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Opinion No. 27/2019 concerning Yves Michel Fotso (Cameroon), request for review of opinion No. 40/2017*

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 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 8 January 2019, the Working Group transmitted to the Government of Cameroon a communication concerning Yves Michel Fotso. The Government replied to the communication on 6 March 2019. 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,

* In accordance with para. 5 of the Working Group's methods of work, Sètondji Roland Adjovi did not participate in the discussion of the present case.

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

(a) Background

4. On 5 June 2018, pursuant to paragraph 21 of the Working Group's methods of work, the source submitted a request for a review of opinion No. 40/2017 concerning Yves Michel Fotso (Cameroon), adopted on 27 April 2017. During its eighty-third session, which took place from 19 to 23 November 2018, the Working Group found this request for review admissible.

(b) The facts as submitted

5. Yves Michel Fotso is a citizen of Cameroon, born in 1960 in Yaoundé. Mr. Fotso is a businessman who worked as chief executive officer of Cameroon Airlines (Camair), a State-owned company, from June 2000 to November 2003.

6. According to the source, Mr. Fotso was arrested on 1 December 2010 in Douala, Cameroon. On the same day, he was brought before the investigating judge of the Mfoundi *Tribunal de Grande Instance* (court of major jurisdiction), who charged him and placed him in pretrial detention on the grounds that, between 2001 and 2004, in his capacity as chief executive officer of Camair, he was alleged to have misappropriated US$ 29 million intended to purchase an aircraft, in collusion with others and to the detriment of the State of Cameroon. The source recalls that Mr. Fotso is detained on two charges, one related to the case of the presidential aircraft, the so-called BBJ-2 case, and one related to the Camair case.

7. The source also reports that, during the proceedings, pursuant to Act No. 2001/028 of 14 December 2011 establishing a special criminal court, this court was given exclusive jurisdiction over cases of misappropriation of public funds. The system of appeal courts and the right of appeal for such offences were abolished once this law was enacted. The Government of Cameroon then adopted Act No. 2012/011 of 16 July 2012 to amend and supplement certain provisions of Act No. 2011/028 of 14 December 2011 and specify that, following enactment, judgments handed down by any court of major jurisdiction in proceedings related to misappropriation could be appealed only if certain strict conditions were met.

8. According to the source, in a judgment of 21 and 22 September 2012, the Mfoundi court found Mr. Fotso guilty of misappropriating the sum of $29 million and sentenced him to 25 years' imprisonment. Mr. Fotso was also sentenced to pay, jointly with his co-defendants, the sum of 21,375,000,000 CFA francs (CFAF) in damages to the State of Cameroon. Mr. Fotso was further ordered to pay, also jointly with his co-defendants, costs amounting to CFAF 1,103,718,775. A five-year term of imprisonment in default of payment was set for all the financial penalties payable to the State.

9. The source recalls that, on 24 September 2014, Mr. Fotso lodged a cassation appeal with the Supreme Court. The appeal was entered in the court register after a long delay, in March 2016.

10. According to the source, on 8 May 2016, after a summary and non-adversarial hearing, the Supreme Court upheld the guilty verdict against Mr. Fotso, pronouncing the decision without specifying the reasons. It also reduced Mr. Fotso's prison sentence from 25 to 20 years but maintained the financial penalties at the same level, i.e. he and his co-defendants were required to pay damages of CFAF 21,375,000,000 and costs of CFAF 1,103,718,775.

11. The source further indicates that the judgment of the Supreme Court, including the detailed reasons, was never formally submitted to Mr. Fotso or his counsel. The Court

pronounced only the operative part of the judgment. Mr. Fotso was not able to acquire a copy of the judgment through one of his co-defendants until almost a year after the hearing was held.

(c) Legal analysis

12. The source argues that the judgment of the Supreme Court reflects the violation of Mr. Fotso's right of appeal to a higher court and the principles of equality of arms and due process.

(i) Alleged violation of the right of appeal to a higher court

13. The source recalls that violations of the right of appeal to a higher court are characterized by a failure to have the facts of the case reviewed by a higher court. The source is relying on the interpretation of this principle set out by the Human Rights Committee in paragraph 48 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, which indicates that a review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the International Covenant on Civil and Political Rights. The source also points out that the Committee has stressed that mere verification by a supreme court of the lawfulness of the evidence with no assessment of its probative value is not sufficient to meet the requirements of article 14 (5) of the Covenant.[1]

14. The source also notes the Committee's view that having the facts of the case reviewed by a higher court is the key requirement for observance of the principle of the right of appeal to a higher court, which is part of the right to a fair trial.

15. In this case, the source reports that, through Act No. 2012/2011, Cameroon has abolished the right of appeal against judgments handed down by a court of major jurisdiction in proceedings related to the misappropriation of public funds. Pursuant to this Act, an appeal in cassation is now the only possible recourse. Such an appeal can be based only on points of law, unlike appeals by the prosecution service, which may be based on both facts and points of law. Accused persons are therefore denied the right to request a review of the interpretation of the facts made by the lower courts.

16. The source asserts that the judgment of the Supreme Court, with its detailed reasoning, shows in concrete terms that the Court did not review the facts of the case, which constitutes a clear violation of article 14 (5) of the Covenant.

17. According to the source, the judgment shows that the Court had come to its decision before the hearing took place and that it certainly did not discuss and review the facts of the case during the hearing as has been claimed.

18. Firstly, the source submits that the operative part of the judgement is marked as "thus judged and pronounced by the specialized division of the Supreme Court in its ordinary public hearing of 3 May 2016". According to the source, that is the date for which the hearing was initially scheduled, before the Court postponed it until 17 May 2016. The error with the date in the judgment and the fact that the judges only withdrew for two hours to deliberate on such a serious and complex criminal case are obvious indications that the operative part of the judgment had already been drafted for the hearing of 3 May 2016 and that the Court had therefore already made its decision and drafted the operative part of the judgment before the hearing of 17 and 18 May 2016.

19. Secondly, the source argues that the judgment of the Supreme Court contains multiple untruths regarding both the actual conduct of the hearing on 17 and 18 May 2016 and the Court's supposed mention and reconsideration of the facts of the case during that hearing. For example, the source reports that testimony given by lawyers, a journalist and a professor who attended the hearing confirm that the Court did not make reference to the facts of the case and that no debate took place between the parties concerning the consideration of the merits of the case. More specifically, these persons attest to the

[1] *Martínez v. Spain* (CCPR/C/97/D/1363/2005), para. 9.3.

following facts: (a) none of the defendants were examined by the Court, and Mr. Fotso was allowed only to read out the opening statement he had prepared; (b) none of the evidence in the case file was produced or debated before the Court; (c) none of the five witnesses for the prosecution were called upon to testify before the Court, meaning that defence counsel could not ask these witnesses any questions; (d) since the Court did not interview the plaintiff, defence counsel were not in a position to ask questions; (e) the hearing was devoted to a reading of the report by the reporting judge, with which both the prosecution service and the State of Cameroon aligned themselves; and (f) following the reading, defence counsel requested an adjournment in order to prepare a response to the report, which was refused, forcing them to plead without thoroughly preparing their defence.

20. Thirdly, according to the source, the Supreme Court used manipulation to imply that the facts of the case had been mentioned and reconsidered. The source indicates that the Court's judgment sets out the facts as submitted, which is said to be based on the evidence in the case file, supposedly considered by the Court, and which includes an account of the statements by both the prosecution witnesses, supposedly heard by the Court, and the accused, supposedly examined by the Court. The source argues that all these details relating to the facts of the case are false, as the Court did not ensure that both parties were heard on the actual evidence in the case, not having examined either the witnesses or the defendants. The source states that, in reality, the details of the judgment relating to the supposed reference to the facts at the hearing of 17 and 18 May 2016 were falsely inserted by the Court in order to give its judgment the appearance of legality.

21. Fourthly, the source reports that the Supreme Court was compelled to order the previous judgment to be partially set aside on a point of law raised by one of Mr. Fotso's co-defendants. Because of this, the Court was bound under article 510 of the Code of Criminal Procedure to take the case over and so to review the facts before ruling. The Court failed to comply with that obligation.

22. The source also indicates that a simple comparison of the wording of the Supreme Court judgment with that of the first-instance judgment will show that the Supreme Court merely repeated the reasoning of the court of first instance. The portions of the Supreme Court judgment regarding the facts, the supposed testimony of the prosecution witnesses and the supposed testimony of Mr. Fotso are exactly the same as in the reasoning of the Mfoundi court.

23. The source argues that the judgment of the Supreme Court is especially vague on the subject of the factual evidence against the accused. The Court never refers to specific evidence and merely alludes to the case file in general terms. The source also points out that the Court's judgment is very short compared to the judgment of the Mfoundi court.

24. In the light of the above, the source claims that the Supreme Court never made reference to the facts of the case during the hearing. The legal and factual basis of Mr. Fotso's guilt was therefore never reviewed, which is a blatant violation of his right of appeal to a higher court.

(ii) Alleged violation of the principle of equality of arms

25. The source indicates that the principle of equality of arms, under article 14 (1) of the International Covenant on Civil and Political Rights, implies that the accused must have exactly the same procedural rights as the prosecution during a criminal trial.[2] The source recalls that, according to the Human Rights Committee, the principle of equality of arms means that each party must be able to challenge all the arguments and evidence submitted by the other party,[3] and that article 14 (3) (e) of the Covenant provides for the right of anyone charged with a criminal offence to examine or have examined the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

[2] *Dudko v. Australia* (CCPR/C/90/D/1347/2005), para. 7.4.

[3] *Jansen-Gielen v. Netherlands* (CCPR/C/71/D/846/1999), para. 8.2.

26. In this case, the source argues that Mr. Fotso was put in a position of complete inequality with respect to the prosecution service during the proceedings before the Supreme Court.

27. Firstly, the source recalls that an accused person may appeal to the Supreme Court only on points of law, whereas the prosecution service may request a review of the facts.

28. Secondly, the source alleges that Mr. Fotso was deprived of his right to examine or have examined the prosecution witnesses at the hearing before the Supreme Court of 17 and 18 May 2016. The Court simply copied the witness statements included in the judgment of the Mfoundi court.

29. Thirdly, the source claims that the atmosphere at the hearing before the Supreme Court of 17 and 18 May 2016 is evidence of a clear violation of Mr. Fotso's rights. The source recalls that the concept of a fair trial entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive, according to general comment No. 32 of the Human Rights Committee, paragraph 25. In this case, the source asserts that there was a very strong military presence in the courtroom, among both the security personnel and the spectators.

30. Fourthly, the source adds that the exorbitant cost of criminal proceedings in Cameroon is paid by the accused person, putting the defence in a position of complete inequality with respect to the prosecution.

31. According to the source, these violations are sufficiently serious to render the detention arbitrary.

(iii) Other alleged violations of the right to a fair trial

32. The source also recalls other evidence provided by Mr. Fotso of violations of his right to a fair trial, beginning with the Working Group's findings on the lack of judicial impartiality in Cameroon, including in its opinions No. 38/2013 and 22/2016.

33. The source goes on to point out the excessive procedural delays, which were also denounced in the Working Group's opinion No. 22/2016. The source indicates that the arrest, detention and prosecution took place more than seven years after the offences of which Mr. Fotso was accused and that the Mfoundi court handed down its judgment more than nine years after the incidents. The source indicates that this constitutes a clear breach of Mr. Fotso's right to trial within a reasonable time.

34. The source also notes the denial of access to the case file before Mr. Fotso's trial. The source states that Mr. Fotso only had access to it the day before his trial at the Mfoundi court. Before that date, the investigating judge had consistently refused access to the case file. His lawyers were only able to consult part of the file and were never allowed to obtain a copy so that Mr. Fotso could defend himself.

35. The source also reports that, at the hearing before the Supreme Court of 17 and 18 May 2016, Mr. Fotso's request for time to prepare a response to the report of the reporting judge was rejected. The defence was thus forced to plead without being properly prepared.

36. Finally, the source indicates that the State of Cameroon had already been compensated in the United States of America through a settlement agreement of 11 August 2006. According to the source, this fact demonstrates that Mr. Fotso's right to a fair trial has been violated. Under the settlement agreement, the State of Cameroon acknowledged that it had been fully compensated for the losses incurred in the BBJ-2 case. The agreement contained a release of liability clause which applied to all persons covered by the agreement. The source argues that the terms of the agreement clearly provide that the State of Cameroon has expressly waived any claims against the other signatories and parties mentioned in the document, including Camair and its directors. Since Mr. Fotso was chief executive officer of Camair at the time, he was ipso facto included within the scope of the agreement.

37. Accordingly, the source argues that the Cameroonian courts should have considered this piece of exculpatory evidence and, if necessary, should have compelled the

Government's lawyer to appear and testify. Mr. Fotso's rights of the defence were thus clearly violated.

Response from the Government

38. On 8 January 2019, the Working Group transmitted the request for review to the Government, asking it to provide more information about Mr. Fotso's situation since his arrest by 11 March 2019 and to make sure it included any comments it wished to make about the allegations set out in this communication. In particular, the Working Group requested the Government to clarify the facts and legal provisions regarding the deprivation of Mr. Fotso's liberty and its compatibility with the obligations of Cameroon under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Mr. Fotso. The Government submitted its response on 6 March 2019.

(a) Comments on the decision to admit the request for review

39. The Government notes that the Working Group indicated only that it had found the request for review admissible, without stating the grounds for this decision. The Government recalls that, at the beginning of the process that resulted in opinion No. 40/2017, proceedings against Mr. Fotso in the national courts were still pending before the Supreme Court. Since both the facts and all the developments in the proceedings up to investigation of the case by the highest court in the country were discussed at that time, information related to those facts and proceedings cannot really be described as new, nor can it be said that they were not known to any party for the purpose of a decision by the Working Group to consider the request for review admissible.

40. Consequently, the Government considers that the review would be based on information examined by the Working Group at a time when the Supreme Court was entertaining proceedings against Mr. Fotso and therefore cannot be invoked. Given that, in the Government's view, the conditions set out in paragraph 21 of the Working Group's methods of work have not been met, the request for review should be found inadmissible.

(b) Comments on the information submitted to the Working Group

41. The Government indicates that the facts on which the deprivation of Mr. Fotso's liberty is based were amply discussed as part of the process that resulted in opinion No. 40/2017 and are therefore not new.

42. The Government notes that the request for review concerns only one of the cases, with the deliberate intention of obtaining a piecemeal assessment of Mr. Fotso's situation.

(c) Preliminary comments on the proceedings before the Supreme Court

43. According to the Government, the source wilfully presents the proceedings before the Supreme Court in malicious terms. The focus on the hearing, characterized as "summary and non-adversarial", could give rise to misunderstanding about the Supreme Court's observance of the principles of a fair trial.

44. The Government explains that the procedural rules applicable before the Supreme Court are laid down in national law. An analysis of these legal provisions, which are compatible with international instruments, shows that the investigation of a case by the Supreme Court is fundamentally different from investigation by the lower courts and that an adequate understanding of proceedings cannot be obtained by considering only the hearing phase.

45. Proceedings before the Supreme Court are governed by the Code of Criminal Procedure and by Act No. 2006/16 of 27 December 2006 on the organization and functioning of the Supreme Court.[4] The Government explains that cases before the

[4] The Government refers more specifically to articles 487 et seq., of the Code of Criminal Procedure and article 65 of Act No. 2006/16.

Supreme Court are investigated mainly through the exchange of statements of case, in which the parties make their arguments regarding the points raised in the appeals brought. These exchanges set the terms of the proceedings. According to the Government, these exchanges took place within the framework of these proceedings and Mr. Fotso's counsel took part in them. The main purpose of the hearing is for the parties to orally develop the arguments already set out in the statements of case and conclusions exchanged beforehand, which have formed the basis of the solution to the dispute proposed by the reporting judge. At this point, the parties and the public prosecutor can make comments on the report of the reporting judge.

46. The Government also indicates that the format of hearings before lower courts, laid down in articles 359 to 384 of the Code of Criminal Procedure, varies according to whether the defendant pleads guilty or not guilty. In the first case, the presentation of evidence is dispensed with. In the second case, the testimonial and documentary evidence, expert opinions and other evidence are first submitted by the prosecution, which is the party that bears the burden of proof. If there is insufficient evidence, the trial ends. Otherwise, the accused is called upon to present his or her defence. According to the Government, the procedure described by the source resembles proceedings in the lower courts.

(d) Comments on the proceedings against Mr. Fotso

47. The Government notes that the source's argument about the abolition of the right of appeal and the consequences of this on the right to have the facts reviewed was already invoked in the initial procedure. The Government recalls that the Working Group indicated that the abolition of the right of appeal was not in itself a violation of article 14 (5) of the Covenant.

48. Regarding the allegation that the Supreme Court had made its decision and drafted the operative part of the judgment before the hearing of 17 and 18 May, the Government explains that a hearing was held on 3 May 2016. During that hearing, the case of Mr. Fotso and his co-defendants was called and the public prosecutor requested an adjournment. The Court granted this request, declaring that the hearing would resume on 17 May 2016.[5] Moreover, the judgment contains indications that information obtained at the hearing of 17 and 18 May 2016 was taken into account in the decision concerning the guilt of the accused.

49. Regarding the argument about the short period of time before the decision was handed down, the Government indicates that the Court came to its decision within the time frame prescribed by law.[6]

50. As for the allegations about the conduct of the hearing, the Government notes that, according to general comment No. 32 of the Human Rights Committee, article 14 (5) of the International Covenant on Civil and Political Rights does not require a full retrial or a hearing, as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus, for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated.[7] The Government argues that a hearing before a higher court does not have to be identical to a hearing before courts of minor jurisdiction, which is the principle on which the source is basing these allegations. Furthermore, it is not in any way a manipulation for the Supreme Court to cite documents from the case file in its account of the facts.

[5] According to the court transcript, which is considered an accurate record of proceedings under article 381 of the Code of Criminal Procedure.

[6] Cameroon, Act No. 2006/16 of 27 December 2006 on the organization and functioning of the Supreme Court, art. 67, and Cameroon, Code of Criminal Procedure, art. 513.

[7] *Pérez Escolar v. Spain* (CCPR/C/86/D/1156/2003), para. 9.3, and *Bertelli Gálvez v. Spain* (CCPR/C/84/D/1389/2005), para. 4.5.

51. The Government also states that the court transcript of 17 and 18 May 2016 shows that the various parties, in the oral testimony that complemented their previous written submissions, referred to the facts of the case and discussed them in the manner commonly used in proceedings before the Supreme Court. To decide whether facts have been discussed, it is necessary to consider not only the hearing but the entire case file submitted to the Court.

52. The Government goes on to indicate that the factual basis of the charges is considered before the review of whether the accused are guilty of those charges, and that this process is not a mere formality.[8] In this case, the Government recalls that the Supreme Court set aside the judgment of the lower court. Consequently, it took the case over and ruled, in accordance with article 510 of the Code of Criminal Procedure. Its decision is not the same as the decision of the lower court. The Government notes in this regard that one of Mr. Fotso's co-defendants, who had been found guilty by the previous court, was acquitted. The acquittal was based not only on the written evidence in the file but on information obtained during the hearing before the Court. The charges against another defendant were reduced to complicity in misappropriation of public funds. The sentences imposed were reduced, in Mr. Fotso's case from 25 to 20 years. Thus, the Court did review the facts of the case in line with the standards recognized by the Human Rights Committee, based not only the information obtained at the hearing but also on evidence produced during the pending proceedings. The complaint regarding the difference in length between the judgments of the lower court and of the Supreme Court is pointless, as no word limit has been set for court decisions.

53. In relation to the alleged violation of the principle of equality of arms, the Government observes that the restriction on the scope of appeal for the different parties might have been relevant if such a limitation prevented the Supreme Court from considering the facts of the case. Incidentally, the public prosecutor attached to the Supreme Court joins appeal proceedings as an associated party. For the examination of witnesses before the Supreme Court, the fact that cases are not considered in the same way before the highest court in the country as before lower courts does not constitute a breach of standards.

54. On the question of the strong military presence at the hearing, the Government notes the subjective nature of that assessment and asserts that such a presence is justified to ensure the security of criminal proceedings.

55. Regarding the allegation that proceedings are prohibitively expensive, the Government indicates that this is not new information to be considered under a review procedure. Moreover, in accordance with the Code of Criminal Procedure, it is possible even before the Supreme Court for an indigent defendant to request legal aid. In this case, the cost did not prove a barrier to the deployment of Mr. Fotso's defence strategy, given that he was assisted by lawyers recruited both in Cameroon and abroad.

56. According to the Government, the alleged lack of impartiality appears to be based on previous opinions of the Working Group; it recalls that the conclusions of opinion No. 22/2016 cannot be automatically extended to the present case, in view of the specific circumstances of the proceedings against Mr. Fotso.

57. Regarding the inequality between defence counsel and the prosecution service with respect to the report of the reporting judge, the court transcript shows that counsel commented on this report, making arguments that followed on from those in the briefs. The source cannot therefore claim that Mr. Fotso's right to have time to prepare his defence was violated. It should also be noted that the Court did not completely agree with the conclusions of the prosecution service.

58. With respect to the allegations about access to the case file during the investigation, the Government recalls that the case was pending before the Supreme Court when the Working Group considered the initial submission. This is not new information or a fact of

[8] Cameroon, Code of Criminal Procedure, art. 529.

which the source was not aware. The allegation about the settlement agreement is also not new.

59. The Government concludes that the Working Group cannot judge the Supreme Court's ruling on Mr. Fotso's guilt or the penalty imposed upon him. The Working Group is not a court of fourth instance.

Further information from the source

60. After receiving a copy of the Government's response, the source submitted additional information on 22 March 2019.

61. According to the source, the cumulative effect of the abolition of appeal proceedings, the establishment of appeals in cassation as the only judicial remedy and the restriction of such appeals to points of law is that the review of guilty verdicts by a higher court is no longer guaranteed, with respect to the facts of the case, which entails a breach of the right of appeal to a higher court.

62. According to the source, the documents appended to the case file and the certified copy of the judgment show that the Supreme Court Registry corrected the reference to the hearing of 3 May 2016 and replaced the date with 17 May 2016 after the Government became aware of the incorrect date in the operative part of the judgment.

63. The source reiterates that the portion of the Supreme Court judgment containing the consideration of the factual basis of the charges is simply copied and pasted from the public prosecutor's address at the Mfoundi court. The court transcript provided by the Government shows that the facts were not discussed during the hearing, at which defence counsel were able to make only general comments on the report.

64. The source recalls that the Supreme Court partially set aside the first-instance judgment and should therefore have come to a new decision. The source also stresses that the Court included material about the facts, witnesses and its consideration of the factual basis of the charges in order to present what was in fact a copy of the first-instance judgment as a review of the facts of the case. The Court also reduced Mr. Fotso's sentence very slightly and changed the sentence of one of his co-defendants.

65. The source also indicates that an analysis of the court transcript confirms that the Supreme Court, although it partially set aside the first-instance judgment, did not apply the relevant provisions of the Code of Criminal Procedure.

66. The source argues that, because appeals to the Supreme Court by accused persons are limited to points of law, the hearing of 17 and 18 May 2016 was not preceded by an adversarial written phase that would have allowed the parties to discuss both points of law and the facts.

67. Furthermore, according to the source, the Government has not shown that the Supreme Court analysed the same information as the lower court and that this information encompassed the entire case file.

68. Regarding the violations of the principle of equality of arms and of the rights of the defence, the source argues that the Government does not deny that Mr. Fotso was deprived of the possibility of examining witnesses or having them examined, in breach of article 14 (3) (e) of the International Covenant on Civil and Political Rights. The Government's argument that proceedings before the Supreme Court do not have to be exactly the same as proceedings before a lower court is weak. Cameroon is obliged to ensure that defendants have the right to examine witnesses or have them examined.

Discussion

69. The Working Group thanks the source and the Government for their cooperation in this case.

70. Before considering the merits of the source's request for review, the Working Group considers it important to specify the circumstances in which, during its eighty-fourth

session, held from 19 to 23 November 2018, it decided that the source's request for review was prima facie admissible.

(a) Admissibility of the request for review

71. The admissibility conditions for requests to review opinions of the Working Group are stipulated in paragraph 21 of its methods of work.

72. The Working Group modified its methods of work to allow requests for review at its fourteenth session, held in November and December 1995, and set out in its annual report the reasons for introducing this possibility.[9]

73. Since its establishment in 1991, the Working Group has only very rarely decided that review requests were admissible.[10] On many occasions, the Working Group has applied the review conditions listed in paragraph 21 and so rejected requests that did not comply with them.[11]

74. The Working Group stresses that a request for review from a source must meet the requirements of paragraph 21 (a) and (b) of its methods of work. In other words, if the source's request for review is not based on entirely new facts that would have caused the Working Group to alter its decision had it been aware of them, and if the facts had been known or had been accessible to the source, the request for review will not be considered admissible. A Government must meet the requirements of all three subparagraphs of paragraph 21. This high threshold for accepting requests for review is compatible with the statement at the beginning of the paragraph that the Working Group may reconsider its opinions "in exceptional circumstances".[12]

75. It follows from the above reasoning and the strict conditions provided for by paragraph 21 of the methods of work that any decision by the Working Group that a request for review is admissible does not entail a full reconsideration of all the facts of the case. In other words, the review procedure does not amount to an appeal in which the Working Group reviews all its previous conclusions. The Working Group confines itself to entirely new facts, meaning facts of which it was not aware at the time when it issued its opinion (methods of work, para. 21 (a)) and which were not known or not accessible to the party making the request (methods of work, para. 21 (b)). The fact that the methods of work of the Working Group allow it to reconsider its own opinions rather than refer the matter to another body shows that this is not an appeal procedure but simply an evaluation of new facts that the Working Group had not been able to consider in its initial opinion.

76. In its response, the Government notes that the Working Group did not give reasons for its decision that the source's request for review met the requirements of paragraph 21 of its methods of work and was therefore admissible. In the opinion of the Working Group, the decision that a request for review is admissible constitutes a prima facie conclusion based on the information provided by the party who submitted the request. When it makes this initial decision, the Working Group cannot determine whether the conditions set out in paragraph 21 of its methods of work have been met without first hearing from the other party, especially to find out whether the alleged new facts would have led it to a different

[9] E/CN.4/1996/40, paras. 50 and 51.

[10] See, inter alia, revised decision No. 3/1996 (Bhutan), stating that the source's request was admissible and granting a partial review; revised decision No. 2/1996 (Republic of Korea), stating that the Government's request was admissible but refusing the review; and revised decision No 1/1996 (Colombia), stating that the Government's request was admissible but refusing the review. In these three cases, the Working Group did not apply the provisions on review in its methods of work because the requests for review were submitted before the adoption of the revision criteria. The Working Group decided that, based on the principle of non-retroactivity, the review criteria would only be applied to requests submitted after their adoption.

[11] A/HRC/19/57, para. 19; A/HRC/10/21, para. 13; A/HRC/7/4, para. 18; E/CN.4/2006/7, para. 9; E/CN.4/1998/44, annex III, p. 36, para. 5.

[12] In its annual report of 1996, the Working Group specified that the new review procedure had been introduced "as a special measure" and "in a spirit of cooperation" (E/CN.4/1997/4, para. 12). See also E/CN.4/1996/40, para. 80.

outcome. Only when the Working Group has considered all the arguments put forward by the parties will it be in a position to conclude, firstly, whether the admissibility conditions set out in paragraph 21 have been met and, secondly, whether the review request is justified.

77. Accordingly, the Working Group considers its decision to inform both the source and the Government that the request for reconsideration was admissible, with no further details, to be an appropriate course of action, in line with its adversarial procedure. The Government was given the opportunity to explain clearly the reasons why it believes that the source's request for review should not be granted, and it has done so, indicating whether each of the source's arguments meets the requirements of paragraph 21 of the Working Group's methods of work. In fact, it would have been inappropriate for the Working Group to conclude that there were new facts without first hearing from the Government since that could have restricted the Government to responding only to those facts.

78. Applying these principles to the present case, the Working Group has considered the arguments of the parties and determined that there is one entirely new fact, namely the judgment of the Supreme Court. The source alleges – and the Government does not deny – that at the end of the hearing held on 17 and 18 May 2016, the Supreme Court read out only the operative part of the judgment, simply stating the sentences without providing any reasons. According to the source, the full judgment of the Supreme Court, a 64-page document containing the Court's detailed reasoning, was never officially transmitted by the Court registry to Mr. Fotso or his counsel. Mr. Fotso was only able to obtain a copy of the judgment one year after the hearing of 17 and 18 May 2016, through one of his co-defendants.

79. The Working Group considers the judgment of the Supreme Court to be a new development (and to contain new facts) not known to it or not accessible to the source at the time when opinion No. 40/2017 was adopted. The source submitted the initial communication to the Working Group on 28 September 2015, with further comments in the response submitted on 25 August 2016, without yet having received a copy of the judgment. Moreover, the judgment itself is potentially important for the outcome of Mr. Fotso's request for review by the Working Group, since it informed the source of the Supreme Court's reasoning and enabled the source to submit to the Working Group arguments that the proceedings before the Supreme Court were in violation of the right to a fair trial (see paras. 84 ff.).[13] Therefore, the Working Group concludes that the request for review is admissible under paragraph 21 of its methods of work.

80. The Working Group wishes to stress that it did not take all the source's arguments into consideration in order to conclude that the source's request for review was admissible. Many of the arguments concerned matters that had either already been raised when the source's initial comments were discussed before the adoption of opinion No. 40/2017, or were known or accessible to the source at that time, and thus did not fulfil the requirements of paragraph 21 of the methods of work.[14] Consequently, the Working Group will only

[13] In its initial opinion No. 40/2017 concerning Mr. Fotso, the Working Group stated in paragraph 51 that the analysis of cassation proceedings should be undertaken on a case-by-case basis and in the light of the arguments of the cassation court itself. As the source highlights in the request for review, Mr. Fotso now has access to the judgment of the Supreme Court and is able to provide proof of the Court's arguments.

[14] For example, in the request for review the source notes that Mr. Fotso was prosecuted in violation of a settlement agreement previously concluded with the Government, which included a release of liability clause (see para. 36 above). This argument had clearly been raised and discussed in opinion No. 40/2017 (para. 50) and does not meet the requirements of paragraph 21 of the methods of work. The source's argument about the similarity of Mr. Fotso's case and the case discussed in opinion No. 22/2016 had also already been considered in opinion No. 40/2017 (para. 49). The source also alleges in the request for reconsideration that the atmosphere at the appeal hearing before the Supreme Court on 17 and 18 May 2016 was highly militarized, in violation of Mr. Fotso's right to a fair trial (see para. 29 above), and that the cost of criminal proceedings was unjustifiably high for Mr. Fotso (see para. 30 above). The Working Group deems these facts to have been known to the source at the time of the hearing and not to appear as new facts in the judgment of the Supreme Court.

consider below the arguments about the violation of the right to due process related to the submission by the source of new information, namely the judgment of the Supreme Court. After considering the merits of the review request below, the Working Group will come to a final determination on whether the new information would have led it to alter its original decision.

(b) Merits of the request for review

81. In considering the merits of the request for review, the Working Group notes that the request relates only to proceedings in the BBJ-2 case against Mr. Fotso and not to the separate proceedings in the Camair case.

82. In determining whether Mr. Fotso's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. 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 a 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. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.[15]

83. The Working Group recalls that under its mandate it does not act as an appellate body for national courts. However, it has the right to consider whether the measures taken by national institutions and courts are compatible with the international human rights standards applicable to the State in question, including whether the right to a fair trial has been observed.[16]

84. The source alleges that the new information in this case, the judgment of the Supreme Court, demonstrates that the Court did not reconsider the facts of Mr. Fotso's case, which is a violation of: (a) his right to appeal his conviction and sentence before a higher court; and (b) the principle of equality of arms and the rights of defence. The Working Group will examine these two allegations.

85. Regarding the alleged violation of Mr. Fotso's right of appeal, the source argues that the Supreme Court did not review the facts of the case, in violation of article 14 (5) of the International Covenant on Civil and Political Rights. The source stresses that this argument concerns the cumulative effect of the abolition of appeal proceedings, the establishment of appeals to the Supreme Court as the only judicial remedy and the restriction of that remedy to points of law, pursuant to Acts No. 2011/028 and No. 2012/011. The Working Group notes that the source made a similar argument that has already been considered in the initial opinion.[17] However, the Working Group considers that the argument invoked in the present request for review includes a new development, since the source claims that the judgment of the Supreme Court, subsequently transmitted to Mr. Fotso, proves that the Court did not effectively reconsider the facts of the case. This argument is different from the source's previous argument that the Court was not able under the law of Cameroon to reconsider the facts. In support of this new argument, the source notes that the Supreme Court was obliged under article 510 of the Code of Criminal Procedure to reconsider the facts of the case before making a new decision, because it had partially set aside the judgment of the Mfoundi court based on a point of law raised by one of Mr. Fotso's co-defendants.

86. In arguing that the Supreme Court did not fulfil its obligation to reconsider the facts in the case of Mr. Fotso, the source alleges that:

(a) The Supreme Court made a decision and drafted the operative part of its judgment on 3 May 2016, two weeks before the hearing of 17 and 18 May 2016. The source indicates that the judgment is dated 3 May 2016 and that this error and the period of only two hours taken for deliberations in a complex case show that the judgment had already been drafted for the hearing of 3 May 2016;

[15] A/HRC/19/57, para. 68.

[16] See, inter alia, opinions No. 14/2017, No. 75/2017 and No. 79/2017.

[17] Opinion No. 40/2017, paras. 14, 15, 34 and 36.

(b) Rather than reviewing the factual basis of the charges in the case, the judgment of the Supreme Court is simply an exact copy of the indictment submitted by the prosecution service to the Mfoundi court and of the reasoning from that court's judgment;

(c) Written testimony by lawyers (including Mr. Fotso's lawyers), a journalist and a professor who attended the Supreme Court hearing of 17 and 18 May confirm that the Court did not review the facts at all and that no adversarial process took place. In particular:

(i) None of the defendants were examined by the Supreme Court, and Mr. Fotso was able only to read out the opening statement he had prepared;

(ii) None of the documents in the case file were produced or brought before the Supreme Court;

(iii) None of the five prosecution witnesses were called upon to testify and defence counsel were not able to examine them;

(iv) The Supreme Court did not interview the plaintiff (the State of Cameroon) and defence counsel were not able to ask questions;

(v) The hearing was devoted to a reading of the report by the reporting judge, and the prosecution and the Government aligned themselves with the content of the report;

(vi) Defence counsel's request for an adjournment in order to prepare a response to the report of the reporting judge was refused. Mr. Fotso's counsel therefore had to argue their case without proper preparation of their defence;

(d) The judgment of the Supreme Court is vague and does not contain any specific reference to the numbers to identify exhibits or other specific evidence. It is also considerably shorter than the judgment of the Mfoundi court.

87. In its response, the Government provides a detailed description of proceedings before the Supreme Court, noting that they are fundamentally different from those before a court of first instance. It notes that the source's arguments relate to the procedure applied by courts of first instance and asserts that the parties were able to argue their cases in an adversarial manner during the exchange of written pleadings before the hearing of 17 and 18 May 2016. The Government also provides a copy of the court transcript which, in its view, shows that a hearing was held before the Supreme Court on 3 May 2016, at which the public prosecutor requested an adjournment. This was granted and the hearing was adjourned until 17 May 2016. Regarding the allegation that the Court took only two hours to deliberate, the Government points out that the Court handed down its judgment within the time period prescribed by law.

88. The Government also states that the Working Group should take no account of the subjective testimony of persons who, according to the source, attended the hearing of 17 and 18 May 2016. The Government further states that it is entirely appropriate for the Supreme Court to refer to parts of the case file and the first-instance judgment to produce its account of the facts of the case. The court transcript shows that the parties had an entire hearing to supplement their previous written submissions and the factual basis of the charges was indeed taken into consideration for the decision. Thus, the Court reviewed the facts in accordance with the standard stipulated by the Human Rights Committee in its general comment No. 32, based not only on the evidence obtained at the hearing but also on evidence produced throughout the proceedings. Lastly, as evidence that the facts were considered, the Government points out that the Court quashed the first-instance judgment, acquitting one of the co-defendants on the basis of the information obtained, amending the charges against another of the co-defendants and reducing Mr. Fotso's sentence from 25 to 20 years. The Supreme Court's reasoning was therefore far from identical to the reasoning of the Mfoundi court. According to the Government, the respective lengths of the Supreme Court judgment and of the lower court judgment are irrelevant.

89. The Working Group has carefully examined the arguments put forward by the two parties and was guided by paragraph 48 of general comment No. 32 of the Human Rights Committee to determine whether the conditions set forth in paragraph 14 (f) of the International Covenant on Civil and Political Rights were met.

90. In view of the above, the Working Group is not in a position to conclude that a violation of article 14 (5) of the International Covenant on Civil and Political Rights occurred in this case. More specifically, it is not convinced by the source's argument that the date of the judgment suggests it had already been prepared before the hearing of 17 and 18 May 2016. The Working Group cannot rule out the possibility that the reference to 3 May 2016 in the judgment is a simple error, referring to the date on which the hearing should have been held before it was adjourned until 17 May 2016. The Working Group is also not convinced that the short time taken for deliberations constitutes a violation of article 14 (5) of the Covenant, noting that a hearing on the matter had been held on 17 and 18 May 2016.

91. Neither can the Working Group accept the source's argument that the Supreme Court's judgment was nothing but a copy of the reasoning of the Mfoundi court, which would indicate that the Court did not reconsider the facts of the case. Although it appears from the documents submitted by the source that substantial sections of the decisions of both courts are identical, the Working Group considers that this could be simply because the Court reviewed the facts, was persuaded by the arguments of the court of first instance and the witness testimony and did not see the need to rewrite the conclusions in a different way. As the Government pointed out and the source did not dispute, the Court acquitted one of the co-defendants, amended the charges against another of the co-defendants and reduced Mr. Fotso's sentence. It therefore appears that it analysed the facts and evidence presented during the proceedings, notwithstanding the various written evidence to the contrary submitted by the source. Equally, the Working Group is not convinced by the source's arguments that the vagueness of the Court's judgment and its short length compared to that of the lower court show that the Court did not review the facts in this case.

92. Lastly, the Working Group notes the source's argument that the Supreme Court stated in its judgment that it had heard testimony although no witnesses had been examined and no adversarial hearing had actually taken place. As stated above, the Working Group wishes to emphasize that it is not an appellate body, meaning that it is neither qualified nor mandated to comment on the application of national law. The Working Group's mandate is rather to determine whether the deprivation of liberty, in each case, complies with the applicable international human rights standards. Therefore, the Working Group is not in a position to determine whether the Supreme Court was obliged under article 510 of the Code of Criminal Procedure or any other law of Cameroon to examine the accused, hear arguments about the case, call witnesses to testify or examine the plaintiff. Under international human rights standards, a "factual retrial" or "hearing de novo" are not necessary for the purposes of article 14 (5) of the Covenant.[18] Accordingly, the Working Group is not in a position to conclude that this article has been violated in the present case.

93. Regarding the alleged violations of the principle of equality of arms and the rights of the defence, the source states that Mr. Fotso was in a position of total inequality with respect to the prosecution service during the hearing before the Supreme Court, in violation of the rights enshrined in article 14 (1) and (3) of the International Covenant on Civil and Political Rights. As shown by the judgment of the Supreme Court and the testimony of persons who were present, Mr. Fotso was deprived of his right to examine or have examined witnesses for the prosecution at the hearing of 17 and 18 May 2016. The source also states that the court transcript submitted by the Government shows that the hearing of 17 and 18 May 2016 was devoted to a reading of the report by the reporting judge, which had not been provided to the defendants before the hearing. According to the source, the transcript confirms that defence counsel requested an adjournment to have time to prepare a

[18] *Rolando v. Philippines* (CCPR/C/82/D/1110/2002), para. 4.5. In that case, an appeal court did not hear the testimony of the witnesses but relied on the interpretation of the evidence made by the court of first instance. The Human Rights Committee decided that a new trial or hearing were not required and found that aspect of the communication inadmissible. See also *Perera v. Australia* (CCPR/C/53/D/536/1993), para. 6.4. Similarly, the Committee concluded that article 14 (5) of the International Covenant on Civil and Political Rights did not require that a court of appeal proceed to a factual retrial, but that a court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial.

response to the report, which was refused by the Court. Defence counsel could thus make only general comments on the report.

94. In its response, the Government observes that the court transcript shows that Mr. Fotso's counsel was able to make comments on the report of the reporting judge, which were a continuation of arguments made in the written statements of case. According to the Government, the right to prepare a defence was not violated. The Government also notes that the Supreme Court did not fully adhere to the conclusions of the public prosecutor.

95. As indicated above, the Working Group is not in a position to comment on the procedure used by the Supreme Court, including the fact that Mr. Fotso was not allowed to examine witnesses on appeal. Furthermore, the Working Group notes that Mr. Fotso's counsel were able to examine the report of the reporting judge, albeit in a general way; they cannot then conclude that the lack of adjournment alone constituted a violation of the right to due process so severe as to render the deprivation of Mr. Fotso's liberty arbitrary under category III.

96. For these reasons, the Working Group is not convinced that the new information in this case would have led it to alter its initial opinion. Consequently, the Working Group has decided not to grant the request for review and to maintain its conclusion stated in opinion No. 40/2017 that this is not a case of arbitrary detention.

Disposition

97. In the light of the above, the Working Group has decided not to review its opinion No. 40/2017.

[*Adopted on 2 May 2019*]