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No. 14/2013 (Burundi)

Communication addressed to the Government on 12 November 2012

Concerning: Mr. Joseph Kalimbiro Ciusi; Mr. Mutambala Swedi Fataki; Mr. Mpahije Félix Kasongo; Mr. Jacques Obengi Songolo and Mr. Maneno Tundula

The Government has not replied.

The State has been a party to the International Covenant on Civil and Political Rights since 9 May 1990.

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, 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, as 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. Joseph Kalimbiro Ciusi was born in 1948 in Kabare, Democratic Republic of the Congo. He is now resident in the refugee camp at Gasorwe, Q32 C4 M4, Muyinga province, Burundi.

4. Mutambala Swedi Fataki was born in 1961 in Uvira, Democratic Republic of the Congo. He is now resident in the refugee camp at Gasorwe, Q11 C3 M4, Muyinga province, Burundi.

5. Mpahije Félix Kasongo was born in 1974 in Minembwe, Democratic Republic of the Congo. He is now resident in the refugee camp at Gasorwe, Q9 C4 M2, Muyinga province, Burundi.

6. Jacques Obengi Songolo was born in 1980 at Sange, Democratic Republic of the Congo. He is now resident in the refugee camp at Gasorwe, Q1 C3 M11, Muyinga province, Burundi.

7. Maneno Tundula was born in 1948 in Kabare, Democratic Republic of the Congo. He is now resident in the refugee camp at Gasorwe, Q9 C3 M11, Muyinga province, Burundi.

Events leading up to the authors' arrest

8. Fleeing from the civil war in the Democratic Republic of the Congo, the authors arrived separately in Burundi between 2000 and 2007 and applied for asylum, and were placed in the refugee camp at Gasorwe, Muyinga province, Burundi.

9. The inadequate living conditions in the Gasorwe refugee camp prompted Mr. Swedi Fataki to set up the Association for the Rights of Refugees in Burundi (ADR), which was registered with the Bujumbura notary public on 1 May 2009.

10. According to article 4 of the Constitution of ADR:

> "The purpose of the Association is to defend the rights of refugees by means of specific measures.
>
> "Specific aims
>
> "1. Identify all refugees, wherever they are, in order to ascertain their concerns.
>
> 2. Inform refugees, wherever they are, to enable them to recognize themselves as refugees and understand their rights and obligations in respect of the country of asylum.
>
> 3. Raise refugees' awareness of their rights by organizing training seminars, workshops, conferences and cultural activities, for example.

4. Assist refugees in seeking and maintaining friendly relations among themselves and with nationals of the country of asylum.

5. Peacefully defend refugees' rights through dialogue and negotiation, as well as peaceful demonstrations.

6. Raise refugees' awareness of development projects, notably in the areas of education, health and occupations of various kinds.

7. Raise public awareness, at the national and international levels, of how refugees live, by means of published material." (Bujumbura notary public, register entry No. M/2625/2009, deposit of minutes, 1 May 2009.)

11. Mr. Swedi Fataki is still the chair and legal representative of the Association, Mr. Tundula is responsible for public relations, Mr. Kasongo is the adviser and Mr. Songolo the coordinator. Mr. Kalimbiro Ciusi is a member of ADR.

12. By a letter dated 5 September 2009, Mr. Swedi Fataki, on behalf of ADR, informed the Administrator of the Gasorwe camp of the formation of the Association.

13. On 28 September 2009, ADR was granted a "certificate of recognition for administrative purposes" by the Administrator of the urban municipality of Bwiza. Recognition permits the Association to carry out its activities in that municipality.

14. The certificate is valid for three months and was renewed on 22 December 2009, 11 March 2010, 15 June 2010, 14 September 2010 and 14 December 2010. The period of validity of the latest certificate was not specified.

15. By letter of 7 December 2009 to the Ministry of the Interior of Burundi, Mr. Swedi Fataki, acting on behalf of ADR, requested the Association's accreditation in Burundi.

16. At that time, the activities of ADR consisted primarily in reporting offences by members of the public and the local police against refugees to the camp Administrator and the representative of the Office for Refugees and Stateless Persons (ONPRA) in Muyinga.

17. At that time the Association had de facto recognition within the refugee camp, as shown by the fact that exit passes were regularly issued to ADR members by the Gasorwe camp Administrator. These passes explicitly stated that exit from the camp was authorized for "ADR business".

18. On 13 June 2010, the legal representative of ADR wrote on behalf of the Association to the United Nations High Commissioner for Refugees to report acts of violence of various kinds by the local population, and condoned by the Burundian police, against Congolese refugees, and misappropriation of the refugees' food rations by the Gasorwe camp Administrator.

19. By letter dated 15 November 2010, Mr. Swedi Fataki, in his capacity as legal representative of ADR, notified the President of the Republic of the difficulties ADR was encountering in its work.

20. By letter of 29 December 2010, Mr. Swedi Fataki, on behalf of ADR, notified the Minister of Security in Burundi of various complaints regarding the security situation of refugees in Burundi. The letter recounts incidents of murder, sexual violence, bodily injury and arbitrary arrest against refugees in the Gasorwe camp and accuses the commander of the camp police of condoning or committing these offences. The letter also expresses the Association's concern at the harassment of its members and complains of "anonymous notices sent to members of ADR Burundi in the camp hinting at the possibility of abductions".

21. On 31 January 2011, the legal representative of ADR complained to the Office for Refugees and Stateless Persons (ONPRA) that spoiled food had been distributed to refugees in the Gasorwe camp and that the Administrator had misappropriated food and an amount of $7,500 intended for the refugees in the camp.

22. Despite the various complaints contained in these letters, the authorities did not investigate any of the allegations of violence and several members of ADR were summoned to the Muyinga prosecutor's office.

23. The increasing number of summonses received by ADR members prompted the Association to issue a communiqué on 7 February 2011 containing the following demands:

> "Henceforth all summonses in connection with reports by the Association for the Rights of Refugees in Burundi (ADR) should be addressed to the Association (legal person) and not to an individual (physical person);
>
> "Any summons addressed to a refugee should be brought either by the police or by the director of the camp, through the [Office of the United Nations High Commissioner for Refugees (UNHCR)] (our protector) and not by another refugee;
>
> "ADR is prepared to respond to any summons from an administrative authority but requests that transport and security for ADR members who have been summoned should be provided by ONPRA and UNHCR;
>
> "The accused should receive the summons one week before the date set for the hearing, not the day before. By way of example, a summons from the Muyinga prosecutor's office dated 26 October 2010 and brought by a refugee was delivered to the person concerned at 7 p.m. on 2 November 2010, yet they were required to be at the Muyinga prosecutor's office, 30 km from the Gasorwe refugee camp, at 9 a.m. on 3 November 2010."

24. No reply having been received to the application for accreditation submitted to the Burundian Minister of the Interior on 7 December 2009, the legal representative of ADR sent another request by letter dated 24 February 2011.

Arrest and detention of the petitioners

25. On 28 March 2011, Melchior Sindayihebura, head of the Muyinga branch of ONPRA, lodged a criminal complaint against Mr. Swedi Fataki with the prosecutor at the Muyinga *tribunal de grande instance* (court of major jurisdiction).

26. The complaint alleged a violation of article 602 of the Criminal Code, on internal State security, whereby:

> "Anyone who
>
> "1. Publicly challenges the binding nature of laws or directly incites others to disobey the law;
>
> "2. Knowingly spreads false rumours likely to alarm members of the public or set them against the Government, or incite civil war;
>
> "3. In order to disturb the peace, knowingly participates in the publication, dissemination or reproduction by any means, of false news or of news items that have been fabricated, forged or are falsely attributed to third parties; or
>
> "4. Exhibits or causes to be exhibited in public places or places open to the public, drawings, posters, prints, paintings or photographs, or any other object or image likely to cause a breach of the peace;

> "Shall be liable to 2 months' to 3 years' imprisonment and/or a fine of 50,000 to 200,000 francs."

27. According to the complaint, the sole purpose of article 5 of the Association's statutory aims (see paragraph 10) was to "set the refugees against the Government of Burundi, the Office of the United Nations High Commissioner for Refugees and other partners by means of marches and demonstrations".

28. According to the head of the ONPRA branch office, ADR's aims conflict with the host Government's mission and with the 1951 Geneva conventions, which recognize UNHCR and the host country Government as the only bodies authorized to defend refugees' rights.

29. At around 3 p.m. on 30 March 2011, a Muyinga police van arrived at Mr. Swedi Fataki's home. On their arrival the police beat Mr. Swedi Fataki and then took him and the other four authors of this communication to the Muyinga police station.

30. They were charged with breach of internal State security (Criminal Code, art. 602) and imprisoned for 3 weeks in a cell measuring about three metres by four, with some 20 other detainees. According to another member of ADR, the detainees were beaten and tortured during their imprisonment. They were then transferred to Ngozi prison, a facility with 400 places that now holds 1,828 prisoners, 871 of them in pretrial detention.

31. On 3 May 2011 ADR issued a communiqué condemning the arrest of five of its members and complaining that the safety of members of ADR in the Gasorwe refugee camp was now at risk. It also stated that the detainees had not been brought before the Burundian courts since their arrest on 30 March 2011.

32. In a letter to the President of the Muyinga court of major jurisdiction, dated 15 May 2011, the detainees requested immediate conditional release. They recalled that, under article 15 of the Convention relating to the Status of Refugees of 28 July 1951, ratified by Burundi on 19 July 1963:

> As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

33. The letter goes on to give a detailed description of the procedure followed by ADR in applying for accreditation in Burundi, in accordance with the requirements of Burundian domestic law, and shows how the public statements of ADR had done no more than assert rights recognized by the Convention relating to the Status of Refugees.

34. The letter also states that, six weeks after their arrest, the detainees had still not seen their file or the criminal complaint on which their arrest was based.

35. On 16 June 2011, the detainees' wives wrote to UNHCR in Burundi complaining that their husbands had still not been assigned a lawyer to defend them. They also stated that Gasorwe refugee camp would not issue them with exit passes in order to visit their husbands in prison. They were obliged to sell food in order to buy exit passes, though these are normally free of charge. Not until several months later was a lawyer appointed, after an NGO intervened.

36. The first public hearing on the case took place on 14 October 2011 at the Muyinga court, that is to say six and a half months after their arrest. The same day, the proceedings were adjourned for consideration.

37. By letter dated 17 October 2011, the lawyer for the authors of this communication, Mr. Amédé Nzobarinda, requested acquittal of the detainees or, in the alternative, conditional release, on the following grounds:

- The unlawful nature of the detainees' arbitrary detention;
- The lack of any evidence of the detainees' guilt: the prosecution relied chiefly on the fact that ADR was not an accredited organization and had not demonstrated the guilt of individual detainees;
- The court's refusal to hear the witnesses called by the accused or to admit the evidence for the defence that they wished to produce;
- The arbitrary application of article 602 of the Criminal Code to the accused;
- The court's lack of jurisdiction in the matter of accreditation of ADR, which is an administrative, not a criminal, procedure (Note to the court dated 17 October 2011).

38. In ruling RP 5896 of 30 January 2011, the Muyinga court sentenced the detainees to 3 years' imprisonment for breach of internal State security.

39. The ruling made the following findings in respect of the detainees:

- The court finds a breach of internal State security by the accused inasmuch as they wrote several things that discredit several of the country's authorities and various senior officials of UNHCR in the name of an association that has never been accredited by the Minister; Mr. Kasongo himself stated at the hearing that they had submitted an application but were still awaiting a reply;
- The purpose of all the letters written by the accused was to incite the refugees to revolt and to terrorize the local people living near the camp. They also wrote that refugees are raped and tortured by security officers and that no one puts a stop to it.

40. On 26 June 2012, counsel appealed the judgement. A hearing was scheduled for 5 July 2012 in the Ngozi appeal court but was postponed because the case file had not yet been transferred there.

Arbitrary nature of the detention and manifest impossibility of invoking any legal basis justifying the deprivation of liberty

(a) Detention while awaiting trial

41. The Burundian Code of Criminal Procedure defines police custody as "holding a person on specified grounds and for a specified period, at the place of arrest or in a police station, as required for the purposes of a criminal or judicial investigation" (Code of Criminal Procedure, art. 58, para. 1).

42. Police custody may not exceed 7 days counted from hour to hour, except where an extension is deemed essential, as determined by the public prosecutor's office and up to a maximum of twice that period (Code of Criminal Procedure, art. 60, para. 1). Any placement in police custody must be duly recorded in a police custody report by the responsible criminal investigation officer (Code of Criminal Procedure, art. 61, para. 1).

43. Under article 71 of the Code of Criminal Procedure, a person cannot be placed in pretrial detention unless there is sufficient evidence against them, the acts they are accused of appear to constitute an offence punishable by law by at least 1 year's imprisonment (para. 1), and pretrial detention is the only means of preventing collusion, maintaining public order, protecting the accused, halting the offence or preventing repetition of the offence, or ensuring that the accused remains at the court's disposal (para. 2).

44. Under article 72 of the Code of Criminal Procedure, where the criteria for pretrial detention are met, the public prosecutor's office may issue a provisional arrest warrant (para. 1). No more than 15 days after the issuance of the warrant, the person in provisional detention must be brought before a court and the court must place them under arrest or release them (para. 2). The court must rule within 48 hours on whether pretrial detention is to continue or the accused is to be released (Code of Criminal Procedure, art. 73).

45. Lastly, article 75 of the Code of Criminal Procedure provides that "the order authorizing pretrial detention is valid for 30 days including the date of issue. On expiry of this period, pretrial detention may be extended by a reasoned decision on a month-by-month basis, for as long as the public interest requires." According to the Supreme Court of Burundi, if the public prosecutor's office does not submit a request within 30 days, as provided under article 75 of the Code, the request for extension of the pretrial detention order is inadmissible and the detainees should be given provisional release.

46. In this case, the authors of the communication were arrested on 30 March 2011. No custody report was drawn up, no provisional arrest warrant was issued and the detainees were not brought before the court until the 14 October 2011 hearing at the Muyinga court, which dealt solely with the merits of the case and not the provisional detention of the accused.

47. Thus the 6-month, 14-day detention between 30 March and 14 October 2011 was unlawful as it had no legal basis. After the maximum period of custody of 7 days, a provisional arrest warrant ought to have been issued and the detainees should have been brought before the court within 15 days after that. The public prosecutor's office should then have requested extension of provisional detention every 30 days.

48. In view of the complete disregard for the rules of procedure governing police custody and pretrial detention, the source asks the Working Group to find the detention of the authors of this communication, between 30 March 2011 and their conviction on 30 January 2012, unlawful and thus arbitrary, in violation of article 9 of the International Covenant on Civil and Political Rights.

(b) Detention after the judgement of 30 January 2012

49. To begin with, the source points out that the criminal complaint lodged on 28 March 2011 was solely against Mr. Swedi Fataki, who, as legal representative of ADR, had signed all the letters and communiqués referred to in the complaint, with the exception of the 11 February 2011 communiqué, which was signed only "ADR/Burundi".

50. The communiqué of 11 February 2011, described in the complaint as inciting refugees not to answer summonses from the prosecutor's office, merely asked the authorities to ensure that, firstly, summonses from the prosecutor's office that concern ADR should be addressed directly to the Association and not to its members, and secondly, that any summons addressed to a refugee should be delivered to them in person by the relevant authority at least one week in advance and not by other refugees from the Gasorwe camp.

51. In addition, the Muyinga court stated in the background section of the judgement that:

- Mr. Songolo had insulted the Administrator of the Gasorwe camp and threatened him with death;
- Mr. Kasimbiri Ciusi and Mr. Kasongo had forced their way into the camp Administrator's office and threatened him.

52. However, judgement RP 5896 of 30 January 2012 gives no legal analysis of these criminal acts and simply sentences all the accused for breach of internal State security.

53. As the judgement puts it, "a breach of internal State security was committed by the accused inasmuch as they wrote several things that discredit several of the country's authorities and various senior officials of UNHCR … in the name of an association that has never been accredited by the Minister".

54. In fact Mr. Swedi Fataki is the sole author of the letters referred to in the judgement and the judgement fails to demonstrate in what way his fellow detainees were involved in writing the letters and communiqués.

55. Indeed, if the letters and communiqués did in fact constitute a breach of internal State security, the Muyinga court, to judge by its reasoning in the paragraph quoted above, seems to believe that all members of ADR, and not just his four fellow detainees, are responsible for the actions taken by Mr. Swedi Fataki on behalf of ADR.

56. The Muyinga court failed to analyse the individual responsibility of each of the accused. The court should have established to what extent and in what capacity (perpetrator, participant, accomplice, etc.) each accused was supposed to have been involved in the offence of breach of internal State security and handed down a reasoned decision demonstrating each one's guilt.

57. Instead of properly identifying the perpetrators of the offence, the court jumped to the conclusion that all of them — apparently in their capacity as members of ADR — were responsible for the breach of internal State security.

58. The source contends that nothing in the letters and communiqués cited can be interpreted as a breach of State security within the meaning of article 602 of the Criminal Code.

59. According to the source, the judgement contains no proper discussion of the offence and no explanation of how the letters and communiqués represented a breach of Burundi's internal security, and makes only the following statements:

- The prosecutor went on to say that the accused had formed an association known as ADR (Association for the Rights of Refugees in Burundi) for the purpose of disrupting security and giving national and international public opinion to understand that refugees in Burundi lived in appalling conditions;
- The prosecutor went on to say that, in communication No. ADR/BDI/016/2010 of 13 June 2010, as published on the website www.refugeespace.net, and addressed to the Minister of Security, the Minister of the Interior and accredited ambassadors in Burundi, the accused, on behalf of their association, stated that Burundi had knowingly allowed into the country food that was no longer edible, given to the refugees by the World Food Programme (WFP);
- The prosecution went on to say that in communication No. ADR/BDI/023/2010 of 15 November 2010, all persons mentioned on the website www.refugeespace.net, the accused stated that the Gasorwe refugee camp was sheltering Rwandan soldiers;
- The prosecution then stated that according to that communication, in refugee camps in Burundi, rape, crimes and acts of torture were committed in front of protection officials, who did not put a stop to them;
- His counsel, Mr. Amédé Nzobarinda, requested, through the court, that the prosecution clearly states what offences had been committed and the dates of the communications;

- The public prosecutor replied that the documents they had written were on file and that the court could verify the letter from ADR stating that the Gasorwe camp comprised ex-combatants from Rwanda, which had created a bad atmosphere between Rwanda, the Democratic Republic of the Congo and Burundi;
- The public prosecutor then stated that ADR had written that Burundi handed out food that was no longer edible;
- The court checked the file and found several letters, including communication No. ADR/CG/BDI/014/2010, addressed to the UNHCR Representative, with supporting photographs attached. ADR argued in this letter that their safety was at risk, that the camp representatives were corrupt, that WFP was handing out spoiled beans, that in 2009 a Mr. Byamungu had been tortured by a head of unit, that refugees were beaten by security officials in broad daylight, that the representatives were aware of the situation and that photographs had been taken as evidence. ADR also mentioned the inadequacy of medical care and stated that the doctor did not pay attention to patients during consultations, which had led to the deaths of several refugees;
- The file also contained a letter from ADR dated 16 June 2010, which revealed that on 10 April 2010, at the Ruyigi provincial market, a refugee named Tutu Mwari had been robbed by some of the local residents, that the chief of the refugees knew about it and that nothing had been done to restore the stolen goods to the victim. A woman had been severely beaten by locals and nothing had been done about it, even though the authorities had been told, as they had been told about other incidents of violence against refugees, committed either openly in front of security officers, or by the officers;
- The file also contains a letter from ADR to the President of Burundi stating that refugees' food was being misappropriated, and that refugees were tortured and killed in front of security officers.

60. The source states that these points do not constitute a violation of article 602 of the Criminal Code as they do not incite anyone to break Burundian law (art. 602, para. 1), attack the country's authorities (para. 2) or disturb the peace (para. 3). According to the source, the judgement completely fails to show in what way these letters and communiqués constitute a violation of article 602 of the Criminal Code.

61. The Muyinga court nevertheless sentenced the five representatives of ADR to the maximum prison sentence provided for in article 602 of the Criminal Code.

62. In view of the lack of any reasoning or precise and relevant legal analysis regarding the guilt of each of the accused, the source requests the Working Group to find that it is clearly impossible to invoke any legal basis justifying the detention of the authors of the communication.

Arbitrary nature of the detention arising from the exercise of the right to freedom of expression

63. Under article 19, paragraph 2, of the Covenant, "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

64. In this case, judgement RP 5896 of 30 January 2012 finds that "an offence of breach of internal State security was committed by the accused inasmuch as they wrote several things that discredited several of the country's authorities and various senior officials of UNHCR".

65. The letters and communiqués cited in the criminal complaint and the judgement are signed only by Mr. Swedi Fataki on behalf of ADR.

66. With the exception of the letter of 15 November 2010, which discussed the difficulties encountered by ADR in the accreditation procedure, and which was copied to the press, all the letters about the situation of refugees in Burundi were addressed only to the relevant competent authorities and representatives of the international community.

67. The letters contained factual exposés of the concerns of ADR with regard to the refugees in Gasorwe camp and were intended to alert the authorities in the hope that they would take steps to improve refugees' living conditions.

68. These actions are consistent with article 7 of the ADR Constitution, which gives one of the aims of the Association is to "raise public awareness, at the national and international levels, of how refugees live, by means of published material".

69. Here it should be recalled that ADR did everything possible to obtain accreditation. In addition to having its Constitution notarized, repeatedly being granted certificates of recognition, and notifying the Gasorwe refugee camp Administrator in writing, ADR applied to the Minister of the Interior for accreditation in letters dated 7 December 2009 and 24 February 2011.

70. The Minister of the Interior never replied to the applications for accreditation, yet he could perfectly well have expressed reservations with regard to article 7 of the ADR Constitution. The source asks the Working Group to find that, in its letters and communiqués, ADR was merely exercising its right to freedom of expression, as guaranteed by article 19, paragraph 2, of the Covenant. Detention of the Association's members on the basis of the exercise of that right is therefore arbitrary.

Arbitrary nature of detention based on failure to apply international standards on the right to a fair trial.

71. The source quotes the first sentence of article 14, paragraph 1 [of the Covenant, which] guarantees in general terms the right to equality before courts and tribunals … The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination … The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant (Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 7, 8 and 13).

72. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges ... and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the Constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them (general comment No. 32, para. 19).

73. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is

incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation ... The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other (general comment No. 32, paras. 19, 21).

74. By a note to the court dated 17 October 2011, counsel for the accused protested to the Muyinga court that, at the 14 October 2011 hearing, the judge had refused to hear the witnesses called by the accused or to admit their evidence for the defence. Notwithstanding the seriousness of these allegations, the judgement finds merely that "counsel's note carries no weight, as everything he says has already been debated in court and a solution has been found by the public prosecutor's office".

75. This rejection by the court is a clear violation both of the principle of equality of arms and of article 14, paragraph 3 (e), of the Covenant.

76. Under article 14, paragraph 2, of the Covenant, "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". In this regard, the Human Rights Committee has explained that "the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle" (general comment No. 32, para. 30).

77. The lack of reasoning in this judgement and the nonchalance with which it convicts all the accused of breach of State security without showing, for each one, how the facts amount to a violation of article 602 of the Criminal Code, constitutes a violation of article 14, paragraph 2, of the Covenant, since their guilt has not been proved beyond reasonable doubt.

78. In addition, article 14, paragraph 3 (d), of the Covenant provides that the State must assign legal assistance to accused persons if they do not have sufficient means to pay for it. In this case, the accused were arrested on 30 March 2011. In a letter dated 15 May 2011, having had no access to counsel, they requested provisional release and pointed out that they had still not had access to their file.

79. On 16 June 2011, that is to say 78 days after their arrest, the accused's wives wrote to UNHCR pointing out that the accused had still not had access to a lawyer. It was only thanks to action by Avocats sans frontières (Lawyers without Borders) that counsel was finally appointed to defend their interests.

80. However, action by a lawyer in the days following their arrest could have prevented the violation of the pretrial detention procedure (Code of Criminal Procedure, arts. 71–73, 75 and 77). This should be deemed a further violation, of article 14, paragraph 3 (d), of the Covenant.

81. Lastly, article 130 of the Code of Criminal Procedure provides that "judgements shall be handed down two months after the end of the hearings at the latest". According to the Human Rights Committee, "an important aspect of the fairness of a hearing is its expeditiousness. While the issue of undue delays in criminal proceedings is explicitly addressed in paragraph 3 (c) of article 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in paragraph 1 of this provision. Where such delays are caused by a lack of resources and chronic underfunding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice ...

What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities ... This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal" (general comment No. 32, paras. 27, 35).

82. Here, although the case was adjourned for consideration at the hearing of 14 October 2011, judgement was not handed down until 30 January 2012, that is, 3 months and 16 days later. Thus judgement was rendered with undue and unjustifiable delay within the meaning of article 14, paragraph 3 (c) of the Covenant. For these reasons the source submits that the rules of fair trial were violated in these proceedings, and that detention was therefore arbitrary in nature.

Response from the Government

83. The Working Group regrets that the Government has not replied to the communication and provided information on the allegations it contains.

Further comments from the source

84. The Working Group has asked the source several times for further information, including on the current situation of the persons concerned and notably those who are in detention, but the source has not replied. The Working Group would have liked the source to provide information in particular on the hearing mentioned in paragraph 39.

Discussion

85. The Working Group considers that it is in a position to consider the case in accordance with its methods of work.

Disposition

86. The Working Group decides to keep the case pending until further information is received from the Government and the source, in accordance with paragraph 17 (c) of its methods of work.

[*Adopted on 26 August 2013*]