



# 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 seventy-sixth session, 22-26 August 2016

#### **Opinion No. 23/2016 concerning Rebecca Kabuo, Juvin Kombi, Pascal Byumanine, Innocent Fumbu, Saïdi Wetemwami Heshima, Gervais Semunda Rwamakuba, Nelson Katembo Kalindalo, Jonathan Kambale Muhasa, Osée Kakule Kilala, Jojo Semivumbi, Serge Syvyavogha Kambale, Mutsunga Kambale, John Balibisire, Kasereka Muhiwa, Kasereka Kamundo, Bienvenu Matumo and Marc Hérítier Capitaine (Democratic Republic of the Congo)**

1. The Working Group on Arbitrary Detention was established by 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 17 June 2016 the Working Group transmitted a communication to the Government of the Democratic Republic of the Congo concerning Rebecca Kabuo, Juvin Kombi, Pascal Byumanine, Innocent Fumbu, Saïdi Wetemwami Heshima, Gervais Semunda Rwamakuba, Nelson Katembo Kalindalo, Jonathan Kambale Muhasa, Osée Kakule Kilala, Jojo Semivumbi, Serge Syvyavogha Kambale, Mutsunga Kambale, John Balibisire, Kasereka Muhiwa, Kasereka Kamundo, Bienvenu Matumo and Marc Hérítier Capitaine. 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) (category I);

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

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

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

(e) When the deprivation of liberty constitutes a violation of international law 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. This case centres around four sets of arrests.

5. The first set took place on 28 November 2015, when two members of the citizens' movement *Lutte pour le changement* (Fight for Change; commonly referred to as *Lucha*), Juvén Kombi and Pascal Byumanine, along with seven other individuals — Innocent Fumbu, Saïdi Wetemwami Heshima, Gervais Semunda Rwamakuba, Nelson Katembo Kalindalo, Jonathan Kambale Muhasa, Osée Kakule Kilala and Jojo Semivumbi — were reportedly arrested by the Congolese authorities during a peaceful demonstration in Goma organized by *Lucha* in memory of the victims of the killings in the Beni region to encourage the Government to investigate those killings. Even though the authorities had been informed in advance of the demonstration, as required by law, the gathering was dispersed by security forces using tear gas and live bullets.

6. On 30 November 2015, the nine above-mentioned persons were reportedly brought before the prosecutor of the Goma *tribunal de grande instance* (court of major jurisdiction).

7. On 2 December 2015, the State Prosecutor allegedly issued a provisional arrest warrant extending their detention for rebellion, incitement to disobedience, insulting the authorities, membership of a criminal organization, aggression and destruction. The nine individuals were then reportedly transferred to the central Munzenze prison in Goma, pending trial.

8. According to the sources, on 3 December 2015, the mayor of Goma banned all *Lucha* activities, arguing that the organization was not included in the register of associations.

9. On 18 January 2016, the lawyers of the above-mentioned persons reportedly filed an application for the provisional release of their clients before the court in Goma. In their application, the lawyers claimed that the individuals had been detained for two months without having an opportunity to be heard by the courts and without any substantive evidence being presented in relation to the alleged offences. They also pointed out that the presumption of innocence of their clients should be respected.

10. On 21 January 2016, the nine detained persons appeared before the court in Goma. The prosecutor reportedly brought the following charges against them: membership of a criminal association, direct incitation to disobedience and insulting the authorities.

11. On 25 January, the application for provisional release filed by the lawyers of the nine detainees was dismissed by the court in Goma and the court of appeal in second instance on the grounds that their release could endanger public order and national security. To date, the nine individuals apparently continue to be held in detention at the central Munzenze prison in Goma.

12. The Goma court of major jurisdiction, ruling on criminal matters in first instance, held the second hearing in this case on 4 February 2016. All the defendants appeared in person at the hearing, assisted by a group of 11 defence lawyers.

13. The defendants were reportedly called to the stand one after the other and questioned on the legal existence of Lucha, the authorization to demonstrate, and the circumstances surrounding the organization of the event of 28 November 2015, at which the defendants had been arrested. While the seven others reportedly claimed to have no ties to the movement, the two accused members of Lucha reportedly acknowledged their membership and the informal existence of their organization and indicated that they had informed the competent authority of the organization of the event of 28 November 2015, in accordance with article 26 of the Constitution. Their lawyers also reportedly argued that article 26 of the Constitution provided for the requirement to inform but not to seek permission to demonstrate and noted that a de facto association did not in itself constitute a criminal association and that the Public Prosecutor's Office had not provided any evidence in support of its charges, in particular regarding the purpose of such an association and the role of each of the accused in it. Claiming to have been sufficiently informed about the first charge (membership of a criminal association), the court deferred the case to a subsequent hearing during which it intended to investigate the second offence (direct incitation to disobedience).

14. During the hearing of 11 February 2016, in order to determine whether there had been incitement to revolt and disobedience, debate focused on a banner used during the demonstration, which bore the message "Beni bloodshed — why this silence?" as well as the tyres allegedly burned at the scene and the rocks used to barricade the road. According to the Public Prosecutor's Office, these elements constituted evidence of incitement of the public by members of Lucha to revolt against the authorities and to commit offences.

15. The lawyers, meanwhile, argued that all of the allegations of the Public Prosecutor's Office were without legal basis, since, according to them, it had failed to identify or present to the court the persons who had allegedly been incited to disobedience by members of Lucha and had offered no evidence of the alleged offences committed by such persons after they had been incited to commit offences.

16. The sources report that, on 10 March 2016, Juvin Kombi and Pascal Byumanine, members of Lucha, were sentenced to 3 months' imprisonment and a fine of 100,000 Congolese francs for the organization of an "illegal" demonstration. Having already spent 3 months in detention, they were released on the same day. Gervais Semunda Rwamakuba, Saïdi Wetemwami Heshima, Nelson Katembo Kalindalo, Jonathan Kambale Muhasa, Innocent Fumbu, Osée Kakule Kilala and Jojo Semivumbi were released.

17. The above-mentioned events were the subject of an urgent appeal on 16 February 2016 by the Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression, on the rights to freedom of peaceful assembly and of association and on the situation of human rights defenders. To date, however, no response has been received from the Government.

18. The second set of arrests involves Rebecca Kabuo, Serge Syvyavogha Kambale, Mutsunga Kambale, John Balibisire, Kasereka Muhiwa and Kasereka Kamundo, all Lucha activists. They were reportedly arrested at approximately 4 a.m. on 16 February 2016 at their respective homes by police in Goma, and taken to the P2 police station, where they were interrogated for several hours without their lawyers. The police reportedly confiscated two laptop computers, their telephones and placards that they were planning to carry during the demonstration.

19. The source reports that on 24 February 2016, the Goma court of major jurisdiction sentenced them all to 2 years in prison. The following day, their lawyers reportedly appealed that decision, as did the Public Prosecutor's Office, which called for a penalty of 10 years' imprisonment.

20. On 3 March 2016, they appeared before the Goma court of appeal on charges of "attempted incitement to civil disobedience" for having participated in organizing a general strike or citywide shutdown that was to be held in Goma to protest against delays in the organization of the presidential election. The six activists and their lawyers were allegedly notified of the hearing only the day before. In the absence of their lawyers, they requested a three-week postponement of the hearing, but that request was denied and the hearing was scheduled for the next day, 4 March, at 9 a.m.

21. On 4 March 2016, their prison sentence was reduced to 6 months by the court of appeal of Goma. They are reportedly still in detention although they should have been released on 16 August 2016.

22. The third set of arrests occurred on 16 February 2016, when two other Lucha activists, Bienvenu Matumo and Marc Héritier Capitaine, were reportedly arrested in Kinshasa. From 16 to 20 February 2016, the date of their transfer to the Prosecutor's Office in Kinshasa/Gombe, these two individuals were reportedly held in incommunicado detention. The source reports that it was not until 23 February 2016 that they were prosecuted by the Public Prosecutor's Office in Kinshasa for "threatening the internal security of the state" and transferred to the Makala prison.

23. On 20 May 2016, they were both reportedly sentenced to 12 months' imprisonment for "spreading false rumours" and "incitement to revolt against the authorities". They reportedly filed an appeal against this judgment.

24. The fourth set of arrests involves four other Lucha activists who were sentenced in 2015 to a suspended prison term of 6 months for having participated in a peaceful demonstration calling for the release of Fred Bauma and Yves Makwambala.

25. In the light of the foregoing, the sources note that the Lucha activists are prisoners of conscience and that they have been deprived of their liberty only for having exercised their right to freedom of expression and peaceful assembly.

#### *Response from the Government*

26. The Government has failed to respond, although the communication was transmitted on 17 June 2016. However, this will not prevent the Working Group from rendering its opinion, as paragraph 15 of its methods of work allows it to do so even in the absence of a reply from the Government.

#### **Discussion**

27. Several sources contacted the Working Group in the present case in relation to various allegations of arbitrary detention of members of Lucha and their versions of events coincide. Furthermore, the occurrence of the various situations described is well established, so the reliability and credibility of the sources in the present case are not in

question. Having failed to refute the facts and the related allegations, the Government has not provided any elements that could change the Working Group's prima facie assessment.

28. The main argument is that, in all of the situations reported, there was a clear will to harass a particular group, in this case Lucha, which is merely trying to express itself freely in a democratic framework. This youth movement has organized peaceful demonstrations to express its political opinions — in a context that is conducive given the debate on the Constitution and the presidential elections — and, sometimes, its dissatisfaction with the ongoing security crisis and resulting death toll.

29. The Working Group recalls that it has already dealt with a case concerning a member of Lucha (opinion No. 31/2015). In that opinion, the Working Group concluded that the sole reason for the arrest and detention of the youth leader was that he had expressed a political opinion, and that he had not been made aware of any criminal allegations that would have justified his deprivation of liberty (see A/HRC/WGAD/2015/31, para. 19). The Working Group therefore concluded that it constituted a violation that fell, *inter alia*, under category II, as defined in the methods of work (see A/HRC/WGAD/2015/31, para. 20). This category protects the exercise of the freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights. In the present case, the facts described above are similar to those in the previous case, and the Group therefore concludes that there was arbitrary detention under category II.

30. In addition, in the present case, it is clear that there was an underlying intent to target persons linked to Lucha, whether because they are members of the movement or because they have participated in a demonstration organized by it. However, the Government does not provide any justification for this targeting or for the discrimination that it implies. In the view of the Working Group, this situation involves political discrimination resulting in the deprivation of liberty of persons with ties to Lucha. Inasmuch as these persons have not committed material crimes, such discrimination violates both article 2 of the Universal Declaration of Human Rights and article 25 of the Covenant, and is thus a violation of international law. This violation falls under category V as defined in the Group's methods of work.

### **Disposition**

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

The arrest and continued detention of Rebecca Kabuo, Juvén Kombi, Pascal Byumanine, Innocent Fumbu, Saïdi Wetemwami Heshima, Gervais Semunda Rwamakuba, Nelson Katembo Kalindalo, Jonathan Kambale Muhasa, Osée Kakule Kilala, Jojo Semivumbi, Serge Syvyavogha Kambale, Mutsunga Kambale, John Balibisire, Kasereka Muhiwa, Kasereka Kamundo, Bienvenu Matumo and Marc Hérítier Capitaine are arbitrary and fall under categories II and V of the categories applicable to the consideration of the cases submitted to the Working Group; the Government of the Democratic Republic of the Congo has the obligation to terminate the detention and accord the victims an appropriate remedy.

32. The Working Group therefore calls for the immediate release of those individuals who are still in detention and for appropriate reparations for the serious violations committed against all of the identified persons who have been arbitrarily arrested and detained.

**Follow-up procedure**

33. 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 follow-up action taken on the recommendations made in this opinion, including on:

- (a) Whether the above-mentioned persons have been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to them;
- (c) Whether an investigation has been conducted into the violation of these individuals' 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 Democratic 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.

34. 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.

35. The Working Group requests the source and the Government to provide the above information within six months of the date of the 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. This follow-up procedure will enable the Working Group to keep the Human Rights Council informed of the progress made in implementing its recommendations, as well as of any failure to take action.

36. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and 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>1</sup>

*[Adopted on 22 August 2016]*

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<sup>1</sup> See Human Rights Council resolution 24/7, paras. 3 and 7.