of 5 days before being brought before the competent judge for a ruling on extending his detention.

23. The source alleges that Mr. Bisimwa was subjected to torture on numerous occasions at the hands of Mr. Kakule during his detention at the premises of the National Intelligence Agency.

24. In the light of the above, the source contends that Mr. Bisimwa's deprivation of liberty is arbitrary and comes under categories II and III of the criteria applicable to the consideration of cases submitted to the Working Group, inasmuch as it breaches articles 5, 7, 9, 10, and 17 (2) of the Universal Declaration of Human Rights; articles 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights; and articles 2, 15 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Response from the Government

25. The Working Group regrets that the Government of the Democratic Republic of the Congo has not replied to its letter dated 18 May 2015 within the 60-day period allotted to it. The deadline having passed, the Working Group may render an opinion, in accordance with its methods of work.

Discussion

26. It does not follow from the absence of a rebuttal by the State that the facts reported are true. The Working Group must still verify the source's credibility and reliability. However, in this case, the narrative of events is internally consistent. Moreover, it is corroborated by proceedings before the national judicial authorities, some of which are described in great detail, and by all the witnesses whose statements are included in the complaint. Lastly, the reputation of the source who came to the victim's aid is an additional reason for considering the facts reported to be incontrovertible.

27. Since the facts as reported have been established, the Working Group expresses its surprise at the National Intelligence Agency's role in the case. Pursuant to Decree-Law No. 003/2003 of 11 January 2003 on the establishment and organization of the National Intelligence Agency, the Agency is "a public service" "under the authority of the President of the Republic", responsible for "ensuring the State's internal and external security" (see articles 1-3 of Decree-Law No. 003/2003). It is obvious that the situation at the heart of this case — which stemmed from a relationship between two individuals — did not endanger State security, whether internal or external, and that, therefore, the officers of the National Intelligence Agency abused their authority and exceeded their mandate by intervening in the case. Furthermore, at the time of the arrest and detention, there was no legal document authorizing the officers to proceed. Consequently, the Working Group is of the view that the arrest and detention are arbitrary under category I, as defined in the methods of work, because the victim was not informed of the reasons for his arrest and subsequent detention, as required under article 9 (2) of the International Covenant on Civil and Political Rights.

28. The Working Group is also very surprised at the treatment to which Émile Bisimwa Muhirhi was subjected in both private and public. There is no doubt that this constitutes torture and inhuman or degrading treatment, which are categorically prohibited under customary international law, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the Democratic Republic of the Congo acceded on 18 March 1996, and article 7 of the International Covenant on Civil and Political Rights. In addition, any such treatment, that culminates in an interrogation or a statement that the victim is not permitted to read before signing, by definition undermines any evidence obtained. Furthermore, any ensuing criminal proceedings that use evidence stemming from this abuse are fundamentally tainted. The principle of a fair trial is irrevocably compromised. The ongoing detention is therefore arbitrary under category III, as defined in the Working Group's methods of work.

29. In accordance with its practice, the Working Group refers the allegation of torture to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

Disposition

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

The deprivation of liberty of Mr. Émile Bisimwa Muhirhi is arbitrary because it lacks legal basis and the right to a fair trial cannot be upheld. It falls within categories I and III of the criteria applicable to the consideration of cases submitted to the Working Group.

31. Consequently, the Working Group requests the Government of the Democratic Republic of the Congo to release Émile Bisimwa Muhirhi without delay and to take all the necessary measures to provide redress for the serious material and moral damage he has suffered, including comprehensive compensation as defined in article 9 (5) of the International Covenant on Civil and Political Rights. In addition, the Government should conduct an investigation into the circumstances surrounding the violation of his rights with a view to determining responsibility and ensuring that any offence committed is punished.

[Adopted on 3 September 2015]