



# General Assembly

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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-ninth session, 23–27 November 2020

#### Opinion No. 62/2020, concerning Benoît Faustin Munene (the Republic of the Congo)

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 6 April 2020 the Working Group transmitted to the Government of the Republic of the Congo a communication concerning Benoît Faustin Munene. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
  - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
  - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
  - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
  - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).



## Submissions

### *Communication from the source*

4. Benoît Faustin Munene is a serviceman and politician of Angolan and Congolese (Democratic Republic of the Congo) nationality. He lives in the Republic of the Congo.

#### (a) Context

5. According to the source, Mr. Munene was the head of the armed forces of the Alliance of Democratic Forces for the Liberation of Congo-Zaire and, alongside Laurent-Désiré Kabila, an active participant in the events leading to the fall of the Mobutu regime.

6. The source states that, under Mr. Kabila's presidency, which lasted from 1997 to 2001, Mr. Munene was appointed Deputy Minister of the Interior and, subsequently, Chief of Staff of the Congolese armed forces and Chief of Staff of the Congolese air force. After Mr. Kabila's assassination in 2001, Mr. Munene was removed from his government post. It is alleged that Mr. Munene's status and privileges were then gradually withdrawn, as he was appointed to non-existent posts on the pretext of being promoted. In 2006, he was forced to retire and placed under surveillance.

7. The source explains that Mr. Munene then formed a political party, the Convention du peuple pour le progrès et la démocratie, and stood as a candidate in the parliamentary elections. However, the incumbent authorities obstructed all the political activities of this newly established party.

8. The source alleges that Mr. Munene was subsequently subjected to several assassination attempts and attacks against his person. In October 2009, and again in September 2010, armed men allegedly attacked his residence using heavy weapons, shooting at his family and staff. During the last attack, one of his daughters was reportedly killed. For this reason, Mr. Munene left Kinshasa.

9. The source states that, on 29 September 2010, Mr. Munene went into exile in the Republic of the Congo, where the authorities welcomed him and granted him "personal protection".

10. The source reports that Mr. Munene has subsequently been held in de facto detention, without justification, by the national authorities of the Republic of the Congo, which confiscated both his Angolan passport and the passport issued to him by the Democratic Republic of the Congo. The source explains that Mr. Munene was first placed under house arrest in a State-owned villa in Ewo, in the west of the country, near the border with Gabon. The national authorities have placed him under constant surveillance on the pretext that they are ensuring his safety. The source states that the conditions of his house arrest are very strict in that he is not allowed to move freely outside the residence and its gardens and is kept under constant surveillance by armed or plain-clothed guards. Furthermore, he is allowed only a bare minimum of communication and his written and telephone messages are monitored and subject to a request for authorization.

11. The source further reports that, on 4 March 2011, during a mock trial in the Democratic Republic of the Congo, the Matadi military court sentenced Mr. Munene, in his absence, to life imprisonment for conspiring against national security. The source alleges that Mr. Munene was never summoned or asked to give a statement. He has never been notified of this judgment, having heard about it only through the press. Following this conviction, the Democratic Republic of the Congo requested the extradition of Mr. Munene but the Republic of the Congo opposed it.

12. The source adds that Mr. Munene has not been granted a residency permit. His deprivation of liberty is not based on any court decision. Moreover, it is not possible for him to submit an application for political asylum, or another residency permit, to the National Committee for Assistance to Refugees, the body responsible for dealing with asylum applications. On supposedly humanitarian grounds, Mr. Munene has been placed under the jurisdiction of the Republic of the Congo and detained in his home, without justification, under the constant surveillance of State officials. According to the source, Mr. Munene is

being used as a high-profile bargaining chip vis-à-vis the authorities of the Democratic Republic of the Congo.

13. The source explains that, in December 2017, Mr. Munene attempted to travel to Gabon to submit an asylum application to the Swiss consular authorities, which have no presence in Brazzaville. Just after he had crossed the border, however, Mr. Munene was arrested and detained by the Gabonese border police for unlawfully entering the country.

14. On 12 January 2018, Mr. Munene was allegedly brought back to Brazzaville, where he was held at the Directorate General for National Surveillance without any legal basis or court decision to justify this action.

15. The source states that, following this unjustified incarceration, Mr. Munene's lawyer contacted the authorities of the Republic of the Congo to find out why he had been detained and to request his release. In this connection, Mr. Munene's lawyer wrote to the Ambassador of the Republic of the Congo (letter dated 17 May 2018) and then to the President (letter dated 31 May 2018) with a view to resolving the situation. He then went to the Directorate General for National Surveillance with a view to meeting with Mr. Munene sometime between 8 and 15 June 2018. Although Mr. Munene's lawyer had obtained a visa from the consular authorities of the Republic of the Congo, he received an email on 6 June 2018 informing him that, on the instructions of the Ambassador of the Republic of the Congo to France, it would be "helpful" for him to postpone his trip in order to prevent any possible difficulties. Mr. Munene's lawyer went ahead with the trip despite this warning, but the authorities of the Republic of the Congo tried to dissuade him from visiting Mr. Munene.

16. The source explains that, despite Mr. Munene's critical state of health (he suffers from high blood pressure and cancer), during his detention he has had access only to primary health care and has never received adequate medical treatment. No specialist outpatient consultations have been arranged for him and he has never been allowed out of detention to attend health-care facilities.

17. According to the source, Mr. Munene not only has difficulty contacting his lawyer but has also been almost totally isolated from his relatives, only one of whom has been allowed to visit his residence, to deliver his mail once a month.

18. The source reports that Mr. Munene's lawyer has continued to send letters to the authorities in an effort to ensure that Mr. Munene receives adequate medical care.

19. The source states that, in 2019, in view of the change in the political situation and the presidency, there was no longer any reason to keep Mr. Munene in strict detention on the grounds that his personal safety was allegedly being protected. In letters dated 30 January 2019 and 11 July 2019, Mr. Munene's lawyer requested his release and the return of his Angolan passport so that he would be free to leave the Republic of the Congo. The lawyer has not received any response.

20. The source states that Mr. Munene is still unable to take legal action against his unlawful detention. At the same time, asylum applications have been submitted in South Africa and Switzerland but these have not yet been processed.

21. Lastly, the source reports that, in December 2019, Mr. Munene was once again placed under house arrest, where he remains to this day. He is under 24-hour surveillance and cannot leave the Republic of the Congo, not even to receive the medical care that he urgently needs. The source explains that he lives with his wife and his youngest daughter but has no freedom of movement. It further states that Mr. Munene lives under constant armed surveillance and has been forbidden from leaving his residence or receiving visits, aside from a single visit from his doctor. He is also forbidden from communicating with anyone.

(b) Legal analysis

22. According to the source, Mr. Munene's detention is arbitrary under categories I, III and V.

## i. Category I

23. The source states that Mr. Munene has been deprived of his freedom of movement since he arrived in the Republic of the Congo. In September 2010, he was placed under house arrest and kept under continuous surveillance in a villa in Ewo. He was not free to leave his residence or the country. From January 2018 to December 2019, following his trip to Gabon, Mr. Munene was detained at the Directorate General for National Surveillance under very harsh conditions: he had almost no contact with his relatives and it was difficult for him to communicate with his lawyer. In December 2019, Mr. Munene was once again placed under house arrest, where he remains to this day. As he has no freedom of movement, he is unable to leave his residence or the country. He is also under 24-hour surveillance. The source thus reports that Mr. Munene has been subjected to several periods of deprivation of liberty.

24. The source recalls that house arrest is considered to be as much a form of deprivation of liberty as outright detention.<sup>1</sup>

25. The source therefore alleges that Mr. Munene may be considered to have been deprived of his liberty since September 2010 (that is, for some 10 years).

26. Since this date, no detention order has been issued to justify Mr. Munene's deprivation of liberty and he has never been brought before a national judge. No judicial decision has been issued. No legal grounds have been cited to justify his house arrest and subsequent detention at the Directorate General for National Surveillance. No reason for his detention has been given aside from an oral explanation relating to his alleged security, in connection with which he was supposedly placed under the personal protection of the President of the Republic. According to the source, this constitutes arbitrary detention under category I.

27. The source also affirms that Mr. Munene has never accepted his deprivation of liberty. On the contrary, he is trying to regain his freedom and leave the Republic of the Congo freely.

28. The source further argues that the grounds for Mr. Munene's deprivation of liberty are spurious. For supposedly humanitarian reasons, Mr. Munene has been placed at the mercy of the authorities of the Republic of the Congo. He has no permit that would allow him to remain lawfully in this country. He cannot apply for refugee status to the National Committee for Assistance to Refugees, the authority responsible for granting such status, since the Directorate General for National Surveillance sits on this Committee on behalf of the Ministry of the Interior. He is therefore totally and arbitrarily dependent on the authorities of the Republic of the Congo, where he has no legal status.

29. No detention order has been issued to justify Mr. Munene's deprivation of liberty, which has no legal basis. The source concludes that Mr. Munene's detention is arbitrary under category I.

30. Furthermore, the source argues that Mr. Munene's continued detention without judicial oversight also renders his detention arbitrary under category I. In this regard, the source recalls that Mr. Munene has been deprived of his liberty for almost 10 years and has never been brought before a judge, as provided for in article 9 (3) of the Covenant, either during his house arrest or during his detention at the Directorate General for National Surveillance.

## ii. Category III

31. According to the source, Mr. Munene has found it difficult to communicate with his lawyer as he has not been given any means of contacting him freely and confidentially. The source states that this violates principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and article 14 (3) (b) of the Covenant.

32. In addition, every time that Mr. Munene was visited by his lawyer between 8 and 15 June 2018, the meeting took place under direct supervision and in the presence of a guard or officer of the Directorate General for National Surveillance.

<sup>1</sup> See *Yklymova v. Turkmenistan* (CCPR/C/96/D/1460/2006); and deliberation No. 01 of the Working Group (E/CN.4/1993/24, section II).

33. In the light of these facts, the source concludes that communication between Mr. Munene and his lawyer has been restricted.

34. The source also argues that Mr. Munene has been kept apart from members of his family, in violation of principles 15, 16 (1) and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rules 43 (3), 58 (1) and 68 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). Indeed, when he was being held at the Directorate General for National Surveillance, Mr. Munene was allowed only extremely limited contact with his family. Only one of them was allowed to bring him his mail once a month. This is the only contact that he was granted.

35. The source therefore concludes that the impact of these restrictions, and his isolation, on the fairness of the proceedings are sufficiently serious as to render the detention arbitrary under category III.

iii. Category V

36. The source recalls that, when deprivation of liberty is the result of discrimination based on political opinion, it constitutes arbitrary detention. It also recalls that Mr. Munene, a professional serviceman, is known for his political activism. He was a member of the Government of the Democratic Republic of the Congo after the fall of the Mobutu regime and was subsequently ousted when Joseph Kabila took power. According to the source, the authorities then wished to get rid of all members of the previous Government, especially Mr. Munene, who was a high-ranking tutelary and military figure in the country. The source reiterates that Mr. Munene then established a political party but the incumbent authorities prevented him from engaging in political activity.

37. The source alleges that Mr. Munene's physical integrity and life were in danger because he was a political opponent of the incumbent regime. As a result, he went into exile in the Republic of the Congo.

38. The source affirms that the present case revolves around the public view, in the Democratic Republic of the Congo, of Mr. Munene as a political figure. Even though Mr. Munene is not a political opponent of the incumbent regime in the Republic of the Congo, he was and still is considered to be a political threat in the Democratic Republic of the Congo.

39. In this connection, the source reports that Mr. Munene has repeatedly denounced the massacres, rapes and ambushes carried out in the east of the Democratic Republic of the Congo as well as the illegal trafficking of raw materials, corruption, misappropriation of public funds, theft of other people's property, unpaid wages, unemployment, poverty, rigged elections, degradation of institutions and agencies, insecurity, injustice, arbitrary detention, summary executions and lack of respect for human rights in that country.

40. The source further recalls that the Democratic Republic of the Congo has requested Mr. Munene's extradition because, in his absence, the Matadi military court sentenced him to life imprisonment for conspiring against the State. The source claims that, although the Republic of the Congo has refused to extradite Mr. Munene, it has also refused to release him because the two countries have allegedly reached an agreement whereby he is kept away from the political life of the Democratic Republic of the Congo and is thereby deprived of his physical freedom and freedom of expression.

41. The source also maintains that, in view of the pressure being exerted by the authorities of the Democratic Republic of the Congo on the authorities of the Republic of the Congo, Mr. Munene is at risk of being returned to the former country at any time and executed there.

42. The source therefore argues that, on the pretext of providing Mr. Munene with humanitarian assistance, but without according him the right to the international protection afforded to political refugees, the authorities are in fact illegally detaining Mr. Munene, covertly subjecting him to the life sentence handed down in the Democratic Republic of the Congo.

43. Therefore, according to the source, Mr. Munene is being detained because of his political opinions and his detention may therefore be considered arbitrary under category V.

*Response from the Government*

44. On 6 April 2020, the Working Group transmitted to the Government a communication concerning Mr. Munene. The Working Group requested it to provide detailed information about Mr. Munene by 5 June 2020 at the latest. Specifically, the Working Group requested the Government to clarify the legal provisions justifying Mr. Munene's continued detention and their compatibility with the obligations of the Republic of the Congo 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 Mr. Munene's physical and mental integrity.

45. The Working Group regrets that it did not receive a response from the Government to that communication, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work. The Working Group notes with concern that, in recent years, the Government has not taken the opportunity to respond, or has not responded in a timely manner, under the Working Group's regular procedure.<sup>2</sup> The Working Group invites the Government to engage constructively with it on all allegations relating to the arbitrary deprivation of liberty.

**Discussion**

46. 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.

47. In determining whether the deprivation of liberty of Mr. Munene is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal 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.

48. Before examining whether Mr. Munene's detention is arbitrary, it is first necessary to determine the periods during which he has been detained. According to the source, Mr. Munene has been held in detention for three periods since he arrived in the Republic of the Congo in September 2010: (a) from 29 September 2010 until December 2017, when he was under supervised house arrest; (b) from 12 January 2018 until December 2019, when he was held at the Directorate General for National Surveillance; and (c) from December 2019 to date, during which time he has again been under supervised house arrest. The source argues that the conditions in which Mr. Munene was held during each of these periods amount to a deprivation of liberty.

49. More specifically, the source alleges that, from 29 September 2010 until December 2017, i.e. for more than seven years, Mr. Munene was kept under house arrest in a villa belonging to the Republic of the Congo in Ewo, near the Gabonese border. According to the source, Mr. Munene could not move freely outside the residence and was kept under constant surveillance by armed or plain-clothed guards. His communications were limited to a bare minimum as all his written and telephone messages were monitored and subject to authorization.

50. In addition, from 12 January 2018 to December 2019, i.e., for almost two years, Mr. Munene was held at the Directorate General for National Surveillance under a very strict detention regime. According to the source, Mr. Munene had almost no contact with his family and had difficulty communicating with his lawyer. One family member was allowed to bring him his mail once a month.

51. Lastly, from December 2019 to date, i.e. for almost a year, Mr. Munene has been under house arrest again. He is under 24-hour surveillance and cannot leave the Republic of the Congo, not even to receive urgent medical care. According to the source, Mr. Munene lives with his wife and youngest daughter but has no freedom of movement as he is not allowed to leave his residence. Mr. Munene lives under constant armed surveillance, has not

<sup>2</sup> See opinions No. 56/2018, No. 5/2018, No. 25/2017 and No. 44/2014.

been allowed to receive any visits, other than a single visit from his doctor, and is forbidden from communicating with anyone.

52. In its deliberation No. 1 on house arrest, the Working Group stated that house arrest may be compared to deprivation of liberty provided that it is carried out in closed premises which the person is not allowed to leave.<sup>3</sup> It went on to clarify that the question of whether a person is deprived of his or her liberty is a question of fact and that a person who is free to leave at any time is not deprived of his or her liberty.<sup>4</sup> The Working Group assesses on a case-by-case basis whether an individual has indeed been deprived of his or her liberty.

53. In applying these principles, the Working Group concludes that Mr. Munene has clearly been deprived of his liberty during each of these three periods. On each occasion, Mr. Munene was detained in premises that he was not allowed to leave and subjected to constant surveillance. Furthermore, his communications were monitored and his contact with the outside world was restricted. Apart from a brief period between December 2017 and 12 January 2018, during which he attempted to travel to Gabon, Mr. Munene has been detained continuously since 29 September 2010, that is, for more than 10 years. In drawing this conclusion, the Working Group notes that the Government has not submitted any information to contest the source's allegations.

54. The Working Group will now examine whether Mr. Munene's detention since September 2010 is arbitrary.

#### *Category I*

55. The source reports that Mr. Munene went into exile in the Republic of the Congo after several assassination attempts and attacks had been made against him when he was based in Kinshasa. On 29 September 2010, when Mr. Munene entered the Republic of the Congo, he was placed in protective detention by the national authorities on the pretext that they were ensuring his safety. The authorities confiscated both his passports, and Mr. Munene has no official legal status in the Republic of the Congo. He cannot apply for asylum or refugee status as the Directorate General for National Surveillance is part of the organization that grants this status. The source states that, on 4 March 2011, a military court in the Democratic Republic of the Congo sentenced Mr. Munene, in his absence, to life imprisonment for conspiring against national security. Although the Democratic Republic of the Congo has requested that Mr. Munene be extradited, the Republic of the Congo is refusing to do so and is instead detaining him indefinitely on the pretext of providing him with humanitarian assistance.

56. The Working Group considers that Mr. Munene's detention in the Republic of the Congo, since 29 September 2010, has no legal basis. According to the information received from the source, which has not been contested by the Government, no charges or legal proceedings have been brought against Mr. Munene in the Republic of the Congo and he is not being detained under any particular law that would provide for his being in custody.

57. Furthermore, as the Working Group has already indicated, deprivation of liberty to protect a person must be used only as a last resort and when the person concerned desires it. It must also be overseen by a judicial authority.<sup>5</sup> In the present case, detention was the authorities' immediate response rather than a last resort. The Working Group believes that alternative measures to detention could have been taken in order to provide Mr. Munene with appropriate protection. For instance, he could have been offered asylum through an independent assessment that did not involve the Directorate General for National Surveillance or his passport could have been returned, allowing him to seek asylum elsewhere. Moreover, Mr. Munene's refusal to accept his deprivation of liberty is clearly shown by his numerous attempts to seek asylum in other countries and to leave the Republic

<sup>3</sup> See Opinions No. 10/2020, para. 57; and No. 16/2011, para. 14.

<sup>4</sup> See A/HRC/36/37, paras. 50–56; and A/HRC/30/37, para. 9. See also opinions No. 56/2018, para. 43; No. 37/2018, para. 25; No. 30/2012, para. 15; No. 16/2011, para. 7; No. 13/2007, para. 24; No. 47/2006, para. 30; and No. 11/2001, para. 12.

<sup>5</sup> See E/CN.4/2002/77, para. 61; and E/CN.4/2003/8, para. 65 (which refers to the detention of vulnerable women but is also relevant to this case).

of the Congo freely. As indicated below, his detention has not been subject to any judicial oversight.

58. Furthermore, the Working Group cannot accept that there is any justification for keeping Mr. Munene under protection for more than 10 years,<sup>6</sup> especially since the political situation in the Democratic Republic of the Congo has reportedly improved since he went into exile. The Government has not provided any explanation as to why Mr. Munene needed to be detained for such a long time for his personal safety.<sup>7</sup>

59. The source further asserts, and the Government has not denied, that Mr. Munene has never had the opportunity to challenge the legality of his detention before a judicial authority in the Republic of the Congo, either during his house arrest or during his detention at the Directorate General for National Surveillance. The fact that the authorities have not given Mr. Munene the opportunity to challenge his detention is manifestly contrary to his right under article 9 (4) of the Covenant to take proceedings before a court so that the judicial authorities may decide without delay on the lawfulness of his detention. The right to challenge the lawfulness of detention, both at the outset and at regular intervals, applies to all situations of deprivation of liberty, including pretrial detention.<sup>8</sup> This judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.<sup>9</sup> Given that Mr. Munene has been unable to challenge his detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant has been violated.

60. The Working Group considers that Mr. Munene's inability to challenge his detention under article 9 (4) of the Covenant has been exacerbated by his restricted access to a lawyer throughout his detention. In particular, Mr. Munene has been unable to consult his lawyer in confidence. Free access to a lawyer from the outset of detention is an essential guarantee to ensure that detainees are able to challenge the legal basis of their detention.<sup>10</sup>

61. For these reasons, the Working Group concludes that there is no legal basis for Mr. Munene's detention since September 2010, that his detention violates article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant and that it is arbitrary under category I.

## Category II

62. According to the source, Mr. Munene played an active role in the political life of the Democratic Republic of the Congo before going into exile in the Republic of the Congo in September 2010. After being forced to retire in 2006, he formed a political party known as the *Convention du peuple pour le progrès et la démocratie* and stood for election. However, the source affirms that the authorities prevented this party from engaging in political activities.

63. The source also reports that Mr. Munene spoke out against the massacres, rapes and other violations committed in the east of the Democratic Republic of the Congo and expressed his views on other issues of public interest such as corruption, the misappropriation of public funds, unemployment, poverty, unfair elections, arbitrary detention, summary executions and the lack of respect for human rights in the country. The source alleges that,

<sup>6</sup> See Opinion No. 9/2004, para. 13 (finding that it is not possible to keep a person under house arrest, allegedly for protection purposes, for one year against his or her will). See also Opinion No. 15/2009, paras. 21–26 (relating to the absence of legal basis for holding persons in continued police protective custody).

<sup>7</sup> Even if it had been established that Mr. Munene was being held for security purposes, such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. See the Human Rights Committee's general comment No. 35 (2014), para. 15.

<sup>8</sup> See A/HRC/30/37, para. 9; and A/HRC/22/44, para. 82 (b).

<sup>9</sup> See A/HRC/30/37, para. 3. See also the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 4.

<sup>10</sup> 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. See also opinion No. 40/2020, para. 29.

although the Republic of the Congo has refused to extradite Mr. Munene to the Democratic Republic of the Congo, it is keeping him in detention under an agreement established between the two countries to remove him from public life and deprive him of his freedom of expression. The Working Group notes that the Government has not provided any information or explanation in response to the source's allegations.

64. The Working Group recalls that article 19 (2) of the Covenant provides that everyone has the right to freedom of expression; that right includes the 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 or her choice. This right applies to political discourse, commentary on public affairs and discussion of human rights.<sup>11</sup> It protects the holding and expression of opinions, including those which are critical of, or not in line with, government policy.<sup>12</sup> The Working Group considers that Mr. Munene's conduct falls within the right to freedom of opinion and expression protected under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant and that he was initially placed in detention, and remains there, because he exercised these rights.

65. Moreover, Mr. Munene's criticism of government policy, as expressed in his comments on various human rights issues in the Democratic Republic of the Congo, concerned matters of public interest. The Working Group considers that he was initially placed in detention, and remains there, because he exercised his right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant.<sup>13</sup>

66. There is nothing to suggest that the permissible restrictions on these rights set out in articles 19 (3) and 25 of the Covenant apply in the present case. The Working Group is satisfied neither that the detention of Mr. Munene was necessary to protect a legitimate interest under these provisions nor that his detention for an undetermined period, beginning 10 years ago, is a proportionate response to his previous activities in the Democratic Republic of the Congo. Importantly, there is no evidence to suggest that Mr. Munene's criticisms of the Government amounted to a direct or indirect call for violence or that they might reasonably be considered a threat to national security, public order, public health or morals or the rights or reputations of others. The Human Rights Council has requested States to refrain from imposing restrictions under article 19 (3) of the Covenant that are not consistent with international human rights law.<sup>14</sup> The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

67. The Working Group concludes that Mr. Munene has been held in detention since September 2010 because he peacefully exercised his rights to freedom of opinion and expression and his right to take part in the conduct of public affairs and that his detention is contrary to articles 19 and 21 (1) of the Universal Declaration of Human Rights and articles 19 and 25 (a) of the Covenant. His detention is arbitrary under category II.

### *Category III*

68. The source alleges that Mr. Munene's ability to communicate freely and in confidence with his lawyer has been restricted throughout his detention, in violation of principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and article 14 (3) (b) of the Covenant.

69. Following Mr. Munene's detention at the Directorate General for National Surveillance in January 2018, his lawyer contacted the authorities of the Republic of the Congo to ask why he had been detained and to request his release. Mr. Munene's lawyer also visited him at the Directorate General in June 2018, despite the authorities' attempts to delay

<sup>11</sup> See the Human Rights Committee's general comment No. 34 (2011), para. 11.

<sup>12</sup> See opinions No. 8/2019, para. 55; and No. 79/2017, para. 55.

<sup>13</sup> Human Rights Committee, general comment No. 25 (1996), para. 8 (noting that citizens can take part in the conduct of public affairs by exerting influence through public debate). See also opinions No. 36/2020, No. 16/2020, No. 15/2020 and No. 45/2019.

<sup>14</sup> Human Rights Council resolution 12/16, para. 5 (p).

his trip and dissuade him from visiting his client. The source affirms that all the visits that Mr. Munene's lawyer paid to him between 8 and 15 June 2018 took place under direct supervision and in the presence of a guard or officer of the Directorate General. Mr. Munene has also been subjected to restrictions on visits and communications during his two periods of house arrest. Consequently, the source maintains that Mr. Munene's detention is arbitrary under category III.

70. In the present case, Mr. Munene's detention is not related to a criminal case as no charges or proceedings have been brought against him and he is not subject to extradition proceedings aimed at bringing him before a court in the Democratic Republic of the Congo. Indeed, Mr. Munene has already been sentenced to life imprisonment in his absence. His detention for protective purposes is a form of administrative detention.<sup>15</sup> However, the Working Group has found that in cases involving excessively lengthy detention, the individual should enjoy the same guarantees as in criminal cases, even if the detention is administrative.<sup>16</sup> Mr. Munene has been in detention for more than 10 years under punitive conditions similar to those imposed on convicted persons.<sup>17</sup> Accordingly, the Working Group will examine his detention under category III. In doing so, the Working Group reiterates that the Government has not challenged any of the allegations made by the source.

71. 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 apprehension, and such access must be provided without delay.<sup>18</sup> In the view of the Working Group, Mr. Munene's lack of access to his lawyer throughout his detention, and the fact that guards supervised, and were present during, interviews with his lawyer violated his right to communicate with and be assisted by counsel, in accordance with principles 11 (1), 15, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Legal consultations may be within sight but not within hearing of the authorities, and all communications with counsel must remain confidential.<sup>19</sup>

72. The Working Group concludes that these restrictions on Mr. Munene's access to his lawyer have contributed to his being detained for an excessively lengthy period of time and are therefore of such gravity as to give his detention an arbitrary character under category III.

#### *Category V*

73. The source argues that Mr. Munene is being detained because of his political opinions. It states that Mr. Munene is known for his political activism. He was a member of the Government of the Democratic Republic of the Congo after the fall of the Mobutu regime and was removed from his post when Joseph Kabila took power. The source also asserts that Mr. Munene's political influence in the Democratic Republic of the Congo is a key factor in the present case. Although he is not part of the political opposition in the Republic of the Congo, he was and still is considered to be a political threat in the Democratic Republic of the Congo. The authorities of the Republic of the Congo are therefore covertly enforcing the life sentence handed down to Mr. Munene, in his absence, in the Democratic Republic of the Congo.

74. As the Government has not responded to the source's allegations or explained why Mr. Munene remains in protective detention after 10 years, the Working Group concludes that Mr. Munene is being detained on discriminatory grounds because of his political or other opinions. As previously indicated, the Government could have offered Mr. Munene asylum

<sup>15</sup> Administrative detention is the deprivation of liberty of a person that is ordered by the executive authority of the State rather than by the judiciary; E/CN.4/Sub.2/1989/27, para. 17.

<sup>16</sup> See opinions No. 49/2020, No. 12/2020, No. 73/2018 and No. 31/2017. See also the Human Rights Committee's general comment No. 32 (2007), para. 15.

<sup>17</sup> In view of the facts presented, the Working Group notes that Mr. Munene has never been tried and has not participated in any judicial proceedings in the Republic of the Congo that might have met the requirements of article 14 of the Covenant.

<sup>18</sup> See A/HRC/30/37, annex, principle 9 and guideline 8.

<sup>19</sup> See the Human Rights Committee's general comment No. 32 (2007), para. 34; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 18; A/HRC/30/37, annex, guideline 8; and opinion No. 59/2020, para. 78.

or allowed him to leave the Republic of the Congo to seek asylum elsewhere. No attempt was made to explore the feasibility of such measures, which suggests that Mr. Munene was placed in detention because of his previous political activities in the Democratic Republic of the Congo. Moreover, in the discussion above concerning category II, the Working Group has established that Mr. Munene's detention resulted from the peaceful exercise of his rights under international law. When detention results from the active exercise of civil and political rights, there is a strong presumption that the detention also constitutes a violation of international law on the grounds of discrimination based on political or other views.<sup>20</sup> Mr. Munene's deprivation of liberty violates articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and is arbitrary under category V.

#### *Concluding remarks*

75. The source reports that Mr. Munene was isolated from his family during his detention at the Directorate General for National Surveillance. During this period, Mr. Munene had extremely limited contact with the outside world: only one of his relatives was allowed to bring him his mail once a month. In the view of the Working Group, the restrictions imposed on Mr. Munene's communication with his family violated his right to communicate with the outside world under principles 15 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

76. Furthermore, the Working Group is deeply concerned that Mr. Munene has never received adequate medical care during his detention, despite the fact that he suffers from high blood pressure and cancer. No outpatient or specialist consultations have been arranged for him and he is not allowed to receive medical treatment elsewhere. Mr. Munene's lawyer has sent several letters to the authorities requesting that medical care be made available to him. The Working Group urges the Government to immediately release Mr. Munene and ensure that he receives medical care. 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.

77. The Working Group recognizes that all States have an obligation to ensure that persons responsible for committing offences are punished. However, the Working Group's opinion in the present case does not concern the previous proceedings brought against Mr. Munene in the Democratic Republic of the Congo but the conditions in which he is currently being detained. States must respect the provisions of the Covenant, violations of which have been identified in the present case.<sup>21</sup>

78. The Working Group would like to conduct a visit to the Republic of the Congo so that it can engage in a constructive dialogue with the Government and thereby address concerns relating to the arbitrary deprivation of liberty.

#### **Disposition**

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

The deprivation of liberty of Benoît Faustin Munene, being in contravention of articles 2, 7, 8, 9, 19 and 21 (1) of the Universal Declaration of Human Rights and of articles 2 (1) and (3), 9, 19, 25 (a) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

80. The Working Group requests the Government of the Republic of the Congo to take the steps necessary to remedy the situation of Mr. Munene 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.

81. The Working Group considers that, taking into account all the circumstances of the case, including the risk of harm to Mr. Munene's health, the appropriate remedy would be to

<sup>20</sup> See opinions No. 42/2020, para. 93; No. 36/2020, para. 75; No. 59/2019, para. 79; No. 13/2018, para. 34; and No. 88/2017, para. 43.

<sup>21</sup> See opinion No. 1/2020, para. 74.

release Mr. Munene immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.<sup>22</sup>

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

83. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

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

### **Follow-up procedure**

85. 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 Mr. Munene has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Munene;
- (c) Whether an investigation has been conducted into the violation of his rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Republic of the Congo with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

86. 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.

87. 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.

88. 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.<sup>23</sup>

*[Adopted on 23 November 2020]*

<sup>22</sup> Working Group on Arbitrary Detention, deliberation No. 10 (A/HRC/45/16, annex I) (identifying full reparations to which victims of arbitrary deprivation of liberty are entitled).

<sup>23</sup> Human Rights Council resolution 42/22, paras. 3 and 7.