



# General Assembly

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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-sixth session (18–22 November 2019)

#### Opinion No. 62/2019 concerning Magloire Ngambia (Gabon)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 3 July 2019 the Working Group transmitted to the Government of Gabon a communication concerning Magloire Ngambia. The Government has not replied to the communication. The State became a party to the International Covenant on Civil and Political Rights on 21 January 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, 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*

#### (a) Background

4. Mr. Ngambia is a Gabonese citizen born on 2 April 1971 in Mounana, Gabon. He was appointed Minister of Economic Affairs of Gabon in 2009 and subsequently headed the Ministry for the Promotion of Investment, Public Works, Transport, Housing and Tourism, where he was responsible for land development, in 2012 and 2013.

#### (b) Arrest and detention

5. The source explains that, on 26 December 2016, the public prosecutor for the Court of First Instance of Libreville opened an investigation into a complaint of misappropriation of public funds in connection with several land development projects. This investigation, conducted by the General Investigation Directorate, led to the arrest of Mr. Ngambia, who, at the time, was an adviser to the President of Gabon.

6. The source states that, on 10 January 2017, Mr. Ngambia was charged with misappropriation of public funds, remanded in custody and incarcerated in Libreville prison. A second detention warrant was issued on 30 May 2017. The source indicates that this second charge concerned the same facts cited in the first proceedings and was not based on a second investigation but on the sole investigation conducted, which had given rise to the first detention warrant.

7. On 14 August 2018, the Libreville Indictment Division issued an order committing Mr. Ngambia for trial before the Special Criminal Court.

8. The source states that Mr. Ngambia is contesting the charges against him and that his political opponents are orchestrating a media campaign to make it appear that he has embezzled nearly €1 billion.

9. The source reports that Mr. Ngambia's conditions of detention are appalling. Mr. Ngambia was held in solitary confinement for several months without any legal basis. The cell where he was held, and where he took his meals, was completely dark and had no sanitary facilities or water. He left it only when his lawyers visited him and was consistently prevented from meeting with his family members and relatives during this period.

10. The source also states that Mr. Ngambia's family has reportedly been harassed and investigated. Mr. Ngambia's partner was summoned and questioned by investigators on 18 January 2018.

11. The source submits that Mr. Ngambia's deprivation of liberty is arbitrary under categories I and III.

#### (c) Legal analysis

##### (i) Category I

12. Firstly, the source recalls that, on 10 January 2017, Mr. Ngambia was placed in pretrial detention in connection with the first charge, where he remained for a legal period of one year, i.e. until 10 January 2018. On 8 December 2017, the investigating judge extended his pretrial detention by 6 months, i.e., until 10 July 2018, at which point the detention order expired. Subsequently, on 30 May 2017, Mr. Ngambia was placed in pretrial detention in connection with the second charge, where he remained for a legal period of one year, i.e. until 30 May 2018. On 25 May 2018, the investigating judge extended his pretrial detention by 6 months, i.e., until 30 November 2018, at which point the detention order expired. Since then, there have been no further extensions of these two detention orders. Nevertheless, all petitions for Mr. Ngambia's release have been rejected by the Gabonese courts.

13. The source therefore submits that Mr. Ngambia's deprivation of liberty, under both the detention warrant issued on 10 January 2017 and that issued on 30 May 2017, ceased to

have any legal basis as of 10 July 2018 and 30 November 2018, respectively, in violation of the second paragraph of article 118 of the Code of Criminal Procedure.

14. The source also states that, despite this situation, applications for his statutory release have not been approved. On 21 December 2018, an order refusing his release was issued in respect of the detention warrant of 30 May 2017, whereas Mr. Ngambia's co-defendants were released at the end of the statutory period of detention.

(ii) Category III

15. The source submits that, in the case at hand, the principles set out in international human rights instruments have repeatedly been violated in the proceedings brought against Mr. Ngambia by the Gabonese courts.

16. Firstly, the source alleges a violation of the right to be tried by an impartial court. According to the source, Gabonese law stipulates that only the Public Prosecutor's Office may register cases and issue summonses to appear before a court, in this case the Special Criminal Court. However, in this case, the President of the Court usurped the role of the public prosecutor by issuing notifications of hearings to the lawyers on 27 December 2018 and 1 March 2019 and by requesting that Mr. Ngambia be transported from the prison. The source argues that the actions taken by the President of the Special Criminal Court do not fall within her legal powers and constitute breaches of a judge's duty of impartiality.

17. The source stresses that the President of the Special Criminal Court, whose constitutional, legal and statutory powers relate only to court proceedings, may not usurp the role of the prosecuting authority. At the same time, by failing to carry out the functions entrusted to it, the public prosecution service has been neglectful in fulfilling its remit.

18. The source argues that this situation infringed Mr. Ngambia's rights and freedoms. His defence council submitted letters of protest and petitions on 5, 7 and 8 March 2019 to the President of the Special Criminal Court and the Secretary-General of the Ministry of Justice. The source explains that the actions taken by the defence in the interests of its client were interpreted by the President of the Court as an act of resistance to prevent the hearing from taking place. The source therefore argues that the Government's actions and failures to ensure the impartiality of justice, and the actions of the President of the Court, constitute violations of articles 8, 9 and 11 of the Universal Declaration of Human Rights; articles 2, 9 and 14 of the International Covenant on Civil and Political Rights; principles 2, 9, 32 and 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and articles 6 and 7 of the African Charter on Human and Peoples' Rights.

19. Secondly, the source alleges that the right to a presumption of innocence has been violated. The source reports that Mr. Ngambia was not present at the opening of the hearing on 13 March 2019 owing to the irregularity in the issuance of notification of the hearing by the President of the Special Criminal Court and the subsequent refusal of the prison authorities to transport him from prison. At that hearing, the President of the Court reportedly made the following statement:

"[Mr. Ngambia] has refused to be transported from the prison today. The Public Prosecutor for the Special Criminal Court is absent today. As people are saying in Libreville, elsewhere in Gabon and in the rest of the world, there is a conspiracy to prevent several ministers of the Republic from being tried, several persons who are responsible for public expenditure in Gabon, who have embezzled the country's money and do not want to stand trial. There are dark forces at work in the Gabonese administration, in the Gabonese justice system, in Gabon and throughout the world that are opposed to bringing those who have robbed the country to justice. Today, I have been appointed President of the Special Criminal Court. I am a judge. I did not ask for this post. My only duty is to work for Gabon. In this capacity, I must serve justice in the name of the Gabonese people. All those who stand in the way of Gabonese justice will be revealed for what they are. That is why I have not opened today's hearing of the Special Criminal Court. I have come to speak out, to tell the Gabonese people that those who have robbed the country, those who have robbed the Gabonese people, those who have been condemning you to rot in poverty for years, they refuse to stand trial. The Gabonese justice that is said to be controlled by

[...]. This is why I have come this morning to tell you that Gabonese justice is not at anyone's behest."<sup>1</sup>

20. The source explains that this statement was recorded and then transcribed in a bailiff's report. It has been quoted in many press articles. The source considers this statement to be extremely serious, as it was made in a judicial forum and at a public hearing by the President of the trial court. The source submits that such a statement constitutes a violation of Mr. Ngambia's presumption of innocence.

21. The source also reports that Mr. Ngambia contests all the accusations made against him and that, in his various ministerial posts, he worked tirelessly in the sole interests of the State and the Gabonese people. Yet, in the statement made by the President of the Special Criminal Court, Mr. Ngambia is accused of refusing to leave the prison in order to avoid being tried by the Court. He is described as someone who has robbed the country and the Gabonese people and who is responsible for the poverty of his fellow citizens. In the source's view, this is tantamount to a conviction even though there has been no judgment on the merits. He is also accused of working in complicity with others to undermine the justice system and corrupt the judicial authority.

22. In the light of the above, the source concludes that the Government of Gabon has violated Mr. Ngambia's right to a presumption of innocence under the above-mentioned provisions of the Universal Declaration of Human Rights, the Covenant, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the African Charter on Human and Peoples' Rights.

#### *Response from the Government*

23. The Working Group sent the relevant communication to the Government on 3 July 2019, informing it that, in accordance with the Working Group's methods of work, it had until 2 September 2019 to respond.

24. As at the present date, the Government has not replied to the communication and has not requested an extension of the deadline.

#### **Discussion**

25. 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.

26. 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 (see 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. The Working Group therefore considers the source's allegations to be credible, given the detailed and consistent information that was provided.<sup>2</sup>

27. The Working Group recalls that the United Nations human rights system has expressed concern about the conditions of detention, access to health care for prisoners and the excessive length of pretrial detention in Gabon, particularly in Libreville Central Prison.<sup>3</sup> The Working Group notes that, according to the report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Gabon in 2013, the number of persons held in pretrial detention was very high, persons were often held in pretrial detention for several years and no alternative measures to deprivation of liberty were being applied. The Subcommittee noted that

<sup>1</sup> Bailiff's report of 13 March 2019, containing the statement of the President of the Special Criminal Court, p. 2.

<sup>2</sup> Opinion No. 27/2016, para. 36.

<sup>3</sup> The Committee against Torture has highlighted the lack of information on the enforcement of the law adopted on 26 December 2009, which provides for improved monitoring of persons serving their sentences and better prison management (see CAT/C/GAB/CO/1, para. 17, and A/HRC/WG.6/28/GAB/2, para. 16).

provisional release measures were seldom used and that people were not released as a matter of course when the investigating judge and the Indictments Chamber had failed to give a ruling before the expiry of the period of pretrial detention.<sup>4</sup>

28. The Working Group recalls that, in accordance with article 9 (3) of the Covenant, persons awaiting trial should not, as a general rule, be detained in custody and should be brought promptly before a judge to decide on the lawfulness, necessity and appropriateness of their pretrial detention.<sup>5</sup>

29. The Working Group has pointed out on several occasions<sup>6</sup> that article 9 (3) of the Covenant sets out two cumulative obligations, namely to be promptly brought before a judge within the first days of the deprivation of liberty and to have a judicial decision rendered without undue delays, in the absence of which the person is to be released.<sup>7</sup> In particular, the Working Group considers that it follows from article 9 (3) of the Covenant that liberty is recognized as a principle and detention as an exception in the interests of justice, and that the consideration of alternative non-custodial measures allows it to be ascertained whether the principles of necessity and proportionality have been met.<sup>8</sup>

30. The source asserts that the detention lacks a legal basis since Mr. Ngambia remains in pretrial detention despite the fact that the detention order has not been extended. He has therefore been held in detention beyond the legal time limit. The Government has chosen not to refute this allegation.

31. The source's argument relates to the legal basis for pretrial detention, which falls within the mandate of the Working Group. Any deprivation of liberty for which there are no grounds and which does not comply with the procedure established by law is arbitrary in accordance with article 9 (1) of the Covenant, article 9 of the Universal Declaration of Human Rights and article 6 of the African Charter on Human and Peoples' Rights. In any event, where an order specifies a time limit for pretrial detention, the person concerned should be released at the end of that period unless the detention order is renewed. That did not occur in the present case, despite the petitions made by Mr. Ngambia to that effect. As the order of 10 January 2017 expired on 10 July 2018 and the order of 30 May 2017 expired on 30 November 2018, the continuation of the detention beyond 30 November 2018 was not justified by any order.

32. Moreover, the source recalls that pretrial detention had been ongoing for more than two years at the time of the submission of the communication to the Working Group. The source points out that all applications to the domestic courts to put an end to the detention have failed and that no alternatives to pretrial detention have been considered. The Government has chosen not to refute these allegations. Consequently, in the opinion of the Working Group, Mr. Ngambia has not been afforded access to an effective remedy against his pretrial detention, in violation of article 9 (4) of the Covenant.<sup>9</sup>

33. The Working Group therefore concludes that Mr. Ngambia's detention is arbitrary under category I, as his pretrial detention has lacked any legal basis since 30 November 2018 and no alternative measures have been considered by a court.

34. The source also alleges that the right to a fair trial has been violated to the extent that Mr. Ngambia's detention has become arbitrary.

35. The Working Group recalls that the right to a fair trial includes the right to be tried without undue delay, in accordance with articles 9 (3) and 14 (3) (c) of the Covenant, article 9 of the Universal Declaration of Human Rights, and article 7 (1) (d) of the African Charter on Human and Peoples' Rights. In the present case, pretrial detention has been ongoing, without any prospect of a trial commencing, since January 2017. In the absence of any justification of such a delay by the Government, it must be concluded that the above-mentioned provisions have been violated.

<sup>4</sup> CAT/OP/GAB/1, para. 44.

<sup>5</sup> See *Hill and Hill v. Spain* (CCPR/C/59/D/526/1993), para. 12.3.

<sup>6</sup> A/HRC/19/57, paras. 53–57; see also opinions No. 28/2014, No. 49/2014 and No. 57/2014.

<sup>7</sup> A/HRC/19/57, para. 53.

<sup>8</sup> *Ibid.*, paras. 54 and 55.

<sup>9</sup> Opinion No. 34/2017, paras. 40–42.

36. Furthermore, the source alleges that the court is not impartial within the meaning of article 14 (1) of the Covenant, articles 8 and 10 of the Universal Declaration of Human Rights and article 7 (1) (b) of the African Charter on Human and Peoples' Rights. As the source points out, certain acts taken by the President of the Special Criminal Court constitute a breach of the judge's duty of impartiality. For example, in carrying out certain procedural acts she usurped the role of the public prosecutor and then openly interpreted the challenges raised by the defence as acts of resistance intended to prevent the trial from going forward. On the basis of these credible allegations, which the Government has not contested, the Working Group concludes that the court has showed bias in violation of the above-mentioned provisions.

37. The source adds that the presumption of innocence protected by article 14 (2) of the Covenant, article 11 of the Universal Declaration of Human Rights and article 7 (1) (b) of the African Charter on Human and Peoples' Rights has allegedly been flouted. In this regard, the source refers to the statement made by the President of the Special Criminal Court at the opening hearing of the session. Once again, the Government chose not to refute this allegation. The truth of the claim is therefore established. The Working Group concludes that there has been a serious violation of the impartiality of the court and the presumption of innocence.

38. Furthermore, the Working Group is concerned about the material conditions of Mr. Ngambia's detention, his isolation and the fact that his family are prevented from visiting him, all of which has undoubtedly affected his ability to prepare his defence, in violation of article 14 (3) (b) of the Covenant and article 7 (1) (c) of the African Charter on Human and Peoples' Rights.

39. The seriousness of these multiple violations of Mr. Ngambia's right to a fair trial leads the Working Group to conclude that his detention is arbitrary under category III.

40. Lastly, the Working Group is particularly concerned about allegations of torture and ill-treatment reported by the source and allegedly suffered by Mr. Ngambia during his interrogation and detention. In accordance with its practice, the Working Group considers it necessary to refer the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

### **Disposition**

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

The deprivation of liberty of Magloire Ngambia, being in contravention of articles 8, 9, 10 and 11 of the Universal Declaration of Human Rights; articles 9 and 14 of the International Covenant on Civil and Political Rights; and article 6 and 7 of the African Charter on Human and Peoples' Rights, is arbitrary and falls within categories I and III.

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

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

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

45. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

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

### Follow-up procedure

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

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

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

50. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>10</sup>

*[Adopted on 19 November 2019]*

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<sup>10</sup> See Human Rights Council resolution 42/22, paras. 3 and 7.