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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fifth session, 18-27 April 2016

Opinion No. 18/2016 concerning Boniface Muriuki Chuma, Ravi Ramesh Ghaghda, Anthony Keya Munialo, Peter Muriuki Nkonge and Anthony Mwandime Wazome (South Sudan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the 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 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.
2. In accordance with its methods of work (A/HRC/30/69), on 19 February 2016 the Working Group transmitted a communication to the Government of South Sudan concerning Boniface Muriuki Chuma, Ravi Ramesh Ghaghda, Anthony Keya Munialo, Peter Muriuki Nkonge and Anthony Mwandime Wazome. The Government has not replied to the communication. The State is not 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 International Covenant on Civil and Political Rights (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

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(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 other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. The present communication concerns Ravi Ramesh Ghaghda, Anthony Keya Munialo, Boniface Muriuki Chuma, Peter Muriuki Nkonge and Anthony Mwandime Wazome.

5. All five men are citizens of Kenya and hold Kenyan identification documents, as was duly made known to the Government of South Sudan in the communication sent to it by the Working Group on 19 February 2016.

6. Prior to the events reported below, all five men worked for Click Technologies, an information and communications technology company located on Airport Road, Juba. The owner of Click Technologies, John Agou, is a security officer and also works for the Government.

7. On the morning of 29 May 2015, personnel from the National Security Forces of South Sudan raided the offices of Click Technologies and arrested Mr. Agou, the owner. He was accused of forging the signature of the President of South Sudan in order to steal over \$200 million from the Central Bank of Kenya and other banks across the world. On the afternoon of the same day, the National Security Forces returned to Click Technologies and arrested everyone on the premises, including the five men who are the subjects of the present communication, namely, Messrs. Chuma, Ghaghda, Munialo, Nkonge and Wazome. At the time of the arrest, the five men were not given any reason for their arrest nor did the forces that carried out the arrest present a warrant.

8. The five men were held in national security camps, deprived of visits by their family members or a lawyer. They were questioned for the first time 40 days after their arrest.

9. The lawyer of the five men was prevented from visiting them in detention. He was informed by a high court judge that the case against them had been taken to court but that it had been dismissed and was being handled by a “committee”. No further explanation was provided about the committee or its composition.

10. On 25 August 2015, the five men were told that the investigation had been concluded and that they would soon be released. Although the investigating committee confirmed to the family members that the five men were innocent and would soon be released, they remained in detention.

11. On 24 October 2015, family members of two of the men were allowed to visit them in detention. On 13 November 2015, Mr. Ghaghda’s family was allowed to visit him for about 10 minutes. All five men were held in one room in poor hygienic conditions. They were provided with one meal a day, which resulted in significant weight loss.

12. Based on the information received, officials at the Ministry of Foreign Affairs of South Sudan once referred to the five men as “State witnesses”. However, at the time of drafting the present communication, it was learned that Peter Muriuki Nkonge had been

released on 7 January 2016, while the other four men remained in detention without charges or any legal proceedings against them. According to the source, they may be detained indefinitely.

13. The source submits that the deprivation of liberty of Mr. Nkonge from 29 May 2015 to 7 January 2016 and the continued deprivation of liberty of Messrs. Chuma, Ghaghda, Munialo and Wazome are arbitrary and fall within categories I and III of the arbitrary detention categories defined by the Working Group. In the source's view, the detention of Mr. Nkonge and the continued detention of Messrs. Chuma, Ghaghda, Munialo and Wazome are without any legal basis and are thus in violation of article 9 (1) of the International Covenant on Civil and Political Rights and fall within category I of the arbitrary detention categories defined by the Working Group.

14. The source further submits that the five men have not been guaranteed the international norms of due process nor a fair trial since they were deprived of their liberty, in violation of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. Although Mr. Nkonge was released on 7 January 2016, the source argues that all five were held in pretrial detention after 29 May 2015 without being informed of the reason for their arrest, without any charge or trial and no access to a lawyer, which is in violation of articles 9 (2) (3) (4) and 14 (3) (a) and (c) of the Covenant.

Lack of response from the Government

15. On 19 February 2016, the Working Group sent a communication to the Government of South Sudan requesting detailed information about the current situation of Messrs. Chuma, Ghaghda, Munialo, Nkonge and Wazome. The Working Group also requested the Government to clarify the factual and legal provisions justifying the detention of the five men and the details regarding the conformity of their trials with international law, in particular the norms of international human rights law which South Sudan has ratified.

16. The Working Group regrets that it did not receive a reply from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work. Further to paragraph 15 of its methods of work, if a reply is not received from the Government, the Working Group may render an opinion on the basis of the information obtained from the source.

Discussion

17. In its jurisprudence, the Working Group has 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 rests upon the Government if it wishes to refute the allegations.¹ In the present case, the Government has chosen not to challenge the *prima facie* credibility of the allegations made by the source.

18. The Working Group recognizes that South Sudan is not a party to the International Covenant on Civil and Political Rights. However, that should not deprive the citizens of South Sudan — nor its residents — of all conventional rights, bearing in mind that South Sudanese citizens used to be Sudanese citizens and had enjoyed those rights since 1986 when Sudan ratified the Covenant.

¹ See, for example, A/HRC/19/57, para. 68; and opinion No. 52/2014.

19. Indeed, on 31 October 2013, the Government of South Sudan made a voluntary pledge to uphold the highest standards in the promotion and protection of human rights and to fully cooperate with the Council in accordance with General Assembly resolution 60/251 (see A/68/565, annex). In South Sudan, the highest standard before secession had been the International Bill of Human Rights. The above-mentioned pledge shall be understood as extending the applicability of the pre-existing set of human rights norms based on the unilateral act constituted by the voluntary pledge. Within the Bill, the Universal Declaration of Human Rights, which has customary value, is undoubtedly applicable to the newly established State and it does not require ratification.

20. The Universal Declaration of Human Rights encompasses the substance of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (see General Assembly resolution 43/173, annex) was adopted to complement it. It would therefore be sufficient in the present case to apply the Universal Declaration of Human Rights in conjunction with the Body of Principles. Accordingly, in this particular case, the Working Group considers that, given the gravity of the violations of the fundamental rights set forth in the Universal Declaration of Human Rights and the Body of Principles, it will suffice to refer in the present opinion to these international instruments.

21. The Working Group is seriously concerned that the men have been subjected to deprivation of liberty since 29 May 2015, the day on which they were arrested without being shown an arrest warrant or provided with the reason for their arrest or the charges against them. Although Mr. Nkongé was released on 7 January 2016, after eight months of detention, the other four men are still in detention to this day, after a period of almost 12 months.

22. Concerning the deprivation of liberty of Mr. Nkongé, further to paragraph 17 (a) of its methods of work, notwithstanding the release of the persons concerned, the Working Group reserves the right to render an opinion, on a case-by-case basis, on whether the deprivation of liberty was arbitrary. As such, the Working Group considers it necessary that Mr. Nkongé's pretrial detention from 29 May 2015 and 7 January 2016 should be the subject of a pertinent review in order to provide an effective remedy, including reparations, in accordance with article 8 of the Universal Declaration of Human Rights.

23. With regard to a ruling of arbitrary detention under category I of its arbitrary detention categories, the Working Group takes due note of the following factual observations:

(a) Although the five men were informed on 25 August 2015 that the investigations had been concluded and that they would soon be released, and the investigating committee had confirmed to the family members that the five men were innocent, they remained in detention;

(b) Officials had, at one point, referred to the five men as "State witnesses".

The Working Group finds that the aforementioned observations confirm that the investigating authority was aware that the five men were innocent and that the Ministry of Foreign Affairs of South Sudan also knew that there was no legal basis for detaining them.

24. In this vein, the Working Group finds that the detention of Mr. Nkongé from 29 May 2015 to 7 January 2016 and the continued detention of Messrs. Chuma, Ghaghda, Munialo and Wazome are without any legal basis and are therefore in violation of the international norms on detention, including article 9 of the Universal Declaration on Human Rights. The Working Group therefore concludes that the deprivation of liberty of Mr. Nkongé from 29 May 2015 to 7 January 2016 and the continued deprivation of liberty

of Messrs. Chuma, Ghaghda, Munialo and Wazome are arbitrary and fall within category I of the arbitrary detention categories defined by Working Group.

25. With regard to a ruling of arbitrary detention under category III of its arbitrary detention categories, the Working Group notes with concern that the five men had been deprived of their fundamental right to a fair trial. The factual and legal elements that led to this observation include the following:

(a) On the morning of 29 May 2015, the five men were arrested by the National Security Forces of South Sudan without an arrest warrant and without their being given the reason for their arrest, in violation of article 9 of the Universal Declaration of Human Rights;

(b) They were held at national security camps and the first investigation concerning them was carried out 40 days after the date of their arrest. During their detention, they were initially denied their right of access to legal counsel and visits by their family. However, family members of two of them were allowed to visit on 24 October 2015, about 5 months after they were arrested, and on 13 November 2015, Mr. Ghaghda's family was allowed to visit him for about 10 minutes. The denial of access to legal assistance and visits by family members for the initial 40 days of their detention and subsequently, except for the brief moments mentioned above, constitutes a violation of articles 9 and 10 of the Universal Declaration of Human Rights;

(c) A judge from the High Court had informed a defence lawyer that their cases had been dismissed by the court but were now being handled by a "committee", without any explanation as to the nature and composition of the said committee. Furthermore, despite confirmation by the investigating committee that the five men were innocent and notification on 25 August 2015 that they would soon be released, they still remain in detention, in violation of articles 9 and 10 of the Universal Declaration of Human Rights.

26. The Working Group is particularly concerned about the nature of the "committee" that is conducting the criminal investigation even after the court dismissed the case concerning the five men. It is also concerned about the status of the National Security Camps where the men — except for Mr. Nkonge who was detained from 29 May 2015 to 7 January 2016 — are currently being detained.

27. Given its ambiguous composition and its superseding capacity deduced from the information received that the "committee" can override the judicial power of the court and intervene in virtually all stages of the judicial process, it can hardly be considered as an impartial judicial organ. The fact that an investigation was pursued even after the court had dismissed the case, and the fact that it was conducted by such an entity, undermine the principle of impartiality that forms the basis of the right to a fair trial. A criminal investigation by an entity called a "committee" is of a rather exceptional character and can hardly be considered as being conducted in conformity with the international norms on detention, including articles 9 and 10 of the Universal Declaration of Human Rights that guarantee the rights of individuals not to be subjected to arbitrary arrest and detention and to be entitled to a fair and public hearing by an independent and impartial tribunal.

28. Based on the above-mentioned findings, the Working Group affirms that the five men have not been guaranteed the international norms of due process nor a fair trial during the period of the deprivation of their liberty, in violation of articles 9 and 10 of the Universal Declaration of Human Rights.

29. Moreover, the Working Group considers that the five men have not been granted their right to receive a visit from their consular officer as guaranteed by international norms on consular relations, including article 36 (1) of the Vienna Convention on Consular Relations. The Working Group recalls that the International Court of Justice, in its

jurisprudence, confirmed that the provisions of article 36 (1) of the aforementioned Convention creates individual rights that may be invoked in the Court.² In this regard, the Working Group confirms that the arbitrariness of the deprivation of liberty of the five men has become exacerbated by the denial of their consular rights, thereby depriving them of their right to a fair trial.

30. Therefore, the Working Group considers that the deprivation of liberty of Mr. Nkonge, between 29 May 2015 and 7 January 2016, and of Messrs. Chuma, Ghaghda, Munialo and Wazome, from 29 May 2015 up to now, is of such gravity as to give the deprivation of liberty an arbitrary character that falls within category III of the arbitrary detention categories defined by the Working Group.

31. Furthermore, in the light of the information received that the five men were provided with only one meal a day under the dire circumstances of the detention cell, which resulted in significant weight loss, the Working Group considers that the deprivation of liberty of these men is in violation of principle 1 of the Body of the Principles, which provides that all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Disposition

32. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Peter Muriuki Nkonge from 29 May 2015 to 7 January 2016 and the continued deprivation of liberty of Boniface Muriuki Chuma, Ravi Ramesh Ghaghda, Anthony Keya Munialo and Anthony Mwandime Wazome since 29 May 2015 are arbitrary, being in contravention of the international norms on detention, including articles 9 and 10 of the Universal Declaration of Human Rights, and fall within categories I and III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

33. Consequent upon the opinion rendered, the Working Group requests the Government of South Sudan to take the steps necessary to remedy the situation of Messrs. Chuma, Ghaghda, Munialo, Nkonge and Wazome without delay and bring it into conformity with the standards and principles enshrined in the international norms on detention, including the Universal Declaration of Human Rights and the Body of Principles.

34. Taking into account all the circumstances of the case, the Working Group considers that the adequate remedy would be to immediately release Messrs. Chuma, Ghaghda, Munialo and Wazome and accord them and Mr. Nkonge, in respect of his pretrial detention between 29 May 2015 and 7 January 2016, an enforceable right to an effective remedy, including reparations, in accordance with article 8 of the Universal Declaration of Human Rights and the Body of Principles.

35. The Working Group also strongly encourages the Government of South Sudan to ratify the International Covenant on Civil and Political Rights and its Optional Protocols.

[Adopted on 27 April 2016]

² See, for example, *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466, paras. 65-78.