



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session (20–24 August 2018)****Opinion No. 56/2018, concerning Jean-Marie Michel Mokoko (Congo)***

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. Its mandate was extended and clarified in resolution 1997/50 of the Commission. 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 4 May 2018 the Working Group transmitted to the Government of the Congo a communication concerning Jean-Marie Michel Mokoko. The Government has not replied to the communication. The State has been a party to the International Covenant on Civil and Political Rights since 5 October 1983.

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,

* A partially dissenting individual opinion by Sètondji Roland Adjovi is appended to this opinion.



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. Mr. Mokoko, a 71-year-old politician, was born in Mossaka in the Congo. He served successively as Chief of Staff of the Congolese Armed Forces from 1987 to 1993, Chief of the International Support Mission in the Central African Republic, and Special Representative of the Chairperson of the African Union Commission in the Central African Republic from 2014 to 2016. He also served as Special Adviser to the President of the Republic on peace and security in Africa between 2014 and 2016.

Background

5. The source explains that, after returning to power in 1997, the President organized a constitutional referendum in 2015 to enable him to run for a third term. The source explains that Mr. Mokoko publicly opposed the move, calling it “a constitutional coup d’état”. On 25 October 2015, the new Constitution was approved by 92.96 per cent of those who voted.

6. The source explains that the constitutional referendum was condemned by international organizations that went on to document the subsequent wave of repression of opponents.

7. The source reports that at 7 p.m. on 9 February 2016, on his return from the Central African Republic, Mr. Mokoko, who had just resigned from his post as adviser to the President and announced his candidacy in the presidential elections, was attacked by officers from the Congolese reserve police force. According to the source, the officers released tear gas, subjected Mr. Mokoko’s family members and friends to severe beatings and damaged his vehicle. The source adds that Mr. Mokoko escaped unharmed.

8. The source explains that on 4 March 2016, the first day of the presidential campaign, Mr. Mokoko was summoned to the Directorate General of National Surveillance to be interviewed. Investigators subsequently searched his home. No items were seized on that occasion. However, the source indicates that, on the basis of that search, he was subsequently accused of possessing weapons of war.

9. The source reports that, in the days that followed, the Congolese authorities allegedly obstructed his campaign by various means, including by restricting his freedom of movement.

10. The source also reports that the President was re-elected in the first round, on 20 March 2016, with 60.07 per cent of the votes cast. At the time of the election, telecommunications facilities were unavailable throughout the country, having been disconnected for four days on national security grounds and to prevent the opposition from publishing the election results illegally. Mr. Mokoko won around 15 per cent of the votes and finished in third place. The results were challenged by the opposition and the international community.

11. According to the source, Mr. Mokoko requested a recount of the votes and the establishment of a joint commission to complete that task. Then, on 24 March 2016, he appealed to his supporters to “live up to their responsibilities regarding the stolen election”. On 25 March 2016, the five opposition candidates called for a peaceful protest against the President’s re-election.

12. The source indicates that, a few days later, Mr. Mokoko’s residence was surrounded by regime forces.

13. The source claims that, on 4 April 2016, Mr. Mokoko was placed under de facto house arrest and confined to his home under virtually round-the-clock supervision by police officers who allowed no one in or out. On 7 April 2016, Mr. Mokoko was notified by the Chief of Staff of the Armed Forces that the 15 soldiers assigned to protect him would be withdrawn. According to the source, this constituted a form of unofficial pretrial detention.

However, the source indicates that Mr. Mokoko was not the subject of any legal proceedings at that time and there was therefore no justification for restricting his freedom of movement.

14. According to the source, this situation continued until 16 June 2016 when the Brazzaville public prosecutor's office opened a judicial investigation and charged Mr. Mokoko with undermining State security and illegal possession of weapons of war and munitions allegedly found during the search of his home on 4 March 2016. He was placed in pretrial detention on 16 June 2016. On 18 July 2016, he was informed that he was also being charged with inciting public disorder. The source states that Mr. Mokoko denies all the charges laid against him.

15. The source also asserts that Mr. Mokoko's arrest and detention are part of a campaign of repression of Congolese political opponents that has been waged since the March 2016 elections and that mirrors the events that followed the 2015 referendum. The source recalls in this regard that international non-governmental organizations have condemned the repression and arrest of political opponents. Consequently, the source argues that Mr. Mokoko's detention is motivated solely by political considerations and is therefore arbitrary.

Legal analysis

16. According to the source, Mr. Mokoko's situation constitutes arbitrary detention under categories I, II and III of the methods of work of the Working Group on Arbitrary Detention.

Arbitrary detention under category I

17. The source argues that Mr. Mokoko's detention is devoid of any legal basis since (i) Mr. Mokoko enjoys legal immunity that precludes his being prosecuted; and (ii) he has been detained for longer than the maximum six-month period allowed for pretrial detention under the Congolese Code of Criminal Procedure.

18. With regard to Mr. Mokoko's legal immunity, the source claims that he was promoted to the rank of Grand Officer in the Congolese order of merit by Presidential Decree No. 86/1044. Article 11 of Presidential Decree No. 2001-179 states that dignitaries of the Republic enjoy legal immunity, and that any citizen awarded an honour in the Congolese orders of merit, devotion or peace may not be prosecuted or arrested without the prior authorization of the Council of National Orders. Furthermore, article 4 of the Decree states that the term "dignitary" includes the status of Grand Officer, the title awarded to Mr. Mokoko. Therefore, his detention and prosecution are illegal and the proceedings as a whole are invalid.

19. The source further reports that Mr. Mokoko's counsel filed a motion with the Indictment Division of the Brazzaville Court of Appeal on 17 January 2018 requesting the annulment of the indictments issued in 2016, citing his legal immunity. However, in a ruling on 15 February 2018, the Indictment Division dismissed the motion, declaring it inadmissible on the ground that it had not been filed within the prescribed period. That ruling was upheld by the Supreme Court on 16 March 2018. In the Supreme Court's ruling, a copy of which was provided by the source, the question of immunity was rejected on the grounds that: (i) the dismissal of the motion was justified by the expiry of the time limit; (ii) the Indictment Division did not exceed its powers in deciding on the inadmissibility of the application; and (iii) Decree No. 2001-179 establishing such immunity is unlawful, since immunity and other jurisdictional privileges can be conferred only by a law. On 30 April 2018, the Supreme Court upheld its ruling and considered its decision of 16 March 2018 to be final.

20. However, according to the source, the argument of a prescribed time period is not tenable in the light of article 323 of the Code of Criminal Procedure, which provides that exceptions based on the invalidity of previous proceedings must, on pain of being time-barred, be presented before any defence of the merits. The source further notes that neither of the two courts contested the existence of legal immunity.

21. With regard to exceeding the maximum period of pretrial detention (which is six months according to the source), the source recalls that Mr. Mokoko has been in pretrial detention since 16 June 2016. On 8 July 2016, Mr. Mokoko filed an application for release. The investigating judge rejected the application on 26 July 2016; that decision was upheld in a ruling issued by the Indictment Division on 18 August 2016. On 13 October 2016, the investigating judge ordered a two-month extension of Mr. Mokoko's detention; that decision was upheld by the Indictment Division on 1 December 2016. According to the source, that was the sole extension permitted under article 121 (3) of the Congolese Code of Criminal Procedure. Article 121 states that:

(a) In cases other than those provided for in the previous article, pretrial detention shall not exceed four months;

(b) If continued detention is deemed necessary, the investigating judge may extend the detention in a special order justified by the facts of the case and issued on the basis of reasoned petitions filed by the public prosecutor;

(c) No extension exceeding two months shall be granted.

22. However, in an order issued on 13 December 2016, the investigating judge further extended Mr. Mokoko's detention until 16 February 2017. On 15 December 2016, Mr. Mokoko's counsel filed another application for release, which was rejected on 19 December 2016.

23. Appeals were lodged against the two extension orders. On 25 January 2017, the Indictment Division issued a ruling upholding the extension of Mr. Mokoko's pretrial detention. That ruling was upheld by the Supreme Court on 27 October 2017.

24. Accordingly, the source concludes that Mr. Mokoko has been held in pretrial detention without a legal basis since 17 December 2016 and in any event since 17 February 2017.

Arbitrary detention under category II

25. According to the source, Mr. Mokoko was confined to his home and then placed in pretrial detention on 16 June 2016 for exercising his rights to freedom of opinion and expression, freedom of peaceful assembly and association, and participation in his country's public affairs. The source recalls that Mr. Mokoko was summoned to the Directorate General of National Surveillance on the first day of the presidential campaign and that he had been attacked on his return to the Congo on 9 February 2016. His home was searched and his freedom of movement restricted. These events constituted a violation of his right to take part in the conduct of the public affairs of his country.

26. Later, when Mr. Mokoko called for the people to engage in peaceful demonstrations following the election he had publicly contested, he was confined to his home for three months before being detained. According to the source, this constitutes a violation of Mr. Mokoko's rights to freedom of expression and peaceful assembly. The source also recalls the backdrop of widespread repression in which this case occurred.

Arbitrary detention under category III

27. The source alleges that Mr. Mokoko did not receive a fair trial, since the investigating officials considered only the evidence for the prosecution and not the evidence for the defence. In addition, the President of the Republic expressed his views on the case on several occasions and announced that the trial would soon begin. He also reportedly stated at a joint meeting of the two chambers of parliament on 30 December 2017 that he would like the trials of the detainees, in particular that of Mr. Mokoko, to take place in the first quarter of 2018. The source therefore claims that the executive interfered in the judicial proceedings, which constitutes a serious violation of the right to a fair trial by an independent and impartial judiciary. The source argues that this interference is further reflected in the modification of the composition of the Supreme Court by Presidential Decree No. 2018-102 of 14 March 2018, just as the Court was about to rule on the question of Mr. Mokoko's legal immunity. The source explains that the speed with which the judgment was issued constituted a violation of Mr. Mokoko's right to a defence, since the

defence team was not informed of the conclusions of the public prosecutor's office beforehand. The source recalls that an appeal was filed at the Supreme Court on 15 February 2018. On 16 March 2018, only two days after the change in its composition, the Supreme Court issued a judgment dismissing the appeal. In other words, it issued the judgment despite the defence team not having been notified of the conclusions of the public prosecutor's office and despite the fact that this failing was raised in an official letter dated 14 March 2018.

28. The source therefore considers that the seriousness of these violations of the right to a fair trial invalidates the proceedings as a whole and renders Mr. Mokoko's detention arbitrary.

Further information from the source

29. As the source provided additional information, on 23 May 2018 the Working Group sent a supplement to its communication to the Government with the following information.

30. According to the source, on 11 May 2018 the Brazzaville Criminal Court sentenced Mr. Mokoko to 20 years' imprisonment. The source alleges that his conviction, which was handed down in circumstances that seriously compromised the rights of the defence, demonstrates how judicial proceedings are hijacked by the Congolese authorities for political purposes.

31. With regard to the pretrial stage, the source reports that on 12 April 2018 the Indictment Division of the Brazzaville Court of Appeal issued a judgment charging Mr. Mokoko in the Criminal Court with illegal possession of weapons of war and munitions and offences against the internal security of the State. On 13 April 2018, Mr. Mokoko, through his lawyers, filed an appeal against that decision at the Supreme Court. On 23 April 2018, the reporting judge for the Supreme Court sent a letter to Mr. Mokoko's lawyers informing them that they had three days from the date of receipt to file their brief. They did so on 26 April 2018, within the time limit set by the Supreme Court. On Friday 27 April 2018, Mr. Mokoko's lawyers consulted the Supreme Court's case list to ascertain whether a date had been set for the hearing. As the list had not yet been posted, they returned to the courthouse on Monday 30 April 2018. They then found that a list dated 27 April 2018 had been posted indicating that the matter would be considered on 30 April 2018. The Supreme Court therefore held Mr. Mokoko's appeal hearing in the absence of his lawyers, without notifying them and without even having posted the list announcing the hearing. According to the source, this amounts to a violation of the rights of the defence. The violation is all the more serious as the decision cannot be appealed. The source reports that, in a judgment dated 30 April 2018, the Supreme Court dismissed the appeal and confirmed the applicant's indictment before the Criminal Court. On 1 May 2018, it was announced that Mr. Mokoko's trial would be held on 7 May 2018. The procedure was thus expedited considerably, blatantly disregarding the rights of the defence and the right to a fair trial.

32. With regard to the trial stage, the source indicates that on 11 May 2018, after an expedited trial and two hours of deliberations, Mr. Mokoko was sentenced to 20 years' criminal detention. According to the source, the extreme severity of the sentence proves that the aim of the procedure was to halt the political activities of a man who enjoyed a wave of popular support and whose only fault was to have dared to challenge a president who had held power for more than 30 years.

33. The source further adds that the case was added to the list while the criminal court was in session. Contrary to article 251 (3) of the Code of Criminal Procedure, Mr. Mokoko did not attend the drawing of lots for the selection of the jurors who convicted him and therefore did not have the opportunity to exercise his right to challenge their participation. In addition, although Mr. Mokoko was scheduled to appear with seven co-defendants (who were also sentenced, in absentia, to 20 years' criminal detention), he was the only one present at the hearing. The source indicates that one of the co-defendants, who had been Mr. Mokoko's main accuser throughout the judicial investigation, had been residing in France under judicial supervision since the beginning of the proceedings. The day after his conviction by the Brazzaville Criminal Court, he reportedly stated in the media that he had been pressured by the authorities to testify against Mr. Mokoko. He stated that he had been

contacted at the time of the trial by the Congolese Minister of Justice, who urged him to attend the hearing and indicated that if he did not, he would be found guilty, whereas if he did attend, he would be acquitted. He reportedly showed the press the plane tickets he claimed to have received from the authorities to encourage him to attend the trial. The interference by the executive also extended to the hearing; one of the experts called to testify reported having received “instructions” not to appear. Moreover, in flagrant violation of the rights of the defence, Mr. Mokoko was forcefully rebuked, both by the judges and the prosecution, for exercising his right to remain silent, despite this being guaranteed by article 14 of the International Covenant on Civil and Political Rights.

Response from the Government

34. The Working Group wrote to the Congolese Government on 4 May 2018, indicating that it expected a reply by 3 July 2018. On 23 May 2018, the Working Group transmitted to the Government the additional information provided by the source.

35. The Working Group notes that on 12 July 2018, the Government requested an extension of the time limit even though it had already expired. On 13 July 2018, the Working Group replied to the Government that the time limit had already expired and that it was therefore no longer possible to extend it.

Discussion

36. 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.

37. 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.

38. According to the source, Mr. Mokoko’s situation constitutes arbitrary detention under the first three categories (I, II and III).

Allegations relating to arbitrary detention under category I

39. The source argues that Mr. Mokoko’s detention is without legal basis because he enjoys legal immunity and he has been held in pretrial detention for longer than the maximum period of six months permitted under the Congolese Code of Criminal Procedure.

40. With regard to Mr. Mokoko’s immunity, the source alleges that Mr. Mokoko was awarded the honorary title of Grand Officer by way of Presidential Decree No. 86/1044 of 17 November 1986. The source further alleges that, in accordance with Presidential Decree No. 2001-179, persons holding such titles enjoy legal immunity unless it is waived in accordance with Congolese law. However, in its decision of 16 March 2018, the Supreme Court considered that the immunity allegedly enjoyed by Mr. Mokoko under Presidential Decree No. 2001-179 was not applicable, as noted by the source. However, upon full reading of that decision, the Working Group notes that the Court reached this conclusion because according to articles 15 and 125 of the Constitution of the Republic of the Congo, immunity can be conferred only by law and not by presidential decree. The decision of 16 March 2018 was subsequently confirmed by the Supreme Court on 30 April 2018; the Court considered it to be final and did not consider de novo the question of immunity. It is therefore unlikely that Mr. Mokoko would be entitled to immunity since the decree from which he claims to derive immunity has been considered unlawful under national law.

41. In reaching this conclusion, the majority of the Working Group noted the substantial interference with the right to a fair trial in the case, including the alleged changes made by presidential decree to the composition of the Supreme Court as it prepared to discuss the question of Mr. Mokoko’s immunity. The Working Group makes some comments on this interference below, in its consideration of whether the violations of Mr. Mokoko’s right to a fair trial were of such gravity as to render his detention arbitrary under category III. In

addition, the majority of the Working Group took into account the fact that the question of Mr. Mokoko's immunity had also been declared inadmissible on procedural grounds by the Indictment Division of the Brazzaville Court of Appeal in its judgment of 15 February 2018; the source's allegations of interference do not appear to extend to this Court.

42. After careful consideration of these factors, the majority of the members of the Working Group are of the opinion that they are not in a position to conclude that Mr. Mokoko did indeed enjoy immunity under Congolese law. If the Working Group were to conclude that he did enjoy immunity, it would then have to challenge the reasoning of a number of national courts and their application of the law in three separate decisions between February and April 2018, and to substitute its judgment for that of the national courts which determined that Mr. Mokoko was not entitled to immunity in this case. In its jurisprudence, the Working Group has systematically refrained from taking the place of national judicial authorities or acting as a supranational tribunal when, as in this case, it is faced with a question relating to the application of domestic law by the judiciary (see, for example, opinions Nos. 59/2016 and 40/2005). Consequently, the majority of the Working Group cannot conclude that Mr. Mokoko's deprivation of liberty was without legal basis on this particular ground.

43. With regard to Mr. Mokoko's house arrest, the Working Group recalls that "house arrest may be compared to deprivation of liberty provided that it is carried out in closed premises which the person is not allowed to leave. In all other situations, it will devolve on the Working Group to decide, on a case-by-case basis, whether the case in question constitutes a form of detention, and if so, whether it has an arbitrary character."¹ In the present case, Mr. Mokoko's house arrest may be compared to deprivation of liberty in that no one was allowed in or out. Such deprivation of liberty must take place within the framework of the law. However, it appears from the facts presented by the source that it was carried out without any legal basis and without any oversight, which renders it arbitrary.

44. The Working Group further recalls that pretrial detention is an exceptional measure that must be justified under article 9 (3) of the Covenant.² Placement in pretrial detention for an indeterminate period contravenes that article. When the criminal justice system sets a time limit for pretrial detention, any measure extending it renders the detention arbitrary, since it is without legal basis. In the present case, the Court not only ordered an additional extension beyond that permitted by law, it then failed to order a further extension of the detention after 17 February 2017. In these circumstances, the Working Group is of the opinion that Mr. Mokoko's continued detention was without legal basis.

45. The Working Group concludes that Mr. Mokoko's house arrest and detention therefore lack any legal basis, violate article 9 (1) of the Covenant and are arbitrary under category I.

Allegations relating to arbitrary detention under category II

46. According to the source, Mr. Mokoko was confined to his home and then placed in pretrial detention on 16 June 2016 because he exercised his rights to freedom of opinion and expression, freedom of peaceful assembly and association, and participation in his country's public affairs.

47. Once again, the Government chose not to refute the source's credible and reliable allegations when given the opportunity to do so. In view of the sequence of events and circumstances described, as well as the Government's silence, the Working Group considers these allegations to be substantiated.

48. International law guarantees Mr. Mokoko not only the rights to freedom of expression (Covenant, art. 19) and to peaceful assembly (art. 21), but also the right to take

¹ Deliberation 01 adopted by the Working Group at its third session, E/CN.4/1993/24, p. 9. See, for example, opinions Nos. 16/2011 and 2/2007.

² General comment No. 35 of the Human Rights Committee on article 9 (liberty and security of person), para. 38, and opinions Nos. 27/2017 and 62/2017 of the Working Group on Arbitrary Detention.

part in the conduct of public affairs in his country (art. 25). These freedoms are protected by international standards, and their exercise may not give rise to criminal prosecution, as in the present case, especially since the search of Mr. Mokoko's home did not uncover any evidence to support the charges, which appear to have been fabricated. The Working Group recalls that the source in opinion No. 5/2018 made similar claims. It appears from these two cases that there is a system in place in the Congo to silence political opposition. Under these circumstances, Mr. Mokoko's arrest and detention are therefore arbitrary under category II.

Allegations relating to arbitrary detention under category III

49. Given that Mr. Mokoko's detention falls within category II, he should not have been tried. However, since the trial has already taken place and the source has submitted arguments in relation to category III, the Working Group will also consider those arguments.

50. The source alleges that Mr. Mokoko did not receive a fair trial since the investigating officials considered only the evidence for the prosecution. In addition, the President of the Republic expressed his views on the case on several occasions and announced that the trial would soon begin. He also reportedly stated at a joint meeting of the two chambers of parliament on 30 December 2017 that he would like the trials of the detainees, in particular that of Mr. Mokoko, to take place in the first quarter of 2018. The source therefore claims that the executive interfered in the judicial proceedings, which constitutes a serious violation of the right to a fair trial by an independent and impartial judiciary. The source further argues that this interference is also reflected in the modification of the composition of the Supreme Court by Presidential Decree No. 2018-102 of 14 March 2018, just as the Court was about to rule on the question of Mr. Mokoko's legal immunity. The source also asserts that the speed with which the judgment was issued constituted a violation of Mr. Mokoko's right to a defence, since the defence team was not informed of the conclusions of the public prosecutor's office beforehand. The source recalls that an appeal was filed at the Supreme Court on 15 February 2018. On 16 March 2018, only two days after the change in its composition, the Supreme Court issued a judgment dismissing the appeal. In other words, it issued the judgment despite the defence team not having been notified of the conclusions of the public prosecutor's office and despite the fact that this failing was raised in an official letter dated 14 March 2018.

51. In addition, the source reports in the supplementary information it provided that the Supreme Court held its hearing regarding Mr. Mokoko's appeal at very short notice, on 30 April 2018, in the absence of his lawyers, without notifying them and without even having posted the list announcing the hearing. At that hearing, the Court upheld Mr. Mokoko's indictment and announced the following day that the trial would be held on 7 May 2018. The source points out that the whole procedure was expedited without regard for the rights of the defence. The source also condemns the political interference reflected in the severity of the sentence handed down on 11 May 2018. The source further denounces the fact that Mr. Mokoko did not have the opportunity to exercise his right to challenge potential jurors. The source also alleges that certain individuals were pressured to testify against Mr. Mokoko. Lastly, Mr. Mokoko's right to remain silent was not respected.

52. It should be recalled that the Government chose not to refute the source's credible allegations when given the opportunity to do so. Accordingly, the Working Group considers the allegations to be substantiated.

53. The right to a fair trial, as enshrined in article 14 of the Covenant, is central to all criminal proceedings. However, the facts reported by the source reveal interference by the executive in several respects: they reveal violations of the independence of the judiciary,³ the adversarial principle, the right to remain silent, the right to be presumed innocent and the right of the accused to be present and to be represented during the proceedings.

³ See general comment No. 32 (2007) of the Human Rights Committee, on the right to equality before courts and tribunals and to a fair trial, paras. 19 and 20.

54. For all these reasons, the Working Group finds that there has been a substantial violation of the right to a fair trial and that Mr. Mokoko's continued detention is arbitrary under category III.

Opinion of the Working Group

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

The deprivation of liberty of Jean-Marie Michel Mokoko is arbitrary in that it violates articles 9 (1) and (3), 14, 19, 21 and 25 of the Covenant, and falls under categories I, II and III as defined in the Working Group's methods of work.

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

57. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Mokoko immediately and accord him an enforceable right to compensation and a guarantee of non-repetition, in accordance with international law.

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

59. The Government should disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

60. 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. Mokoko has been released and, if so, on what date;
- (b) Whether reparations, including the award of compensation, have been made to Mr. Mokoko;
- (c) Whether an investigation has been conducted into the violation of Mr. Mokoko'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 the Congo with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

61. 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, in the form of a visit by the Working Group.

62. The Working Group requests the source and the Government to provide the requested information within six months of the date of 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. This would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as of any failure to take action.

63. 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 opinions 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.⁴

[Adopted on 23 August 2018]

⁴ Human Rights Council resolution 33/30, paras. 3 and 7.

Annex

Partially dissenting individual opinion by Sètondji Roland Adjovi

1. On the whole, I agree with this opinion of the Working Group. However, I consider the arrest and subsequent detention of Mr. Mokoko despite the immunity he enjoys to be unlawful. In my view, the Working Group should have reached this additional conclusion instead of stating in paragraph 42 of the opinion that the majority of the Working Group concluded that they could not do so.

2. Indeed, the Working Group has previously found in a number of cases that the arrest and detention of a person who enjoys immunity under domestic law constitutes a violation under categories I and III.¹ To reach a different conclusion in the present case would be inconsistent.

3. The main difference between the present case and the previous cases mentioned above lies in the nature of the immunity conferred by a regulatory, non-legislative act on someone awarded an honour, in this case, the order of merit. Immunity is primarily a matter of national law, irrespective of the type of act under which it is conferred; similarly, national law contains a procedure for the withdrawal of immunity. As long as such immunity is in accordance with national law and does not violate international standards, as in the present case, I see no legal reason not to afford it the same weight as immunity conferred through a constitutional or legislative act and related to a role in government. It is usual practice to give precedence to national law, within both the Working Group and other human rights bodies.

4. The Supreme Court's judgment of 30 April 2018 poses a further difficulty. In that judgment, the Court upheld a judgment issued by the Court's Indictment Division in March 2018. The Division had found that a joint reading of articles 15 and 125 of the Constitution led to the conclusion that the regulatory act granting immunity was unlawful because of the principle of the equality of citizens before the law. However, that reasoning did not take into account the fact that the regulatory act in question had been issued under a previous Constitution, not the one referred to by the Court. Nor did it take into account the fact that equality before the law does not apply only to legislative acts. In this respect, it should be noted that in the Sala case (opinion No. 31/2016) the Government in question had raised the same principle but considered that the law granting immunity was unconstitutional and therefore could not have the effect the victim claimed. In its ruling of April 2018, the Congolese Supreme Court did nothing more than simply repeat its previous position. This lack of justification seems to me to be significant in view of the obvious procedural flaws, such as the failure to notify the accused of the conclusions of the public prosecutor's office and the haste with which the newly constituted court issued a negative decision only two days after the appointment of its new members. This ruling would only have convinced me and would only have deserved to be treated with all due respect if there had not been other circumstances that cast doubt on the Court's independence.

5. Moreover, in the present case, the Court of Appeal, in its consideration of the question of immunity, did not conclude that the immunity was invalid: it simply considered that the applicant should have raised the argument earlier and that, by not doing so, he had exceeded the applicable time limit. The adoption of this purely procedural position reinforces our reading of the situation and of the judicial decisions relating to Mr. Mokoko.

6. Consequently, I remain convinced that in this case, since Mr. Mokoko's legal immunity had not been formally revoked, he should not have been arrested. In my humble opinion, it was the Working Group's duty to hold the State accountable for upholding its own laws in respect of security of person.

¹ See opinions Nos. 31/2016, paras. 113–115; 36/2017, paras. 80–87; 5/2018, paras. 37 and 42; 9/2018, para. 37; and 33/2018, paras. 55 and 56.

7. Lastly, I conclude that Mr. Mokoko's arrest and detention also lacked any legal basis because his immunity had not been revoked. This reinforces the conclusion of the Working Group with regard to category I.
