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Working Group on Arbitrary Detention

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Opinions adopted by the Working Group on Arbitrary Detention at its seventy-second, 20–29 April 2015

No. 6/2015 (the Kingdom of Swaziland)

Communication addressed to the Government on 20 February 2015

Concerning Thulani Rudolf Maseko

The Government has not replied to the communication

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 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. Mr. Thulani Rudolf Maseko (hereinafter Mr. Maseko), is a lawyer and activist who advocates for human rights, including constitutional reforms in favour of freedom and democracy in Swaziland. He is a co-founder of the organization called Lawyers for Human Rights Swaziland (LHRS) and the Southern African Human Rights Defenders Network.

4. On 17 March 2014, Mr. Maseko was initially arrested by the Royal Swaziland police from his office situated at the Swazi Plaza in Mbabane, Swaziland. An arrest warrant was shown at the time of the initial arrest. The arrest warrant for Mr. Maseko was issued by Chief Justice Michael Ramodibedi of the High Court for "contempt of court". This charge was based on statements made in an article written by Mr. Maseko, titled *Where the Law Has No Place*, published in *The Nation*, an independent magazine in Swaziland. In the article, Mr. Maseko criticized the conduct of Chief Justice Ramodibedi in relation to the prosecution of a Government vehicle inspector for actions the inspector took against members of the judiciary arising from the misuse of Government vehicles.

5. Upon his initial arrest, Mr. Maseko was detained overnight at the Mbabane Police Station without access to his lawyer. Reportedly, Chief Justice Ramodibedi ordered the police to deny Mr. Maseko access to his lawyer during this period.

6. On 18 March 2014, Mr. Maseko was brought to Chief Justice Ramodibedi's chambers. The lawyers representing him were not informed that this was taking place. However, by chance, the attorneys saw the prosecutor and followed him to the Chief Justice's Chambers. There, Chief Justice Ramodibedi ordered Mr. Maseko remanded into custody for seven days, even though the prosecutor had not requested that the defendants be remanded. After seven days, Mr. Maseko appeared before Judge Simelane who extended the detention.

7. On 6 April 2014, Mr. Maseko was released when Judge Mumcy Dlamini of the High Court of Swaziland determined that the initial arrest warrant was invalid and contrary to Swaziland's Criminal Procedure and Evidence Act. The Attorney's General Office, along with the Office of the Director of Public Prosecutions, appealed this decision.

8. A new verbal order for Mr. Maseko's arrest was issued in open court by Judge Mpendulo Simelane on 9 April 2014. Mr. Maseko was re-arrested following the decision of Judge Simelane to suspend the judgment that had led to his release on 6 April 2014.

9. On 11 April 2014, Judge Simelane denied the defendant's application for bail pending the criminal trial even though the court was presented with no evidence that Mr. Maseko presented a flight risk, a risk of interfering with witnesses, or a risk to others.

10. In response to an application from the accused, Judge Simelane refused to recuse himself from presiding over the criminal trial. This is despite the fact that Judge Simelane personally witnessed the events underlying Mr. Maseko's allegedly contemptuous article, and had taken judicial notice thereof; and Judge Simelane was subpoenaed as a witness.

Thus, in this matter, there appears to be a conflict of interest for Judge Simelane. Nevertheless, Mr. Maseko's trial on the contempt of court charge was heard before Judge Simelane from 14 to 30 April 2014.

11. On 17 July 2014, Judge Simelane of the High Court found Mr. Maseko guilty of the criminal offense of contempt of court. On 25 July 2014, Judge Simelane issued a Judgment sentencing Mr. Maseko to two years' imprisonment without the option of a fine, or supervised release. The prison term is counted from 17 March 2014, the date he was taken into custody. Judge Simelane also imposed a fine of 50,000 Swazi Emalangeni (equivalent to approximately 3,750 Euros) to be paid within one month from the date of the judgment.

12. Mr. Maseko filed an appeal of his conviction and sentence. The appeal has not yet been heard, but is presently anticipated for May 2015.

13. On 3 November, 2014, the Supreme Court of Swaziland declared it was unable to hear the appeal against Mr. Maseko's re-arrest of 9 April 2014 because the record of the proceedings was incomplete, as it did not include a written judgment from Judge Simelane. However, no written record of the re-arrest exists because Judge Simelane issued the order verbally in open court. The Supreme Court postponed the matter indefinitely and indicated that Mr. Maseko would be entitled to submit an application to be released on bail, which would be decided by Judge Simelane.

14. On 3 December 2014, a panel of the Swaziland Supreme Court overruled Judge Dlamini's decision declaring Mr. Maseko's initial arrest on 17 March 2014 unlawful. The Court held that contrary to the prior ruling, Chief Justice Ramodibedi was authorized to issue the original warrant of arrest.

15. The source submits that the continued detention of Mr. Maseko is arbitrary and falls under category II and III of the Working Group's defined categories of arbitrary detention.

16. The source is of the view that the arrest and detention of Mr. Maseko result from his exercise of his right to freedom of opinion and expression, as guaranteed by article 19 of the Universal Declaration of Human rights (UDHR), and article 19 of the International Covenant on Civil and Political Rights (ICCPR). In this regard, the source argues that the penalties imposed on Mr. Maseko's freedom of expression for his purported contempt of court cannot be justified by any measure as a proportionate response to the publication of the article for which he has been punished.

17. The source also argues that the two-year sentence was particularly harsh, as conviction for "contempt of court" in Swaziland ordinarily carries a 30-days sentence or a fine in the amount of 30,000 Swazi Emalangeni (equivalent to approximately 2,250 Euros). The judge added that the sentence should be such that "it serves as a deterrent to others".

18. The source concludes that the judgement and sentence against Mr. Maseko was intended to chill free speech and free expression, particularly with respect to speaking critically about the Government and matters of public concern, such as instances of public corruption. This intent is also evidenced by the severity of its punishment of Mr. Maseko. According to the source, the sentence only aims at sanctioning Mr. Maseko's human rights activities.

19. The source also submits that Mr. Maseko has not been guaranteed the international norms of due process and guarantees to a fair trial, in violation of articles 9 and 10 of the UDHR, and articles 9 and 14 of the ICCPR. The source argues that Mr. Maseko was denied the right to a public hearing by an independent and impartial court and the right to be presumed innocent in a criminal proceeding. In this regard, the source indicates that the initial arrest warrant was issued by Chief Justice Ramodibedi, on his own motion against Mr. Maseko for criticizing his handling of a case.

20. Chief Justice Ramodibedi remanded Mr. Maseko to pre-trial custody without allowing the accused to consult with counsel and even though the prosecution did not request a custodial remand of the accused.

21. Judge Simelane denied Mr. Maseko's application for bail and refused to recuse himself from presiding over the criminal trial where there is a conflict of interest.

22. The source argues that demonstrated by the above mentioned facts, Mr. Maseko's prosecution for contempt of court was a results-driven process designed to ensure a conviction and a disproportionately severe sentence in order to silence criticism of the judiciary.

23. The detention of Mr. Maseko is also contrary to articles 1, 9.3.c and 12.2 of the United Nations Declaration on Human Rights Defenders, adopted by the General Assembly on 9 December 1998. And to articles II and IX of the Declaration of principles of Freedom of Expression in Africa, adopted by the African Commission on Human and People's Rights on 23 October 2002.

Response from the Government

24. The Working Group regrets that the Government has not responded to the allegations transmitted by the Working Group on 20 February 2015.

25. Despite the absence of any information from the Government, the Working Group considers that it is in the position to render its Opinion on the detentions of Mr. Maseko in conformity with paragraph 16 of its Methods of Work.

Discussion

Freedom of expression

26. The Government chooses not to rebut the *prima facie* reliable allegations submitted by the source, according to which Mr. Maseko, a human rights advocate, was deprived of liberty for the article in which he criticized the conduct of Chief Justice Ramodibedi in relation to the prosecution of a Government vehicle inspector for actions the inspector took against members of the judiciary arising from the misuse of Government vehicles. For this publication Mr. Maseko was convicted to two years' imprisonment without the option of a fine or supervised release.

27. In this regard, the Working Group concurs with the statement of the Special Rapporteur on the right to freedom of opinion and expression that the detention and trial of Mr. Maseko for his exercise of the right to express his opinion on a court case "runs contrary to Swaziland's international human rights obligations, in particular under article 19 of the International Covenant on Civil and Political Rights."¹ Moreover, as emphasised by the Special Rapporteur, "criminal sanctions, in particular imprisonment, for alleged libel or defamation are not proportional to the effective exercise of the right to freedom of opinion and expression."²

¹ "Swaziland: UN experts condemn continued detention and trial of human rights defenders", Geneva, 12 June 2014.

² Ibid.

28. Furthermore, as noted by the Special Rapporteur on the independence of judges and lawyers, Mr. Maseko, as a lawyer, "has the right to take part in public discussions of matters concerning the law and the administration of justice."³

29. In this regard, the Working Group also notes that, according to the *Latimer House Guidelines for the Commonwealth*, applicable to the Kingdom of Swaziland as a Commonwealth country, "the criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts"⁴ and that "the criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions."⁵

30. The Working Group considers that Mr. Maseko has been deprived of liberty with disproportionately severe sentence for having peacefully exercised his right to freedom of expression as guaranteed by Article 19 of the UDHR and Article 19 of the ICCPR. Thus, the deprivation of liberty of Mr. Maseko falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

Right to a fair trial

31. Pursuant to Article 14 of the ICCPR, everyone has the right to a fair hearing by an impartial tribunal. The Working Group recalls that, according to the *Bangalore Principles of Judicial Conduct*, "a judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially."⁶ Such proceedings include instances where "the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings" or where the judge "was a material witness in the matter in controversy".⁷

32. In the case under consideration, the initial arrest warrant for Mr. Maseko for criticizing the conduct of Chief Justice Ramodibedi was issued by Chief Justice Michael Ramodibedi himself on his own motion. Furthermore, Chief Justice Ramodibedi remanded Mr. Maseko to pre-trial custody even though the prosecution did not request a custodial remand of the accused.

33. Moreover, it was Judge Simelane, a material witness in the related case, who remanded the accused in custody despite a previous judgement ordering the release of Mr. Maseko. Judge Simelane also denied Mr. Maseko's application for bail and refused to recuse himself from presiding over the criminal trial where there is a conflict of interest.

34. Furthermore, in violation of Article 14 of the ICCPR, Mr. Maseko was deprived of his right to legal assistance and was not allowed to consult with a counsel when the decision to pre-trial custody was considered by Chief Justice Ramodibedi.

35. The Working Group considers that the non-observance of the international norms relating to the right to a fair trial, established in Article 10 of the UDHR and Article 14 of the ICCPR in this case is of such gravity as to give the deprivation of liberty of Mr. Maseko an arbitrary character. Thus, the deprivation of liberty of Mr. Maseko falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

³ "Swaziland: UN experts condemn continued detention and trial of human rights defenders", Geneva, 12 June 2014.

⁴ The Latimer House Guidelines for the Commonwealth, 19 June 1998, VI.1(b)

⁵ Ibid., VII (b).

⁶ Bangalore Principles of Judicial Conduct, 2002, para. 2.5

⁷ Ibid.

Disposition

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

The deprivation of liberty of Mr. Maseko has been arbitrary, being in contravention of Articles 10 and 19 of the UDHR, and Articles 14 and 19 of the ICCPR; it falls within categories II and III of the categories applicable to the consideration of the cases submitted to the Working Group.

37. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Maseko and bring it into conformity with the standards and principles set forth in the UDHR and ICCPR.

38. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Maseko and accord him an enforceable right to compensation in accordance with article 9, paragraph 5, of the ICCPR.

[Adopted on 22 April 2015]
