

Opinion No. 74/2017

concerning Franck Diongo Shamba (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. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 19 September 2017 the Working Group transmitted to the Government of the Democratic Republic of the Congo a communication concerning Franck Diongo Shamba. 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 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).

Submissions

Communication from the source

4. Franck Diongo Shamba is a citizen of the Democratic Republic of the Congo and resides in Kinshasa, the capital.

5. According to the source, Mr. Diongo Shamba is the member of the National Assembly of the Democratic Republic of the Congo for the electoral district of Lukunga and president of the Mouvement Lumumbiste Progressiste (Progressive Lumumbist Party), an opposition political party. The source notes that Mr. Diongo Shamba's political activities are directly related to his arrest and detention.

6. The source explains that on 19 December 2016, the day of Mr. Diongo Shamba's arrest in Kinshasa, many members of the security forces were deployed to prevent any form of protest in relation to the end of Joseph Kabila's term of office on 20 December 2016. According to the source, many opponents of the regime were arrested throughout the country during the same period.

7. According to the source, it seems very clear that the authorities wanted to prevent any initiative to challenge the sitting Government and took all the necessary measures to prevent any person or organization likely to spark such a debate from taking any action. These measures included arbitrary arrests and detentions, looting and acts of torture.

8. The source explains that Mr. Diongo Shamba was arrested with some 50 members of the Mouvement Lumumbiste Progressiste at his residence in Kinshasa. The arrest was reportedly extremely violent and was carried out by soldiers of the Republican Guard under the leadership and direct command of the general who is also the chief of staff appointed under Presidential Order No. 14/069 of 16 November 2014 and of his general deputy.

9. According to the source, these forces did not have an arrest warrant and were not executing the decision of a public judicial authority. They arrested Mr. Diongo Shamba alleging that he had been caught in the act (in flagrante delicto) of abducting, detaining and assaulting three soldiers of the Republican Guard (members of the seventh artillery regiment).

10. According to the source, the circumstances preceding the arrest demonstrate the implementation of a strategy clearly orchestrated at the highest level of government to trick Mr. Diongo Shamba so that he could be arrested.

11. According to the source, in the early hours of 19 December 2016, the general who is the chief of staff dispatched three of his subordinates in civilian clothing to identify Mr. Diongo Shamba's residence with a view to breaking into it. These three "armed scouts" were neutralized by members of the public not far from the entrance to Mr. Diongo Shamba's home. Once they had been disarmed, they were brought to Mr. Diongo Shamba for appropriate action. According to the source, they were already in the hands of, and under the protection of, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, which Mr. Diongo Shamba had called to prevent a public lynching, when he was arrested on the pretext of abducting these three individuals.

12. According to the source, the general who is the chief of staff arrested Mr. Diongo Shamba with a totally disproportionate use of combat weapons. He conducted a raid with heavy weapons on Mr. Diongo Shamba's residence, during which many civilians were injured and assaulted. Some were arrested and released on the same day. According to the source, Mr. Diongo Shamba's home was destroyed, ransacked, looted and temporarily occupied by the Republican Guard.

13. Fifteen members of the Mouvement Lumumbiste Progressiste who were present were transferred to the Tshatshi camp, where they remained in detention on the date of the complaint. The source notes that eight of them were acquitted, while the other seven were sentenced to 7 months' imprisonment under Judgment RP 24.828 handed down by the High Court of Kinshasa-Gombe on 3 June 2017.

14. The source reports that, in the hours following the arrest, at the Tshatshi camp to which he was transferred with all those arrested on the same day, including activists, family members, neighbours and boys, Mr. Diongo Shamba was subjected to many acts of torture that had serious consequences, including injections of harmful substances, having his arms broken with a rifle butt and burned with sulfuric acid and his legs fractured through bayonet blows, and serious injuries caused by iron wire and bars.

15. It was not until the next day, 20 December 2016, that, despite his alarming state of health necessitating emergency medical treatment, Mr. Diongo Shamba was transferred to the Public Prosecutor's Office and appeared before the Supreme Court. The Court ordered his pretrial detention without a hearing, as is confirmed in Judgment RP 019/CR/2016.

16. According to the source, Mr. Diongo Shamba's detention is taking place under the control of the officers of the Republican Guard, under the direct authority of the Head of State. Mr. Diongo Shamba was held successively at the following locations: the Tshatshi military camp in Kinshasa, the headquarters of the Republican Guard; the headquarters of the military intelligence service in Kinshasa, where he was subjected to inhuman and degrading acts; a cell at the Public Prosecutor's Office; and the Makala prison, a penal and rehabilitation centre in the Selembao commune of Kinshasa, where he remained at the time of the submission of the communication to the Working Group.

17. The source notes that the use of the flagrante delicto procedure, resulting from a staged incident, enabled the authorities to circumvent article 107 of the Constitution, which prohibits the arrest and prosecution of members of the parliament without the prior authorization of the National Assembly or the Senate. The Public Prosecutor's Office brought Mr. Diongo Shamba before the courts on the

basis of Legislative Ordinance No. 78/001 of 24 February 1978 concerning punishment of flagrant offences. The source notes that the Act of 19 February 2013 on proceedings before the Court of Cassation, which provides for a specific procedure for parliamentarians, was not, however, respected. According to the source, the notification required under article 74 of the Act was not given.

18. According to the source, the prosecutor retained the charges of aggravated arbitrary arrest and arbitrary detention, as well as attempted murder of members of the Republican Guard, offences punishable by articles 4, 44, 45 and 67 (1) and (2) of the Criminal Code (vols. I and II). These offences are punishable by death (attempted murder — articles 4 and 44) and life imprisonment or death (aggravated arbitrary arrest and detention — article 67). The prosecutor requested a sentence of 15 years' imprisonment.

19. According to the source, the Supreme Court partially granted the indictment and convicted Mr. Diongo Shamba of the offences of arbitrary arrest and unlawful detention followed by torture, as provided for in article 67 (1) and (2) of the Criminal Code. The Court held that Mr. Diongo Shamba was responsible on the grounds that he was the mastermind behind the offences, having given the orders to carry them out. The Court did not, however, apply the sentence proposed by the Public Prosecutor's Office but imposed a penalty of 5 years' imprisonment.

20. According to the source, on 27 February 2017 Mr. Diongo Shamba filed a complaint against the Congolese State and the general in question with the Auditor General of the Armed Forces of the Democratic Republic of the Congo.

21. The source notes that the Supreme Court ruled in first and last instance, which means that there was no possibility of appealing the decision. In addition, no administrative remedies are available.

22. The source considers that Mr. Diongo Shamba's arrest and detention constitute arbitrary deprivation of liberty under categories II, III and V as defined in the methods of work applicable to the consideration of cases submitted to the Working Group.

Category II

23. Mr. Diongo Shamba, a member of the national parliament and president of the Mouvement Lumumbiste Progressiste, was arrested on 19 December 2016, together with some 50 members of his movement opposing the regime in the Democratic Republic of the Congo. Before his arrest, he regularly received death threats, including through anonymous telephone messages. These attacks aimed solely to prevent him from freely exercising his right to freedom of expression, association and peaceful assembly. In addition to the threats, Mr. Diongo Shamba was often the victim of physical attacks and assassination attempts.

24. Furthermore, the headquarters of his political party was the target of numerous acts of vandalism, in relation to which all complaints proved fruitless, as the judicial and government authorities acted as silent accomplices. The source emphasizes that, in spite of the threats and attacks against him, Mr. Diongo Shamba never ceased to exercise his right to freedom of expression, assembly and association, risking his life to do so.

25. At the time of his arrest, President Joseph Kabila's term in office was coming to an end and Mr. Diongo Shamba was the only opposition leader to call on the people to publicly protest against his continued rule. On the day of Mr. Diongo Shamba's arrest, the leader of the Union pour la Démocratie et le Progrès Social (Union for Democracy and Social Progress) had instructed people to stop challenging the authority of the Head of State.

26. The source notes that between 14 and 20 December 2016, a series of very strict measures were adopted by various local and central authorities to silence critics and those who supported political dialogue. In addition to these measures, many arrests were made, with the sole aim of preventing the free expression of opinions and the organization of protests.

27. Mr. Diongo Shamba's arrest took place precisely in this context. It served no other purpose than to prevent him from exercising his right to freedom of expression (article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights), freedom of association (article 20 of the Universal Declaration and article 22 of the Covenant) and freedom of peaceful assembly (article 21 of the Covenant). The source submits that Mr. Diongo Shamba's detention is therefore arbitrary under category II.

Category III

28. Mr. Diongo Shamba's detention is also arbitrary under category III of the Working Group's methods of work, since he was deprived of the guarantees of the right to a fair trial, as recognized by international standards and outlined below.

(i) Violation of the right not to be subjected to arbitrary arrest

29. The source notes that Mr. Diongo Shamba's arrest was undoubtedly made in conditions that violated article 9 (1) of the Covenant, which provides that no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. Principles 2 and 36 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment are also applicable in the present case.

(ii) Violation of the right to challenge one's detention through a review of its legality by an independent judge

30. According to the source, Mr. Diongo Shamba's detention was approved by the Court a posteriori, more than 24 hours after his arrest. Despite the fact that his state of health warranted a medical consultation, the Court ordered his pretrial detention, indicating that this measure would be replaced by house arrest. However, this house arrest never came into effect since Mr. Diongo Shamba was placed under high military surveillance in the medical unit of the Makala prison, where he had been admitted after the torture suffered during his arrest and the first hours of detention.

31. The source asserts that the conditions of his detention while he awaited the court decision, which did not take into consideration the need for specific measures to respond to Mr. Diongo Shamba's state of health, constitute at least a violation of article 9 (3) of the Covenant.

(iii) Violation of the right to an independent and impartial tribunal and equality of arms

32. The requirement of independence of the judiciary under article 14 (1) of the Covenant is considered an absolute requirement because it cannot be restricted. The source refers to the Human Rights Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, which notes that the requirement of independence refers, among other things, to the actual independence of the judiciary from political interference by the executive branch and the legislature. The standard of independence and fairness must be measured by objective and reasonable criteria. Article 14 also requires that the prosecution and the defence enjoy equality of arms. In the present case, the source notes that there was clearly no equality of arms given the conditions under which Mr. Diongo Shamba appeared and the expedited nature of the proceedings.

(iv) Violation of the right to be presumed innocent

33. The source maintains that, in violation of article 14 (2) of the Covenant, the Government, at the highest level, violated Mr. Diongo Shamba's right to the presumption of innocence by stating publicly, from the moment of his arrest, that he was guilty. Indeed, national radio and television were already publicly commenting on Mr. Diongo Shamba's conviction even before the "court ruling".

(v) Violation of the right to communicate freely with one's lawyer and the right to adequate time for the preparation of a defence

34. The source notes that Mr. Diongo Shamba was tried in expedited proceedings in violation of all guarantees to which persons charged with a criminal offence are entitled, including the right to be informed of the charges against them in a language that they understand, the right to prepare their defence with the counsel of their choice, the right to be present at their own trial and to participate in their own defence, the right to examine witnesses, the right to an interpreter and the right to silence.

35. According to the source, Mr. Diongo Shamba's essential right to the assistance of a lawyer from the outset was violated because he was unable to meet with his lawyers before the proceedings.

36. Furthermore, Mr. Diongo Shamba was detained incommunicado, tortured and immediately brought before the Supreme Court, without being given any opportunity to have contact with his lawyers. The source recalls that Mr. Diongo Shamba was in a seriously deteriorated state of health during the hearing because of the ill-treatment to which he had been subjected at the time of his arrest and in the first hours of detention. During the hearing he was on a drip and using a wheelchair. According to the source, it is now evident that it would have been extremely difficult for him to communicate with his lawyers.

37. The source also notes that Mr. Diongo Shamba was unable to examine the witnesses for the prosecution or have them examined. Similarly, he was unable to have witnesses for the defence called and examined.

(vi) Violation of the right to have one's conviction reviewed by a higher court

38. The source notes that Mr. Diongo Shamba's right to have his conviction reviewed by a higher tribunal, as provided for in article 14 (5) of the Covenant and article 21 of the Constitution of the Democratic Republic of the Congo, has been violated. Even in flagrante delicto cases, the right to appeal a judgment is a fundamental right.

39. In the present case, the source notes that Mr. Diongo Shamba's trial was held before the judges of the Supreme Court acting as a court of cassation and sitting in first and last instance. The source recalls that Mr. Diongo Shamba therefore had no right of appeal under national law.

(vii) Violation of the right not to be subjected to torture or inhuman or degrading treatment or punishment

40. The source submits that the arrest and detention of Mr. Diongo Shamba were carried out in clear violation of articles 7 and 10 of the Covenant and articles 1 and 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

41. In addition to the conditions of arrest, the source recalls the inhumane conditions in which Mr. Diongo Shamba was forced to appear before the Supreme Court starting on 20 December 2016. Having been forcibly taken from the emergency room of the Ngaliema hospital by the police against his doctors' strict orders, he was forced to appear covered in blood, sitting in a wheelchair while on a drip for more than 12 hours, from 10 a.m. to 11.50 p.m.

42. According to the source, Mr. Diongo Shamba's lawyers argued that it was not possible to conduct proceedings given their client's state of health. The transcript of certain sections of the hearing that it was possible to film are illuminating in this regard. The defence lawyers asked for a postponement of the hearing so that their client could receive treatment.

43. In response to the arguments put forward by the defence lawyers, the prosecutor merely explained that the defendant had been transferred to the clinic before coming to the hearing and that he had been examined by a doctor. The prosecutor said that the medical report he had received did not note anything in particular, but Mr. Diongo Shamba's lawyers argued that, owing to the corruption of certain members of the clinic to which their client had been transferred, the medical report they had written was worthless.

44. According to the source, the Court ruled without commenting on the invoked incapacity of Mr. Diongo Shamba to participate in the trial in a manner that would allow him to exercise his rights appropriately.

45. In the light of the circumstances described above, the source submits that the severity required to conclude a violation of the right to a fair trial resulting in arbitrary detention has been met in the case of Mr. Diongo Shamba.

Category V

46. The source submits that Mr. Diongo Shamba's detention is also arbitrary under category V of the Working Group's methods of work because he was deprived of his liberty for discriminatory reasons based on his political opinions. In the present case, Mr. Diongo Shamba was targeted by the Government because of his position as president of the Mouvement Lumumbiste Progressiste, which opposed the regime. The source recalls that on 19 December 2016, Mr. Diongo Shamba was the only opposition leader to have publicly called for peaceful protests. According to the source, Mr. Diongo Shamba was therefore detained because of his political opinion by a government that has decided to silence all forms of expression of that view, in contravention of article 8 of the Constitution, which recognizes that rights related to the existence of political opposition, its activities and its efforts to ensure the democratic assumption of power are inviolable. The source stresses that Mr. Diongo Shamba's detention violates both national and international law.

Response from the Government

47. On 19 September 2017, the Working Group transmitted the allegations of the source to the Government through its regular communication procedure. It requested the Government to provide its response by no later than 18 November 2017. To date, the Government has neither replied nor requested an extension of the deadline, as permitted under the Working Group's methods of work.

Discussion

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

49. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

50. In the light of all the information received, the Working Group considers that the source has made credible prima facie allegations that can be summarized as follows: on 19 December 2016, President Kabila's second and final constitutional term of office should have come to an end. Mr. Diongo Shamba, a member of the national parliament and president of the Mouvement Lumumbiste Progressiste, was the only opposition leader to call on the people to demonstrate publicly. He was arrested on 19 December 2016, with some 50 members of the movement, at his home in Kinshasa. The arrest was extremely violent and carried out by soldiers of the Republican Guard, who claimed a flagrante delicto case of abducting, detaining and assaulting three members of the Republican Guard. Since then, Mr. Diongo Shamba has remained in detention, although other members of the opposition arrested at the same time have been released.

Violations under category II

51. The Working Group notes that Mr. Diongo Shamba was arrested on 19 December 2016 together with some 50 members of a movement headed by him that opposed the regime in the Democratic Republic of the Congo. It further notes that, according to the source, the headquarters of Mr. Diongo Shamba's political party was the target of numerous acts of vandalism, all complaints regarding which have been in vain.

52. The Working Group also notes that the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo has confirmed that the de facto general prohibition on demonstrations in the country was unjustified and disproportionate to the need to maintain public order as well as contrary to international human rights law, including article 20 of the Universal Declaration of Human Rights and article 21 of the Covenant, which provide for freedom of peaceful assembly.

53. Regarding the source's allegations concerning the various threats and attacks against Mr. Diongo Shamba, the Working Group notes that it has not been established that this was the Government's doing. However, there is no doubt that it is the responsibility of the State to ensure that every citizen and/or resident can enjoy his or her rights and freedoms without undue restrictions.

54. Moreover, in view of the facts presented by the source, the Working Group considers that it has been established that Mr. Diongo Shamba was arrested as a result of exercising his freedom of expression, association and peaceful assembly, as guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant. This violation by the Democratic Republic of the Congo amounts to the arbitrary deprivation of the liberty of Mr. Diongo Shamba, an act that falls under category II.

Violations under category III

55. The Working Group considers that it has been established that Mr. Diongo Shamba was arrested and detained without a warrant and without any prior judicial decision, in violation of his rights under article 9 of the Covenant and principles 2 and 36 of United Nations General Assembly resolution 43/173 of 9 December 1988.

56. The Working Group notes that the report of the United Nations Joint Human Rights Office on human rights violations in the Democratic Republic of the Congo in the context of the events of 19 December 2016 confirms that Mr. Diongo Shamba was detained at the headquarters of the military intelligence service, where he was subjected to cruel, inhuman and degrading treatment. Despite his extremely worrying state of health, which required emergency medical care, Mr. Diongo Shamba appeared before the Supreme Court on 20 December 2016.

57. Mr. Diongo Shamba's detention was approved by the Court more than 24 hours after his arrest. Despite having full knowledge of his state of health, the Court ordered his pretrial detention. Accordingly, the Working Group considers that it has been established that Mr. Diongo Shamba was deprived of his liberty in violation of article 9 (3) of the Covenant.

58. Furthermore, in the light of these allegations, the Working Group concludes that the fact that the Court ordered the pretrial detention of Mr. Diongo Shamba without a hearing, as reflected in Judgment RP 019/CR/2016, is a violation of article 14 of the Covenant.

59. The Working Group considers that the source's allegations highlight a breach of the principle of equality before the law, in violation of article 14 (1) of the Covenant, given the refusal to allow Mr. Diongo Shamba to receive treatment in the hospital of his choice and the expedited nature of the proceedings. Article 14 (1) of the Covenant also requires that the prosecution and the defence enjoy equality of arms. The source notes that the corruption of staff of the clinic to which Mr. Diongo Shamba was transferred meant that the medical report had no value. Without ruling on whether these allegations are well-founded, the Working Group recalls that the Democratic Republic of the Congo acceded to the United Nations Convention against Corruption on 23 September 2010, and that it therefore has a duty to strengthen measures to prevent and combat corruption more effectively and to promote integrity, accountability and proper management of public affairs and public property. Corruption can affect the quality of justice and therefore lead, depending on the circumstances, to biased justice, in violation of article 14 of the Covenant.

60. The Working Group also concludes that the fact that the Government and national radio and television commented publicly on Mr. Diongo Shamba's guilt before the Court had rendered its decision contravenes the principle of the presumption of innocence and constitutes a violation of article 14 (2) of the Covenant (see opinions Nos. 35/2017 and 36/2016).

61. With regard to the source's allegations concerning the right to communicate with a lawyer, the right to adequate time for the preparation of a defence and the right to examine witnesses, the Working Group considers that these allegations disclose violations of article 14 (3) (b) and (e), since Mr. Diongo Shamba was not able to prepare his defence with a counsel of his own choosing, or to call witnesses. In addition, the fact of having deprived Mr. Diongo Shamba of the assistance of a lawyer from the outset of the case amounts to a violation of article 14 (3) (b) of the Covenant.

62. The Working Group also concludes that, as the Supreme Court ruled at first and last instance, Mr. Diongo Shamba's fundamental right to have his conviction reviewed by a higher tribunal, as enshrined in article 14 (5) of the Covenant, has been violated. The Working Group notes that article 21 of the Constitution of the Democratic Republic of the Congo provides for the same guarantee, and it therefore finds that the violation is also of a constitutional nature.

63. The Working Group is particularly concerned about the ill-treatment of Mr. Diongo Shamba. It wishes in particular to draw attention to the source's allegations that Mr. Diongo Shamba was denied appropriate medical care and held incommunicado. According to the source, the Court ruled without considering the invoked incapacity of Mr. Diongo Shamba, owing to his state of health, to participate in the proceedings in a manner that would allow him to exercise his rights appropriately, in violation of detention standards, including the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (see opinion No. 35/2016, para. 20). This conduct is contrary to the duty of prosecutors to respect and protect human dignity and uphold human rights, and contrary to the obligations of the Democratic Republic of the Congo under articles 12, 13 and 16 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

64. Without ruling on the source's allegations concerning acts of torture, the Working Group considers it appropriate to refer the allegations to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, in accordance with paragraph 33 (a) of its methods of work.

65. In the light of the circumstances described above, the severity threshold required to conclude a violation of the right to a fair trial resulting in arbitrary detention has been met in the case of Mr. Diongo Shamba. His arrest and detention were carried out in clear violation of article 5 of the Universal Declaration of Human Rights, articles 7 and 10 of the Covenant, articles 1 and 4 of 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, rule 25 of the Nelson Mandela Rules and opinion No. 35/2016 of the Working Group on the obligation to give special attention to persons with special health-care needs, which provides that the failure to take such measures would add gravity to the arbitrariness of the deprivation of liberty.

66. The Working Group therefore concludes that the non-observance of the international norms relating to the right to a fair trial established in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the other relevant international instruments is of such gravity as to give the deprivation of liberty of Mr. Diongo Shamba an arbitrary character that places it in category III, as defined in the Working Group's methods of work.

Category V

67. The Working Group considers that, in addition to having been prevented from exercising his right to freedom of expression, association and peaceful assembly, Mr. Diongo Shamba also suffered discrimination that may be based on his position as president of the Mouvement Lumumbiste Progressiste and his status as a leader in challenging any extension of the President's term of office. Because of this discrimination based on political considerations, Mr. Diongo Shamba was treated differently from all the other arrested persons. This discrimination has led to prolonged detention and to different treatment, making Mr. Diongo Shamba's detention arbitrary under category V.

68. In conclusion, the Working Group is particularly concerned by the management of this orchestrated violation by the judges, in the light of article 14 (1) of the Covenant. The judges failed in their duty of justice and undermined citizens' trust in their ability to rule on points of law in a manner equitable for all (see also opinion No. 29/2017). This case should be referred to the Special Rapporteur on the independence of judges and lawyers.

Disposition

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

The deprivation of liberty of Franck Diongo Shamba, being in contravention of articles 2, 5, 7, 9, 19 and 20 of the Universal Declaration of Human Rights and of articles 2, 3, 7, 9, 10, 14, 19, 21 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

70. The Working Group requests the Government of the Democratic Republic of the Congo to take the steps necessary to remedy the situation of Mr. Diongo Shamba 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.

71. The Working Group considers that, given all the circumstances of the case, the appropriate remedy would be to release Mr. Diongo Shamba immediately and accord him an enforceable right to reparation, including compensation and a guarantee of non-repetition, in accordance with international law, and to provide him with medical care as needed and appropriate for his condition.

72. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

Follow-up procedure

73. 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 Mr. Diongo Shamba has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Diongo Shamba;
- (c) Whether an investigation has been conducted into the violation of M. Diongo Shamba's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Democratic Republic of the Congo with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

74. 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.

75. The Working Group requests the source and the Government to provide the above information within six months of the date of the 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.

76. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and 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.¹

[Adopted on 21 November 2017]

¹See Human Rights Council resolution 33/30, paras. 3 and 7.