



Human Rights Council
Working Group on Arbitrary Detention**ADVANCE UNEDITED VERSION****Opinions adopted by the Working Group on Arbitrary Detention at its seventy-second, 20–29 April 2015****No.2/2015 (Ethiopia and Yemen)****Communication addressed to the Government on 18 September 2014****Concerning Andargachew Tsige****The Government has not replied to communications****States are parties to the International Covenant on Civil and Political Rights.**

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

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of 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);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The case summarized below was reported to the Working Group on Arbitrary Detention as follows:

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

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

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

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

8. Mr. Tsige was the subject of a Joint Urgent Appeal (ETH 1/2005) issued on 10 June 2005, by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the question of torture. At that time, the Special Rapporteurs drew the attention of the Ethiopian Government to information received regarding the incommunicado detention of approximately 1500 demonstrating students, the killing of 26 persons, the wounding of 100 others and the arrest and harassment of Mr. Tsige, among other named individuals.

9. According to the source, following the Ethiopian Parliamentary elections that took place on 15 May 2005, Mr. Tsige was arrested and allegedly cruelly beaten whilst in detention. It is reported that he still suffers from eye-related problems as a result. In 2009,

Mr. Tsige was tried *in absentia* in Ethiopia and sentenced to death for an alleged coup attempt. He was prosecuted *in absentia* again in 2012 on terrorism charges and sentenced to death.

10. The source submits that the deprivation of liberty of Mr. Tsige is arbitrary and falls under category I of the Working Group's defined categories of arbitrary detention. According to the source, Mr. Tsige has not been officially informed of the charges brought against him and any other reason for his detention. He has been detained *incommunicado* since his arrest. As a consequence, he has been deprived of his liberty without any legal basis from the time of his arrest and has been denied the possibility of being able to challenge the legality of his detention before a judicial authority, contrary to article 9 of the Universal Declaration of Human Rights (UDHR) and of the International Covenant on Civil and Political Rights (ICCPR).

11. The source further submits that the deprivation of liberty of Mr. Tsige falls under categories II and V of the Working Group's defined categories of arbitrary detention. Mr. Tsige is being held on the basis of his political convictions and as a result of exercising his rights to freedom of expression and of assembly. His detention may be considered in violation of articles 19 and 20 of the UDHR and articles 19 and 21 of the ICCPR.

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

Response from the Government

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

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

Discussion

Burden of proof

15. At the outset of its discussion on this case, the Working Group reinstates its position on the burden of proof.¹ The lack of response by Governments is therefore analysed as an agreement with the statement of facts provided in the application. Furthermore, the Working Group recalls that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, the burden to

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

prove the negative fact asserted by the applicant lies with the public authority, because the latter is “generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out”². As a result, the facts as alleged by the source are not disputed and the Working Group will make its legal assessment on that basis in conformity with paragraph 16 of its Methods of Work.

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

Arrests and detention abroad, extradition and trial of terrorist suspects

17. The Working Group has in its jurisprudence, deliberations, legal opinions, and concluding reports from country visits and otherwise in its annual reports to the Human Rights Council reviewed issues relating to arrests and detention abroad, extradition and trial of terrorist suspects. These issues were also addressed in the 2010 Joint study on global practices in relation to secret detention in the context of countering terrorism, undertaken by four United Nations Special Rapporteurs and Working Groups, including the Working Group on Arbitrary Detention.⁴

18. In its 2008 annual report, the Working Group elaborated a list of principles for the deprivation of liberty of persons accused of acts of terrorism in accordance of articles 9 and 10 of the UDHR and articles 9 and 14 of the ICCPR. They were set out as follows:

(a) Terrorist activities carried out by individuals shall be considered as punishable criminal offences, which shall be sanctioned by applying current and relevant criminal and penal procedure laws according to the different legal systems;

(b) Resort to administrative detention against suspects of such criminal activities is inadmissible;

(c) The detention of persons who are suspected of terrorist activities shall be accompanied by concrete charges;

(d) The persons detained under charges of terrorist acts shall be immediately informed of them, and shall be brought before a competent judicial authority, as soon as possible, and no later than within a reasonable time period;

(e) The persons detained under charges of terrorist activities shall enjoy the effective right to habeas corpus following their detention;

(f) The exercise of the right to habeas corpus does not impede on the obligation of the law enforcement authority responsible for the decision for detention or maintaining the detention, to present the detained person before a competent and independent judicial

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

³ See, for instance, *Butovenko v. Ukraine*, HRC, no. 1412/2005, para. 7.3; *Medjnoune v. Algeria*, no. 1297/2004, para. 8.3; *Conteris v. Uruguay*, no. 139/1983, para. 7.2; *Bleier v. Uruguay*, no. 30/1978, para. 13.3.

⁴ Joint study on global practices in relation to secret detention in the context of countering terrorism, undertaken by the Special Rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism; on torture and other cruel, inhuman or degrading treatment or punishment and the Working Groups on Arbitrary Detention and Enforced and Involuntary Disappearances, A/HRC/13/42, 19 February 2010.

authority within a reasonable time period. Such person shall be brought before a competent and independent judicial authority, which then evaluates the accusations, the basis of the deprivation of liberty, and the continuation of the judicial process;

(g) In the development of judgments against them, the persons accused of having engaged in terrorist activities shall have a right to enjoy the necessary guarantees of a fair trial, access to legal counsel and representation, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution, all of which should take place in an adversarial process;

(h) The persons convicted by a court of having carried out terrorist activities shall have the right to appeal against their sentences.⁵

Allegations against Yemen

19. The Working Group has found several violations of international law. Mr. Tsige was detained whilst in transit by Yemeni authorities without a warrant at the time of his arrest, nor was he notified of the charges against him or otherwise informed of the grounds for his detention, and not offered legal representation, in breach of article 9 UDHR and articles 9 and 14 ICCPR.

20. Upon this arrest Yemeni authorities have promptly handed Mr. Tsige to the custody of Ethiopian authorities. Yemeni authorities did not present the UK Government with the advance notice of the transfer of this British national. The Working Group notes that international law on extradition provides procedures that would need to be observed by countries in cases such as the one presently before the Working Group. The arrest, secret and incommunicado detention, and subsequent transport of Mr. Tsige constitute violations of articles 9 and 11 UDHR and articles 9 and 12 ICCPR. The detention falls within under categories I and III of the categories applicable to the cases before the Working Group.

Allegations against Ethiopia

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

22. On second occasion, since the date of his arrest, Mr. Tsige has been held in *incommunicado* detention, at an unofficial location, without access to family members, consular services or legal counsel. The Working Group also notes that secret detention or *incommunicado* detention may put individuals under pressure to confess to a crime and infringe the right not to be compelled to testify against oneself under article 11 of the UDHR and article 14 of the ICCPR. In the conclusions of the 2010 Joint study on global practices in relation to secret detention in the context of countering terrorism referred to above in para. 52, it is reiterated that international law clearly prohibits secret detention, which violates a number of human rights and humanitarian law norms that may not be derogated from under any circumstances⁶ The lack of legal representation under

⁵ WGAD annual report 2008, A/HRC/10/21, 16 February 2009 [53].

⁶ A/HRC/13/42, 19 February 2010, [8]-[97].

interrogations by Ethiopian government agents constitutes another grave violation under article 11 of the UDHR and article 14 of the ICCPR.

23. Furthermore the Working Group holds the view that the source has provided reliable evidence on a possible situation of physical abuse and mistreatment which could amount to cruel, inhuman and degrading treatment therefore warranting appropriate action as the prohibition of such a treatment is a *jus cogens* norm.⁷

24. The Working Group therefore finds that there are serious violations of the international norms relating to the right to a fair trial, as well established in international law, especially in Articles 8, 9, 10 and 11 of the UDHR as well as Articles 9 and 14 of the ICCPR. The gravity of such violations qualifies them for category III of the categories applicable to the consideration of cases submitted to the Working Group.

25. In addition, the Working Group finds that Mr. Tsige is being held on the basis of his political convictions and as a result of exercising his rights to freedom of expression and of assembly. His detention may therefore be considered in violation of articles 19 and 20 of the UDHR and articles 19 and 21 of the ICCPR. The deprivation of liberty of Mr. Tsige therefore falls under categories II and V of the Working Group's defined categories of arbitrary detention.

Disposition

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

The deprivation of liberty by Yemen of Mr. Andargachew Tsige is arbitrary, being in contravention of articles 8, 9, 10 and 11 of the UDHR and articles 9 and 12 ICCPR, falls within category I and category III of the categories applicable to the consideration of the cases submitted to the Working Group;

The deprivation of liberty by Ethiopia of Mr. Andargachew Tsige falls within categories II, III and V of the categories applicable to the consideration of the cases submitted to the Working Group, being contrary to articles 19 and 20 of the UDHR and articles 19 and 21 of the ICCPR.

27. Consequently upon the opinion rendered, the Working Group requests Ethiopia to take the necessary steps to remedy the situation of Mr. Tsige and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be the immediate release of Mr. Tsige and an adequate compensation be afforded to him.

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

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

30. The Working Group recalls the Human Rights Council's call for all States to cooperate with the Working Group, to take account of its views and, where necessary, to

⁷ See: Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Sénégal*), Judgment, I.C.J. Reports 2012, p. 422, para. 99.

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.⁸

[Adopted on 20 April 2015]

⁸ Human Rights Council resolution 24/7, para. 3.