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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018

Opinion No. 80/2018 concerning Bitwedded Abraha (Eritrea)

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 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 9 August 2018 the Working Group transmitted to the Government of Eritrea a communication concerning Bitwedded Abraha. 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. Bitweded Abraha is an Eritrean national who was born in 1953. Mr. Abraha is a soldier (commanding officer), an educator and a port administrator.

5. According to the source, Mr. Abraha was a freedom fighter brigadier general and fought for the independence of Eritrea from 1973 until 1991. He played an important role in liberating Assab, one of the port cities of Eritrea.

(a) Arrest and detention

6. According to the source, Mr. Abraha was arrested on 6 October 1991, in Assab where he was Deputy Administrator, by soldiers of the Government of Eritrea implementing the orders of the then General Secretary and military leader of the Eritrean People's Liberation Front, Isaias Afwerki, who is the current President of Eritrea. Mr. Abraha was detained between October 1991 and 24 December 1997 and then again from 8 March 1998 until the present day. According to the source, between these two periods of detention, Mr. Abraha was released, but under constant surveillance.

7. The source indicates that no arrest warrant or order of a justice or official court was presented with regard to the arrest of Mr. Abraha.

8. The source reports that, at first, the place of detention of Mr. Abraha was unknown. His family members were told that he had been sent abroad to study. After many months, the family, insisting on receiving information about Mr. Abraha, was told that he had been taken into custody due to a disagreement with the then Secretary-General of the Eritrean People's Liberation Front. It was only after two years of detention that his family heard, from individuals who had been detained in the same location as Mr. Abraha, that he had been held in a place known as "Wenjel Mrmera", which was located at the back of police station No. 2 in Asmara. His family then sent a written complaint to the Head of the National Intelligence and Security Service. This complaint requested information about his guilt, and asked that he be either pardoned, taking into consideration his participation in the struggle for independence, or if that was not possible, to charge him formally and allow him to be tried before a court, with his right to defend himself guaranteed. The then Head of the National Intelligence and Security Service replied to the request stating that they would settle the disagreement. He explicitly added that Mr. Abraha was their comrade who was closer to them than to anyone else, and told the family not to worry about the problem. The family sent similar complaints and requests to several ministries and the President, who answered that Mr. Abraha was going to be released and that this detention was based merely on a misunderstanding. In particular, the Ministry of Justice informed the family that it knew nothing about the case. Again, in the period after his second arrest, his family was not informed about his whereabouts, but after a year, it was given unofficial information that he had been in police station No. 6 in Asmara until about 2001. From 2001 up to the present day, Mr. Abraha has been held in Wenjel Mrmera.

9. In addition, the source reports that the Eritrean authorities originally accused Mr. Abraha of illegal profiteering from a cargo of whisky left in Assab.

10. Allegedly, the then Secretary-General of the Eritrean People's Liberation Front ordered Mr. Abraha to let the Government of Ethiopia acquire all the assets it lost after the capture of Assab. Mr. Abraha refused to obey that order and said that those assets were captured and should not be returned because "it cost Eritrea the blood of young Eritrean martyrs". According to the source, the then Secretary-General perceived Mr. Abraha's strong opposition as an affront to his authority. Soon after that event, the Ethiopian Government offered to pay the salaries of the port and refinery employees of Assab. Once again, Mr. Abraha refused the offer and declared that Eritrea was an independent State and that the salaries should be covered by Eritrea. As the finances of Eritrea were in a poor state, Mr. Abraha suggested selling the large number of bottles of whisky in order to pay the salaries of the port workers of Assab and to help other Eritrean establishments run their activities in Assab. He wrote a letter to that effect to the then Head of that region, who supported the idea and gave permission to Mr. Abraha to do so.

11. The source also notes that Mr. Abraha disagreed with the policy of the then Secretary-General of the Eritrean People's Liberation Front concerning informal relations with the new Government of Ethiopia. Therefore, Mr. Abraha was considered as a rival. The then Secretary-General thus considered that Mr. Abraha would not agree to his methods of control. According to the source, it was therefore convenient to find a useful accusation against Mr. Abraha according to which he had sold the bottles of whisky for his own personal use (which amounted to corrupt use of funds), and, on the basis of those unverified accusations, put Mr. Abraha into prison (in October 1991).

12. The source highlights that the accusations have never been tested in court and that he has never been formally charged with any offence. The source states that there has never been a legal basis or case for his arrest and imprisonment. In addition, the source claims that, as there is no rule of law or system of courts, no one has any legal avenue by which to take up his case. The only operational courts are special military courts, the agenda of which is controlled by the President.

(b) Legal analysis

(i) Category I

13. The source states that there is no Constitution in place or rule of law in Eritrea. Individuals are detained without having access to courts of law. In that context, Mr. Abraha has had no right to a trial or to know what charges have been made (if any) against him, and has never appeared before a court of law.

(ii) Category II

14. The source alleges that Mr. Abraha has been deprived of his liberty because of his political opinions and his willingness to express his views on the way his country should be governed under a democratic system. These rights are guaranteed by articles 18, 19 and 21 of the Universal Declaration of Human Rights.

15. In particular, the source reports that, in May 1991, the then Secretary-General of the Eritrean People's Liberation Front declared free access to the port of Assab to the newly established Government of Ethiopia, without due consultation with high-level Eritrean officials. At that time, as the effective Administrator of Assab, Mr. Abraha openly reminded and warned about the dangers of declaring free access to the port. From that point onwards, the then Secretary-General perceived Mr. Abraha's strong opposition as an affront to his authority.

16. The source explains that, soon after, the Government of Ethiopia offered to pay the salaries for the port and refinery employees of Assab. Mr. Abraha again refused to accept the offer, declaring that Eritrea was an independent State and that the salaries should be covered by Eritrea. He insisted that both countries needed to establish their relationship on a formal basis as between nation States. Yet, the then Secretary-General of the Eritrean People's Liberation Front signed an agreement that allowed Ethiopia to use the facilities of the port of Assab without restrictions. Again, Mr. Abraha expressed his dissatisfaction and insisted on consulting and discussing these matters with officials, and insisted on the need to establish the two countries' relationship in accordance with standard procedures between independent nation States.

17. According to the source, Mr. Abraha was placed in detention on 6 October 1991. His imprisonment was not made public. For almost six months, his family and his colleagues in Army Unit 07 were deceived about his whereabouts. They were told he had left the country to study abroad. However, it was later revealed that the main reason for his imprisonment was his popularity with the army, widespread among the freedom fighters, and that he was seen as a threat to the power base of the then Secretary-General of the Eritrean People's Liberation Front.

18. The source states that Mr. Abraha was temporarily released on 24 December 1997. On that date, Mr. Abraha was told that he was going to a special army court to be released. Allegedly, Mr. Abraha declared, at the time, that: "You cannot tell me to come in or go out without the rule of law. Those who have the power to release me must at least have the rank

of major general. Even then, they will have to state the crime that I committed or make it clear that I committed no crime in accordance with the rule of law and I will accept it only when it is put in writing.” He was later told that he was not guilty of any crime and that he would be paid his unpaid salary and be compensated for the miscarriage of justice. All these statements were put in writing and given to him. However, although it appeared that he was being released without charge, his imprisonment was not definitely ended as he was arrested again on 8 March 1998. He has been kept in solitary confinement since then. This, according to the source, further emphasizes the fact that, because of his political beliefs, the then Secretary-General of the Eritrean People’s Liberation Front does not want him to be able to pass on his beliefs and political opinions to others.

(iii) Category III

19. The source notes that Eritrea ratified the International Covenant on Civil and Political Rights in 2002. The source claims that, under both the Universal Declaration of Human Rights and the Covenant, Mr. Abraha’s arrest and detention have been arbitrary. The source argues that Mr. Abraha was not informed at the time of his arrest of the reasons for his arrest or of any charges against him (articles 9 (2) and 14 (3) of the Covenant); nor has he ever been informed of any such charges. In addition, the source claims that Mr. Abraha has never been brought before a judge or participated in a fair and public trial by an independent tribunal (article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant); nor has he been offered bail (article 9 (3) of the Covenant). There is no court of law in Eritrea to which family or friends might present his case and the unlawfulness of his imprisonment (article 9 (4) of the Covenant). Appeals by his family to the then Secretary-General of the Eritrean People’s Liberation Front had no effect. In addition, Mr. Abraha has never been presumed innocent until proven guilty (article 14 (2) of the Covenant). He has never had a lawyer to act as counsel in his case (article 14 (3) (b) of the Covenant), nor has he had a trial without undue delay (article 14 (3) (c) of the Covenant) nor has he been present at any trial to face charges (article 14 (3) (d) of the Covenant).

(iv) Category V

20. The source states that it is clear, from the evidence and interpretation presented above, that Mr. Abraha has been deprived of his liberty because of his political opinions about how a democratic State should operate, opinions which he freely expressed according to the rights guaranteed under articles 18 and 19 of the Universal Declaration of Human Rights and the Covenant. The right to freedom of thought, the right to hold opinions without interference (article 19 (1) of the Covenant) and the right to freedom of expression and to impart ideas of all kinds (article 19 (2) of the Covenant) are also applicable here.

21. The source further specifies that, while in prison, Mr. Abraha wrote two books: *Democracy in Eritrea*, which concerns the need to remove the dictatorship and fight for democracy in Eritrea, and *Civil War and its Aftermath*, regarding the Eritrean civil war of the 1970s and 1980s, the lives lost and those who lost their democratic principles in the struggle for power, as well as the consequences thereof on Eritrean society. Both these books, because of the political analysis they contain, are likely to have made the authorities unwilling to release him.

22. In addition, the source recalls that Mr. Abraha is known to have written the following: “I was put in prison because I believed in establishing a democratic government. The Government of Eritrea knows this. It could have brought me to a court of law. It never did”; and “Even if I am imprisoned, the truth will never be imprisoned. Moreover, you should know that whoever puts me in prison will never sleep in peace”. This makes clear, according to the source, that he knew his imprisonment was a case of discrimination on political, philosophical and moral grounds.

Response from the Government

23. On 9 August 2018, the Working Group transmitted the source’s allegations to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 9 October 2018, detailed information about the current situation of Mr. Abraha and any comments on the source’s allegations.

24. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

25. 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.

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

Context

27. At the outset of this Opinion, it is important to provide some contextual information to help in its analysis. Indeed, that context illustrates the exceptional nature of the allegations in this case.

28. The territory of present-day Eritrea used to be within Ethiopia. Eritrea fought for its independence and won it through a referendum supervised by the United Nations in April 1993.¹ In May 1993, Eritrea was admitted to the United Nations following Security Council resolution 828 (1993) and General Assembly resolution 47/230. Thereafter, allegations of consistent human rights violations led to the establishment of the mandate of the Special Rapporteur on the situation of human rights in Eritrea,² who the Government has refused to cooperate with so far. Indeed, having been appointed in November 2012, the former Special Rapporteur was not granted access to the country. Her term of office ended in October 2018 when a new Special Rapporteur was appointed. The Human Rights Council has also established a commission of inquiry on human rights in Eritrea, which has not been allowed into the country. It concluded its work with two consecutive reports, which substantiated various human rights violations.³ That is the wealth of highly reliable information at the disposal of the Working Group when it considers the present submission. The Working Group also notes that Eritrea has recently been elected as a member of the Human Rights Council.⁴

29. The claims presented by the source are corroborated by the observations of the Special Rapporteur on the situation of human rights in Eritrea and the commission of inquiry on human rights in Eritrea, which show a systemic problem with arbitrary deprivation of liberty in Eritrea. The Special Rapporteur wrote in her report that the current situation in Eritrea perpetuated the patterns of human rights violations identified by both the Special Rapporteur and the Commission of inquiry on human rights in Eritrea, namely arbitrary arrests and detentions; overcrowding in congested places of detention; deaths in custody; violations of freedom of expression, association and peaceful assembly; and religious persecution (A/HRC/38/50, para. 27). In the same report, she also pointed out that there was still neither a Constitution nor a parliament in Eritrea and that the rule of law was not supreme; the Government and its agents were not subject to the law, thus perpetuating long-entrenched impunity for widespread human rights violations (para. 28).

¹ *The United Nations and the Independence of Eritrea* (United Nations publication, Sales No. E.96.1.10), pp. 19–30. Officially, Eritrea became independent on 24 May 1993.

² Human Rights Council resolution 20/20, para. 4.

³ See Human Rights Council resolution 26/24 establishing the commission; and its two reports, A/HRC/29/42 and A/HRC/32/47.

⁴ See the results of the elections in the General Assembly on 12 October 2018 (www.un.org/en/ga/73/meetings/elections/hrc.shtml).

Legal analysis of the allegations of arbitrary detention

30. The source argues that the situation of Mr. Abraha falls within categories I, II, III and V as defined in its methods of work. The Working Group will consider each category in turn.

31. The source has established that Mr. Abraha was arrested and detained on two occasions. While he was released after his first detention (1991–1997), Mr. Abraha has not been released since his second arrest on 8 March 1998. In both instances, Mr. Abraha was neither presented with any warrant of arrest nor provided with the reasons for his arrest and detention. In addition, he was never afforded an opportunity to present a case on the lawfulness of his detention to a judge. In the absence of any information from the Government to the contrary, and bearing in mind the corroborating evidence from the special procedures on Eritrea, the Working Group considers that there was no legal basis for the arrest and detention of Mr. Abraha from October 1991 to December 1997 and again since 8 March 1998. Thus, the deprivation of liberty of Mr. Abraha, being in contravention of article 9 of the Covenant, is arbitrary and falls within category I.

32. The source has alleged that Mr. Abraha has been detained for 27 years because, on several occasions, he expressed his political opinion and his opposition to the decisions taken concerning the port of Assab and the relations between Eritrea and Ethiopia. He also raised his concerns about the officials not being consulted during the decision-making process. The then Secretary-General of the Eritrean People's Liberation Front perceived Mr. Abraha's strong opposition as undermining his authority. Mr. Abraha also wrote books during his detention about democracy in Eritrea. Furthermore, he has been kept in solitary confinement since March 1998, which confirms the authorities' worries about his influencing others.

33. The Working Group recalls that restrictions may be placed on freedom of expression that relate to respect for the rights or reputations of others, or to the protection of national security or of public order or of public health or morals. Restrictions are not allowed on grounds not specified in article 19 (3) of the Covenant, even if such grounds would justify restrictions to other rights protected in the Covenant. In this case, the restrictions do not apply.

34. Moreover, the fact that Mr. Abraha is an official does not reduce his freedoms of opinion and expression. The Human Rights Committee noted that the value placed by the Covenant upon uninhibited expression was particularly high concerning the content of political discourse. Indeed, all public figures, including those exercising the highest political authority such as heads of state and government, were legitimately subject to criticism and political opposition.⁵

35. The Working Group concludes that the deprivation of liberty of Mr. Abraha was therefore due to the exercise of his right to freedom of opinion and expression, thus violating article 19 of the Universal Declaration and the Covenant. The detention is therefore arbitrary and falls within category II.

36. Although there has been no trial in the present case, there is evidence to support a finding of a violation of the fair trial norms. Indeed, Mr. Abraha has been deprived of the right to challenge the lawfulness of his arrest and detention before a court of law under article 9 (3) and (4) of the Covenant, of the right not to be subjected to solitary confinement under rules 1 and 43 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), of the right to be tried without undue delay under article 14 (3) (c) of the Covenant, of the right to have a defense under article 14 (3) (b) of the Covenant, and of the right to a fair trial under articles 10 of the Universal Declaration and 14 of the Covenant.

37. It is important to highlight the duration of solitary confinement, that is 20 years. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Eritrea acceded in 2004, obliges each State party to undertake to prevent cruel, inhuman or degrading treatment or punishment (art. 16). More specifically, the United Nations Standard Minimum Rules for the Treatment of Prisoners bans indefinite or prolonged solitary confinement (rule 43 (1) (a) and (b)), where solitary confinement is

⁵ Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 38.

defined as the confinement of prisoners for 22 hours or more a day without meaningful human contact, and prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days (rule 44).

38. The Working Group concludes that the breaches of articles 9, 10 and 11 of the Universal Declaration and articles 9 and 14 of the Covenant are of such gravity as to give Mr. Abraha's deprivation of liberty an arbitrary character, falling within category III.

39. The source also alleges that the arbitrary detention of Mr. Abraha falls within category V. However, the lack of sufficient information has prevented the Working Group from analysing any specific allegation of discrimination other than that related to the freedoms that Mr. Abraha enjoyed and that were already considered under category II.

40. In concluding its consideration of the case, the Working Group wishes to recall that Eritrea made extensive and voluntary pledges in its candidacy for a seat on the Human Rights Council (A/73/360). This is the time for Eritrea to show its active and effective commitment to human rights through full cooperation with the special procedures in general, and for the enforcement of the present opinion.

41. Bearing in mind that the Human Rights Council has addressed the situation in Eritrea in the past, the Working Group will refer the case to the Special Rapporteur on the situation of human rights in Eritrea. In addition, and recalling the recent election of Eritrea as member of the Council, the Working Group calls on the Council for its further consideration of this matter, in holding one of its members accountable for violations of that member's international legal obligations and its voluntary pledges.

Disposition

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

The deprivation of liberty of Bitwedwed Abraha, being in contravention of articles 9, 10, 11 and 19 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

43. The Working Group requests the Government of Eritrea to take the steps necessary to remedy the situation of Mr. Abraha 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.

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

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

46. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in Eritrea, for appropriate action.

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

Follow-up procedure

48. 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. Abraha has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Abraha;

(c) Whether an investigation has been conducted into the violation of Mr. Abraha's 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 Eritrea with its international obligations in line with the present opinion;

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

49. 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.

50. The Working Group requests the source and the Government to provide the above-mentioned 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.

51. 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.⁶

[Adopted on 21 November 2018]

⁶ See Human Rights Council resolution 33/30, paras. 3 and 7.