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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019

Opinion No. 30/2019 concerning Amade Abubacar (Mozambique)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 14 February 2019 the Working Group transmitted to the Government of Mozambique a communication concerning Amade Abubacar. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).



Submissions

Communication from the source

4. Amade Abubacar is a Mozambican national, born on 10 July 1987. He usually resides in Changane, Mozambique. He is a community radio journalist for the State-owned Rádio e Televisão Comunitária Nacedje de Macomia. Mr. Abubacar is also a correspondent for an independent newspaper, *Zitamar News*.

Contextual background

5. According to the source, the northern districts of the Province of Cabo Delgado, including Macomia, have experienced armed attacks since October 2017. The province is important to the authorities due to its abundant mineral resources, including gas and rubies. After the attacks began, the Government increased its military presence in the region. It is alleged that journalists reporting on armed attacks have been intimidated, arbitrarily arrested and subjected to torture and other ill-treatment and are, in this way, prevented from reporting on the situation to media channels.

6. The source explains that Mr. Abubacar has been covering attacks on civilians by armed groups in Cabo Delgado Province since October 2017 as part of his work as a journalist for the Nacedje community radio station, for which he has worked for more than ten years. The source reports that Mr. Abubacar was the director of the radio station for a couple of years, but in September 2018 he was demoted to the position of regular journalist. The source alleges that the reason for the demotion was Mr. Abubacar's frequent reporting on armed attacks in the province. Reportedly, other community journalists in Cabo Delgado Province have not been allowed by their superiors to report on the attacks and are afraid to speak about them. According to the source, this is an example of government censorship and harassment of journalists in the region.

Arrest and detention

7. According to the source, on 5 January 2019, the police of Macomia District in Cabo Delgado Province arrested Mr. Abubacar. The arrest took place while he was interviewing and photographing a group of displaced persons who had fled their homes due to the intensification of violent attacks by alleged members of an extremist group known as Al-Shabaab. The source explains that the police officers arrested Mr. Abubacar without an arrest warrant. They handcuffed him, confiscated his cell phone and took him into custody. That day, Mr. Abubacar was transferred from the Macomia District Police Command to the military detention facility in Mueda, 200 kilometres from the place of his arrest. There, Mr. Abubacar spent 12 days in incommunicado detention. During that time, Mr. Abubacar and his lawyer were not informed of the reasons for the arrest, and Mr. Abubacar was not charged with any crime. Mr. Abubacar and his lawyer were only informed of the charges on 18 January 2019.

8. The source indicates that, on the day of his arrest and during the following days, family members and colleagues of Mr. Abubacar went to the Macomia District police station and requested to see him and to receive information on his situation. Their requests were denied and they were ordered by police officers to leave the police station immediately. On 10 January 2019, Mr. Abubacar's lawyer filed requests before the Office of the Public Prosecutor in Mueda District in order to receive information about his client's whereabouts. The lawyer also requested to see the case file and to receive information on the procedure against Mr. Abubacar at Mueda District Judicial Court. However, there were apparently no records concerning him.

9. Furthermore, the source alleges that Mr. Abubacar's lawyer enquired as to his client's whereabouts at the district police station and the military detention facility in Mueda District, but the officials denied that Mr. Abubacar was being held at either place. Therefore, on 11 January 2019, Mr. Abubacar's lawyer filed a petition for a writ of habeas corpus at Mueda District Judicial Court in order to compel the Office of the Public Prosecutor to produce Mr. Abubacar at Mueda District Judicial Court.

10. The source further reports that, on 17 January 2019, Mr. Abubacar was transferred to the Macomia District Police Command prison. On 24 January 2019, Mr. Abubacar was transferred again to Miezi prison, in Pemba District, where he is currently being detained.

11. Reportedly, an order to detain Mr. Abubacar was issued on 17 January 2019 by Macomia District Police Command. On 18 January 2019, Macomia District Judicial Court ordered his continued pretrial detention at Macomia District Police Command. The judge ruled that Mr. Abubacar's detention was lawful as he was presented before the court a day after his transfer into police custody. However, according to the source, article 311 of the Penal Code states that a person must be brought before a court within 48 hours of his or her detention. Therefore, the judge failed to take into consideration that Mr. Abubacar had been arrested on 5 January 2019 and held incommunicado by Mozambican military forces for 12 days before being transferred to police custody on 17 January 2019. According to the source, the decision by the court is thus a violation of Mr. Abubacar's rights to a fair trial and due process.

12. Furthermore, the source reports that, on 18 January 2019, the judge rejected the request of Mr. Abubacar's lawyer for his client's provisional release. The denial was motivated by the fact that, according to the evidence in the case file, there was no doubt as to Mr. Abubacar's guilt. Specifically, the judge stated in his ruling that Mr. Abubacar's release would allow him to continue to commit criminal acts and to disturb the peace. The alleged evidence showing Mr. Abubacar's guilt consists of a list of names of suspected Al-Shabaab members that Mr. Abubacar had in his possession at the time of his arrest. The police also pointed out that Mr. Abubacar's employer was unaware of the interviews he was conducting. The source argues that merely being in possession of a list of names cannot serve as a basis to prove guilt or any association with a criminal group in the absence of additional evidence to support a presumption of guilt, especially for a journalist like Mr. Abubacar.

13. The source indicates that Mr. Abubacar is being investigated on charges of violating State secrecy through electronic media and of public incitement using electronic media, pursuant to articles 322 and 323 of the Penal Code. The Public Prosecutor has not yet filed charges against Mr. Abubacar.

Legal analysis

14. The source considers that the arrest and the detention of Mr. Abubacar are arbitrary under categories II and III of the Working Group.

15. The source alleges that, from 5 to 17 January 2019, Mr. Abubacar was held in incommunicado detention, and the authorities did not inform him of the reason for his arrest or detention. Mr. Abubacar was not charged with any crime and was not granted access to his lawyer. The source recalls, however, that access to a lawyer immediately after being placed in detention is a fundamental safeguard against torture and other ill-treatment. On 25 January 2019, representatives of the Mozambican Human Rights Commission and the Mozambican Bar Association visited Mr. Abubacar at the Miezi prison. Allegedly, Mr. Abubacar suffered physical aggression while in military detention. He had also been deprived of food at the Macomia District prison, even though his family had brought food to the prison for him daily. Since Mr. Abubacar's transfer to Pemba District on 24 January 2019, every attempt his brother has made to visit him at the Miezi prison has been denied. The police officers justified the denials by saying that they had received orders to prohibit visits.

16. Furthermore, the source claims that Mr. Abubacar was arrested while carrying out his professional duties as a journalist, in violation of the Government's obligation to respect and promote freedom of expression and of the press, in accordance with articles 9, 10 and 19 of the Universal Declaration of Human Rights, article 19 of the Covenant, article 9 of the African Charter on Human and Peoples' Rights and article 48 of the Constitution of Mozambique.

17. Moreover, the source argues that, by holding Mr. Abubacar in incommunicado detention, failing to inform him of the reasons for his arrest until he was finally brought before the court, failing to present Mr. Abubacar before a court within 48 hours of his arrest

and denying him the right to access his lawyer, Mozambique has violated the rights enshrined in articles 9, 14 and 17 of the Covenant and articles 9 and 10 of the Universal Declaration of Human Rights.

Response from the Government

18. On 14 February 2019, a communication relating to the allegations set out above was sent to the Government of Mozambique. In accordance with its methods of work, the Working Group gave the Government until 15 April 2019 to submit its response. The Working Group notes that, as at the present date, the Government has not replied to its communication and has not requested an extension of the deadline.

Discussion

19. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

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

21. The source has provided coherent information corroborated by various sources. The allegations are therefore credible. The Government has already been notified of the same information through a joint urgent appeal from the Working Group and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. The Government acknowledged receipt of the appeal but failed to provide any substantive response.¹ When the Working Group has before it prima facie credible allegations that the Government has failed to challenge, it can only rely on those allegations to proceed. The silence of the Government of Mozambique will therefore be construed as implicit acquiescence to the allegations that the Working Group will now assess vis-à-vis the categories of arbitrary detention, bearing in mind the totality of the information available to it.

22. At the outset of its analysis, the Working Group recalls that the Human Rights Committee, in its concluding observations issued in 2013 on the initial report of Mozambique, expressed concern at reports of arbitrary arrests and detention, including of children; lengthy pretrial detention beyond the legally prescribed limits; failure to inform detained persons about their rights, the reasons for their detention and the charges against them; and difficulties faced by detained persons in gaining access to a lawyer from the very beginning of their detention (CCPR/C/MOZ/CO/1, paras. 11, 13 and 22).

23. The source reports that Mr. Abubacar was arrested on 5 January 2019 by police officers without an arrest warrant. From 5 to 17 January 2019, he was held in incommunicado detention, and the authorities did not inform him of any reasons for the arrest or detention. Mr. Abubacar was not charged with any crime. The Working Group finds that those facts demonstrate a violation of the State's obligation to notify the detainee of the reasons for his arrest and detention and to present him to a judge promptly for an opportunity to challenge the legality of the arrest and detention.

24. For the above reasons, the Working Group concludes that article 9 of the Covenant and article 9 of the Universal Declaration of Human Rights have been violated. The arrest and detention therefore lack legal basis and are arbitrary under category I.

25. The source reports that Mr. Abubacar was arrested due to his professional duties as a journalist. The Working Group recalls that freedom of opinion and expression and freedom of thought and conscience are fundamental human rights guaranteed in articles 9 and 18 of

¹ The urgent appeal (MOZ 1/2019) and the State party's reply of 23 January 2019 are available from <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

the Universal Declaration of Human Rights, articles 18 and 19 of the Covenant and articles 8 and 9 of the African Charter on Human and Peoples' Rights. The Working Group notes that the Human Rights Committee has also stated that the freedom of expression includes the right to seek, receive and impart information and ideas of all kinds,² therefore covering as well the professional sector of journalism.³

26. The Working Group recalls that, pursuant to article 19 (3) of the Covenant, freedom of expression may be subject to certain restrictions where such restrictions fulfil the following criteria: they must be expressly provided by law; they must serve one of the legitimate objectives provided for in article 19 (3) (a) or (b); and they must be proportionate and necessary to the achievement of that objective.⁴ It should be noted that restrictions are not allowed on grounds not specified in article 19 (3) of the Covenant, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.⁵ The Working Group observes that the Government has failed to provide any justification in that sense in the present case, and therefore concludes that those restrictions do not apply.

27. The Working Group also recalls its jurisprudence that States should not prohibit criticism of institutions, such as the army or the administration, and that the penalization of a media outlet, publishers or journalists solely for being critical of the Government or the political or social system adopted by the Government can never be considered to be a necessary restriction of freedom of expression in a democratic society.⁶

28. The Working Group further recalls its prior statement that the work of journalists and human rights defenders is also protected by the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, which states in articles 1 and 5 (a) that everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.⁷ It is worth noting that, in adopting the Declaration, the General Assembly was reaffirming the provisions set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, therefore reaffirming existing legal principles that extend to all States.

29. In view of the facts presented by the source, the Working Group considers that it has been established that Mr. Abubacar was arrested for exercising his right to freedom of thought and of expression, as guaranteed by articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 and 19 of the Covenant. As a result, the deprivation of liberty of Mr. Abubacar is arbitrary, falling under category II. In consequence, no trial would be justified.

30. The source reports that Mr. Abubacar was arrested on 5 January 2019 and held incommunicado by Mozambican military forces for 12 days before being transferred to police custody on 17 January 2019. He was therefore held in custody for some 288 hours (12 days) before being brought before a judge, instead of the maximum period of 48 hours (two days) prescribed by the Human Rights Committee.⁸ As stated in article 9 (3) of the Covenant, article 10 of the Universal Declaration of Human Rights and article 7 of the African Charter, any arrested person should be brought promptly before a judge. During that period of incommunicado detention, Mr. Abubacar did not have access to a lawyer or family members, preventing him therefore from preparing for his case, including to

² General comment No. 34 (2011) on the freedoms of opinion and expression, para. 11. See also the Working Group's opinion No. 73/2018.

³ *Mavlonov and Sa'di v. Uzbekistan* (CCPR/C/95/D/1334/2004), para. 8.4.

⁴ See opinion No. 42/2018.

⁵ See Human Rights Committee, general comment No. 34.

⁶ See opinion No. 13/2018.

⁷ Opinion No. 62/2018, para. 61.

⁸ General comment No. 35 (2014) on liberty and security of person, para. 33.

challenge the lawfulness of his detention. Such a proceeding violated his right to legal representation promptly after his arrest and throughout the criminal procedure.

31. In addition, the arrest and initial detention of Mr. Abubacar, a civilian, was conducted by the military. The Working Group has stated in numerous occasions that civilians must not be subject to military justice, in accordance to the right to a fair trial.

32. The Working Group holds the view that the foregoing acts and omissions by the authorities are a violation of the guarantees of the due process of law as provided for in articles 9 and 10 of the Universal Declaration of Human Rights, article 14 of the Covenant and principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The violation of due process is of such gravity that it renders the detention of Mr. Abubacar arbitrary under category III.

33. The source alleges that Mr. Abubacar suffered physical aggression while in military detention and that he was deprived of food at the Macomia District prison. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on the right to food and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for appropriate action.

Disposition

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

The deprivation of liberty of Amade Abubacar, being in contravention of articles 9, 10, 18 and 19 of the Universal Declaration of Human Rights and articles 9, 14, 18, 19 and 24 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

35. The Working Group requests the Government of Mozambique to take the steps necessary to remedy the situation of Mr. Abubacar without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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

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

38. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on the right to food and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for appropriate action.

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

Follow-up procedure

40. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

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

(c) Whether an investigation has been conducted into the violation of Mr. Abubacar's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Mozambique with its international obligations in line with the present opinion;

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

41. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

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

43. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.⁹

[Adopted on 3 May 2019]

⁹ Human Rights Council resolution 33/30, paras. 3 and 7.