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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-third session, 31 August-4 September 2015

Opinion No. 37/2015 concerning Christopher Ngoyi Mutamba (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 9 June 2015, the Working Group transmitted a communication to the Government of the Democratic Republic of the Congo concerning Christopher Ngoyi Mutamba. 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).

Submissions

Communication from the source

4. Mr. Ngoyi Mutamba, who was born on 12 September 1960, is the national president of the non-governmental organization Synergie Congo Culture et Développement (Congo Culture and Development Synergy) and the coordinator of the Société civile de la République démocratique du Congo (Civil society of the Democratic Republic of the Congo) advocacy association.

5. The source states that, from 12 January 2015, Mr. Ngoyi Mutamba participated actively in peaceful protests against the electoral reform introduced by the Government. He was particularly involved in documenting human rights violations committed during the demonstrations held on 19 and 20 January 2015.

6. The source reports that, on 21 January 2015, Mr. Ngoyi Mutamba was part of a delegation of human rights defenders who visited Kinshasa General Hospital to meet demonstrators who had been injured during rallies organized on 19, 20 and 21 January 2015 to denounce the revision of the electoral law. Several members of the Republican Guard entered the hospital and fired shots, injuring four people and terrifying patients and visitors. Mr. Ngoyi Mutamba and his colleagues managed to leave the scene without incident.

7. At around 8.30 p.m. on 21 January, Mr. Ngoyi Mutamba and his colleagues met in Victoire Square in Matonge, Kinshasa, in the immediate vicinity of the Inter Matonge Hotel, where Congolese human rights defenders who travel to Kinshasa often stay. Mr. Ngoyi Mutamba was arrested by a serviceman in uniform who asked him to follow him. He was then loaded onto a pick-up truck with no number plates and taken to an unknown location. He was not shown a warrant at the time of his arrest, nor did those who abducted him disclose their identity or the reasons for the arrest.

8. The source asserts that, at around 5.30 a.m. the next day, 22 January 2015, six men in plain clothes arrived at Mr. Ngoyi Mutamba's home with a military search warrant issued by the judge advocate's office in Gombe. They searched the property, including Mr. Ngoyi Mutamba's study, seized his travel documents and informed his relatives that he was being detained at the Gombe district military prosecutor's office.

9. Several members of Mr. Ngoyi Mutamba's family and a number of his colleagues tried to visit him at the military prosecutor's office and, later, at prisons in Kinshasa. The authorities subsequently refused to provide information on where Mr. Ngoyi Mutamba was being detained.

10. On 26 January 2015, the Director-General of the National Intelligence Agency revealed that Mr. Ngoyi Mutamba was being held by the Agency, without providing further details on the reasons for his arrest or on the exact place of detention.

11. The source reports that, on 5 February 2015, the Government's spokesperson announced the charges against Mr. Ngoyi Mutamba at a press conference in Kinshasa. The spokesperson refused to disclose where Mr. Ngoyi Mutamba was being detained and asserted that his family and lawyers had been made aware of his whereabouts. This claim was publicly denied by Mr. Ngoyi Mutamba's relatives on 8 February 2015.

12. On 10 February 2015, Mr. Ngoyi Mutamba was brought before the press by the Minister of the Interior. It was ascertained that he had been detained by the National Intelligence Agency. This was the first time that his family and lawyers had seen him since his abduction.

13. The source maintains that, according to a police report of 10 February 2015, Mr. Ngoyi Mutamba “was arrested on 21 January 2015 for having [allegedly] ordered demonstrators on 19 January 2015 ‘not to abandon the wave of demonstrations but to sustain the violence until the Head of State has fled’”. These claims were based on a telephone conversation that had supposedly taken place between Mr. Ngoyi Mutamba and a person named Kadi, about whom no further details were provided. Mr. Ngoyi Mutamba denied the allegation that, during the conversation, he called on demonstrators to “burn and destroy the homes of deputies and senators as they would with those of the Chinese”. The source adds that, in the police report, Mr. Ngoyi Mutamba was accused of the following offences: arson (Criminal Code, book II, arts. 103 and 104); wilful destruction (Criminal Code, book II, arts. 110 and 111); spreading false rumours (Criminal Code, book II, art. 199 bis); subversive propaganda (decree-law of 14 January 1961 punishing subversive propaganda, art. 1); incitement to civil disobedience (Criminal Code, book II, art. 135 bis); incitement to racial hatred (ordinance-law No. 66-342 of 7 June 1966 punishing racism and tribalism); inciting members of the military to commit acts contrary to duty or to discipline (Military Criminal Code, art. 88); criminal association (Criminal Code, book II, arts. 156, 157 and 158); attacks and conspiracies with the aim of carrying out a massacre, devastation or pillaging (Criminal Code, book II, arts. 200 and 201); and breaches of national security (Criminal Code, book II, arts. 193, para. 2, and 195).

14. On 11 February 2015, Mr. Ngoyi Mutamba was brought before the State Prosecutor-General, who, having upheld the charges of spreading false rumours (Criminal Code, book II, art. 199 bis), incitement to disobedience of the law and to revolt (Criminal Code, book II, art. 135 bis), incitement to racial hatred (Criminal Code, book I, arts. 21.4 and 23.1, and Criminal Code, book II, arts. 79 and 82), wilful destruction (Criminal Code, book I, arts. 21.4 and 23.1 and Criminal Code, book II, art. 200) and theft against him, ordered that he should be detained during his trial. He is being held at Makala Central Prison.

15. The following evidence has been used to justify Mr. Ngoyi Mutamba’s detention: (a) an audio recording of the alleged telephone conversation with the above-mentioned Kadi; (b) a draft of the speech that Mr. Ngoyi Mutamba was set to deliver at a meeting on 11 January that was banned; and (c) a leaflet calling for demonstrations on 19, 20 and 21 January, which Mr. Ngoyi Mutamba denies having written.

16. The pretrial detention order against Mr. Ngoyi Mutamba was based on articles 29, 30 and 31 of the Decree of 6 August 1959 on the Code of Criminal Procedure and provided that he should be held in pretrial detention for 15 days because “the offences are serious” and “to enable the public prosecutor’s office to gather all the evidence”. The pretrial detention order handed down by Kinshasa/Matete Magistrates’ Court was dated “2014, the 13th”, without any more information about the date of issuance, which ostensibly was prior to the commission of the offences for which Mr. Ngoyi Mutamba was accused. In addition, it is not stated in the order whether it was issued in the judge’s chambers. There is no mention of the place of issuance or of any statement or submission by the defence, and the order is not reasoned in that it offers no solid evidence of guilt. Lastly, the order was valid for 15 days from its date of issuance. That deadline passed several months ago, yet no official measures have been taken to extend the pretrial detention.

17. On 4 March 2015, the State and 22 Chinese nationals brought criminal indemnification proceedings against Mr. Ngoyi Mutamba before Kinshasa/Matete

Magistrates' Court for spreading false rumours, incitement to disobedience of the law and to revolt, incitement to racial hatred, wilful destruction and theft. As the defendant had not been notified within the legal time limit for holding the hearing, he refused to appear voluntarily. The Court therefore decided not to hear the case and set a new date of 18 March 2015 so that procedural irregularities could be resolved.

18. The source reports that, on 18 March 2015, a second hearing was held at Makala Central Prison. In anticipation of the hearing, several journalists and representatives of the international community and of Congolese civil society who wished to attend had appeared at the Court, but a number of them were refused entry. The President of the Bar submitted a request for the hearings to be held in public. The judges, who indicated that they would have to refer the matter to their superiors, could not respond to the request and decided to proceed with the hearing. Mr. Ngoyi Mutamba, who had asked for his right to a public hearing to be fully respected, filed an appeal against the Court's decision to resume the proceedings. The Court, unable to respond to the request, eventually decided to postpone the hearing pending a ruling on the matter by the appellate court.

19. On 10 April 2015, the president of the appellate court received a written request from Mr. Ngoyi Mutamba to allow the press to cover the hearing of 13 April.

20. The source reports that, on 13 April 2015, before he had even made his submissions in appeal, Mr. Ngoyi Mutamba verbally recalled his written request for the day's hearing to be covered by the press. The appellate judges, noting that dealing with the request was a prerequisite, decided to withdraw to deliberate the matter before returning to consider the submissions in appeal. They undertook to deliver a provisional ruling within 24 hours, by 14 April.

21. On 15 April 2015, they ruled that Mr. Ngoyi Mutamba's appeal was inadmissible, which prevented him from making his submissions in appeal.

22. Mr. Ngoyi Mutamba's lawyers had prepared an application for release from detention, but given that proceedings had been initiated before the Court, the lawyers considered that it was to the Court that the application should be submitted. However, in the light of developments with regard to holding the hearings in public and of the referral of the matter to the appellate court prior to the consideration of the merits of the case, doing so proved impossible. Mr. Ngoyi Mutamba's lawyers, who planned to file a cassation appeal against the appellate court's ruling, hoped to submit the application to the court of cassation.

23. The source alleges that the proceedings against Mr. Ngoyi Mutamba have been marred by grave irregularities, including the lack of an arrest warrant, the failure to meet the legal deadline for holding the hearing before the court in Kinshasa on 4 March 2015, serious mistakes in the drafting of the pretrial detention order and the failure to respect the right to a public hearing at Makala Central Prison on 18 March 2015 and before the appellate court on 13 April. These irregularities constitute violations of Congolese law and of international norms relating to the rights to liberty and security of person and to a fair trial. When considered together, these irregularities suggest that Mr. Ngoyi Mutamba enjoys no protection under the law and render the violations so serious as to give the detention an arbitrary character.

24. The source claims that, when Mr. Ngoyi Mutamba was arrested, no warrant was presented.

25. The source states that Mr. Ngoyi Mutamba was prevented from preparing his defence before the court in Kinshasa on 4 March 2015 owing to the failure to meet the legal deadline for holding the hearing.

26. The source states that the pretrial detention order issued by the judges of Kinshasa/Matete Magistrates' Court is dated "2014, the 13th", without specifying the date of issuance, which ostensibly was prior to the commission of the offences for which Mr. Ngoyi Mutamba was accused. The date, however, is a key element and a failure to mention it renders the order void. Moreover, it is not stated in the order whether it was issued in the judge's chambers, despite the fact that article 30, paragraph 1, of the Congolese Code of Criminal Procedure stipulates that it should be issued in the judge's chambers; according to Congolese case law, pretrial detention orders issued at hearings are rendered void on procedural grounds. There is also no mention of the place of issuance or of any statement or submission of defence, as required by article 30, paragraph 2, of the Code. The order is not reasoned in that it offers no solid evidence of guilt, notwithstanding the fact that according to Congolese doctrine and case law, the existence of such evidence is a basic condition for pretrial detention; the requirement is implicitly established in article 27, paragraph 1, of the Code. Lastly, the order was valid for 15 days from the date of issuance. That deadline passed several months ago, yet no official measures have been taken to extend the pretrial detention.

27. Regarding the failure to respect the right to a public hearing, the source alleges that, on 18 March 2015, several journalists and representatives of the international community and of Congolese civil society were not allowed to attend Mr. Ngoyi Mutamba's hearing at the court in Kinshasa. Following a request from the President of the Bar, the judges, who indicated that they would have to refer the matter to their superiors, decided to proceed with the hearing in private, even though article 66 of the Organic Act of 11 April 2013 on the organization, functioning and competence of ordinary courts grants Congolese judges very extensive powers, including with regard to the conduct of proceedings and to the maintenance of order in the court. In addition, Mr. Ngoyi Mutamba's request for the press to be allowed to cover the hearing of 13 April 2015 before the appellate court was declared inadmissible by the appellate judges and Mr. Ngoyi Mutamba was prevented from making his submissions in appeal.

28. The source alleges that Mr. Ngoyi Mutamba is in detention for exercising universally recognized human rights, in particular the rights to freedom of expression and to peaceful assembly, which include the right, individually and in association with others, to promote and protect human rights. Mr. Ngoyi Mutamba's detention is therefore arbitrary in that it constitutes a form of harassment that runs counter to international human rights standards and to the corresponding obligations of the Democratic Republic of the Congo. The detention is also arbitrary in that it is aimed at punishing Mr. Ngoyi Mutamba and at preventing him from acting to promote and to encourage respect for universally recognized human rights.

29. In the light of the foregoing, the source contends that Mr. Ngoyi Mutamba's deprivation of liberty is arbitrary and falls under categories II and III of the categories applicable to the consideration of cases submitted to the Working Group, in that it lacks any legal basis and runs counter to articles 7, 9, 10, 19 and 20 of the Universal Declaration of Human Rights and to articles 9, 14, 19, 21, 22 and 26 of the International Covenant on Civil and Political Rights, to which the Democratic Republic of the Congo acceded on 1 November 1976.

Response from the Government

30. The Working Group notes that the Government of the Democratic Republic of the Congo has not replied to the communication addressed to it on 9 June 2015. As the 60-day deadline for replying has long passed, the Working Group is now in a position to conduct its deliberations, in accordance with its methods of work.

Discussion

31. In the absence of a rebuttal from the respondent State, the Working Group must limit itself to assessing the credibility and reliability of the source solely on the basis of the information at its disposal. In this regard, the Working Group notes that the source's account is consistent and presents no contradictions. Moreover, the allegations in the present case are similar to those made in other recent cases before the Working Group, including opinions Nos. 25/2015 (abuse of power by officials of the National Intelligence Agency) and 31/2015 (detention of a human rights defender). The Working Group is therefore convinced of the accuracy of the facts as summarized in the following paragraph.

32. Mr. Ngoyi Mutamba is a civic activist who opposes the constitutional reform of the presidential mandate and who chose to investigate the recent violence suffered by members of the public during the demonstrations of 19 and 20 January 2015. While he was visiting victims of the violence on 21 January, the security forces burst into the hospital but were unable to apprehend him. Later that day, at around 8.30 p.m., he was arrested in the city near a hotel that is very popular with other activists. He was not informed of any charges and knew nothing about the identity of the individuals who arrested him. The day after his arrest, his home was searched by law enforcement officers, who stated that he was being held at a location where his family were subsequently unable to find him. It was not until 26 January 2015 that the Director-General of the National Intelligence Agency stated that he was being detained on the Agency's premises, without specifying the exact location. It was not until 10 February 2015, almost three weeks after his arrest, that he was finally presented to the press along with a police report detailing the charges against him. In the criminal case file, some of the procedural documents are flawed because essential elements such as dates and locations are missing. The public nature of the hearings in the ensuing criminal proceedings was also affected, and the defendant complained that the schedule of the judicial proceedings had not allowed him to prepare adequately.

33. In the Working Group's view, in this case, Mr. Ngoyi Mutamba was the victim of an arrest that had no legal basis and was therefore arbitrary owing to a violation of article 9, paragraph 1, of the International Covenant on Civil and Political Rights. The secret nature of the detention for the first three weeks throws serious doubt on the proceedings, which are vitiated by an irregularity that is difficult to rectify. Moreover, the right to a fair trial as established in article 14 of the International Covenant on Civil and Political Rights includes the right to a public hearing by an independent and impartial tribunal. That did not occur in the case in question, which means that this fundamental right too was violated.

34. Lastly, on the basis of the information at the Working Group's disposal, there is no doubt that this arrest and prosecution are the result of Mr. Ngoyi Mutamba's activism as a human rights defender.

35. Considered as a whole, this situation of abuse hence meets the definition of arbitrary detention under categories I, II and III of the categories applicable to the consideration of cases submitted to the Working Group.

Disposition

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

The ongoing deprivation of liberty of Mr. Ngoyi Mutamba is arbitrary because it lacks a legal basis, because it results from the exercise by the victim of his fundamental rights and because his right to a fair trial has not been respected.

His detention therefore falls under categories I, II and III of the categories applicable to the consideration of cases submitted to the Working Group.

37. Consequently, the Working Group requests the Government of the Democratic Republic of the Congo to release Mr. Ngoyi Mutamba immediately and to take all necessary steps to remedy the serious material and moral harm that he has suffered by providing full reparation in line with article 9, paragraph 5, of the International Covenant on Civil and Political Rights. The Government should also ensure that an investigation is carried out to establish the facts and to apportion responsibility, and that any misconduct is punished.

[Adopted on 4 September 2015]
