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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April 2020–1 May 2020

Opinion No. 9/2020 concerning Songolo Abwe, Bahome Amisi, Mulenda Amisi, Ababa Anito, Dax Byamungu, Dominique Nepanepa Kahenga, Kibunga Kasindi, Mwenelwata Kitungano, Sikabwe Kiza, Charles Anzuruni M'massa, Sukuma Maenda, Mathias Mafataki Mahano, William Riziki, Amisi Shomari, Kaskil Sumail and Jacque Nsimba Vela (Mozambique)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 27 September 2019, the Working Group transmitted to the Government of Mozambique a communication concerning Songolo Abwe, Bahome Amisi, Mulenda Amisi, Ababa Anito, Dax Byamungu, Dominique Nepanepa Kahenga, Kibunga Kasindi, Mwenelwata Kitungano, Sikabwe Kiza, Charles Anzuruni M'massa, Sukuma Maenda, Mathias Mafataki Mahano, William Riziki, Amisi Shomari, Kaskil Sumail and Jacque Nsimba Vela. 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 case submitted to the Government in the communication dated 27 September 2019 concerned the following 16 refugees and asylum seekers who were all living at the Maratane Refugee Camp, Nampula Province, Mozambique.

5. Anzuruni Charles M'massa was born in 1981. He is a refugee from the Democratic Republic of the Congo and his refugee status was granted on 12 December 2011.

6. Mathias Mafataki Mahano was born in 1957. He is a refugee from the Democratic Republic of the Congo and his refugee status was granted on 29 June 2006.

7. Kibunga Kasindi was born on 12 September 1959. He is a refugee from the Democratic Republic of the Congo and his refugee status was granted on 12 December 2011.

8. Songolo Abwe was born in 1982. He is a refugee from the Democratic Republic of the Congo and his refugee status was granted on 17 December 2004.

9. Mulenda Amisi was born in 1975. He is a refugee from the Democratic Republic of the Congo and his refugee status was granted on 20 February 2008.

10. Sukuma Maenda was born in 1978. He is a refugee from the Democratic Republic of the Congo and his refugee status was granted on 29 June 2006.

11. Mwenelwata Kitungano was born in 1979. He is a refugee from the Democratic Republic of the Congo.

12. Amisi Shomari was born on 28 September 1958. He is a refugee from the Democratic Republic of the Congo.

13. Kaskil Sumail was born in 1994. He is a refugee from the Democratic Republic of the Congo.

14. Jacque Nsimba Vela was born in 1963. He is a refugee from the Democratic Republic of the Congo.

15. Ababa Anito was born in 1988. He is a refugee from Ethiopia.

16. Dominique Nepanepa Kahenga was born in 1979. He is an asylum seeker from the Democratic Republic of the Congo.

17. William Riziki was born in 1984. She is an asylum seeker from the Democratic Republic of the Congo. She was registered on 19 April 2010.

18. Sikabwe Kiza was born in 1964. He is an asylum seeker from the Democratic Republic of the Congo. He was registered on 13 June 2006.

19. Bahome Amisi was born on 11 December 1975. He is an asylum seeker from the Democratic Republic of the Congo. He was registered on 18 August 2008.

20. Dax Byamungu was born in 1979. He is an asylum seeker from the Democratic Republic of the Congo. He was registered on 23 June 2005.

Arrest and detention

21. According to the source, the 16 above-mentioned individuals were arrested on 17 January 2019, at around 10 p.m., in the Maratane Camp by 24 officers, including police officers, officers of the National Criminal Investigation Service and officers of the National Immigration Service.

22. Allegedly, the officers handcuffed and beat them in front of their families, which was, according to the source, an unnecessary humiliation and excessive use of force. The 16 individuals were not presented with any warrant or informed of the reasons for their arrest. Neither were they informed of any criminal charges against them at the time they were taken into police custody on 17 January 2019. To date, they have not been informed of the reasons for their arrest and detention.

23. The source explains that, when the lawyers of the 16 individuals requested information about their arrest from the Police of the Republic of Mozambique, the authorities informed them that their detention was merely an administrative one, adding that the police had no information about the reasons for their detention. Furthermore, the police informed the lawyers that they were only offering the detention facilities for use by the immigration authorities. The immigration authorities did not respond positively to several requests filed by the lawyers to meet and discuss the detention of the 16 individuals.

24. Between 17 and 19 January 2019, the 16 individuals were held in a police station in Nampula, Nampula Province. On 19 January 2019, the police transferred them to the Third Police Station in Pemba, Cabo Delgado Province, where they are currently being detained. Neither the police nor the immigration officials informed the 16 individuals of the reason for their transfer from Nampula Province to Cabo Delgado Province.

25. Prior to their detention, the 16 individuals had been living in Mozambique for at least eight years. All of them have family living in the Maratane Camp, who lack the financial means to travel to Pemba to visit them. In addition, road travel to Pemba can be very dangerous because of the ongoing violent attacks in Cabo Delgado Province.

26. The source further explains that, on 23 January 2019, the Government attempted to deport seven men from the group, namely Messrs. Bahome Amisi, Byamungu, Kasindi, Kitungano, M'massa, Mahano and Sukuma, to the Democratic Republic of the Congo. They were not notified of any deportation order, nor were they permitted to challenge their deportation. According to the testimony from the seven men, the Mozambican immigration officers forced them to board a flight to Kinshasa. However, when they arrived at Kinshasa airport, the immigration officer denied them entry and ordered their return to Mozambique.

27. According to the source, the immigration officer in Kinshasa claimed that the emergency travel documents issued in their names by the Cabo Delgado Provincial Directorate of Immigration did not prove their citizenship of the Democratic Republic of the Congo. At no point during their deportation were they allowed to be in possession of those travel documents. The seven men said that the immigration officer also claimed that they could not return to their home in the Kivu Region due to increasing political instability and insecurity as the new President was due to take office the next day. The seven men were then sent back to Mozambique. During their return travel, they were held for three days at Jomo Kenyatta International Airport in Nairobi, waiting to board a flight to Mozambique. On 26 January 2019, the seven men arrived in Pemba and were transferred back to the Third Police Station.

28. The source also reports that, on 12 March 2019, lawyers filed an application for the provisional release of the 16 individuals on the grounds that their arrest without warrant was illegal. The lawyers also observed that none of the 16 individuals was notified of any administrative or criminal procedure against them. The Cabo Delgado Provincial Court has yet to rule on the request. Two weeks later, during a hearing on the application for bail at the Pemba Provincial Court, the representative of the Cabo Delgado Provincial Directorate of Immigration stated that the deportation attempt was the result of the Minister of the Interior's oral decision to expel the 16 individuals due to their alleged participation in a demonstration that took place in the Maratane Camp on 5 October 2015 and resulted in damage to the camp facility. However, the source highlights that, in May 2017, the Nampula Provincial Court found all 16 individuals not guilty of the damage caused to the camp facility.

29. The source claims that, on the day of the hearing, the 16 individuals were not present in the court. The police explained in court that they were not in their custody and they were not therefore responsible for bringing them to the hearing. The police observed that they were only providing the space as requested by the Cabo Delgado Provincial Directorate of Immigration.

Legal analysis

30. As developed above, the source recalls that, on 17 January 2019, the police and immigration officers arrived at the Maratane Camp in the evening. They allegedly beat, handcuffed and arrested the 16 above-mentioned individuals in front of their families. The officers did not have an arrest warrant. On 19 January 2019, the police transferred them from Nampula to the Third Police Station in Pemba. They were not informed of the reasons for their transfer to Pemba in Cabo Delgado, and this transfer made family visits difficult. They have never been informed of the reasons for their continued detention. Therefore, the source argues that Mozambique has violated the rights of the individuals concerned to a fair trial, including the right to not be subjected to arbitrary arrest or detention, the right to be informed of the reasons for their arrest and of any charges against them and the right to be presumed innocent as enshrined in articles 9, 14 and 17 of the Covenant and article 9 of the Universal Declaration of Human Rights.

31. The source claims that Mozambique also failed to present the 16 individuals to a judge promptly for an opportunity to challenge the legality of their arrest and detention. They have been in detention since 17 January 2019 and, eight months after their arrest, they have not been brought before a judge. Mozambique is thus violating their right to be brought promptly before a judge and to be tried within a reasonable time or to be released, as enshrined in article 9 (3) of the Covenant, article 10 of the Universal Declaration of Human Rights and article 6 of the African Charter on Human and Peoples' Rights.

32. Furthermore, the source alleges that, since their arrest, the 16 individuals have not been guaranteed the possibility of any administrative or judicial review or remedy of their detention in violation of article 3 of the Covenant.

33. The source explains that, on 12 March 2019, lawyers filed an application for the provisional release of the 16 refugees and asylum seekers, but the Pemba Provincial Court has yet to rule on the request. This is, according to the source, a violation of the guarantees of the due process of law, particularly of the right to be promptly informed of any charges against them, as provided for in articles 9 (2) and 14 of the Covenant, articles 9 and 10 of the Universal Declaration of Human Rights.

34. Moreover, the source claims that the 16 individuals have been held, during their detention in Mozambique, at the Third Police Station in Pemba since 19 January 2019. At one point, they were kept without food for 25 consecutive days. The detainees had to pay someone to buy bread and water for them. They are also not being provided with the necessary medical assistance. Two of them were suffering from malaria and the authorities only agreed to take them to the hospital when they were in a critical condition. The detention facility where they are being held was damaged by Cyclone Kenneth in April 2019. The police station was flooded and no reparations were made to re-establish the conditions of the detention facility. The source also claims that there is a lack of sanitation facilities. For instance, the 15 men and 1 woman are being held in the same cell and they have no access to toilet facilities. They have to drink yellow-coloured water from the sink if they do not have money to pay someone to buy bottled water. The source concludes that their ill-treatment during their arrest and the conditions of their detention violate article 7 of the Covenant and article 5 of the Universal Declaration of Human Rights.

35. For these reasons, the source considers that the arrest and detention of the 16 individuals is arbitrary under categories I, III and IV.

Response from the Government

36. On 27 September 2019, the Working Group transmitted the allegations made by the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 26 November 2019, detailed information about the current situation of the 16 above-mentioned individuals and to provide comments on the source's allegations. The Working Group also called upon the Government to ensure the physical and mental integrity of the 16 individuals.

37. The Working Group regrets that it did not receive a response from the Government to that communication, nor did the Government request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work.

Discussion

38. 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.

39. 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 (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.

40. The Working Group will thus address the source's allegations in turn.

Category I

41. The source reported that the 16 individuals had been arrested on 17 January 2019 without any arrest warrant, they had not been informed of the reasons for the arrest and had not been informed promptly of the charges. Moreover, seven of them had been deported to the Democratic Republic of the Congo but could not enter because the Congolese authorities had not considered their identification papers valid. Those seven individuals had therefore been returned to the detention place in Mozambique.

42. The Working Group recalls that, pursuant to article 9 (1) of the Covenant, no one shall be deprived of liberty except on such grounds and in accordance with such procedures as are established by law. Article 9 (2) of the Covenant provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for the arrest. In order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law that may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant. Moreover, as the Working Group has previously stated, an arrest is arbitrary when carried out without informing the arrested person of the reasons for the arrest.¹

43. In view of the facts, the Working Group considers that the arrest of the 16 individuals without a warrant lacked legal basis and therefore violated article 9 (1) of the Covenant.

44. Moreover, the Working Group notes that the source explained that the 16 individuals were either refugees or asylum seekers. Therefore, the Working Group recalls that, according to article 33 of the Convention relating to the Status of Refugees and its 1967 Protocol, the 16 individuals are protected from refoulement to a territory where their life or freedom would be threatened.² However, the Working Group notes that the source explained that the representative of the Cabo Delgado Provincial Directorate of Immigration had stated, in March 2019, that a deportation attempt had been made to implement the oral decision of the Minister of the Interior to expel the 16 individuals due to their alleged participation in a demonstration that had taken place in the Maratane Camp on 5 October 2015, which had resulted in damages to the camp facility. Therefore, the Working Group considers that the Government is detaining them in the context of a refoulement.

45. The Working Group also recalls that the principle of non-refoulement is well established in customary and conventional international law to protect the enjoyment of the right to seek asylum, as enshrined in article 14 of the Universal Declaration of Human Rights. The principle of non-refoulement is also established in the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1967), in which article II (3) states that: “[n]o person shall be subjected by a Member State to

¹ See, for example, opinion No. 46/2019, para. 51, and opinion No. 10/2015, para. 34.

² The principle of non-refoulement applies to refugees and also to asylum seekers, as stated by the Executive Committee of the Office of the United Nations High Commissioner for Refugees, for example, in its Conclusion No. 6 (XXVIII) (1977) on non-refoulement, in which it reaffirmed the fundamental importance of the principle of non-refoulement of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they had been formally recognized as refugees (para. (c)).

measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened". The same instrument states, in article V, that any repatriation must be voluntary, which therefore reinforces the principle of non-refoulement.

46. The Working Group thus considers that, in view of the authorities' explanation of the arrest and detention, any refoulement would be a violation of international law. The Working Group considers that, not only was there no legal basis presented to the individuals concerned at the time of their arrest, but, in addition, the deportation order was unlawful and should not have been enforced. This is thus a further violation of article 9 (1) of the Covenant.

47. The Working Group also considers that the absence of information about the reasons for the arrest and the absence of notification of the charges violated article 9 (2) of the Covenant.

48. In addition, the Working Group notes that, since their arrest and detention, the refugees have not had an opportunity to challenge the legality of their deprivation of liberty, in violation of article 9 (3) and (4) of the Covenant. This also amounts to a violation of the right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant.

49. The Working Group therefore concludes that the arrest and detention of the 16 individuals lacks a legal basis and is arbitrary under category I.

Category III

50. The source indicates that the 16 individuals were involved in a demonstration in 2015 and accused of damage to State property. However, in May 2017, the Provincial Court of Nampula found all 16 individuals not guilty of the damage caused to the camp facility.

51. The Working Group notes that, despite this acquittal, their arrest on 17 January 2019 and subsequent detention are linked to this accusation from 2015. The Working Group recalls that, according to article 14 (7) of the Covenant, no one shall be liable to be punished again for an offence for which he or she has already been finally acquitted. The Working Group thus considers that their detention is a breach of that article.

52. The Working Group also considers that their deprivation of liberty violates their right to be presumed innocent, as enshrined in article 14 (2) of the Covenant. If the State has failed to prove their guilt, it is unlawful to expel them to implicitly punish them for this accusation in a different way. The Working Group considers that this constitutes a serious abuse of process that challenges the independence of the judiciary, as enshrined in article 14 (1) of the Covenant, and the respect due to judicial outcomes.

53. The Working Group therefore concludes that the violation of article 14 (1), (2) and (7) of the Covenant is so serious that the detention of these individuals is arbitrary under category III.

Category IV

54. The source explained that the 16 individuals had been arrested on 17 January 2019 and since then had been detained. Moreover, on 23 January 2019, the authorities had attempted to deport 7 of the 16 individuals to the Democratic Republic of the Congo, which had refused their entry and had sent them back to Mozambique. The Working Group finds that the failed attempt to forcibly transfer seven of the individuals concerned was a violation of the principle of non-refoulement, applicable in the case at hand, as explained above. The same conclusion can be reached for the detention on the basis of refoulement. Moreover, the source explained that the 16 individuals had never had an opportunity to have a judicial review of their detention. The Working Group thus considers that the 16 individuals have been deprived of liberty for an extended period of time without recourse to judicial review. As a result, the Working Group concludes that their arrest and detention with a view to repatriate them is arbitrary and falls within category IV.

55. Considering the status of the victims in this case, the Working Group is of the view that a referral to the Special Rapporteur on the human rights of migrants is warranted.

56. Finally, the Working Group considers that, in view of the alleged violence used at the time of their arrest and the conditions of their detention, this case needs to be referred to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for further investigation.

Disposition

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

The deprivation of liberty of Songolo Abwe, Bahome Amisi, Mulenda Amisi, Ababa Anito, Dax Byamungu, Dominique Nepanepa Kahenga, Kibunga Kasindi, Mwenelwata Kitungano, Sikabwe Kiza, Charles Anzuruni M'massa, Sukuma Maenda, Mathias Mafataki Mahano, William Riziki, Amisi Shomari, Kaskil Sumail and Jacque Nsimba Vela, being in contravention of articles 8, 9, 10 and 14 of the Universal Declaration of Human Rights and articles 2 (3), 9 (1), (2), (3) and (4) and 14 (1), (2) and (7) of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and IV.

58. The Working Group requests the Government of Mozambique to take the steps necessary to remedy the situation of Messrs. Abwe, Bahome Amisi, Mulenda Amisi, Anito, Byamungu, Kahenga, Kasindi, Kitungano, Kiza, M'massa, Maenda, Mahano, Shomari, Sumail and Vela and Ms. Riziki, 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.

59. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Messrs. Abwe, Bahome Amisi, Mulenda Amisi, Anito, Byamungu, Kahenga, Kasindi, Kitungano, Kiza, M'massa, Maenda, Mahano, Shomari, Sumail and Vela and Ms. Riziki immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls on the Government to take urgent action to ensure the immediate release of these individuals.

60. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Messrs. Abwe, Bahome Amisi, Mulenda Amisi, Anito, Byamungu, Kahenga, Kasindi, Kitungano, Kiza, M'massa, Maenda, Mahano, Shomari, Sumail and Vela and Ms. Riziki and to take appropriate measures against those responsible for the violation of their rights.

61. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the human rights of migrants, for appropriate action.

62. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

63. 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. Abwe, Bahome Amisi, Mulenda Amisi, Anito, Byamungu, Kahenga, Kasindi, Kitungano, Kiza, M'massa, Maenda, Mahano, Shomari, Sumail and Vela and Ms. Riziki have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Messrs. Abwe, Bahome Amisi, Mulenda Amisi, Anito, Byamungu, Kahenga, Kasindi, Kitungano, Kiza, M'massa, Maenda, Mahano, Shomari, Sumail and Vela and Ms. Riziki;

(c) Whether an investigation has been conducted into the violation of the rights of Messrs. Abwe, Bahome Amisi, Mulenda Amisi, Anito, Byamungu, Kahenga, Kasindi, Kitungano, Kiza, M'massa, Maenda, Mahano, Shomari, Sumail and Vela and Ms. Riziki 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 Mozambique with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

64. 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.

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

66. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has 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.³

[Adopted on 1 May 2020]

³ Human Rights Council resolution 42/22, paras. 3 and 7.