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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fifth session (18-27 April 2016)

Opinion No. 8/2016 concerning Richard Spyros Hagabimana (Burundi)

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. Its mandate was then extended and clarified under Commission resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.
2. In accordance with its methods of work (A/HRC/30/69), on 6 January 2016, the Working Group sent a communication to the Government of Burundi concerning Richard Spyros Hagabimana. 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 sentence or despite an amnesty law applicable to him) (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 International Covenant on Civil and Political Rights (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

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(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 that aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

4. Mr. Hagabimana, 46 years of age at the time of his detention, is a national of both Burundi and Greece. He is a colonel in the Burundian police and Deputy Head of Operations. His habitual residence is located in Bujumbura, the capital of Burundi, in the municipality of Muha.

5. The source alleges that, on 27 June 2015, Mr. Hagabimana was arrested by the Presidential Guard in Burundi and brought to a detention centre of the secret services without being informed of the reasons for his arrest.

6. The source reports that, at around 8 p.m., Mr. Hagabimana was attacked by about 20 members of the Presidential Guard. Throughout the night of 27 June 2015, Mr. Hagabimana was tortured in order to extract a confession from him. He was punched, kicked and beaten with the butt of a rifle in the face, legs, hands, feet and back. Consequently, Mr. Hagabimana reportedly sustained injuries on the soles of his feet that are responsible for a series of neurological and mobility problems.

7. The source reports that, on 28 June 2015, Mr. Hagabimana was brought to a national television station, where he was presented as a member of a criminal gang that handed out weapons and grenades in order to disrupt the national parliamentary elections held on 27 June 2015. The source maintains that the accusations made in the television programme are false and, until then, had not been officially brought, as Mr. Hagabimana had not yet been informed in writing of the nature of the accusations levelled against him. Consequently, he was deprived of his right to be informed in an effective manner of the reasons for his arrest and detention in order to prepare his defence.

8. Although Mr. Hagabimana's arrest took place on 27 June 2015, the arrest warrant was not issued by an officer of the public prosecutor's office until 2 July 2015. This warrant accuses Mr. Hagabimana of violating article 586 of the Criminal Code, which covers the offence of undermining the authority of the State. According to the source, Mr. Hagabimana faces a sentence of 30 years' imprisonment for this offence. The warrant orders Mr. Hagabimana's arrest and transfer to the central prison in Muramvya.

9. Concerning the arrest warrant of 2 July 2015, the source refers to article 115 of the Code of Criminal Procedure of Burundi, which establishes that any order authorizing pretrial detention is valid for 30 days. On completion of this period, pretrial detention may be extended for successive periods of one month. In the present case, the warrant was issued for an indefinite period and was not renewed.

10. Until 8 July 2015, 11 days after his arrest, Mr. Hagabimana remained in the detention centre of the secret services. Then, on that day, he was transferred to the central prison in Muramvya on the false charge, according to the source, of participation in an attempted coup d'état. According to the source, Mr. Hagabimana was detained in very difficult conditions, and all his property had been stolen or destroyed by the police and his wedding ring taken away from him under threat to cut off his finger with a knife. He allegedly did not have the opportunity to consult a doctor or receive visits from his immediate family.

11. On 13 July 2015, Mr. Hagabimana was transferred to a remote prison located in the town of Rumogne, where he is currently being held. The source reports that there was reason to fear that Mr. Hagabimana might be a victim of enforced disappearance for political reasons. Moreover, his state of health is worrying, as he had been suffering from malaria. In the source's view, the risk of his dying or being murdered is particularly high.

12. According to the information received, during the anti-government demonstrations that have taken place in Burundi since 26 April 2015, Mr. Hagabimana was allegedly ordered by his superiors to use force to put an end to the demonstrations, even if this were to cost lives. However, Mr. Hagabimana was reportedly opposed to such orders and did not follow them.

13. The source reports that Mr. Hagabimana was arrested and prosecuted solely because of his refusal to follow the orders of his superiors on 7 May 2015. In addition, on the day when the coup d'état was declared, on 13 May 2015, Mr. Hagabimana was apparently outside the country because of an official seminar in Zanzibar.

14. The source also states that there was tension between some members of the defence services, security services and the Government and Mr. Hagabimana. Indeed, they considered that a crackdown would resolve the political crisis, while Mr. Hagabimana sought to ensure compliance with the laws and regulations governing crowd control and the use of force by the police in Burundi. Similarly, the source reports that the number of conflicts in the country has continued to increase and that any demonstration is put down by the defence and security forces. A large number of Burundian citizens have been killed, and others have fled the country or have been arrested and detained.

15. In view of the above, the source argues that, up until the date of his arrest, Mr. Hagabimana had been unable to work properly because of the undue misunderstandings and suspicions that he had come under in performing his duties. Moreover, Mr. Hagabimana was considered by his superiors to be a "public enemy" because of his refusal to follow orders from the Government and with a view to preventing him from expressing his opposition.

16. The source also argues that, since his arrest, Mr. Hagabimana has not been able to receive adequate assistance from his lawyer because of the severe restrictions on communication with the outside world that have been imposed since his imprisonment. Furthermore, although Mr. Hagabimana has a lawyer, the lawyer has not been provided access to any evidence against his client.

17. The source reports that his trial before the Supreme Court of Burundi commenced on 14 December 2015 (more than five months after his arrest), and it is only at that time that Mr. Hagabimana was brought before a judge for the first time, whereas article 111 of the Code of Criminal Procedure provides that a person must be brought before a judge within 15 days of the issuance of an arrest warrant.

18. The source expresses serious doubts about the possibility that Mr. Hagabimana was guaranteed a fair trial. For example, the source claims that, at the first hearing, Mr. Hagabimana's lawyers sought the adjournment of the hearing because they did not have access to the case file. The Court rejected the request and, the following day, threw his lawyers out on the pretext that they were obstructing the proceedings.

19. The source also mentioned the European Parliament resolution of 17 December 2015 on the situation in Burundi. The resolution refers, in paragraph 23, to the case of Mr. Hagabimana. The European Parliament urged the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy, Federica Mogherini, "to continue the efforts to secure the immediate release of Richard Spiros Hagabimana, a police officer in Burundi who has been illegally imprisoned and tortured because as a

policeman he refused to shoot at a crowd on 28 July 2015”.¹ Accordingly, the source reports that the life and liberty of Mr. Hagabimana are in imminent danger.

20. In the light of the foregoing, the source claims that the deprivation of liberty of Mr. Hagabimana is arbitrary and falls within categories III and V applicable to the consideration of cases submitted to the Working Group, as it would violate articles 7, 9, 14, paragraph 3 (b), and 26 of the International Covenant on Civil and Political Rights, which Burundi ratified on 9 May 1990.

21. Concerning category III, the source mentions different procedural irregularities, such as the use of torture in order to force Mr. Hagabimana into making confessions and the fact that he was not informed of the reasons for his arrest, that he was not able to receive proper legal assistance from his lawyer in order to prepare his defence and that he did not have access to the evidence used against him. Although Mr. Hagabimana was arrested on 27 June 2015, the arrest warrant was issued on 2 July 2015 for an indefinite period and was not renewed. Lastly, the 15-day time limit established by article 111 of the Code of Criminal Procedure for an appearance before a judge was not observed. These facts are in breach of articles 7, 9 and 14, paragraph 3 (b), of the Covenant.

22. Concerning category V, the source stated that Mr. Hagabimana was prosecuted solely because of his opposition to his superiors and his refusal to follow their orders on 7 May 2015, particularly the refusal to use violence in order to put an end to the demonstrations even if this would cause deaths. As a result of his refusal to follow the orders of the Government, he was regarded as a “public enemy”. The source also referred to the difficult conditions to which Mr. Hagabimana was subjected in the exercise of his duties following this refusal because of the suspicions which he came under. The source maintains that these facts are contrary to article 26 of the Covenant.

Response from the Government

23. The Government of Burundi had not deigned to respond to the serious allegations made in the communication. As the 60 days granted for such a response have passed, the Working Group is in a position to issue its opinion on this case.

Discussion

24. The lack of response from the Government constitutes a waiver of its right to challenge the allegations made against it. Accordingly, if the allegations are reliable and documented, the Working Group will find them credible and consider them to be true.

25. In this case, the allegations are at odds with one piece of evidence, namely the European Parliament resolution. While the source speaks of an arrest on 27 June 2015, the resolution refers to a refusal to use force against demonstrators on 28 July 2015, which is physically impossible if it is agreed that Mr. Hagabimana had already been in detention for one month. However, the source also cited the arrest warrant dated 2 July 2015, noting that it was issued after the arrest. It must therefore be assumed that a factual error had made its way into the European Parliament resolution and that, ultimately, this error is not all that important given that the other facts are consistent, including the identity of the victim, the circumstances of his arrest and detention and the circumstances of Burundi itself.

26. Indeed, the crisis situation that Burundi is experiencing today is no secret for anyone, much less for the United Nations. The Security Council has closely followed developments in the crisis and has carried out at least two field missions (March 2015 and

¹ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0474+0+DOC+XML+V0//EN>.

January 2016). Other United Nations bodies, such as the Peacebuilding Commission, and the Secretary-General have also been focusing on the crisis, as attested by the many public reports on its aspects and development. Thus, the violence used by security forces against demonstrators is a fact that is so undeniable that current discussions of a United Nations response revolve mainly around the police (see, in this respect, Security Council resolution 2279 (2016) and the letter dated 15 April 2016 from the Secretary-General addressed to the President of the Security Council (S/2016/352)). In these circumstances, the bravery of Mr. Hagabimana is to be commended, as it would be desirable if there were more law enforcement officers of this calibre who could give true meaning to the monopoly of the legitimate use of physical force granted to the State.

27. Mr. Hagabimana, therefore, supposedly exercised his right not to obey an order that clearly violated human rights and was prosecuted for such action. This is an uncommon situation which, in the opinion of the Working Group, deserves to be highlighted, since his refusal to comply in this case has saved lives, despite the fact that Mr. Hagabimana himself was laying himself open to reprisals, as the prosecution against him clearly shows.

28. Furthermore, after his arrest, it reportedly took five days for an arrest warrant to be issued, with a very brief mention of the reasons for his arrest. During those five days, Mr. Hagabimana had allegedly already been subjected to physical abuse aimed at extracting confessions from him. It should be concluded that his arrest lacked any legal basis at the time that it had occurred, which falls within category I.

29. In addition, the criminal law of Burundi provides that an arrest warrant is valid for a maximum period of only one month, with the possibility of renewal; in the present case, however, the arrest warrant was not renewed, which means that, as of 2 August 2015, the detention had no legal basis, as the arrest warrant had ceased to exist under the law. The detention, therefore, also lacked any legal basis, which also coincides with category I.

30. In addition, it allegedly took more than five months before Mr. Hagabimana was brought before a judge, in December 2015. This also constitutes a violation of criminal procedure in Burundi and a major violation of the international standard as summarized in principle 8 and guideline 7 of the 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).

31. Lastly, there were numerous violations of the rights of the defence. First, Mr. Hagabimana did not receive the prompt legal assistance required in any criminal proceedings. Furthermore, his lawyers were not able to communicate with him or to have access to the case file in order to make a full assessment of the case and put up an adequate defence. It should be added, mindful of the pressure that the authorities and the circumstances could exert on the judges, that the lawyers were quickly banned from the courtroom in a trial in which the accused was said to be literally defenceless against his jailors. This is a violation of the right to a fair trial, as set out in article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights, and the detention is accordingly arbitrary under category III.

32. Furthermore, the serious allegation of torture and inhuman and degrading treatment should be reported to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment so that he may conduct an investigation and take any appropriate action.

Disposition

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

34. The arrest and detention of Mr. Hagabimana are arbitrary under categories I, II and III as defined in paragraph 8 of the Working Group's methods of work. The Working Group calls upon the Government of Burundi to put an immediate end to this by awarding Mr. Hagabimana appropriate reparation. Furthermore, the Working Group requests the Government to clarify the circumstances that led to such abuse in order to determine those responsible.

35. Lastly, in accordance with paragraph 33 (a) of the methods of work, the Working Group is referring the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for the launch of an immediate inquiry into the allegations of torture.

[Adopted on 19 April 2016]
