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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its sixtieth session, 2–6 May 2011

#### No. 4/2011 (Switzerland)

#### Communication addressed to the Government on 20 December 2010

#### Concerning: Mr. Zaza Yambala

#### The State is a party 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 that mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its working methods, 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 following case was submitted to the Working Group on Arbitrary Detention in the following terms: Mr. Zaza Yambala, a citizen of the Central African Republic, was arrested by the Swiss immigration authorities on 25 November 2008.

4. According to the information he submitted to the Working Group, Mr. Yambala arrived in Switzerland in 2005 as an asylum-seeker. The authorities rejected his request for asylum. Mr. Yambala was informed that he would be deported to his country of origin or elsewhere. He refuses to be deported to his country as he fears that he will be persecuted by his Government for political and ethnic reasons. In his country he belonged to a rebel group and his family was attacked several times.

5. According to the same information, Mr. Yambala suffers from a heart ailment and the visits of the prison physician are of no use. Mr. Yambala is not authorized to receive any other visitors. Furthermore, he reports that although he has tried to contact the Working Group on Arbitrary Detention and various NGOs in writing, for an unknown reason his letters have not reached their addressees.

6. To date, Mr. Yambala has appeared before the judge four times. His detention has been prolonged systematically and he is now being held in an immigration prison near Zurich airport in Switzerland.

7. The Working Group transmitted this information to the Government in order to obtain clarification of Mr. Yambala's situation and the legal provisions justifying his continued detention.

#### *Response from the Government*

8. The Working Group on Arbitrary Detention expresses its gratitude to the Government for having provided the requested information in a timely manner.

9. The Government, in its reply of 21 March 2011, after stressing the importance it attaches to the protection and respect, without discrimination, of human rights, states that Mr. Yambala entered Switzerland illegally on 14 August 2005 and on that date submitted a request for asylum. The request was refused on 7 October 2005 by the Federal Office for Migration, which requested Mr. Yambala to leave the country. By appealing the decision, Mr. Yambala was able to prolong his stay in Switzerland until 6 January 2006. The Government states that since that date Mr. Yambala has been residing illegally in Switzerland. The Government adds that Mr. Yambala has on various occasions been held in different prisons for different reasons which were all based on the detention orders and other court orders issued under Swiss federal and cantonal law.

10. On 25 November 2008 Mr. Yambala was placed in pretrial detention and then sentenced to 2 years in prison for endangering the life of others, illegally detaining others, causing bodily harm to his girlfriend, and damaging property. He was freed by a decision dated 19 February 2010 that took effect on 25 March 2010. On 25 February 2010 the Office for Migration of the Security Directorate of the canton of Zurich ordered Mr. Yambala to be detained pending expulsion as soon as he had served his prison sentence, namely on 25

March 2010. The corresponding detention order was issued on 26 March 2010 and extended by decisions dated 10 June, 1 July, 30 August, 29 October and 23 December 2010. On that date, the detention was extended until 22 March 2011.

11. The Government also states that Mr. Yambala is receiving medical care, mail and visitors. This is proven by the fact that Mr. Yambala has contacted the Working Group.

### **Discussion**

12. The question submitted to the Working Group on Arbitrary Detention concerns a citizen of the Central African Republic who arrived in Switzerland on 14 August 2005, requested asylum and was refused it by the Swiss authorities on 7 October 2005. His appeal against that decision, which was rejected, led to his stay in Switzerland being prolonged until 6 January 2006.

13. According to the information received, it is undisputed that Mr. Yambala finished serving the sentence imposed for violations of Swiss criminal law on 25 March 2010. Instead of being freed on that date, Mr. Yambala has, since 26 March 2010, been detained pending expulsion, i.e. for more than one year, and his detention has been prolonged five times by a judge of the Zurich district court.

14. The Working Group conducts its analysis in three stages. It first establishes whether the measure of detention pending expulsion is appropriate to achieve the State's goal. Secondly, it determines whether the measure and its duration fulfil the conditions of necessity and proportionality. Finally, it has to consider whether, given the circumstances, the use of detention pending expulsion renders the deprivation of liberty arbitrary.

15. The Working Group is of the view that the goal of expulsion conceals the real reasons for the detention. The Government is detaining Mr. Yambala not only because he is an illegal migrant but especially to protect Swiss public order. If that were not true, the authorities could have expelled him after his request for asylum had been rejected. The Government also states that Mr. Yambala has been residing illegally in Switzerland since 6 January 2006, without explaining why measures to return him to his country or expel him were not taken at that time. This is particularly strange in view of the Government's statement that between 2006 and 2008 Mr. Yambala was detained on various occasions in different prisons.

16. Regarding the detention of irregular migrants, the former Commission on Human Rights clarified and extended the mandate of the Working Group in its resolution 1997/50 of 1997 to cover the issue of administrative detention of asylum-seekers and migrants. In addition, the Working Group adopted its Deliberation No. 5 on human rights guarantees that asylum-seekers and immigrants in detention should enjoy. The Working Group's opinion expressed therein supports the decriminalization of this type of detention, since an irregular migrant should not be considered a criminal. In its report of 10 January 2008 to the Human Rights Council, the Working Group reiterated its concerns regarding the administrative detention of foreigners (A/HRC/7/4, paras. 41–54).

17. The Working Group wishes to note that an expulsion decision is admissible only if it is implemented humanely and with full respect for the human dignity of the person concerned. Such a decision must always be implemented with due regard for the person's situation and particular circumstances. The Working Group notes that, while in principle States are not prohibited from using detention pending expulsion, this option is clearly defined and subject to strict conditions and procedural guarantees.

18. Furthermore, the principle of proportionality always requires that detention be used as a last resort and that strict legal limitations and effective judicial guarantees be established. The justifications required for the detention, such as the risk that the immigrant

will seek to avoid justice or expulsion, must be clearly defined and enumerated in the legislation.

19. Furthermore, a maximum duration must be specified, at the end of which the detained person shall be freed. Such detention should never be used as a dissuasive measure. It must be ordered by a judge and be subject to regular judicial review of its lawfulness and reasonableness as required by the provisions of article 9, paragraph 4, of the International Covenant on Civil and Political Rights. The detention of a person pending expulsion should never be indefinite or of excessive or unreasonable duration.

20. Most countries limit the duration of detention pending expulsion. In Switzerland, article 79 of the Federal Law on Foreign Nationals provides as follows concerning the detention of foreigners pending expulsion:

1. [...] detention pending return or expulsion [cited] in articles 75 to 77 [...] [may not] exceed a total of six months.

2. The maximum duration of the detention may, with the agreement of the cantonal judicial authorities, be extended by a maximum of 12 months [...] in the following cases:

(a) If the person concerned is not cooperating with the competent authorities;

(b) If there is a delay in obtaining, from a State that is not a Schengen State, the documents needed for departure.

21. Furthermore, according to article 80, paragraph 6, of the Law,

The detention shall be terminated in the following cases:

(a) If the reason for the detention no longer exists or the return or expulsion is impossible for legal or material reasons;

[...].

22. Under Swiss law, Mr. Yambala's detention pending his expulsion was not supposed to last longer than six months. This principle is subject to the exceptions mentioned in article 79, paragraph 2 (a) of the Federal Law on Foreign Nationals. In its reply the Government simply states that Mr. Yambala's prolonged detention "results mainly from his uncooperative behaviour towards the Swiss authorities in connection with their efforts to give him access to travel documents". In the absence of additional information, the fact that Mr. Yambala is opposed to being expelled to his country of origin because of the risk of persecution cannot in and of itself be considered uncooperative behaviour that would justify the prolongation of detention.

23. Even if the duration of his current detention is considered to be within the legal limits, that does not resolve the question of whether Mr. Yambala's detention is arbitrary from the standpoint of international law.

24. The Working Group wishes to point out that no treaty provision of public international law specifies a duration for the detention of a foreigner pending expulsion. This period begins on the day on which the person is placed in detention pending expulsion and ends on the day on which the person is either freed or expelled from the country. According to the in-depth study of the issue by the International Law Commission, "While international jurisprudence recommends a reasonable period of detention and considers some periods excessive, it does not state what exactly the limits should be" (A/CN.4/625, para. 262).

25. In the Working Group's view, where detentions in Switzerland are concerned, it is worthwhile to refer to the well-established jurisprudence of the European Court of Human Rights. Article 5, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms expressly enshrines the right of a State to detain a person against whom action is being taken with a view to deportation or extradition. In the *Chahal v. United Kingdom* case the European Court of Human Rights clarified many aspects of article 5, paragraph 1 (f). The Court recalled that the provision "does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing" (judgment of 15 November 1996, para. 112). "The Court recalls, however, that any deprivation of liberty under [article 5, para. 1 (f)] will be justified only for as long as deportation proceedings are in progress [art. 5, para. 1 (f)]. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under article 5, para. 1 (f) [...]. It is thus necessary to determine whether the duration of the deportation proceedings was excessive" (ibid., para. 113).

26. The Working Group wishes to point out that Mr. Yambala has been detained since 25 November 2008. Since that date, if not since the moment his appeal against the decision regarding his asylum request was rejected, the authorities have had sufficient time to expel him. When the chances of removal within a reasonable period are remote, a Government's obligation to seek alternatives to detention becomes pressing (see Opinion No. 45/2006 (United Kingdom of Great Britain and Northern Ireland), A/HRC/7/4/Add.1, para. 25). In the Working Group's view, given that in this case the detention has lasted since 25 November 2008 and the administrative detention pending expulsion has been extended several times since the detention order of 25 March 2010, the actual likelihood of expulsion is small or even practically non-existent. Mr. Yambala's detention thus assumes an indefinite character and cannot be seen as necessary or proportional to the stated goal.

27. Finally, regarding the handling of Mr. Yambala's case, the Working Group is of the view that, though Mr. Yambala's administrative detention was extended by a judge, he does not necessarily benefit from the same procedural safeguards as in an ordinary trial. In the *A. v. Australia* and *C. v. Australia* cases (communication No. 900/1999, CCPR/C/76/D/900/1999, para. 8.2), the Human Rights Committee clarified that,

"in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification".

28. The Government, in its response, did not provide precise proof of the obstacles preventing Mr. Yambala's expulsion. The Government merely referred to Mr. Yambala's "uncooperative behaviour" without explaining what constitutes such behaviour or the reasons justifying the prolongation of the administrative detention. In the Working Group's view such a justification, unaccompanied by further details, is not appropriate to justify Mr. Yambala's continued detention.

29. Mr. Yambala's current detention appears to be a way to prolong the detention associated with his completed prison sentence. Furthermore, the Government has not provided the Working Group with enough information to prove that, given Mr. Yambala's specific circumstances, there were no less restrictive measures for achieving the same goal — for example, requiring him to report to the authorities, to post bail or the like — that would take into account his deteriorating health.

30. The Working Group can only conclude that the deprivation of liberty has taken on the characteristics of indefinite detention, which is prohibited under article 9, paragraph 1

of the International Covenant on Civil and Political Rights.<sup>1</sup> His detention is thus arbitrary and falls within Category III of the categories applicable to the consideration of cases submitted to the Working Group.

### **Disposition**

31. In the light of the preceding, the Working Group on Arbitrary Detention renders the following opinion:

Mr. Yambala's deprivation of liberty since 26 March 2010 is arbitrary and contravenes article 9, paragraph 1, of the International Covenant on Civil and Political Rights, and it falls within Category III of the categories used by the Working Group, especially since, by the date of the Government's reply, the last extension of Mr. Yambala's detention had expired without any proper reason being given to justify his continuing detention. Given the circumstances of the present case, the alleged goal of expulsion, the excessive duration of the detention and the Government's failure to provide any justification for the delay in implementing the expulsion constitute a violation of the minimum standards for a fair and equitable trial.

32. Having submitted this opinion, the Working Group calls on the Government to take the necessary measures to remedy the situation in order to bring it into conformity with the provisions and principles enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It calls on the Government to free Mr. Yambala immediately and, if the latter is to be expelled, to ensure that he will not be subject to retribution in his country or elsewhere.

*[Adopted on 3 May 2011]*

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<sup>1</sup> The Human Rights Committee has stated that "[t]he drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability" (see *Hugo van Alphen v. The Netherlands*, communication No. 305/1988, 15 August 1990, CCPR/C/39/D/305/1988, para. 5.8).