Opinion No. 25/2017

concerning Jean-Claude Mbango, Samba Mountou Loukossi and Ismaël Chrislain Mabarry (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/33/66), on 20 January 2017 the Working Group transmitted to the Government of the Congo a communication concerning Messrs. Jean-Claude Mbango, Samba Mountou Loukossi and Ismaël Chrislain Mabarry. 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. The present communication concerns the following three men, who are citizens of the Congo:
(a) Jean-Claude Mbango, born on XX March XXXX, who was a police colonel and former chief of police of the department of Pool (south-west region). He was arrested on 11 May 2013;
(b) Samba Mountou Loukossi, born on XX August XXXX, who was a bailiff. He was arrested on 31 March 2013;
(c) Ismaël Chrislain Mabarry, born on XX June XXXX, who was a police sergeant. He was arrested on 18 April 2013.
5. According to the source, Messrs. Mbango, Mountou Loukossi and Mabarry have been arbitrarily detained since their arrest. All three were first held at the Directorate-General of Territorial Security until 13 June 2013, without their lawyers being able to meet them. They were then transferred to Brazzaville prison, where they remain in pretrial detention.
6. The prosecutor initially opened a judicial investigation against them for armed robbery, illegal possession of weapons of war, breach of internal State security, complicity and criminal association.

The source notes that the three persons under investigation vigorously protest their detention and maintain their innocence.

Ill-treatment

7. According to the source, Messrs. Mbango, Mountou Loukossi and Mabarry were all three subjected to ill-treatment shortly after their arrest.

8. Mr. Mountou Loukossi has alleged that in April 2013 he was subjected to ill-treatment amounting to torture at the Makélékélé and Ouenza Mandzandza police stations. According to the source, several photographs show marks of torture caused by lighted candles being applied to various parts of his body, including the most sensitive areas. The trousers that he wore during his incommunicado detention at the Directorate-General of Territorial Security were bloodstained. Furthermore, his condition was a matter of grave concern, and the medical prescription of the Public Prosecutor at the Supreme Court recommending that he should receive medical and therapeutic treatment in a hospital was not complied with.

9. According to the source, Mr. Mbango has also suffered ill-treatment. In January 2014, following unrest in Brazzaville, he was transferred to a detention centre in Impfondo, 600 kilometres from Brazzaville, together with some other detainees, and it was there that he was reportedly subjected to abuse in an unlit room for more than six months.

10. Lastly, the source reports that Mr. Mabarry has similarly suffered ill-treatment. He was detained incommunicado for five weeks at the police station in the third arrondissement of Brazzaville, without his family or his lawyers being informed of his place of detention. At the police station, he was subjected to very long interrogations marked by brutality and abuse. Furthermore, the source reports that his two foreign lawyers were able to see first-hand in June 2015 that Mr. Mabarry was lying on a mattress in one of the prison yards, apparently unattended, except for a woman crouching next to him.

Procedure

11. According to the source, Messrs. Mbango and Mabarry were not brought before a judge for more than two years and were thus detained without a valid order. Mr. Mbango did not appear before an investigating judge (the senior investigating judge of the Brazzaville *tribunal de grande instance* (court of major jurisdiction)) until 19 June 2015, when a detention order was finally issued against him. His indictment and the detention order were subsequently set aside and replaced by orders issued by a second investigating judge on 25 August 2015. Mr. Mabarry first appeared before an investigating judge on 4 September 2015, when he was charged and issued with a detention order. Lastly, Mr. Mountou Loukossi was brought before the senior investigating judge of the Brazzaville *tribunal de grande instance* and charged on 21 June 2013.

12. The source recalls that, under article 108 of the Criminal Code of Procedure, “anyone taken into custody under an arrest warrant who has been held for over 72 hours in a public gaol without a hearing is deemed to be arbitrarily detained”. It further recalls that, under article 121 of the Code, pretrial detention must not exceed four months and may be renewed once only for no longer than two months. According to the source, the three detainees are therefore being arbitrarily detained.

13. On 6 August 2014, Messrs. Mbango, Mountou Loukossi and Mabarry's lawyer filed an application for release with the Indictments Division of the Brazzaville Court of Appeal. In a judgment of 15 October 2014, the Division declared the application admissible but dismissed it on the merits. The Division noted that the “senior judge had been unable to take certain steps within his competence” and had merely extended the detention of the three men several times, and it ordered the senior investigating judge to “file charges against them immediately and without further delay and to regularize their detention orders”. The Indictments Division found that certain required investigative steps had not been taken owing to resistance by Colonel Mbango, “who refused to appear before the senior judge for further steps in the proceedings, thus making it impossible for the Indictments Division to make a sovereign and informed assessment of the merits of the application for provisional release”.

14. The source notes that, notwithstanding the clear reminder of the rules of law and fundamental principles, the Indictments Division refused to sanction the procedural irregularities, choosing instead to order the investigating judge to address them by regularizing the detention orders of Messrs.

Mbango, Mountou Loukossi and Mabarry. The source also highlights that, during the hearing before the Indictments Division, the Public Prosecutor at the Court of Appeal — the supreme prosecuting authority — took a clear stance in his submissions in favour of the release of the detainees. Lastly, the source vigorously contests the reasoning that a detained person would be able to prevent a senior investigating judge from conducting a judicial investigation by avoiding being charged.

15. The decision of the Indictments Division was appealed on a point of law. In its judgment of 16 June 2015, the Criminal Division of the Supreme Court declared the appeal inadmissible on the grounds that the sum deposited with the registry of the Supreme Court by Messrs. Mbango, Mountou Loukossi and Mabarry's lawyer was insufficient. The lawyer deposited 10,000 CFA francs, whereas the Supreme Court ruled that that sum should have been multiplied by three because he was representing three clients. Messrs. Mbango, Mountou Loukossi and Mabarry's lawyer contested that interpretation of the rules of procedure and during the proceedings adduced case law showing that the established practice in the Congo is to deposit only 10,000 CFA francs per appeal, regardless of the number of appellants.

16. In any event, the source points out that the Supreme Court's reasoning should have led it to admit at least one of the appeals, given that the sum of 10,000 CFA francs had in fact been deposited. According to the source, in view of the gravity of the issues at stake in terms of civil liberties, human rights, rights of the defence and respect for the proper administration of justice, at least one of the appeals should have been admitted as a matter of course.

17. According to the source, the Indictments Division of the Brazzaville Court of Appeal and the Supreme Court of the Congo knowingly upheld the arbitrary detention of the three detainees.

18. On 13 July 2015, the Indictments Division of the Brazzaville Court of Appeal delivered a new judgment on an action for annulment brought by Mr. Mbango's counsel. The Indictments Division annulled the record of Mr. Mbango's first appearance before the senior investigating judge dated 19 June 2015 and the detention order issued against him on the grounds that, at that date, none of Mr. Mbango's lawyers had been called to appear. However, the source notes that, instead of ordering Mr. Mbango's immediate release, the Indictments Division sent the case back to the investigating judge for regularization. A new detention order was issued against Mr. Mbango on 25 August 2015. From 13 July 2015 to 25 August 2015, Mr. Mbango was held without a detention order owing to the annulment by the Indictments Division of the detention order of 19 June 2015.

19. According to the source, “the Indictments Division of the Brazzaville Court of Appeal is not or is no longer a court with jurisdiction to hear appeals concerning the judicial activity of investigating judges but it has assumed the role of remedying their shortcomings”. The source considers that the three detainees are deprived of the guarantees afforded by a State governed by the rule of law.

20. On 26 August 2016, the investigating judge issued an order primarily intended to forward the case to the Public Prosecutor at the Brazzaville Court of Appeal for referral of the matter to the Indictments Division of the Brazzaville Court of Appeal. The order charged Messrs. Mbango, Mountou Loukossi and Mabarry with the offences of breach of State security and criminal association.

21. On 5 December 2016, the Indictments Division delivered a judgment indicting Messrs. Mbango, Mountou Loukossi and Mabarry on charges of breach of State security, but it dropped the charges of criminal association. The judgment was appealed.

22. Lastly, the source reports that Messrs. Mbango, Mountou Loukossi and Mabarry's lawyers submitted a complaint before the African Court on Human and Peoples’ Rights on 7 September 2015.

Arbitrary detention under category III

23. The source submits that almost all the acts on which the investigation proceedings are based were annulled by the Indictments Division but that the judicial consequences of the failure to respect their rights of defence, the principle of the presumption of innocence, and individual freedoms and human dignity were not taken into account in favour of the detainees.

24. The sources notes that the above violates the following international instruments: the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples’

Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
25. The source further submits that the national laws of the Congo have also been violated in the present case, including the Constitution of 20 January 2002 and the Code of Criminal Procedure.
26. The source alleges that the circumstances surrounding the deprivation of liberty of Messrs. Mbango, Mountou Loukossi and Mabarry constitute a violation of the right to a fair trial. Accordingly, it considers that their detention is arbitrary under category III of the methods of work applicable to the consideration of cases submitted to the Working Group.

Response from the Government

27. As indicated above, the Government of the Congo has not responded to the letter sent to it on 20 January 2017.

Discussion

28. 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.
29. 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.
30. The source has produced a coherent account that is consistent with the information available to the Working Group. This information is supported by evidence from the judicial proceedings. The Working Group is therefore satisfied that the source is reliable, and the Government has not rebutted the allegations. The Working Group will therefore proceed to assess the situation on the basis of the facts as submitted by the source.
31. According to the information summarized in paragraphs 4 and 11 above, the three individuals under investigation before the national courts were not brought before a judge within a reasonable time for them to contest their detention or to have the charges confirmed, let alone for their trial to be held. Thus, Mr. Mountou Loukossi was brought before the investigating judge on 21 June 2013, just over two months after his arrest on 31 March 2013. Mr. Mabarry was held incommunicado for five weeks following his arrest on 18 April 2013 and was not brought before a judge until 19 June 2015, more than two years after his arrest. Lastly, Mr. Mbango too was not brought before a judge until 19 June 2015, more than two years after his arrest on 11 May 2013.
32. These facts clearly contravene various well-established criminal procedure rights under international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Furthermore, the provisions of the Congolese Code of Criminal Procedure, notably articles 108 and 121, seem a priori to be consistent with international human rights law.
33. The Working Group is deeply concerned that Messrs. Mbango, Mountou Loukossi and Mabarry were subjected to ill-treatment during part of their detention, including acts potentially amounting to torture, in violation of article 7 of the Covenant and of the Convention against Torture ratified by the Congo on 30 July 2003. The prohibition of torture is a *jus cogens* norm, whose violation must never be tolerated by the State. Furthermore, any instance of torture places the detained person in danger and at the same time has a fundamental impact on the criminal proceedings against that person. Moreover, the Working Group is of the view that the instances of ill-treatment in the present case should be referred to the relevant Special Rapporteur and reminds the State of its duty to investigate these allegations with a view to determining responsibility, as appropriate.
34. Regarding the violations of criminal procedure highlighted by the source, the Working Group finds a violation of the right to be “promptly” informed of any charges (art. 9 (2) of the Covenant), of the right to “be brought promptly before a judge ... and ... be entitled to trial within a reasonable time or to release” (art. 9 (3) of the Covenant) and of the right to a fair trial (art. 14 (3) of the Covenant). These violations render the detention of Messrs. Mbango, Mountou Loukossi and Mabarry arbitrary under category III.

35. Lastly, the Working Group notes that Messrs. Mbango, Mountou Loukossi and Mabarry were detained for an extended period before the charges against them were formalized, with the result that their arrest and detention during the first weeks were without legal basis, in violation of article 9 (1) of the Covenant. Their detention is therefore also arbitrary under category I.
36. The Working Group is concerned about the detention situation in the Congo. It therefore invites the State to consider the possibility for the Working Group to conduct a visit to assist it through a constructive dialogue to improve its legal framework to prevent arbitrary detention.

Disposition

37. In the light of the foregoing, the Working Group renders the following opinion:
The deprivation of liberty of Jean-Claude Mbango, Samba Mountou Loukossi and Ismaël Chrislain Mabarry, being in contravention of articles 7, 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.
38. The Working Group requests the Government of the Congo to take the steps necessary to remedy the situation of Messrs. Mbango, Mountou Loukossi and Mabarry without delay and bring it into conformity with the relevant international norms, including those set out in the Covenant.
39. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Messrs. Mbango, Mountou Loukossi and Mabarry immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

Follow-up procedure

40. 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 Messrs. Mbango, Mountou Loukossi and Mabarry have been released and, if so, on what date;
(b) Whether compensation or other reparations have been made to Messrs. Mbango, Mountou Loukossi and Mabarry;
(c) Whether an investigation has been conducted into the violation of Messrs. Mbango, Mountou Loukossi and Mabarry'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 Congo with its international obligations in line with the present opinion;
(e) Whether any other action has been taken to implement the present opinion.
41. 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.
42. 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.
43. 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 25 April 2017]

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