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Human Rights Council Working Group on Arbitrary Detention

Opinion adopted by the Working Group on Arbitrary Detention at its seventy-second session (20–29 April 2015)

No. 2/2015 (Ethiopia and Yemen)

Communication addressed to the Governments on 18 September 2014

concerning Andargachew Tsige

The Governments have not replied to the communication.

The States are parties to the International Covenant on Civil and Political Rights.*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Governments.

2. 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 the detainee) (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

* Ethiopia acceded to the International Covenant on Civil and Political Rights on 11 June 1993; Yemen acceded to the Covenant on 9 February 1987.



Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration 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 for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The case summarized below was reported to the Working Group.

4. Andargachew Tsige (or Tsege), born in Ethiopia on 9 February 1955, has been living in the United Kingdom of Great Britain and Northern Ireland since his exile from Ethiopia in 1979. He is a citizen of the United Kingdom, possessing passport number 099283837, issued on 2 December 2011. He is a founding member of an Ethiopian political opposition party, Ginbot 7, which was established in the aftermath of the national elections held in Ethiopia in May 2005. It is reported that the Government of Ethiopia has banned Ginbot 7 and officially considers it to be a terrorist organization.

5. According to the information received, Mr. Tsige was arrested by Yemeni authorities on 23 June 2014, during a scheduled two-hour layover at Sana'a airport as he was transiting from Dubai, United Arab Emirates, to Asmara. He was reportedly not presented with a warrant at the time of his arrest, nor was he notified of the charges against him.

6. The source informs that on, 3 July 2014, the Yemeni ambassador to the United Kingdom informed the United Kingdom Foreign and Commonwealth Office that the Yemeni authorities had handed Mr. Tsige to the Ethiopian authorities on the day of his arrest. The Government of the United Kingdom was not given advance notice of this transfer. On 7 July 2014, the Ethiopian Embassy informed the Government of the United Kingdom that Mr. Tsige was in Ethiopian custody but did not provide any information regarding his whereabouts.

7. The source informs that a State-run television channel, ETV, has aired two videos of Mr. Tsige being interrogated. In the videos, Mr. Tsige appears gaunt and disoriented as he confesses to a range of terrorist offences, which the source refutes. A British psychiatric expert has assessed the videos and has concluded that there was a "serious deterioration in Mr. Tsige's mental state" between the first and second video, and that he gives all the indications of having been tortured in detention.

8. Mr. Tsige was the subject of a joint urgent appeal (ETH 1/2005) issued on 10 June 2005 by the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. At that time, the Special Rapporteurs drew the attention of the

Government of Ethiopia to information received regarding the incommunicado detention of approximately 1,500 demonstrating students, the killing of 26 persons, the wounding of 100 others and the arrest and harassment of Mr. Tsige, among other named individuals.

9. According to the source, following the Ethiopian parliamentary elections that took place on 15 May 2005, Mr. Tsige was arrested and allegedly cruelly beaten while in detention. It is reported that he still suffers from eye-related problems as a result. In 2009, Mr. Tsige was tried in absentia in Ethiopia and sentenced to death for an alleged coup attempt. He was prosecuted in absentia again in 2012 on terrorism charges and sentenced to death.

10. The source submits that the deprivation of liberty of Mr. Tsige is arbitrary and falls within category I. According to the source, Mr. Tsige has been officially informed neither of the charges brought against him nor of any other reason for his detention. He has been detained incommunicado since his arrest. As a consequence, he has been deprived of his liberty without any legal basis from the time of his arrest and has been denied the possibility of being able to challenge the legality of his detention before a judicial authority, contrary to article 9 of the Universal Declaration and article 9 of the Covenant.

11. The source further submits that the deprivation of liberty of Mr. Tsige falls within categories II and V. Mr. Tsige is being held on the basis of his political convictions and for exercising his rights to freedom of expression and of assembly. His detention may be considered to be in violation of articles 19 and 20 of the Universal Declaration and articles 19 and 21 of the Covenant.

12. The source submits that the deprivation of liberty of Mr. Tsige further falls within category III., as his right to a fair trial has been violated and he has been denied the possibility of seeking an effective remedy, in contravention of articles 8, 9 and 10 of the Universal Declaration and articles 9 and 14 of the Covenant. Since the date of his arrest, Mr. Tsige has been held in incommunicado detention, at an unofficial location, without access to family members or legal counsel. The source reports that, 50 days following his arrest, a staff member from the United Kingdom Embassy in Addis Ababa was allowed one brief meeting with Mr. Tsige. However, no consular access to Mr. Tsige has been permitted since then. It is believed his videotaped confessions were allegedly extracted under torture during his detention. Having been tried and sentenced in absentia, he has been denied the ability to provide a full defence to the charges formerly put to him.

Response from the Government

13. On 18 September 2014, the Working Group communicated the allegations of the source to the Government of Ethiopia and the Government of Yemen, requesting them to provide the Working Group with detailed information about the current situation of Mr. Tsige and to clarify the legal provisions justifying his continued detention.

14. Despite the absence of responses from the Governments, the Working Group considers that it is in the position to render an opinion in accordance with paragraph 16 of its revised methods of work and on the basis of information made available to it.

Discussion

Burden of proof

15. At the outset of its discussion on this case, the Working Group reinstates its position on the burden of proof.¹ The lack of a response by the Governments is therefore analysed as an agreement with the statement of facts provided in the application. Furthermore, 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 of proving the negative fact asserted by the applicant lies with 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”.² As a result, the facts as alleged by the source are not disputed and the Working Group will make its legal assessment on that basis in conformity with paragraph 16 of its methods of work.

16. A similar approach has been adopted by the Human Rights Committee, according to which the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information.³

Arrests and detention abroad, extradition and trial of terrorist suspects

17. The Working Group has, in its jurisprudence, deliberations, legal opinions, reports on country visits and annual reports to the Human Rights Council, reviewed issues relating to arrests and detention abroad, extradition and trial of terrorist suspects. These issues were also addressed in the 2010 joint study on global practices in relation to secret detention in the context of countering terrorism undertaken by two Special Rapporteurs and two Working Groups, including the Working Group on Arbitrary Detention (A/HRC/13/42).

18. In its 2008 annual report, the Working Group set out a list of principles for the deprivation of liberty of persons accused of acts of terrorism in accordance with articles 9 and 10 of the Universal Declaration and articles 9 and 14 of the Covenant (see A/HRC/10/21, para. 54).

Allegations against Yemen

19. The Working Group has found several violations of international law surrounding the detention of Mr. Tsige by Yemeni authorities while he was in transit. At the time of his arrest, he was neither presented with a warrant by Yemeni authorities, nor notified of the charges against him or otherwise informed of the grounds for his detention, nor offered legal representation, in breach of article 9 of the Universal Declaration and articles 9 and 14 of the Covenant.

20. Upon his arrest, Yemeni authorities promptly handed Mr. Tsige into the custody of Ethiopian authorities. Yemeni authorities did not present the Government of the United Kingdom with the advance notice of the transfer of this British national. The Working

¹ See opinion No. 41/2013 (Libya), paras. 27 and 28 (A/HRC/WGAD/2013/41).

² *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, Judgment, 30 November 2010, para. 55.

³ See, for example, communications No. 1412/2005, *Butovenko v. Ukraine*, Views adopted on 19 July 2011, para. 7.3; No. 1297/2004, *Medjnoue v. Algeria*, Views adopted on 14 July 2004, para. 8.3; No. 139/1983, *Conteris v. Uruguay*, decision of admissibility adopted on 30 March 1984, para. 7.2; and No. 30/1978, *Bleier v. Uruguay*, decision of admissibility adopted on 24 March 1980, para. 13.3.

Group notes that international law on extradition provides procedures that would need to be observed by countries in cases such as this one. The arrest, secret and incommunicado detention and subsequent transport of Mr. Tsige constitute violations of articles 9 and 11 of the Universal Declaration and articles 9 and 12 of the Covenant. The detention falls within under categories I and III.

Allegations against Ethiopia

21. The Working Group notes that Mr. Tsige has been arrested and detained on two occasions. On the first occasion, Mr. Tsige was arrested in 2005 by Ethiopian authorities following the Ethiopian parliamentary elections. He was subsequently released. In 2009, Mr. Tsige was tried in absentia in Ethiopia and sentenced to death for an alleged coup attempt. He was prosecuted in absentia again in 2012 on terrorism charges and sentenced to death. Having been tried and sentenced in absentia, Mr. Tsige has been denied the ability to provide a full defence to the charges formerly put to him, which constitutes a violation of article 11 of the Universal Declaration and article 14 of the Covenant.

22. On the second occasion, since the date of his arrest, Mr. Tsige has been held in incommunicado detention, at an unofficial location, without access to family members, consular services or legal counsel. The Working Group also notes that secret or incommunicado detention may put individuals under pressure to confess to a crime and infringe on the right not to be compelled to testify against oneself under article 11 of the Universal Declaration and article 14 of the Covenant. In its sections II and III, the 2010 joint study on global practices in relation to secret detention in the context of countering terrorism repeated that international law clearly prohibits secret detention, which violates a number of norms regarding human rights and humanitarian law that may not be derogated from under any circumstances. The lack of legal representation under interrogations by Ethiopian government agents constitutes another grave violation under article 11 of the Universal Declaration and article 14 of the Covenant.

23. Furthermore, the Working Group holds the view that the source has provided reliable evidence on a possible situation of physical abuse and mistreatment that could amount to cruel, inhuman and degrading treatment, therefore warranting appropriate action as the prohibition of such a treatment is a *jus cogens* norm.⁴

24. The Working Group therefore finds that there are serious violations of the international norms relating to the right to a fair trial, as well established in international law, especially in articles 8, 9, 10 and 11 of the Universal Declaration as well as articles 9 and 14 of the Covenant. The gravity of such violations qualifies them for category III.

25. In addition, the Working Group finds that Mr. Tsige is being held on the basis of his political convictions and for exercising his rights to freedom of expression and of assembly. His detention may therefore be considered to be in violation of articles 19 and 20 of the Universal Declaration and articles 19 and 21 of the Covenant. The deprivation of liberty of Mr. Tsige therefore falls within categories II and V.

Disposition

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

⁴ See Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment, I.C.J. Reports 2012, p. 457, para. 99.

The deprivation of liberty by Yemen of Andargachew Tsige is arbitrary, being in contravention of articles 8, 9, 10 and 11 of the Universal Declaration and articles 9 and 12 Covenant. It falls within categories I and III.

The deprivation of liberty by Ethiopia of Andargachew Tsige is arbitrary, being in contravention of articles 19 and 20 of the Universal Declaration and articles 19 and 21 of the Covenant. It falls within categories II, III and V.

27. Consequent upon the opinion rendered, the Working Group requests the Government of Ethiopia to remedy the situation of Mr. Tsige and bring it into conformity with the standards and principles set forth in the Universal Declaration. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Tsige immediately and to afford him adequate compensation.

28. Furthermore, in accordance with paragraph 33 (a) of its revised methods of work, the Working Group considers it appropriate to refer the allegation of cruel, inhuman and degrading treatment to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

29. The Working Group reminds Ethiopia that its national laws should comply with all obligations under international law, in particular international human rights law.

30. The Working Group recalls that the Human Rights Council called for all States to cooperate with the Working Group, 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.⁵

[Adopted on 20 April 2015]

⁵ Human Rights Council resolution 24/7, paras. 3, 6 and 9.