



General Assembly

Distr.: General
3 July 2017
English
Original: French

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017

Opinion No. 14/2017 concerning Cornelius Fonya (Cameroon)

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. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 20 September 2016, the Working Group transmitted a communication to the Government of Cameroon concerning Cornelius Fonya. The Government replied to the communication on 18 November 2016. 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. Mr. Fonya is a 39-year-old citizen of Cameroon. Prior to his detention, he worked as a carpenter and resided in Limbe, Cameroon.
5. According to the source, on 29 October 2012, Mr. Fonya was seized by a group of people in Limbe. At that time, two men accused Mr. Fonya of having made advances towards them. Mr. Fonya was then beaten and handed over to the National Gendarmerie in Limbe. The source alleges that the Gendarmerie in Limbe arrested Mr. Fonya the same day without an arrest warrant or other decision by a public authority justifying his arrest.
6. On 7 November 2012, Mr. Fonya was formally brought before the judicial authorities in Limbe. He pleaded not guilty and was remanded in custody by the Deputy State Counsel when his request to be released on bail was denied. The source alleges that, six weeks later, at a second hearing on 9 January 2013, a judge agreed to release Mr. Fonya on bail of US\$ 1,200. This decision was subsequently revoked by the judge.
7. At his trial before the Court of First Instance in Limbe, Mr. Fonya was accused of having consensual same-sex relations with a minor. Although the complainant did not testify at the trial, the source claims that it was demonstrated that he was at least 19 years of age. Section 347 bis of the Penal Code of Cameroon is entitled “Homosexuality” and punishes “sexual relations with a person of the same sex” with imprisonment of 6 months to 5 years and a fine of US\$ 34 to US\$ 342. This law imposes a double penalty when the act involves an adult and a person of the same sex who is between 16 and 21 years of age. The source notes that, by contrast, consensual sexual relations involving an adult and a person of the opposite sex who is between 16 and 21 years of age are legal in Cameroon.
8. After spending more than one year in prison awaiting trial, Mr. Fonya was sentenced to 9 years’ imprisonment. According to the source, he was convicted under section 347 bis of the Penal Code. While the maximum sentence for violating this provision is 5 years’ imprisonment, Mr. Fonya’s sentence was doubled because of the age of the complainant. Following this decision, Mr. Fonya filed an appeal. However, the source reports that, to date, the Court has refused to hear this appeal.
9. The source reports that Mr. Fonya is currently being detained at the Buea Central Prison, where prisoners are kept in overcrowded cells and receive only one meal each day. According to the source, the prison is a breeding ground for scabies, ringworm, eczema, head lice, skin rashes and fungal infections, and Mr. Fonya suffers from almost all of these ailments. In addition, the source maintains that, since Mr. Fonya was convicted of violating section 347 bis of the Penal Code, he is at grave risk of torture and ill-treatment by the prison guards and the prison population in general. The source submits that the continued arbitrary deprivation of liberty of Mr. Fonya constitutes an imminent threat to his health and his physical and psychological integrity.
10. The source considers that the deprivation of liberty of Mr. Fonya is arbitrary according to categories I, II and V of the categories established in the methods of work of the Working Group on Arbitrary Detention.
11. In relation to category I, the source submits that the detention of Mr. Fonya is based solely on a law that criminalizes homosexuality. According to the source, this law violates the rights to privacy and freedom from discrimination under the Covenant, and there is therefore no legal basis for Mr. Fonya’s deprivation of liberty.
12. In relation to category II, the source submits that Mr. Fonya has been deprived of his liberty solely on the basis of his sexual orientation, in violation of article 26 of the Covenant. Further, in relation to category V, the source considers that Mr. Fonya has been deprived of his liberty on the basis of his presumed sexual orientation, in violation of his right to equality under the Universal Declaration of Human Rights and the Covenant.
13. Finally, the source states that, under article 45 of Act No. 96/06 of 18 January 1996 (which amended the Cameroonian Constitution of 2 June 1972), the international treaty

obligations of Cameroon, including those under the Covenant, take precedence over domestic law provisions such as section 347 bis of the Penal Code.

14. Accordingly, the source submits that Mr. Fonya should be released immediately and granted compensation under article 9 (5) of the Covenant.

Response from the Government

15. On 20 September 2016, the Working Group transmitted the allegations from the source to the Government of Cameroon under its regular communication procedure. The Working Group requested the Government to provide detailed information, by 19 November 2016, regarding the situation of Mr. Fonya since his arrest, including any comment on the source's allegations. The Working Group also requested the Government to clarify the facts and legal provisions justifying Mr. Fonya's deprivation of liberty and its compatibility with the obligations of Cameroon under international human rights law, particularly treaties that the State has ratified.

16. On 18 October 2016, the Government sought an extension of 60 days to submit its response. In conformity with paragraph 16 of its methods of work, the Working Group granted an extension of 30 days (the maximum period of extension permitted under its methods of work) and requested the Government to submit its response by 19 December 2016. The Government submitted its response on 18 November 2016, well before the extended deadline.

17. In its response, the Government states that Mr. Fonya has been deprived of his liberty and imprisoned for having committed aggravated indecent assault of a person under 16 years of age, an offence punishable under section 346 (2) of the Penal Code.

18. According to the Government, on 28 October 2012, Mr. Fonya's neighbours in Limbe, having heard noises associated with a physical altercation, entered his house and discovered him fighting with a young man.¹ The investigations resulted in an accusation of sexual assault by Mr. Fonya on the young man, who was then 15 years of age. According to the Government, the young man stated that the fight had resulted from Mr. Fonya wanting to impose sexual relations upon him by force, after he had refused an offer of payment for sex. The young man noted that this was standard behaviour for Mr. Fonya, who, whenever his companion was absent, plied the young man with alcohol and abused him.

19. The Government reports that, during the preliminary investigation by the Limbe station of the National Gendarmerie, where Mr. Fonya and the young man had been taken, at least two other persons reported having been sexually assaulted by Mr. Fonya, who confessed to the offences.

20. Mr. Fonya was brought before the State Counsel at the Court of First Instance in Limbe on 7 November 2012 and was charged pursuant to the flagrante delicto procedure with having committed the offences of homosexuality and private indecent assault (punishable under sections 347 bis and 295 of the Penal Code). Mr. Fonya was remanded in custody, and he pleaded not guilty to the charges.

21. During arguments at the hearing, the defendant was assisted by legal counsel. After the prosecution had presented its case, the Court considered that there was a prima facie case against the defendant, who was then invited to present his defence. He chose to testify under oath. According to the Government, the Court acquitted the defendant of the charge of homosexuality for lack of evidence and reclassified the charge of private indecent assault (Penal Code, sect. 295) to aggravated indecent assault of a person under 16 years of age (Penal Code, sect. 346 (2)). In accordance with section 362 of the Criminal Procedure Code, the defendant was notified of the new classification for his defence. His lawyer stated that the defence continued to be based on the evidence that had previously been admitted on the court file.

¹ The name of the young man is known to the Working Group but has been withheld to protect his privacy as he is not the subject of the present opinion.

22. The Government maintains that, during the hearing of 20 November 2013, the Court sentenced Mr. Fonya to 9 years' imprisonment and ordered him to pay costs of US\$ 136 for aggravated indecent assault of a person under 16 years of age. On 25 November 2013, Mr. Fonya appealed against this decision. The Government notes that the matter was deferred several times and that most (at least 10) of these deferrals were due to the absence of the defendant's lawyer.

23. The Government states that section 346 (2) of the Penal Code imposes more serious penalties for indecent assault of a person under 16 years of age when the offender is one of the persons referred to in section 298 of the Code (a person who has authority over the victim or has legal or customary guardianship of the victim, a civil servant, a religious minister or a person who was aided by one or more other persons). In the present case, the Government asserts that the Court found that the victim was 15 years of age at the time of the offence and was a minor. The Court also found that the victim lived with Mr. Fonya, as his mother had entrusted him into Mr. Fonya's care for the purposes of an apprenticeship as a carpenter. Mr. Fonya thus had customary guardianship of the victim within the meaning of section 298 of the Penal Code. The Government concludes that there is therefore a clear legal basis for the detention of Mr. Fonya.

24. Further, the Government refers to the source's allegation that Mr. Fonya's deprivation of liberty resulted from the exercise of his civil and political rights and amounted to a violation under category II. In particular, the Government notes that the source appears to suggest that sexual relations between an adult and a minor are legal under Cameroonian law provided that the parties are of the opposite sex, which is a serious misunderstanding. On the contrary, according to section 347 of the Penal Code, the fact that the victim is a minor is an aggravating circumstance in cases of assault committed on a person between 16 and 21 years of age, regardless of the circumstances. The Government concludes that the commission of indecent assault on a person under 16 years of age cannot constitute the exercise of a civil or political right.

25. The Government also refers to the source's allegation that Mr. Fonya was deprived of his liberty because of his presumed sexual orientation, in violation of the right to equality under the Universal Declaration of Human Rights and the Covenant. The Government reiterates that Mr. Fonya was deprived of his liberty for having committed aggravated indecent assault of a person under 16 years of age and argues that the source has not demonstrated in what way the right to equality was violated in the Government's prosecution of Mr. Fonya for this fact.

26. In addition, the Government submits that there is no right to sexual orientation enshrined in the Covenant. Neither the text of the Covenant nor any other convention negotiated under the auspices of the United Nations and to which Cameroon is a party mentions such a right. The Government believes that the attempt to extend the obligations of the State through a patently broad interpretation is not legally justified. It refers to the views of two members of the Human Rights Committee who warned against this trend in their dissenting opinion annexed to the Committee's Views in *X v. Colombia*.² The two members, Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil, stated that:

“[N]o interpretation, even one grounded in legal experience at the national level, can ignore current enforceable international law, which does not recognize any human right to sexual orientation. That is to say, the scope of the Committee's pioneering and standard-setting role should be circumscribed by legal reality.

The main point is that, whatever interpretation is given to article 26, it must relate to non-discrimination and not to the creation of new rights which are by no means clearly implied by the Covenant, not to say precluded given the context in which the instrument was conceived. [...]

In sum, the law's flexibility yields many good things, but it can at times lead to extremes that strip an instrument of its substance and substitute something other, a content different from that intended by the author and different from that reflected in

² See communication No. 1361/2005, *X v. Colombia*, Views adopted on 30 March 2007, annex.

the spirit and letter of the text. The choices made in the process of interpretation are valid only in the context and within the limits of the provision being interpreted. Of course States still have the right and the capacity to establish new rights for the benefit of those under their jurisdiction. It is not for the Committee, in this regard, to substitute itself for States and make choices it is not entitled to make.”

27. The Government states that it is not obliged to follow an interpretation that does not correspond to the accepted meaning of the rights enshrined in the conventions that it has ratified. States have clearly expressed their misgivings about the unjustified extension of the scope of their treaty obligations on this issue. The Government cites the discussion of the report of the Third Committee at the sixty-fourth session of the United Nations General Assembly (A/64/PV.65). One of the draft resolutions contained in this report mentioned general comment No. 20 (2009) of the Committee on Economic, Social and Cultural Rights, on non-discrimination in economic, social and cultural rights. General comment No. 20 refers to sexual orientation as a ground covered by the right to non-discrimination.

28. According to the Government, the discussion of this text shows that the Group of Arab States, agreeing with the view expressed by the Group of African States, introduced an amendment to the text of the draft resolution because of the reference in paragraph 10 to general comment No. 20, which refers to sexual orientation. The Group of Arab States considered that sexual orientation and sexual identity are contentious concepts. Further, the Group considered that reference to rights relating to sexual preferences could lead to discrimination against other people and runs counter to efforts to eliminate discrimination based on race, colour or religion, and to achieve equality between men and women. Finally, the Group of Arab States affirmed that it is extremely important to make very clear that internationally agreed human rights instruments should not be interpreted in an incorrect or unusual way. The Government notes that this amendment was adopted by 76 votes to 72, with 26 abstentions. The Government emphasizes that the position of Cameroon on a possible right to sexual orientation is known, and has been expressed within both the Human Rights Council and the United Nations General Assembly.

29. Finally, the Government addresses the source’s allegations relating to the violation of Mr. Fonya’s procedural rights, including that Mr. Fonya was arrested without a warrant. The Government states that arrest without a warrant is permitted in exceptional circumstances under section 31 of the Criminal Procedure Code, notably in cases of *flagrante delicto*. Further, under section 30 of the Code, the power given to police and other law enforcement officers to apprehend and bring a person without delay before the authorities is also exceptionally conferred on private individuals in cases of *flagrante delicto*. Section 103 of the Criminal Procedure Code defines an offence in *flagrante delicto* as a crime that is in the course of being committed or that has just been committed. In this case, the Government asserts that the fight between Mr. Fonya and the young man attracted the attention of neighbours, and there was therefore a presumptive *flagrante delicto* offence under section 103. Consequently, no warrant was required under section 31. The Government concludes that the arrest of Mr. Fonya took place in accordance with applicable legal provisions.

30. The Government also refers to the source’s allegations regarding the revocation of the decision to release Mr. Fonya. Under section 224 (1) of the Criminal Procedure Code, a decision to release an accused person is based on undertakings intended to ensure that the person will appear before the competent court. According to the Government, Mr. Fonya was released on bail at a court hearing on 9 January 2013, and the matter was scheduled for further argument on 13 February 2013. The defendant did not appear in court for hearings scheduled on 13 February and 3 March 2013. At a hearing on 3 April 2013, the decision to release him was revoked and he was remanded in custody. The Government submits that the revocation of the decision to release Mr. Fonya is logical since, having benefited from a decision to release him on bail, Mr. Fonya did not appear at subsequent hearings. In conclusion, the Government maintains that the detention of Mr. Fonya has a legal basis and does not result from the exercise of a right enshrined in the Covenant.

Further information from the source

31. On 27 January 2017, the response from the Government was sent to the source for further comment. The source responded on 7 February 2017.

32. The source notes the assertion of Cameroon that, while Mr. Fonya was originally charged with the crime of homosexuality, he was ultimately convicted of aggravated indecent assault of a person under 16 years of age. However, the source submits that the Government provided no documentary evidence of that judgment and the Working Group should therefore reject the Government's explanation. The source recalls that, in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (para. 49), the Human Rights Committee has held that a criminal defendant "is entitled to have access to a duly reasoned, written judgement of the trial court". The source concludes that the judgment, if it existed, should have been provided to the Working Group.

33. According to the source, international pressure has forced the Government to attempt to conceal its persecution of lesbian, gay, bisexual and transgender (LGBT) persons by utilizing post hoc substitution of criminal charges, but with the same anti-LGBT motivation. The source maintains that, in reality, Mr. Fonya was convicted of the crime of homosexuality.

34. The source submits that the deprivation of liberty of Mr. Fonya is arbitrary according to category III, in addition to categories I, II and V, as mentioned previously. In relation to category III, the source notes that the Government does not dispute that Mr. Fonya was tried, convicted and sentenced to 9 years' imprisonment without having the opportunity to cross-examine the purported victim and sole eyewitness in his case. According to the source, that fact alone renders Mr. Fonya's detention arbitrary under category III. The source cites article 14 (3) (e) of the Covenant and recalls that the Human Rights Committee has interpreted this article in the case of *Rouse v. Philippines*³ to require that the accused have the opportunity to cross-examine witnesses against him. In that case, the Human Rights Committee noted that the defendant, who was charged with having sexual relations with a minor, was not given the opportunity to cross-examine the alleged victim at trial. The conviction was based solely on a written statement from the alleged victim. The Human Rights Committee found that:

"Considering that the author was unable to cross-examine the alleged victim, although he was the sole eyewitness to the alleged crime, the Committee concludes that the author was the victim of a violation of article 14, paragraph 3 (e)."

35. The source also cites opinion No. 40/2014 of the Working Group (para. 20). In that case, the Working Group interpreted article 14 (3) (e) of the Covenant to require that the prosecution produce witnesses at trial for cross-examination by the accused, especially in cases where witness statements serve as the basis for a conviction. The source emphasizes that, in the present case, given that the young man did not testify at trial, Mr. Fonya had no opportunity to cross-examine him as to his age, whether there was ever a fight or a sexual assault, the nature of their relationship, or any other matter that would establish Mr. Fonya's innocence.

36. Finally, the source notes the Government's admission that Mr. Fonya filed a timely appeal against his conviction and sentence on 25 November 2013, but that no second hearing has taken place. The source argues that the failure to provide Mr. Fonya with a second hearing violates article 14 (5) of the Covenant and renders his detention arbitrary under category III.

Response from the Government

37. Given that the source raised new allegations relating to category III, the Working Group took the exceptional step of forwarding the source's response to the Government on 9 February 2017, with a request to provide comments by 10 April 2017. On 6 April 2017, the Government requested an extension of 60 days to submit its response. On an

³ See communication No. 1089/2002, *Rouse v. Philippines*, Views adopted on 25 July 2005, para. 7.5.

exceptional basis, the Working Group granted a further seven days to the Government, which submitted its response on 12 April 2017.

38. The Government stated that, in raising questions of fact such as whether a fight or sexual assault actually took place, the source has asked the Working Group to consider facts and evidence that do not fall within its mandate. Rather, such matters fall within the jurisdiction of courts at the national level. The Government also recalled that the Working Group cannot serve as an appellate court in relation to national courts.

39. In addition, the Government submitted to the Working Group a judgment of the Court of First Instance in Limbe dated 20 November 2013, which, in its view, contradicts the allegations made by the source. The transcript of the hearing states that judgment in this matter was partly delivered on 16 October 2013, when the Court amended the charge and re-arraigned Mr. Fonya. On that date, the State Counsel stated that he had no further evidence to submit in support of the amended charge. The matter was then adjourned to 30 October 2013 for the defence to tender further evidence. However, the defence stated that it had no further evidence to provide, and the matter was adjourned to 20 November 2013 for delivery of the final judgment.

40. According to the judgment, Mr. Fonya was convicted of violating sections 264 (3) and 298 of the Penal Code. The Court found that Mr. Fonya had committed an indecent act on a minor in Limbe. Mr. Fonya's lawyer noted that his client was a first offender and had a spouse and three children, one of whom was very young. Mr. Fonya's lawyer also stated that his client was remorseful and had already spent a reasonable amount of time in prison. The sentence of the Court simply states that there were two cases involving the forceful sodomy of young boys and that, in both cases, the boys had "gone mad" after the acts in question. The judgment provides no further explanation, and it is not clear which cases the Court is referring to.

Discussion

41. The Working Group thanks the source and the Government for their prompt replies and submissions, which succinctly raised relevant issues in this case. This has allowed the Working Group to consider this case as expeditiously as possible, with a full understanding of the matters in dispute between the parties.

42. The Working Group notes that Mr. Fonya filed an appeal in November 2013 and that the appeal hearing has yet to take place, as discussed above. However, this does not prevent the Working Group from considering this case, as there is no requirement that domestic remedies be first exhausted before the Working Group can issue an opinion.⁴

43. There are serious contradictions between the claims made by the source and the Government. On the one hand, the source maintains that Mr. Fonya was convicted of the crime of homosexuality, while the Government insists that the Court of First Instance in Limbe acquitted Mr. Fonya of this charge and reclassified the charge of private indecent assault as a charge of aggravated indecent assault of a person under 16 years of age under section 346 (2) of the Penal Code. Moreover, the source claims that evidence at trial established that the alleged victim was at least 19 years of age at the time of the alleged offence, while the Government claims that he was only 15 years of age at that time. It is common ground between the parties that the alleged victim did not testify at trial and was not cross-examined as to his age.

44. In order to resolve such conflicts, 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 rests upon the Government if it wishes to refute the allegations (see

⁴ See, for example, opinions Nos. 19/2013 and 11/2000.

A/HRC/19/57, para. 68). The Government can meet this burden of proof by producing documentary evidence in support of its claims.⁵

45. In this case, the Government has produced a brief transcript of the trial judgment to support its claims regarding the substitution of charges against Mr. Fonya. However, the judgment reveals serious flaws. The Court of First Instance does not refer to any evidence against Mr. Fonya, it does not provide reasons for finding Mr. Fonya guilty of having committed an indecent act on a minor under 16 years of age, and the sentencing remarks do not clarify the legal basis on which Mr. Fonya was sentenced to 9 years' imprisonment. Moreover, the judgment refers to section 264 (3) of the Penal Code, whereas the Government stated that Mr. Fonya was convicted on an amended charge under section 346 (2) of the Code. In addition, the judgment does not make reference to evidence, if any, adduced at trial regarding the age of the alleged victim. The Government could have provided evidence (for example, a birth certificate or record of medical examination) in support of its claim that the alleged victim was 15 years of age at the time of the offence and that section 346 (2) of the Penal Code was therefore the appropriate legal basis for Mr. Fonya's deprivation of liberty; however, it did not.

46. Accordingly, the Government has not met its burden of proof and has not rebutted the source's allegations. The Working Group wishes to emphasize that, in reaching this conclusion, it has not substituted itself for a domestic appellate court. Rather, it has considered the judgment of the Court of First Instance and the assertions made by the Government in an attempt to resolve a matter directly within its mandate, namely whether Mr. Fonya was deprived of his liberty based on his presumed sexual orientation, a prohibited ground of discrimination under international law. The Working Group finds that Mr. Fonya was prosecuted and convicted of homosexuality under section 347 bis of the Penal Code for conduct involving an adult of the same sex. The Working Group wishes to note that Mr. Fonya's conviction takes place against a background of persecution of people for their sexual orientation and gender identity in Cameroon, including frequent prosecution under section 347 bis of the Penal Code, which has been well documented by various United Nations human rights mechanisms.⁶

47. Further, the Working Group finds that the deprivation of liberty of Mr. Fonya is based on section 347 bis of the Penal Code, which criminalizes consensual same-sex relations.⁷ That provision violates the obligations of Cameroon under the Covenant to protect the right to privacy and to guarantee non-discrimination. This has been the position of United Nations human rights mechanisms since the 1994 decision by the Human Rights Committee in *Toonen v. Australia*.⁸ In this decision, the Committee found that laws that criminalize consensual same-sex relations between adults violate the right to privacy under article 17 of the Covenant. While the Committee did not consider it necessary to decide whether such laws also violated article 26 of the Covenant, it stated its view that the

⁵ See opinion No. 41/2013, which notes that the source of a communication and the Government do not always have equal access to the evidence, and frequently the Government alone has the most relevant information. In this regard, the Working Group recalls that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden to disprove the negative fact asserted by the applicant is on the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out", *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits*, *Judgment*, I.C.J. Reports 2010, p. 661, para. 55.

⁶ See, for example, opinion No. 22/2006, which found that the detention of 11 people charged and, in some cases, convicted under section 347 bis of the Cameroonian Penal Code was arbitrary. See also document CCPR/C/CMR/CO/4 (para. 12) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) media briefing notes of 16 November 2012 (<http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/MediaBriefingCameroonLGBT.doc>).

⁷ The Working Group confines its findings to the application of section 347 bis to private consensual sexual conduct between adults and makes no comment on the application of the provision when the conduct involves an adult and a person under 18 years of age.

⁸ See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994.

reference to “sex” in articles 2 (1) and 26 of the Covenant is to be taken as including sexual orientation.⁹

48. Since *Toonen*, the Working Group has repeatedly emphasized in its jurisprudence that deprivation of liberty on the basis of sexual orientation is arbitrary and prohibited under international law (see, for example, opinions Nos. 25/2009, 42/2008, 22/2006 and 7/2002). In opinion No. 22/2006 (para. 19), the Working Group specifically considered section 347 bis of the Cameroonian Penal Code and found that:

“[T]he existence of laws criminalizing homosexual behaviour between consenting adults in private and the application of criminal penalties against persons accused of such behaviour violate the rights to privacy and freedom from discrimination set forth in the International Covenant on Civil and Political Rights. Consequently, the Working Group considers that ... the criminalization of homosexuality in Cameroonian law is incompatible with articles 17 and 26 of the International Covenant on Civil and Political Rights, which instrument Cameroon has ratified.”

49. The Working Group considers that section 347 bis, in itself, violates the obligations of Cameroon under articles 2, 7 and 12 of the Universal Declaration of Human Rights and articles 2, 17 and 26 of the Covenant. There is therefore no legal basis for Mr. Fonya’s deprivation of liberty, making it arbitrary according to category I.

50. Similarly, Mr. Fonya has been deprived of his liberty on the basis of his sexual orientation, in violation of his rights to equality before the law, equal protection of the law and freedom from discrimination under articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 and 26 of the Covenant. His deprivation of liberty is thus also arbitrary according to categories II and V.

51. The Working Group reiterates its findings, as well as those of other human rights mechanisms, that sexual orientation is a prohibited ground of discrimination under existing international human rights law and that any detention resulting from such discrimination is considered arbitrary.¹⁰

52. Moreover, discrimination on the grounds of sexual orientation, including through laws that criminalize consensual same-sex relations between adults, is increasingly acknowledged by the international community as unacceptable. During the second universal periodic review of Cameroon, conducted in May 2013, 16 recommendations were made in which the Government was called upon to put an end to discrimination on the basis of sexual orientation, including by repealing legislation that criminalizes consensual same-sex relations between adults and by better protecting the LGBT community in Cameroon. The Human Rights Council has also adopted resolutions (for example, resolutions 27/32 and 17/19) expressing concern at discrimination against individuals because of their sexual orientation or gender identity. The African Commission on Human and Peoples’ Rights has taken a similar step in its landmark resolution condemning the arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity.¹¹ More recently, in 2016, the Human Rights Council, in its resolution 32/2, established the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. Paragraph 1 of the resolution reaffirms that all human beings are born free and equal in dignity and rights, and

⁹ The Working Group also recalls the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, particularly principles 1, 2 and 7. The Working Group supports the statement of universally applicable human rights enshrined in the Yogyakarta Principles.

¹⁰ This is supported by the dissenting views of Human Rights Committee members Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil in *X v. Colombia* (a case involving a claim by an individual in a same-sex relationship to a survivor’s pension), which was cited at length by the Government in its submissions.

¹¹ Resolution 275 on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity, adopted at the fifty-fifth ordinary session of the African Commission on Human and Peoples’ Rights, held in Luanda, Angola, from 28 April to 12 May 2014.

that everyone is entitled to all the rights and freedoms set forth in the Universal Declaration of Human Rights, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

53. For the above reasons, the Working Group considers that Mr. Fonya should never have been tried for the offence of homosexuality and that his detention is arbitrary for that reason alone. However, given that Mr. Fonya was tried for this offence, the Working Group also finds that the source's allegations disclose violations of Mr. Fonya's right to a fair trial under articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant. Specifically, as the source alleges and the Government does not contest, Mr. Fonya was denied the opportunity to cross-examine the young man who was the alleged victim and sole eyewitness. This is a violation of article 14 (3) (e) of the Covenant, which requires that all criminal defendants be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings (see Human Rights Committee general comment No. 32, para. 39). In its jurisprudence, the Working Group has consistently found a violation of article 14 (3) (e) when, as in this case, the prosecution has relied upon the written statement of a witness who was not made available for examination at trial (see, for example, opinions Nos. 40/2014, 4/2013 and 53/2011).

54. Further, the Working Group finds that there has been a violation of article 14 (5) of the Covenant, as Mr. Fonya has not been afforded the opportunity to appeal against his conviction and sentence. Article 14 (5) states that: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

55. The Government does not contest that Mr. Fonya filed an appeal on 25 November 2013, five days after his conviction and sentence, but has never had his matter heard on appeal. Rather, the Government attributes the delay in the appeal process to the absence of Mr. Fonya's lawyer on several occasions. However, almost three and a half years have passed since Mr. Fonya's conviction, and the Government has had ample time to make other arrangements to ensure that Mr. Fonya's appeal could take place. This includes ensuring that Mr. Fonya had access to another lawyer, or to State-funded legal aid if he was not able to afford counsel. As the Working Group recently restated in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, the right to be assisted by counsel of one's own choice applies at any time during the detention of a person and, if the person is without adequate means, effective legal aid must be provided promptly at all stages of the deprivation of liberty (see A/HRC/30/37, principle 9). The lack of an appeal hearing in Mr. Fonya's case was particularly serious as he may have had valid grounds to challenge the sufficiency of evidence at his trial, given the absence of direct testimony from the alleged victim and sole eyewitness. Similarly, in order to exercise his right to an appeal, Mr. Fonya was entitled to have access to a duly reasoned, written judgment of the trial court (see Human Rights Committee general comment No. 32, para. 49). As noted above, the judgment of the Court of First Instance in Limbe cannot be said to meet this requirement, as the Court failed to provide reasons for the conviction and sentencing of Mr. Fonya.

56. The Working Group finds that the delay in providing an appeal hearing to Mr. Fonya constitutes a violation of his right to be tried without undue delay under article 14, paragraphs 3 (c) and 5, of the Covenant. Before his conviction, Mr. Fonya had already served nearly a year in pretrial detention (with only a short release on bail in early 2013), and has since served almost half of the sentence for a serious sexual offence involving a minor. He is detained in prison conditions that, as the Government does not dispute, represent an imminent threat to his safety and well-being. The State cannot remedy these violations by providing Mr. Fonya with an appeal hearing now, as the effectiveness of his

right to a review has been impaired by the unreasonable and insufficiently explained delay since his conviction.¹²

57. The Working Group concludes that these violations of the norms related to the right to a fair trial are of such gravity as to give the deprivation of liberty of Mr. Fonya an arbitrary character according to category III.

58. The Working Group expresses serious concern at the unacceptable conditions in which Mr. Fonya is being detained and reminds the Government that it is responsible for ensuring that such conditions meet international standards. Moreover, having found that Mr. Fonya was discriminated against for his presumed sexual orientation, in violation of international norms, the Working Group is concerned about reports of retaliatory measures against those who have offered or continue to offer support to Mr. Fonya. It is the responsibility of the Government to protect everyone in its territory or under its jurisdiction against any human rights violations and to provide remedies whenever a violation occurs.

59. The Working Group would welcome the opportunity to work constructively with the Government in addressing its serious concerns about arbitrary deprivation of liberty in Cameroon. In January 2017, the Working Group sent a written request to the Government to undertake a country visit; if the request is accepted, the Working Group will be able to visit Cameroon for the first time. The Working Group notes that the Government issued a standing invitation to all thematic special procedures mandate holders on 15 September 2014, and looks forward to a positive response from the Government to its request to visit.

Disposition

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

The deprivation of liberty of Cornelius Fonya, being in contravention of articles 2, 7, 9, 10, 11 and 12 of the Universal Declaration of Human Rights and of articles 2, 9, 14, 17 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

61. The Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Fonya 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 Covenant.

62. Taking into account all the circumstances of the case, the Working Group considers that the adequate remedy would be to release Mr. Fonya immediately and accord him an enforceable right to compensation and other reparations, in accordance with article 9 (5) of the Covenant.

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

64. The Working Group urges the Government to bring its criminal laws, particularly section 347 bis of the Penal Code, into conformity with the recommendations made in this opinion and with the commitments of Cameroon under international human rights law.

65. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.

¹² The Human Rights Committee has consistently held that the rights set forth in article 14, paragraphs 3 (c) and 5, read together, confer a right to a review of a decision at trial without undue delay. See, for example, Human Rights Committee general comment No. 32, para. 49; communication No. 818/1998, *Sextus v. Trinidad and Tobago*, Views adopted on 16 July 2001; communication No. 750/1997, *Daley v. Jamaica*, Views adopted on 31 July 1998; and communication No. 588/1994, *Johnson v. Jamaica*, Views adopted on 22 March 1996.

Follow-up procedure

66. 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. Fonya has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to him;
- (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 Government with its international obligations, in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

67. 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.

68. 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. 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.

69. 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.¹³

[Adopted on 21 April 2017]

¹³ See Human Rights Council resolution 33/30, paras. 3 and 7.