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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-eighth session, 24–28 August 2020

Opinion No. 40/2020 concerning Jean Claude Hamenyimana (Burundi)*

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 25 March 2020 the Working Group transmitted to the Government of Burundi a communication concerning Jean Claude Hamenyimana. 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,

* Seong-Phil Hong did not participate in the discussion of the present case.



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. Jean Claude Hamenyimana is a citizen of Burundi born in 1990. Mr. Hamenyimana is a businessman. Since his release on 2 May 2019, his main place of residence has been in Kimisagara, Rwanda.

(a) Arrest and detention

5. According to the source, Mr. Hamenyimana was arrested on 19 January 2016, at approximately 2.30 p.m., in Jabe, Mukaza commune, Bujumbura Mairie, by police officers from the Unit for the Protection of Institutions and the Judicial Investigation and Intervention Squad. The officers, who did not present a warrant, went to Mr. Hamenyimana's home, where he was sleeping, and asked him about the whereabouts of the persons who had shot at the police. Although Mr. Hamenyimana replied that he knew nothing of their whereabouts, he and his employee were loaded into a van, where other persons were lying face down, crammed together and tied up.

6. The source reports that, upon arrival at the facilities of the National Intelligence Service, the persons who had been arrested were subjected to violence and torture for more than three hours, including with steel rods and bayonets. The source explains that some of the perpetrators wore civilian clothing and others military or police uniform. While inflicting this violence and torture, they interrogated the arrested persons about the identity of those who had fired at the police and made hateful comments about their ethnicity. For example, the perpetrators told each other to "aim for the pelvis to make them infertile, since their ethnic group produces courageous rebels".

7. The source explains that, in the evening, criminal investigation officers questioned Mr. Hamenyimana about his involvement in the insurgency or rebellion. Mr. Hamenyimana denied any involvement and explained to them the circumstances of his arrest. After the questioning, Mr. Hamenyimana was handcuffed and placed in a cell of the National Intelligence Service, where he remained for a week. According to the source, his handcuffs were removed only when he showered. He had no mattress and slept on a concrete floor. Mr. Hamenyimana shared this cell with 12 other persons. The source notes that Mr. Hamenyimana was not allowed to receive treatment, despite the injuries that he had sustained during the beating.

8. On 26 January 2016, Mr. Hamenyimana was brought before the public prosecutor for his hearing. He was then transferred to Mpimba prison. On 27 June 2017, he was transferred to Ngozi prison.

9. In February 2016, Mr. Hamenyimana was summoned to appear before the Ntahangwa *Tribunal de grande instance* (court of major jurisdiction), sitting in chambers. The source explains that Mr. Hamenyimana denied the allegations put forward by the prosecution that he was one of the persons who had fired at police officers and thrown bombs at them. The source also notes that Mr. Hamenyimana informed the judge in chambers about the torture to which he had been subjected at the National Intelligence Service facilities. The judge nevertheless reportedly ordered that the detention should continue. Mr. Hamenyimana then appealed the decision of the court of major jurisdiction, sitting in chambers, to the Mukaza *Cour d'appel* (court of appeal), before which he reiterated the circumstances of his detention, the fact that his employee had been released the same day, even though they had both been apprehended under the same circumstances, and the torture to which he had been subjected. The Mukaza court of appeal then ordered his provisional release from detention on remand. However, this decision was not enforced.

10. The source also notes that Mr. Hamenyimana was acquitted by the Mukaza *Tribunal de grande instance* (court of major jurisdiction) in a judgment on the merits, of which he

was notified on 8 August 2017. However, Mr. Hamenyimana was not released until 2 May 2019, almost two years after his acquittal.

(b) Legal analysis

(i) Category I

11. The source argues that the arbitrary character of Mr. Hamenyimana's detention arises from several factors, first and foremost the lack of a legal basis for his detention under article 9 (1) of the Covenant, to which Burundi acceded on 9 May 1990.

12. In the present case, the source argues that no arrest procedure was followed, since no arrest warrant or other document justifying Mr. Hamenyimana's detention was presented to him at the time of his arrest. On 26 January 2016, Mr. Hamenyimana learned that an arrest warrant had been issued against him, for his transferral to Mpimba prison, and that he had been charged with harming national security. The source concludes that Mr. Hamenyimana's detention on remand between 19 January 2016 – the date of his arrest – and 26 January 2016 had no legal basis.

13. The source further notes that, according to article 110 of the Code of Criminal Procedure, "freedom being the rule and detention the exception, the accused may be placed in detention on remand only if there are sufficient indications of guilt and if the acts that he or she is alleged to have committed constitute an offence punishable by law with a penalty of imprisonment for at least 1 year". However, the source notes that Mr. Hamenyimana was arrested without the slightest indication that he was guilty of involvement in the offence that he was alleged to have committed. In this regard, the source notes that Mr. Hamenyimana was in bed when the police arrested him. The lack of any proof of his guilt is further demonstrated by the fact that no incriminating evidence was put forward during the investigation. In this connection, the source recalls that Mr. Hamenyimana was acquitted by the trial court on 8 August 2017 and was held in detention without any legal basis until 2 May 2019, which constitutes a violation of article 203 of the Code of Criminal Procedure. The source concludes that, in view of the above, the detention of Mr. Hamenyimana should be considered arbitrary under category I.

(ii) Category III

14. According to the source, the facts show that the proceedings against Mr. Hamenyimana were marred by numerous irregularities that constitute violations of Burundian law and international standards relating to the right to liberty and security of person and the right to a fair trial. Taken together, these violations suggest that Mr. Hamenyimana did not enjoy the protection of the law and are of such gravity as to give his detention an arbitrary character.

15. Firstly, the source alleges a violation of procedural rules and safeguards during the arrest of Mr. Hamenyimana, since no warrant justifying his arrest was presented to him.

16. Secondly, the source alleges that Mr. Hamenyimana had no access to legal assistance during the trial. Indeed, he was deprived of the fundamental right to be assisted by a lawyer in judicial proceedings. During questioning by the National Intelligence Service and, subsequently, his appearance before the Bujumbura Mairie public prosecutor, Mr. Hamenyimana was not assisted by a lawyer, even though this is a legal obligation under article 95 of the Code of Criminal Procedure. The source argues that Mr. Hamenyimana's right to be assisted by a lawyer continued to be violated during his interview by the investigating judge and during the hearing before the court of major jurisdiction, sitting in chambers.

17. The source therefore concludes that the procedural irregularities of which Mr. Hamenyimana was a victim seriously undermined his right to a fair trial and are of such gravity that his detention must be considered arbitrary under category III.

(iii) Category V

18. The source alleges that Mr. Hamenyimana's ethnicity was a factor in his "persecution". In support of this allegation, the source recalls that the comments made about Mr. Hamenyimana and the other persons who had been arrested, namely that they should be hit in the lower back to make them infertile, since their ethnic group supposedly produced courageous rebels, are sufficient proof of ethnic hatred. The source notes that the terms used are reminiscent of hateful rhetoric of some members of the political authorities.

Response from the Government

19. On 25 March 2020, the Working Group transmitted to the Government a communication concerning Mr. Hamenyimana. The Working Group requested it to provide detailed information about Mr. Hamenyimana by 25 May 2020 at the latest. Specifically, the Working Group requested the Government to clarify the legal provisions justifying Mr. Hamenyimana's continued detention and their compatibility with the obligations of Burundi under international human rights law, in particular with the treaties that the State has ratified. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Mr. Hamenyimana.

20. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work. The Working Group notes with concern that the Government has not taken the opportunity to respond to the allegations made in the present case and in other communications transmitted under the regular procedure in recent years.¹ Indeed, the Government has not responded to the Working Group under its regular communications procedure since 2012. The Working Group invites the Government to engage constructively with it on all allegations relating to the arbitrary deprivation of liberty.

Discussion

21. 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.

22. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

23. The Working Group recalls that, in accordance with paragraph 17 (a) of its methods of work, it reserves the right to render an opinion, on a case-by-case basis, as to whether the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. The circumstances of the present case, including the allegations that Mr. Hamenyimana was subjected to serious human rights violations, are such that the Working Group considers that there is still relevance in rendering an opinion on the question of whether the deprivation of liberty of Mr. Hamenyimana was arbitrary, even though he was released on 2 May 2019.

24. The source argues that Mr. Hamenyimana's arrest and detention were arbitrary under categories I, III and V. The Working Group will consider the source's allegations one by one.

Category I

25. The Working Group notes that Mr. Hamenyimana was arrested on 19 January 2016 without a warrant and without being duly informed, at the time of his arrest, of the reasons

¹ See opinions No. 25/2020, No. 37/2019, No. 7/2018, No. 54/2017, No. 8/2016, No. 30/2015, No. 33/2014 and No. 14/2013.

for the deprivation of his liberty. It was not until 26 January 2016 that he learned that an arrest warrant had been issued against him, for his transferral to Mpimba prison, and that he had been charged with harming national security. The Government has not contested these allegations.

26. According to article 9 (1) of the Covenant, no one may be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. In order for a deprivation of liberty to have a legal basis, it is not sufficient that there be a law that authorizes the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.² The Working Group concludes that the arrest of Mr. Hamenyimana without a warrant constitutes a violation of his right under article 9 (1) of the Covenant and article 9 of the Universal Declaration of Human Rights.

27. Furthermore, the Working Group has consistently held that detention on remand is an exceptional measure and as such must be justified in each individual case.³ Mr. Hamenyimana's application for provisional release from remand was rejected by the Ntahangwa court of major jurisdiction in February 2016. However, by a decision of 23 August 2016, a copy of which was provided to the Working Group by the source, the Mukaza court of appeal amended the order issued at first instance and ordered the provisional release of Mr. Hamenyimana. The source notes, however, that this decision was never enforced and that Mr. Hamenyimana remained in detention on remand, despite his attempts to have the decision implemented. The Government has not contested this allegation, which, moreover, is supported by the documentation provided by the source. The Working Group concludes that the continued detention of Mr. Hamenyimana, despite the decision ordering his release, had no legal basis and constitutes a second violation of article 9 (1) of the Covenant.⁴

28. In addition, Mr. Hamenyimana was acquitted by the Mukaza court of major jurisdiction in a judgment on the merits, of which he was notified on 8 August 2017. The source provided the Working Group with a copy of the judgment. Once again, this judgment was not enforced, and Mr. Hamenyimana remained in detention until 2 May 2019, almost 21 months after he was acquitted. The continued detention of Mr. Hamenyimana after his acquittal constitutes a flagrant violation of the right under article 9 of the Covenant to be tried or released.⁵

29. Furthermore, the Working Group notes that Mr. Hamenyimana was brought before the public prosecutor on 26 January 2016. As the Working Group has previously noted, a prosecuting body cannot be considered a judicial authority for the purposes of article 9 (3) of the Covenant.⁶ Moreover, the Working Group considers that Mr. Hamenyimana was not able to challenge his detention under article 9 (4) of the Covenant, as he had not had access to a lawyer when he was brought before the prosecutor. Access to a lawyer from the outset of detention is an essential safeguard to enable the detainee to challenge the legal basis for his or her detention.⁷ Consequently, the legal basis for Mr. Hamenyimana's detention was not established under either article 9 (3) or article 9 (4) of the Covenant.

30. The Working Group therefore considers that Mr. Hamenyimana's arrest and detention lacked a legal basis and were thus arbitrary under category I.

² Opinions No. 25/2020, para. 34; No. 46/2018, para. 48; No. 36/2018, para. 40; No. 10/2018, para. 45; and No. 38/2013, para. 23.

³ See opinion No. 62/2017. See also the Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 38, and A/HRC/19/57, paras. 53–56.

⁴ Human Rights Committee, general comment No. 35, para. 41.

⁵ *Ibid.*, para. 41.

⁶ Opinions No. 5/2020, para. 72; No. 45/2019, para. 52; and No. 14/2015, para. 28. See also Human Rights Committee, general comment No. 35, para. 32.

⁷ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), principle 9 and guideline 8.

Category III

31. With regard to category III, the source explains that Mr. Hamenyimana was deprived of the right to legal assistance in the context of judicial proceedings. The source asserts that Mr. Hamenyimana had no legal assistance during questioning at the National Intelligence Service facilities, his interview by the investigating judge or the hearing before the court of major jurisdiction, sitting in chambers. In the absence of any rebuttal from the Government, the Working Group considers that the facts presented by the source are credible.

32. The Working Group recalls that all persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their arrest, and that such assistance must be provided without delay.⁸ In the light of the facts, the Working Group concludes that Mr. Hamenyimana's right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choice, as provided for in article 14 (3) (b) of the Covenant, has been violated, as has his right to mount an effective defence through counsel of his choice, as provided for in article 14 (3) (d) of the Covenant.

33. The Working Group also considers that Mr. Hamenyimana has established a *prima facie* credible case – which the Government has not contested – that he was subjected to torture and ill-treatment at the National Intelligence Service facilities, in violation of the absolute prohibition of torture as a peremptory norm of international law, article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant and articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Burundi is a party. Furthermore, the Working Group considers that Mr. Hamenyimana's ability to participate in his own defence would have been seriously impaired by the allegations of torture and ill-treatment, in violation of his right to equality of arms under article 14 (1) of the Covenant. The Working Group therefore refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

34. The Working Group concludes that these violations are of such gravity as to give the deprivation of liberty of Mr. Hamenyimana an arbitrary character under category III.

Category V

35. The source maintains that Mr. Hamenyimana's ethnicity was a factor in the ill-treatment that he experienced during his detention. The source asserts that, following his arrest, Mr. Hamenyimana was subjected to violence and torture for more than three hours, including with steel rods and bayonets. The law enforcement officials responsible for the violence also hurled hateful insults about Mr. Hamenyimana's ethnicity and that of the other persons who had been arrested. As an example, the source mentions the officials' comment that the detainees should be hit "to make them infertile, as their ethnic group produces courageous rebels".

36. The Working Group recalls that, 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, the detention is arbitrary. The Working Group also notes that statements made towards a detained person that demonstrate a discriminatory attitude are one of the factors used to establish the discriminatory character of a case of deprivation of liberty.⁹

⁸ Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 32 and 34; and the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 9 and guideline 8.

⁹ A/HRC/36/37, para. 48.

37. Recalling its opinions No. 25/2020 and No. 7/2018, in which it found that Burundian law enforcement officials had practised discrimination on the basis of ethnic origin, and in the absence of any rebuttal from the Government, the Working Group considers Mr. Hamenyimana's allegations to be credible. The comments that the authorities made when inflicting violence on Mr. Hamenyimana suggest that his arrest and detention were the result of ethnic discrimination. This link is all the more convincing in view of the nature of the discriminatory statements made and the link with the accusations levelled against Mr. Hamenyimana regarding his alleged participation in a rebel group. The Working Group concludes that the deprivation of liberty of Mr. Hamenyimana constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. The Working Group therefore considers that Mr. Hamenyimana's arrest and detention were arbitrary under category V.

38. The Working Group also takes note of the source's allegations – which the Government has not contested – that Mr. Hamenyimana was handcuffed and placed in a cell of the National Intelligence Service, where he remained for one week. According to the source, his handcuffs were removed only when he showered. He had no mattress and slept on a concrete floor. Mr. Hamenyimana shared this cell with 12 other persons. The source also states that Mr. Hamenyimana received no treatment despite the injuries that he had sustained during the beating. The Working Group takes this opportunity to remind the Government of its obligation under article 10 (1) of the Covenant to ensure that all persons deprived of their liberty are treated with humanity and with respect for their inherent dignity.

39. The present case is one of many cases brought before the Working Group in recent years concerning arbitrary detention in Burundi.¹⁰ The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.¹¹

Disposition

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

The deprivation of liberty of Jean Claude Hamenyimana, being in contravention of articles 2, 7 and 9 of the Universal Declaration of Human Rights and articles 2, 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

41. The Working Group requests the Government of Burundi to take the steps necessary to remedy the situation of Mr. Hamenyimana 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.

42. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Hamenyimana an enforceable right to compensation and other reparations, in accordance with international law.

43. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Hamenyimana and to take appropriate measures against those responsible for the violation of his rights.

44. 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.

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

¹⁰ See opinions No. 56/2020, No. 55/2020, No. 25/2020, No. 37/2019, No. 7/2018, No. 54/2017, No. 8/2016, No. 30/2015 and No. 33/2014.

¹¹ See, for example, opinion No. 47/2012, para. 22.

Follow-up procedure

46. 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 compensation or other reparations have been made to Mr. Hamenyimana;

(b) Whether an investigation has been conducted into the violation of Mr. Hamenyimana's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Burundi with its international obligations in line with the present opinion;

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

47. 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.

48. 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.

49. 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.¹²

[Adopted on 25 August 2020]

¹² Human Rights Council resolution 42/22, paras. 3 and 7.