



Human Rights Council
Working Group on Arbitrary Detention**Opinion adopted by the Working Group on Arbitrary Detention at its seventy-fifth session (18-27 April 2016)****Opinion No. 22/2016 concerning Marafa Hamidou Yaya (Cameroon)**

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was then clarified and extended by the Commission 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 1 July 2015, the Working Group transmitted to the Government of Cameroon a communication concerning Marafa Hamidou Yaya. The Government replied to the communication on 30 September 2015. 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 sentence or despite an amnesty law applicable to him) (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 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 rights (category V).

Submissions

Communication from the source

4. Marafa Hamidou Yaya, aged 61 years, is a politician. He has served as presidential adviser, Secretary-General of the Office of the President of the Republic, and Minister of the Interior.

5. The source states that in 2000, when Mr. Yaya was Secretary-General of the Office of the President, the Government of Cameroon decided to acquire an aircraft for the President. At the time, Cameroon was implementing a structural adjustment programme imposed by the International Monetary Fund and the World Bank. The Government nevertheless decided to request CamAir, the national airline, to contact GIA International, an American company with its headquarters in Medford, Oregon. GIA International subsequently agreed to be the intermediary between the Government of Cameroon and the Boeing Corporation.

6. In 2001, the Cameroonian Government allegedly received a proposal from the Boeing Corporation through GIA for the acquisition of a BBJ-2 for US\$ 31 million, with a down payment of \$2 million. On the orders of the Administration, the Minister of the Economy and Finance directed CamAir to withdraw \$2 million from one of its accounts with the Commercial Bank of Cameroon, and to deposit said amount into a GIA bank account with Bank of America, also based in Medford. Subsequently, the Minister of the Economy and Finance ordered the general manager of the national oil company to transfer \$31 million (with the deduction of \$2 million to be reimbursed to CamAir) to GIA.

7. The source states that, after the terrorist attacks of 11 September 2001, the United States Government misidentified GIA as standing for “Groupe Islamique Armé” (Armed Islamic Group) and as a result froze all GIA accounts. GIA and the Boeing Corporation therefore decided, in the light of the temporary insolvency of GIA, that the next BBJ-2 aircraft would be reserved for GIA.

8. In 2002, Mr. Yaya was replaced as Secretary-General of the Office of the President. His successor terminated the contracts with GIA and CamAir, and cancelled the order of a BBJ-2 on account of the Government’s interest in a different model, the 767-200.

9. The source maintains that GIA was then declared insolvent even though it still owed \$31 million to the Government of Cameroon, following the transfer made to it in 2002.

10. In response, the Government of Cameroon lodged a complaint against GIA with a United States federal court, the United States Federal Bankruptcy Court in the state of Oregon, in order to recover the \$31 million owed to it. On 3 September 2004, the forensic accountant hired an accountant.

11. The source states that in 2006, the United States federal court approved an amicable settlement proposed by the Parties. Under the settlement agreement, Cameroon received \$858,163.27, a Boeing 767 valued at \$16 million and a cash refund of \$1.5 million from the sale of a Boeing 747 aircraft. The source alleges that the Government of Cameroon refused to finance a detailed audit of all funds transferred from the Government of Cameroon and CamAir to third parties. The source further alleges that, according to the accountant, the

Government of Cameroon did not support his work relating to the review and quantification of the Government's claims for reimbursement.

12. According to the source, on 4 August 2008, a police report concluded that no evidence could be found regarding the embezzlement of public funds by Mr. Yaya in the BBJ-2 case. However, this report was not included in the case file following Mr. Yaya's arrest.

13. On 2 February 2010, a report of the Public Prosecutor for the High Court of Mfoundi concluded that no evidence could be found regarding the embezzlement of public funds by Mr. Yaya in the BBJ-2 case. However, this report was also not included in the case file following Mr. Yaya's arrest.

14. The source reports that, at a press conference held on 2 September 2013, the lawyer who had represented the Government of Cameroon in the proceedings before the federal court in Oregon stated that Cameroon had been fully compensated for its loss. Nevertheless, this lawyer refused to testify in the case in 2012 citing as a reason the lawyers' code of conduct.

15. According to the information received, on 11 April 2012, Mr. Yaya received a letter in which the Public Prosecutor for the High Court of Mfoundi requested him to testify in the preliminary investigation of Jean-Marie Atangana Mebara, Hubert Patrick Marie Otele-Essomba, Jérôme Mendouga, Yves Michel Fotso, Kevin Joseph Walls and others, all of whom had all been accused of conspiracy and coercion in the misappropriation of public funds.

16. On 12 April 2012, Mr. Yaya filed an application with the Upper Regional Court requesting that the judge considering the case be replaced, owing to a conflict of interest and pursuant to section 591 of the Code of Criminal Procedure. There was no response to that request. In violation of section 598 of the Code of Criminal Procedure, the preliminary investigations were not suspended until a decision had been handed down by the Court, and the Court itself refused to take a stance on the matter.

17. On 16 April 2012, Mr. Yaya was called before the High Court of Mfoundi. Neither Mr. Yaya nor his lawyer was given access to the preliminary investigation file, which was not yet available. This was in violation of section 172 (3) of the Code of Criminal Procedure, which provides that a defendant's case file be placed at the disposal of his or her counsel 24 hours before a trial. This also constitutes a violation of section 37, section 165 (3) (a) and section 165 (5) (b) of the Code, which establish the defendant's right to access his or her case file. Moreover, the request from Mr. Yaya's lawyer to examine the witness statements obtained during the preliminary investigation was rejected, in violation of section 172 (3); this in turn negatively affected the preparation of the defence.

18. On the day of his testimony, Mr. Yaya was arrested in the chamber of magistrates of the High Court of Mfoundi, by the multidisciplinary gendarmerie intervention unit (GPIGM), after invoking his right not to testify and referring to his statement of 2008 before the Public Prosecutor. According to the information received, no arrest warrant was presented and Mr. Yaya was not informed of the reasons for his arrest, in violation of sections 167 (1) (a) and 122 of the Code of Criminal Procedure, which require officers who perform an arrest to inform the suspect of the case against him.

19. Furthermore, section 218 (2) requires the examining magistrate to specify the charges before issuing a remand warrant. Moreover, the warrant is valid if the charges are punishable by a custodial sentence. Section 218 (2) stipulates that such a warrant should be issued only in cases of a serious offence. Given that the remand warrant was not issued on the basis of specific charges, the source maintains that at that time such a warrant was not justified.

20. The arrest was allegedly ordered by the judge of the High Court of Mfoundi, who reportedly issued a remand warrant without specific charges, referring to a preliminary investigation of Mr. Atangana Mebara, Mr. Otele-Essomba, Mr. Mendouga, Mr. Fotso, Mr. Walls and others, all of whom had been accused of conspiracy and coercion in the misappropriation of public funds. The source alleges that in the proceedings against Mr. Yaya there were irregularities regarding the legal basis of the proceedings initiated against him. Mr. Yaya was accused of being an accomplice in this case because of his alleged mismanagement of public funds and the amount of \$31 million, which had been reserved for the purchase of a BBJ-2 Boeing aircraft. The charges are based on articles 74, 96 and 184 of the Penal Code.

21. The source reports that, from 16 April to 25 May 2012, Mr. Yaya was detained at the Kondengui maximum-security prison, in Yaoundé, by the National Gendarmerie, pending trial.

22. While serving his sentence, he wrote a series of open letters outlining his views on the BBJ-2 case. These letters were made public by the media. The source reports that Mr. Yaya was then transferred from the Kondengui maximum-security prison to a military place of detention under the supervision of the Office of the Minister of Defence, in charge of the Gendarmerie.

23. Since 25 May 2012, Mr. Yaya has been detained at Secondary Prison in Yaoundé, a military place of detention still under the authority of the Office of the Minister of Defence. This is not an official detention facility.

24. On 18 June 2012, Mr. Yaya's lawyer sent a letter to the Minister of Justice, drawing his attention to the poor detention conditions of Mr. Yaya. The cell in which he is being held receives very little natural light and is extremely damp, which seriously affects Mr. Yaya's vision and respiratory tract, which is chronically infected. Mr. Yaya also suffers from heart problems and has inadequate access to medical care. Furthermore, his right to receive visits from his family and his lawyer has been restricted on several occasions, as has his right to speak privately with his lawyer. His lawyer's documents have been checked by military guards working for the Officer of the Minister of Defence on several occasions. The source asserts that the restriction of family visits violates section 238 of the Code of Criminal Procedure and that Mr. Yaya's lawyer should not be subjected to checks of his person or his documents, in accordance with article 241 (1) of the Code of Criminal Procedure.

25. On 16 July 2012, Mr. Yaya was informed that his trial would begin on 24 July 2012. It is only on 19 July 2012 that a case file — still incomplete — was submitted to his lawyer in preparation for Mr. Yaya's defence just five days later.

26. In his memoirs, the examining magistrate confessed that the order against Mr. Yaya had been prepared by the Minister of State, the Minister of Justice and the Garde des Sceaux, with the assistance of the High Court examining magistrate and of a prosecutor who allegedly was made a Supreme Court judge shortly thereafter; that same judge was also the appeals judge for Mr. Yaya's case. The source concludes that the judges in question lacked independence and impartiality. In addition, the authorities disregarded information that proved Mr. Yaya's innocence, with the High Court of Mfoundi refusing to admit a report of the criminal investigation police and a report of the Prosecutor of the Republic, both of which concluded that there was no evidence that Mr. Yaya had embezzled public funds in the BBJ-2 case. These reports were not included in the record of proceedings.

27. During Mr. Yaya's trial, the defence requested that the out-of-court settlement from the 2006 dispute should be accepted as evidence before the High Court of Mfoundi, so as to demonstrate that at the time the settlement had been reached, all the parties had agreed not

to prosecute the persons involved in the case following signature of the agreement. Thus, the Government of Cameroon, by prosecuting Mr. Yaya, had breached that agreement. The defence's request was rejected and the document was declared inadmissible before the High Court of Mfoundi. Even this request was rejected and the judge declared the agreement inadmissible. According to the source, this constitutes a violation of the principle of equal treatment of the prosecution and the defence.

28. On 21 and 22 September 2012, the High Court of Mfoundi sentenced Mr. Yaya to 25 years' imprisonment for conspiracy and coercion in the misappropriation of public funds. The source reports that Mr. Yaya's conviction was based on laws that are no longer in force in the Cameroonian legal system or that have no relevance. The charges were based on an alleged violation of articles 74, 96 and 184 of the Penal Code and of sections 391 (1), 393 (1) (b) and 426 (1) of the Code of Criminal Procedure, and on the Supreme Court ruling of 1 December 1964. However, the Court's reasoning was based on a law that had been superseded, and was therefore no longer in force, and on a decision of the Criminal Chamber of the French Court of Cassation on 4 January 1902, concerning article 227-22 of the French Penal Code relating to incitement to corruption of minors.

29. The source also submits that the High Court of Mfoundi ignored the request of Mr. Yaya's lawyer to exclude evidence considered tainted by the defence according to section 3 of the Code of Criminal Procedure. Nevertheless, such evidence was declared admissible.

30. The source goes on to state that the selection of witnesses was unbalanced in such a way as to secure the conviction of Mr. Yaya. In this connection, the refusal of the lawyer who had represented the Government of Cameroon before the federal court in Oregon to testify on the grounds of the lawyers' code of conduct lacks credibility, given that, just one year after Mr. Yaya's conviction, the same lawyer made an official statement that the Government of Cameroon had been fully compensated.

31. During the 48-hour period prescribed by law, Mr. Yaya lodged an appeal with the Supreme Court. According to article 13 (3) of Act No. 2012/011 of 16 July 2012, the Court is obliged to rule on the appeal within six months. However, the source states that, 33 months later, the appeal remains pending. Moreover, article 11 (2) and (3) of Act No. 2012/011 of 16 July 2012 restricts the rights of the defence in providing that only the prosecution has the right to submit new evidence in appeals proceedings. Accordingly, it is impossible for Mr. Yaya to present recently discovered exculpatory evidence.

32. The source also reports that, on 23 September 2013, Mr. Yaya submitted to the Supreme Court a request for provisional release, pending the Court's ruling on his appeal. The request was rejected by the Court.

33. On 2 August 2014, Mr. Yaya's family sent a letter to the President of Cameroon, requesting Mr. Yaya's transfer, for medical reasons, to the American hospital in Paris, where he had received treatment in the past, to have his vision problems, chronic respiratory infections, and heart trouble examined and treated appropriately.

34. The source claims that the proceedings against Mr. Yaya are marred by grave irregularities that constitute violations of Cameroonian law and of international norms relating to the rights to liberty and security of person, to a fair trial, and to freedom of expression and association. When considered together, these irregularities suggest that Mr. Yaya enjoys no protection under the law and render the violations so serious as to give the detention an arbitrary character.

35. The source states that Mr. Yaya's arrest and detention are the result of his exercising his right to freedom of expression, of association and of participation in government, guaranteed under articles 19, 20 and 21 of the Universal Declaration of Human Rights, articles 19, 22 and 25 of the International Covenant on Civil and Political Rights, ratified by

Cameroon on 27 June 1984, and the Constitution of Cameroon. Furthermore, the source states that Mr. Yaya's arrest was also motivated by his support for the progressive movement within the political party, Rassemblement démocratique du peuple camerounais, and his presidential ambitions. Therefore, according to the source, Mr. Yaya is perceived as a threat to the policies led by President Biya.

36. In the light of the foregoing, the source contends that the detention of Mr. Yaya is arbitrary and falls under categories II and III of the categories applicable to the cases submitted to the Working Group, insofar as it violates articles 7, 9, 10, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 9, 10 (1), 14, 21, 22, 25 and 26 of the International Covenant on Civil and Political Rights.

Response from the Government

37. The Government of Cameroon requested a deadline extension of 60 days from 6 July 2015. On 15 July 2015, the Working Group informed the Government that it had been granted an extension of 30 days, in line with paragraph 16 of its methods of work. On 30 September 2015, Cameroon duly submitted its reply with a considerable number of supporting documents.

38. In its detailed reply, the Government of Cameroon refutes the facts by presenting a series of procedural documents relating to Mr. Yaya. The Government contends that Mr. Yaya offers no proof that he has been detained for political reasons, much less for his political opinion as he claims, and that the only charge against him is his involvement in the corruption case on the acquisition of a presidential aircraft. The Government goes on to state that his trial was held in the manner prescribed by law and his rights duly respected, and that it is inconceivable to claim the right to a fair trial at an earlier stage than indictment or arrest.

Further comments from the source

39. The reply of the Government of Cameroon was transmitted to the source, who submitted his comments on 13 November 2015.

40. In his comments, the source refutes all the Government's statements and submits new evidence resulting from the domestic proceedings and arguments based on the practice of international bodies for human rights protection.

Discussion

41. In the present case, the Working Group welcomes the cooperation of the Government of Cameroon, which responded to the allegations in a timely manner after the extension was granted, in order to settle the case promptly. The Working Group also welcomes the fact that the source and the Government provided evidence in support of their respective statements. That said, in the present case, the Working Group's in-depth analysis of the 1,000 or so pages submitted in order to exclude irrelevant information led to delays.

42. Of all the information received, it should be noted that there is agreement on a number of facts. Mr. Yaya was apprehended, prosecuted and sentenced in the case relating to the purchase of a presidential aircraft. During part of the acquisition process, Mr. Yaya was the Secretary-General of the Office of the President of the Republic. The Government did not respond to other aspects relating to the case, including the claim that it had been fully compensated for the money it had invested in the failed acquisition of the aircraft, notwithstanding the statement made by the Government's counsel in the recovery of these monies, as provided by the source.

43. Furthermore, the Government simply refutes the claim that Mr. Yaya was prosecuted and convicted because he expressed his political opinion, without addressing the substantive argument put forward by the source. In his submissions, the source first attempts to demonstrate that there were no grounds for Mr. Yaya's prosecution under the Code of Criminal Procedure, since the Government had already recovered its investment, before going on to reveal the real reasons behind the proceedings. It is the Working Group's view that the open letters written by Mr. Yaya after he was arrested cannot logically be regarded as the reason for his arrest. However, there is no doubt that Mr. Yaya's removal from the Government in December 2011, and his arrest and the proceedings initiated against him a few months later occurred shortly after WikiLeaks made public, nationally and internationally, the United States Government's confidential opinion that Mr. Yaya would make a viable candidate to replace the President of Cameroon. The Working Group wishes to stress that this case is not the first of its type to be considered and that, in the past, it has expressed its concern about similar cases in which political speculation resulted in persons' being brought before Cameroonian courts.¹ Lastly, it is worth noting that the arrest, detention and prosecution of Mr. Yaya occurred after more than seven years after the events in question and more than three years after the hearing relating to the prosecution of other individuals, and that the Government does not offer any explanation for such delay.

44. Furthermore, the Government does not address the substance of the charges that Mr. Yaya's right to a fair trial was violated. The Government is correct in stating that an individual cannot avail him- or herself of the right to a fair trial prior to indictment. However, the Government does not offer convincing arguments to prove that this right was observed throughout the proceedings. For example, a judge about whom Mr. Yaya had already expressed reservations nevertheless presided over his trial, because the decision rejecting Mr. Yaya's request to have the judge replaced was handed down only after his arrest. Moreover, the source contests the seriousness of the case, which would not seem to warrant preventive detention — an assertion to which the Government also does not respond. Worse still, Mr. Yaya's ability to defend himself was undermined by the failure to provide him and his lawyer with the case file, including potentially exculpatory evidence, in a timely fashion before the trial. All of this constitutes a material breach of the fundamental right to a fair trial, as covered by article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights.

45. As indicated above, the Government corroborated essential aspects of the events as reported by the source. The robust evidence provided by the source both in his initial complaint and in his additional comments strengthens his credibility as regards his account of the events. In the light of the facts and evidence submitted, the Working Group is convinced that the arrest, detention and conviction of Mr. Yaya were not justified and that his right to a fair trial was seriously violated during the criminal proceedings to which he was subjected. However, although the source's arguments are persuasive, the tacit reasons for the exploitation of the Cameroonian criminal justice system remain uncertain.

46. As to the source's claim that the arbitrary detention falls within category II as defined in the Working Group's methods of work, the Working Group is unable to conclude that the prosecution of Mr. Yaya was motivated by his political ambitions, even if it is obvious that the prosecution was unjustified. It is not for the Working Group to speculate; therefore, in this case, it cannot consider the source's arguments in that regard.

¹ See opinion No. 38/2013, para. 27, and opinion No. 38 (2014), para. 31.

47. The source also claims that the detention is arbitrary under category III. In this regard, the Working Group's conclusion is clear: Mr. Yaya suffered an extremely serious violation of his right to a fair trial rendering null and void the proceedings against him.

48. The source did not put forward arguments in relation to the other categories and the Working Group itself sees no reason to consider them, as they do not relate to the facts in the matter at hand.

49. In conclusion, the Group notes that Mr. Yaya's state of health is of concern and that the risks involved are very serious because of their potentially irreversible nature. This situation requires the further and prompt attention of the Government of Cameroon.

Disposition

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

The detention of Mr. Yaya is arbitrary under category III, as defined in paragraph 8 of the Working Group's methods of work. The Government has the obligation to terminate the detention and grant the victim an appropriate remedy. In these circumstances, the Working Group calls for the immediate release of Mr. Yaya, with the possibility of a retrial, provided that the public prosecutor has reasonable grounds for prosecution, in which all his rights must be fully observed.

51. In conformity with paragraph 33 (a) of its methods of work, the Working Group refers the case to the Special Rapporteur on the independence of judges and lawyers for all appropriate action.

[Adopted on 27 April 2016]