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**Human Rights Council**  
**Working Group on Arbitrary Detention****Opinions adopted by the Working Group on Arbitrary Detention at its eighty-eighth session (24–28 August 2020)****Opinion No. 56/2020 concerning Cadeau Bigirumugisha (Burundi)\***

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 26 March 2020 the Working Group transmitted to the Government of Burundi a communication concerning Cadeau Bigirumugisha. 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).

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\* Seong-Phil Hong did not participate in the deliberations on this case.



## Submissions

### *Communication from the source*

4. Cadeau Bigirumugisha is a Burundian citizen born in 1978. Mr. Bigirumugisha is a member of the military, the National Defence Forces of Burundi. Previously, he was a liaison officer for a former Minister of National Defence who was prosecuted in connection with the attempted coup d'état of 13 May 2015. At the time of his arrest, Mr. Bigirumugisha was living in the military camp in Ngagara, in Bujumbura Mairie Province.

#### (a) Arrest and detention

5. According to the source, in the morning of 10 August 2015, Mr. Bigirumugisha was arrested near the army headquarters located in the commune of Mukaza, in Bujumbura Mairie, while he was carrying an official letter to the Ministry of Health. Mr. Bigirumugisha was arrested by military personnel on the orders of the commander of the Ngagara Camp, but without a warrant. Also, his identity document was confiscated and he was not informed of the reasons for his arrest. He was then taken to the military police lock-up, where he spent six days without being questioned.

6. On 16 August 2015, Mr. Bigirumugisha was taken to the premises of the National Intelligence Service, where he was reportedly interrogated, without counsel, about the assassination of a lieutenant general. The source further states that the assassination took place while Mr. Bigirumugisha was on leave in Ruyigi Province. The source also reports that on 2 September 2015, Mr. Bigirumugisha was questioned by a prosecutor from the Public Prosecutor's Office in Bujumbura Mairie on the basis of reports from the National Intelligence Service. Again, Mr. Bigirumugisha was interrogated without counsel. After this interrogation, Mr. Bigirumugisha was taken back to the National Intelligence Service cell.

7. According to the source, around 30 September 2015, an arrest warrant was issued for Mr. Bigirumugisha and he was transferred to the prison in Gitega.

8. In November 2015, Mr. Bigirumugisha was brought before the judges' council chamber of the Bujumbura Mairie Tribunal de Grande Instance (court of major jurisdiction) for verification that his detention was lawful. The detention was upheld by the court.

9. The source reports that nearly eight months later, on 6 July 2016, Mr. Bigirumugisha was brought before the trial judge, without counsel, and with the prosecution presenting no witnesses. Further hearings were held on 1 August and 11 October 2016. The source states that no prosecution witnesses were ever called. At the last hearing, the case was adjourned with the court reserving judgment. One month later, the court had reopened the proceedings to allow the prosecution to conduct a further investigation. On 27 December 2016, a hearing was held by the Mukaza Tribunal de Grande Instance, and the prosecution explained that witnesses for the prosecution had not appeared because they had no protection. The case was then adjourned sine die. Thus, the source alleges that for over three years, the case has not been scheduled for a public hearing to allow Mr. Bigirumugisha to present arguments in his defence.

#### (b) Legal analysis

##### (i) Category I

10. According to the source, the arbitrary nature of Mr. Bigirumugisha's detention stems first of all from the lack of a legal basis for his detention, as called for in article 9 (1) of the Covenant.

11. In the present case, the source alleges that no arrest procedures were followed, as no arrest warrant or other justification for detention was presented to Mr. Bigirumugisha at the time of his arrest. It was only around 30 September 2015, some 50 days after his arrest, that Mr. Bigirumugisha learned that he had been the subject of an arrest warrant for his transfer to the prison in Gitega and that he had been charged with murder. The source concludes that, from 10 August to the end of September 2015, Mr. Bigirumugisha had been held in pretrial detention without any legal basis.

12. Secondly, the source alleges that Mr. Bigirumugisha had no access to judicial review mechanisms during approximately three months of detention. On this point, the source explains that the first hearing in the judges' council chamber took place in November 2015, while the arrest warrant for Mr. Bigirumugisha had been issued on or around 30 September 2015. Given that the lawfulness of his detention was never confirmed within the time prescribed by law, in accordance with article 111 of the Code of Criminal Procedure, the source concludes that Mr. Bigirumugisha's deprivation of liberty has no legal basis.

13. The source emphasizes that Mr. Bigirumugisha was arrested without the slightest hint of guilt that could justify his involvement in the lieutenant general's assassination, which is in contravention of article 110 of the Code of Criminal Procedure. According to the source, the lack of evidence is the result of a lack of findings against the defendant during the judicial investigation. In the light of the above considerations, the source asserts that Mr. Bigirumugisha's detention must be considered arbitrary under category I.

(ii) Category III

14. The source alleges that, in the proceedings against Mr. Bigirumugisha, there were many flaws that constitute violations of Burundian law and of international standards relating to the rights to liberty and security of person and to a fair trial.

15. Firstly, the source argues that Mr. Bigirumugisha was arrested in violation of several mandatory procedures. As explained above, no warrant was presented to Mr. Bigirumugisha to justify his arrest. In addition, Mr. Bigirumugisha continues to suffer violations, as his trial has not proceeded at all. The source reports that for more than three years the case has been back in open court after a ruling to reopen the proceedings and observes that the judge handling the case has done little to move it ahead. Therefore, according to the source, the case has not been handled within a reasonable time.

16. Secondly, the source maintains that the authorities failed to respect the obligation to bring Mr. Bigirumugisha before a competent court within the statutory time limit, i.e., within 15 days of the issue of the arrest warrant, as stipulated in article 111 of the Code of Criminal Procedure.

17. The source also recalls that a warrant for the arrest of Mr. Bigirumugisha was issued around 30 September 2015, i.e., some 50 days after the arrest, and that he was brought before the court for a detention order review in November 2015, or three months after his detention and two months after the arrest warrant was issued. The source points out that article 112 of the Code of Criminal Procedure provides that the "release from pretrial detention shall be ordered by the court on its own motion in the event of wrongful detention". However, the flaws in the detention, including the exceeding of time limits, were not penalized by the judge.

18. Thirdly, the source alleges that Mr. Bigirumugisha was deprived of the basic right to legal assistance during the judicial proceedings. The source thus recalls that when Mr. Bigirumugisha was subjected to questioning by the National Intelligence Service, he was not assisted by counsel, although the assistance of counsel is a legal obligation under article 95 of the Code of Criminal Procedure. This violation persisted during the questioning before the investigating judge and during the judges' council chamber hearing. Furthermore, the source reiterates that treatment of the case has been inordinately slow, which is contrary to the principle of reasonably prompt consideration of cases established in article 38 of the Constitution. Despite this provision of the fundamental law, the source notes that the case has been dragging on before a court of first instance for four years. The source also recalls that the last public hearing was held on 27 December 2016, when the prosecution requested a postponement of the case to allow it to appear with the witnesses for the prosecution, with the necessary protection measures, and the court thus adjourned the case sine die.

19. For these reasons, the source concludes that these procedural flaws violated the right of Mr. Bigirumugisha to a fair trial and are of such gravity that his detention is arbitrary under category III.

(iii) Category V

20. According to the source, Mr. Bigirumugisha was wrongly accused of being a member of the group that made an attempt on the lieutenant general's life because Mr.

Bigirumugisha had been a member of the former regular army that fought against the rebel movements that are now in power, and because of his previous position as a liaison officer for the former Minister of Defence, who has been accused by the regime of playing a role in the attempted coup of 13 May 2015.

21. The source also recalls that, since the 1960s, Burundi has repeatedly experienced crises based on the ethnic conflicts between Hutus and Tutsis. The source points out that Mr. Bigirumugisha is of Tutsi ethnicity. His ethnic background and the fact that he was a liaison officer for a former government minister, also a Tutsi, and who has been prosecuted for an attempted coup d'état, put him in a situation of extreme vulnerability.

#### *Response from the Government*

22. On 26 March 2020, the Working Group transmitted to the Government a communication concerning Mr. Bigirumugisha. The Working Group requested it to provide detailed information on Mr. Bigirumugisha by 25 May 2020 at the latest. More specifically, it requested the Government to clarify the legal provisions justifying his continued detention, as well as their compatibility with the obligations of Burundi under international human rights law, and specifically with the treaties that the State had ratified. Moreover, the Working Group called upon the Government to safeguard Mr. Bigirumugisha's physical and mental integrity.

23. The Working Group regrets that it did not receive a response from the Government to that communication, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work. The Working Group notes with concern that the Government has not taken the opportunity to respond to the allegations made in the present case and in other communications filed under the ordinary procedure in recent years.<sup>1</sup> In fact, the Government has not replied to the Working Group's regular communication procedure since 2012. The Working Group invites the Government to engage constructively with it on all allegations relating to the arbitrary deprivation of liberty.

#### **Discussion**

24. 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.

25. 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.

26. The source argues that the arrest and detention of Mr. Bigirumugisha are arbitrary under categories I, III and V. The Working Group will consider the source's allegations in turn.

#### *Category I*

27. The source reports that Mr. Bigirumugisha was arrested on 10 August 2015 near the army headquarters located in the commune of Mukaza, in Bujumbura Mairie, while he was carrying an official letter to the Ministry of Health. Mr. Bigirumugisha was arrested by military personnel on the orders of the commander of the Ngagara Camp, but without a warrant. Also, his identity document was confiscated and he was not informed of the reasons for his arrest. He was then taken to the military police lock-up, where he spent six days without being questioned. An arrest warrant was issued for Mr. Bigirumugisha around 30 September 2015.

28. According to article 9 (1) of the Covenant, no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by

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<sup>1</sup> See opinions No. 55/2020, No. 40/2020, No. 25/2020, No. 37/2019, No. 7/2018, No. 54/2017, No. 8/2016, No. 30/2015, No. 33/2014 and No. 14/2013.

law. In order for a deprivation of liberty to have a legal basis, it is not sufficient that there be a law that authorizes the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.<sup>2</sup> The Working Group notes the absence of any justification for Mr. Bigirumugisha's arrest without warrant and therefore considers that it constitutes a violation of his right under article 9 (1) of the Covenant and article 9 of the Universal Declaration of Human Rights.

29. Furthermore, the Working Group recalls that article 9 (2) of the Covenant requires that a person who is arrested be informed, at the time of arrest,<sup>3</sup> of the reasons for the arrest, and it notes that in this case the authorities failed to inform Mr. Bigirumugisha. The Working Group also notes that Mr. Bigirumugisha was not informed of the charges against him until around 30 September 2015, when an arrest warrant was issued for him. In view of this delay, for which the Government has provided no justification, the Working Group concludes that there has been a violation of article 9 (2) of the Covenant, as Mr. Bigirumugisha was not promptly informed of the charges against him.

30. The source also reported that Mr. Bigirumugisha was not brought promptly before a judge, as a prosecutor of the public prosecutor's office in Bujumbura Mairie questioned him on the basis of reports from the National Intelligence Service on 2 September 2015 and he was brought before the judges' council chamber of the Bujumbura Mairie Tribunal de Grande Instance (court of major jurisdiction) for verification that his detention was lawful in November 2015. This allegation too has not been contested by the Government.

31. As the Working Group has previously emphasized, a prosecuting body cannot be considered to be a judicial authority for the purposes of article 9 (3) of the Covenant.<sup>4</sup> In this connection, the Working Group recalls that, in accordance with article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge must be brought promptly before a judge or other officer authorized by law to exercise judicial power and must be entitled to trial within a reasonable time or to release. The Human Rights Committee, in its general comment No. 35 (2014) on liberty and security of person, stated in paragraph 33 that, while the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.

32. The source also points out that article 111 of the Code of Criminal Procedure stipulates that presentation before a judge must take place within 15 days of the issuance of the arrest warrant. For an arrest that takes place on the day the warrant is issued, this is incompatible with article 9 (3) of the Covenant, as 15 days is excessive. The Working Group therefore invites the Government to bring this provision into conformity with international standards.

33. In this regard, the Working Group considers that the authorities have failed to fulfil their obligation under article 9 (3) of the Covenant.

34. The Working Group also notes that Mr. Bigirumugisha was not brought before a judge before November 2015 and therefore did not have the opportunity to challenge the lawfulness of his detention before then, as stipulated in article 9 (4) of the Covenant.

35. The Working Group thus finds that Mr. Bigirumugisha's arrest and detention have no legal basis, in violation of article 9 of the Universal Declaration of Human Rights and article 9 (1–4) of the Covenant, and are arbitrary under category I.

### *Category III*

36. The source explains that Mr. Bigirumugisha was deprived of the basic right to legal assistance in the judicial proceedings. The source claims that at the time of his questioning

<sup>2</sup> Opinions No. 25/2020, para. 34; No. 46/2018, para. 48; No. 36/2018, para. 40; No. 10/2018, para. 45; and No. 38/2013, para. 23.

<sup>3</sup> Opinions No. 46/2019, para. 51; and No. 10/2015, para. 34.

<sup>4</sup> Opinions No. 5/2020, para. 72; No. 45/2019, para. 52; and No. 14/2015, para. 28. See also Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 32.

at the premises of the National Intelligence Service, Mr. Bigirumugisha was not assisted by counsel. This violation persisted during the questioning before the investigating judge and during the judges' council chamber hearing. In the absence of any rebuttal by the Government, the Working Group considers that the facts presented by the source have been established.

37. The Working Group recalls that all persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their apprehension, and that such assistance must be provided without delay.<sup>5</sup>

38. In the light of the facts, the Working Group concludes that Mr. Bigirumugisha's right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choice, as provided for in article 14 (3) (b), of the Covenant, has been violated, as has his right to conduct an adequate defence through counsel of his choice, as provided for in article 14 (3) (d) of the Covenant.

39. Furthermore, the source explains that Mr. Bigirumugisha's trial has been unduly and excessively slow and that his case is still pending, the last public hearing having taken place on 27 December 2016. At that hearing, the prosecution requested a postponement of the case to allow prosecution witnesses to appear with the required protective measures. In response, the court ordered a postponement sine die. The Government has not provided any explanation for this postponement.

40. The Working Group recalls that the reasonableness of any delay in bringing a case to trial must be assessed on a case-by-case basis, taking into account its complexity, the conduct of the defendant and the manner in which the authorities have handled the case.<sup>6</sup> In the present case, the Working Group considers, taking into account that the last hearing took place in December 2016 and that the case was adjourned sine die, that the right to be tried without undue delay, as provided for under article 14 (3) (c) of the Covenant, was violated.

41. For these reasons, the Working Group concludes that the violations of the right to a fair trial under article 10 of the Universal Declaration of Human Rights and article 14 of the Covenant are of such gravity as to confer on Mr. Bigirumugisha's deprivation of liberty an arbitrary character under category III.

#### *Category V*

42. The source claims that Mr. Bigirumugisha was wrongly accused of being a member of the group that made an attempt on the lieutenant general's life because he had been a member of the former regular army that fought against the rebel movements that are now in power and because of his previous position as a liaison officer for the former Minister of Defence, who has been accused by the regime of playing a role in the attempted coup of 13 May 2015. The source also points out that Mr. Bigirumugisha is of Tutsi ethnicity and that his ethnicity would place him in a state of extreme vulnerability.

43. The Working Group recalls that, 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, the detention is arbitrary.

44. Recalling its Opinions No. 55/2020, No. 25/2020 and No. 7/2018, in which it concluded that there was discrimination against members of the former regular army who were of Tutsi ethnicity,<sup>7</sup> and in the absence of a rebuttal by the Government, the Working Group considers the allegations of the source to be credible. The Working Group therefore

<sup>5</sup> Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 32 and 33, and United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), principle 9 and guideline 8.

<sup>6</sup> Opinions No. 83/2019, para. 70, and No. 45/2016, para. 51. See also Human Rights Committee, general comment No. 32, para. 35.

<sup>7</sup> See also CAT/C/BDI/CO/2/Add.1, paras. 12, 13, 18 and 19.

concludes that the arrest and detention of Mr. Bigirumugisha are the result of ethnic and political discrimination, as he was arrested and detained solely because he was a member of the army and worked for a former Minister of National Defence. According to the Working Group, this is a violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. The Working Group therefore considers Mr. Bigirumugisha's arrest and detention to be arbitrary under category V.

45. Furthermore, and in view of this last conclusion, the Working Group refers the case to the Special Rapporteur on minority issues.

### **Disposition**

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

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

47. The Working Group requests the Government of Burundi to take the steps necessary to remedy the situation of Mr. Bigirumugisha 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.

48. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Bigirumugisha immediately and to accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global COVID-19 pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent measures to ensure the immediate release of Mr. Bigirumugisha.

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

50. The Working Group requests the Government to bring its laws into conformity with the recommendations made in the present opinion and with the commitments made by Burundi under international human rights law.

51. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on minority issues, for appropriate action.

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

### **Follow-up procedure**

53. 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. Bigirumugisha has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Bigirumugisha;
- (c) Whether an investigation has been conducted into the violation of Mr. Bigirumugisha'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 Burundi with its international obligations, in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

54. 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.

55. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

56. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>8</sup>

*[Adopted on 28 August 2020]*

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<sup>8</sup> Human Rights Council resolution 42/22, paras. 3 and 7.