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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fifth session, 14–23 November 2012

No. 55/2012 (Malawi)

Communication addressed to the Government on 11 July 2012

Concerning Davide Alufisha

The Government did not reply to the communication within the 60-day deadline.

The State is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. In March 2008, Mr. Alufisha was arrested at his home. Six police officers in civilian clothes carried out the arrest. Mr. Alufisha was handcuffed and taken to Blantyre Police Station. No warrant was shown. He was not informed of the charges nor reasons for his arrest.

4. At Blantyre Police Station, Mr. Alufisha was allegedly taken to a room where police officers started beating him with a panga knife and a piece of metal pipe on his knees, feet and back. He was then taken to a cell in the police station which he had to share with 60 individuals. Mr. Alufisha was not given food by the police and was beaten again with a view to extracting a confession.

5. Approximately one week after the arrest, the petitioner was formally interviewed by the police. He was then charged and given a caution statement to sign in which he denied the allegation of murder.

6. After approximately two weeks of custody at Blantyre Police Station, Mr. Alufisha was taken to Blantyre Magistrates Court for a preliminary hearing where he was charged with murder under section 209 of the Penal Code of Malawi. The petitioner appeared in court along with another suspect, Jolam Jouwao. In response to the questions from the magistrate Mr. Alufisha pleaded not guilty. Mr. Alufisha was not informed during the court hearing of his rights to bail or to consult a lawyer. No lawyer was present in court. Nor did the magistrate inform Mr. Alufisha of his right to a State-sponsored lawyer. To date Mr. Alufisha has been provided with no details regarding the criminal case against him, including the identity of the alleged victim.

7. At the closure of the hearing, Mr. Alufisha was taken to Chichiri Prison in Blantyre, where he remains. The petitioner left the prison on one occasion in 2009 when he was taken to Zomba Mental Hospital for one day. According to the source, this is a mandatory technical procedure to decide whether the accused is fit to plead. He has not been taken for trial since his initial court appearance and no date for trial is set.

Source's contention regarding the arbitrary character of Mr. Alufisha's detention

8. The source submits that Mr. Alufisha's detention is arbitrary being in total or partial non-observance of the right to a fair trial. The petitioner was not informed at the time of his arrest of the reasons of his arrest in alleged breach of Section 42 (1) (a) of the Constitution of Malawi and article 9, paragraph 2, of the International Covenant on Civil and Political Rights. Similarly, at the moment of his arrest he was not informed of his right to remain silent nor of the consequences of making any statement, contrary to Section 42 (2) (a) of the Constitution of Malawi.

9. Mr. Alufisha has not been given any information on the criminal case against him, including any evidence that could be brought by the prosecution if his case proceeds to

trial. In the source's view, this runs contrary to article 14, paragraph 3 (a), of the International Covenant on Civil and Political Rights.

10. The petitioner was detained at Blantyre Police Station for over two weeks, and beyond the 48 hour police custody period as prescribed by law in section 42 (2) (b) of the Constitution of Malawi.

11. After the hearing at Blantyre Magistrates Court, Mr. Alufisha was placed in Chichiri Prison together with convicted prisoners, which is contrary to article 10, paragraph 2 (a), of the Covenant and sections 42 (2) (d) of the Constitution of Malawi. The source further notes the ill-treatment of Mr. Alufisha and lack of adequate nutrition.

12. The source contends that the ongoing pretrial detention lasting for over 48 months violates article 7, paragraph 1, of the African Charter on Human and Peoples' Rights and articles 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant, which provide for a defendant's trial within a reasonable time and without undue delay. Mr. Alufisha has not been informed of his right to a lawyer and legal assistance, in alleged breach of sections 42 (1) (c) and 42 (2) (f) of the Constitution of Malawi, article 14, paragraph 3 (d), of the Covenant and article 7, paragraph 1, of the African Charter.

13. The source indicates that Mr. Alufisha's remand document held at Chichiri prison states that he was first remanded to prison on 9 April 2008, to be held until 30 December 2008. The remand sheet was subsequently renewed on 29 July 2009, expiring on 29 September 2009. It is the source's submission that this is contrary to section 267 of the Malawi Criminal Procedure and Evidence Code which provides that periods of remand cannot exceed 15 days without renewal. Thus, the source concludes that Mr. Alufisha was detained illegally from 23 April 2008 until 29 July 2009, and has been detained illegally since 13 July 2009.

14. Finally, the source informs that section 161G of the Criminal Procedure and Evidence Code of Malawi sets a 90-day custody time limit for those held on a murder charge (as amended and effective as of 1 May 2010). It follows that Mr. Alufisha's detention since 30 July 2010 is in contravention of domestic custody time limits.

15. In the light of the foregoing, the source submits that Mr. Alufisha's deprivation of liberty is arbitrary as it involves grave breaches of the minimum guarantees enshrined in his right to a fair trial.

Response from the Government

16. The Working Group addressed a communication to the Government on 11 July 2012. No response has been received from the Government.

Discussion

17. In the absence of a response from the Government, the Working Group is able, based on its revised methods of work, to render an opinion in the light of the information submitted to it.

18. The Working Group recalls the Human Rights Committee's concluding observations on the initial report of Malawi (CCPR/C/MWI/CO/1, 2012), which expressed concern in paragraph 11 at "allegations according to which torture is widespread in the State party and sometimes leads to the death of detainees in police custody. The Committee is also concerned about the reported excessive use of force by police officers during arrests and about the fact that some detainees are subjected to torture and cruel, inhuman or degrading treatment (arts. 6 and 7)."

19. In paragraph 12, the Human Rights Committee expressed concern about:

“Information provided by the State party according to which about 1,200 detainees are under pretrial detention, many of them for long periods. The Committee is also concerned about the backlog of cases to be handled by national courts and tribunals, including those on appeal. The Committee is further concerned that legal assistance is not accessible to all litigants and that the number of judges, magistrates and lawyers remain insufficient in the State party (arts. 7, 10 and 14).

The State party should strengthen the measures aimed at expediting all cases before national courts and tribunals, so as to avoid long periods of pretrial detention. In that regard, the State party should ensure that persons whose detentions are extended by a decision of a tribunal or a court are legally assisted.”

20. In paragraph 13, the Committee expressed “concern at reports of deplorable conditions of detention in prisons, including a high rate of overcrowding and reported deaths of detainees due to the poor health-care system”. In paragraph 14, the Committee was “concerned about allegations according to which searches without a warrant are common in the State party” and noted that “the State party should take all necessary measures to repeal the 2010 amendment to the Police Act, which expands the authorization of searches without warrant, in order to prevent arbitrary searches and interference with liberty and privacy”. Malawi expressed deep concern and referred to different steps that were being taken to remedy the situation and bring the legal system into compliance with international law.

21. Furthermore, the Government included the following in its submissions under the universal periodic review in 2011:¹ “Regarding pre-detention trial, the new procedural code and evidence act had established pre-trial custody time limits. The maximum amount of time that a person could be held in pre-trial detention was 120 days, and this was in relation to most serious crimes, including genocide and treason. Under the Constitution, a person should not be held for more than 72 hours without having been brought before a court.”

22. There are several breaches of Mr. Alufisha’s international law right to liberty under article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights. Mr. Alufisha was neither informed at the time of his arrest of the reasons of his arrest, nor later about the charge or any evidence against him. The initial two-week period of detention of Mr. Alufisha was in breach of the requirement that he be brought promptly before a judge.

23. In addition, there are several breaches of Mr. Alufisha’s international law right to a fair trial under article 10 of the Universal Declaration and article 14 of the Covenant. Mr. Alufisha was not informed of his right to remain silent, of the consequences of making any statement or of his right to legal representation.

24. These breaches of the Universal Declaration and the Covenant also constitute breaches of the African Charter on Human and Peoples’ Rights and the Constitution of Malawi.

25. The Working Group finds that Malawi is in breach of article 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. The violations of the international law on the right to a fair trial, established in the Universal Declaration and in the relevant international instruments accepted by the States concerned, are of such gravity as to give the deprivation of liberty an arbitrary character (category III).

¹ Report of the Working Group on the Universal Periodic Review, Malawi (2010), A/HRC/16/4, para. 93.

Disposition

26. In the light of the preceding, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Davide Alufisha is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights; it falls within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

27. Consequent upon the opinion rendered, the Working Group requests the Government of Malawi to remedy the situation of Davide Alufisha, in accordance with the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

28. The Working Group considers that, given the circumstances of the case and bearing in mind the prolonged period of time during which David Alufisha has been deprived of liberty, the appropriate remedies would be:

- (a) The immediate release of Mr. Alufisha; or, alternatively
- (b) That his trial be conducted as expeditiously as possible.

29. The Working Group further requests the Government to take all necessary steps to provide Mr. Alufisha, in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights, compensation for the harm he has suffered during the period of his prolonged arbitrary detention.

30. In accordance with article 33 (a) of its revised methods of work, the Working Group considers it appropriate to refer the allegations of torture to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

[Adopted on 19 November 2012]
