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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019

Opinion No. 5/2019 concerning Hervé Mombo Kinga (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 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 24 January 2019 the Working Group transmitted to the Government of Gabon a communication concerning Hervé Mombo Kinga. 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. Hervé Mombo Kinga is a citizen of Gabon who was born on 9 July 1974. He lives in Libreville and owns an Internet café.

5. According to the source, Mr. Mombo Kinga is also an activist who runs a blog. He openly criticized the Government of Gabon and expressed his support for the losing candidate in the 2016 presidential election. Among other activities, Mr. Mombo Kinga showed videos in the vicinity of his café. He had no prior criminal record.

b. Arrest and detention

6. The source reports that in August 2017, Mr. Mombo Kinga participated in peaceful demonstrations against the disputed election results. He also began filming Gabonese citizens living in poverty. According to the source, the majority of the country's population live in such conditions. In making the videos, Mr. Mombo Kinga's aim was to expose the corruption and poor governance of the regime. On one occasion, Mr. Mombo Kinga posted the videos on his Facebook page.

7. According to the source, on 28 August 2017 Mr. Mombo Kinga was arrested in Libreville by the specialized police of Gabon as he was opening up his Internet café. The police officers did not show an arrest warrant or provide a reason for his arrest.

8. The source explains that Mr. Mombo Kinga was then taken to the specialized police documentation centre, which is controlled by the President. Three days later, on 31 August 2017, Mr. Mombo Kinga was transferred to Libreville Central Prison pursuant to a court order. He was not granted the right to be represented by a lawyer until the day he was formally placed in detention. His detention order was issued before he had even appeared in front of the investigating judge, in violation of the provisions of the Gabonese Code of Criminal Procedure. Mr. Mombo Kinga was charged with "insulting the Head of State", under article 158 of the Criminal Code, and with "incitement to violence" and "participation in propaganda activities contributing to public disorder", under article 88 of the Criminal Code. These offences are punishable by prison terms of 10 and 5 years respectively. Mr. Mombo Kinga's lawyer was not allowed to consult his client's file, which in any case did not sufficiently substantiate the charges against Mr. Mombo Kinga, as the Prosecutor later acknowledged.

9. The source also reports that in Libreville Central Prison, Mr. Mombo Kinga was kept in solitary confinement for 1 month and 6 days. In the isolation cell, he was reportedly subjected to psychological torture. Only a very limited amount of light and air entered the cell through a small opening in the ceiling, leaving Mr. Mombo Kinga unable to distinguish night from day. Mr. Mombo Kinga received his food rations through the same opening. Although detainees are generally entitled to three meals a day, Mr. Mombo Kinga was given food only once a day, and only after dark. The food was thrown to him over the wall as if he were an animal. He was unable to wash and had no access to a toilet. He had to sleep on the floor, but could not lie down properly because of the small size of the cell, which measured less than 5.4 square metres. The source argues that this treatment violates article 1 (1) of the Gabonese Constitution, which provides that no one shall be humiliated, ill-treated or tortured even when under arrest or imprisoned.

10. According to the source, although Mr. Mombo Kinga's lawyer wrote to the Director of the Prison, the Minister of Justice and the Ambassador of the United States of America on 2 October 2017 regarding the deplorable conditions in which he was being detained and his human rights, no steps were taken to improve the situation. Eventually, the day after a letter was sent to the Ambassador to the European Union, Mr. Mombo Kinga was transferred to another cell where conditions were better.

11. His lawyer considered Mr. Mombo Kinga's pretrial detention to be illegal under national law and submitted three applications for release on bail. In January 2018, his

lawyer also wrote to the Attorney General to highlight the arbitrary nature of Mr. Mombo Kinga's detention. On 19 January 2018, his lawyer submitted a brief to the investigating judge demonstrating that the facts available did not constitute evidence of an offence and that there was therefore no proof to support the charges brought against Mr. Mombo Kinga. On 1 August 2018, his lawyer also wrote to the Prosecutor to raise the inhumane conditions of his client's detention. The source notes that under article 135 of the Gabonese Criminal Code, public officials who disregard or refuse to comply with the legal requirements relating to arbitrary and illegal detention face a prison sentence and possibly a fine.

12. At the time of submission of the complaint, Mr. Mombo Kinga was no longer being held in solitary confinement, but remained in detention and continued to suffer the harmful effects of his arrest and detention. He was still waiting for a hearing to be scheduled.

c. Legal analysis

i. Category I

13. According to the source, the arrest of Mr. Mombo Kinga is arbitrary under category I because the Government has not invoked any legal basis for his arrest or detention. The source claims that the Gabonese security forces arbitrarily arrested Mr. Mombo Kinga and did not promptly inform him, either verbally or in writing, of the reasons for his arrest or of the charges against him. The detention order issued for Mr. Mombo Kinga does not specify the grounds for his detention, as is required under article 115 of the Gabonese Code of Criminal Procedure. The source also argues that the requirements governing detention set forth in the same article have not been met, since: (a) no evidence has been provided to demonstrate that Mr. Mombo Kinga participated in any of the offences of which he is accused; (b) Mr. Mombo Kinga has cooperated fully with the authorities; and (c) he did not pose a threat to public order. Furthermore, instead of being issued after the initial stage of the investigation and after his appearance before the investigating judge, as required under Gabonese law, the detention order was issued before he appeared before the investigating judge. The source further notes that even the Prosecutor acknowledged that Mr. Mombo Kinga's case file did not sufficiently substantiate the charges against him.

14. According to the source, the circumstances of the case represent a clear violation of international and national law, namely article 9 of the Universal Declaration of Human Rights, articles 9 (2) and 14 (3) of the International Covenant on Civil and Political Rights, and article 115 of the Gabonese Code of Criminal Procedure, thus ruling out any legal basis for Mr. Mombo Kinga's arrest within the meaning of category I.

ii. Category II

15. The source maintains that Mr. Mombo Kinga was arrested for insulting the Head of State, participating in propaganda activities, inciting violence and causing public disorder after posting online a video that exposed the poor living standards of the Gabonese people. However, according to the source, Mr. Mombo Kinga simply sought to contest the results of the presidential election through peaceful expression, in accordance with fundamental rights protected both by international law and by the Gabonese Constitution. In publishing his personal images and videos on the Internet, Mr. Mombo Kinga was exercising his right to facilitate the transmission of information to others through a public online platform. However, owing to the repression of activists and independent media in Gabon, unjustified accusations of incitement to violence, propaganda activities and causing public disorder are regularly made against citizens who, like Mr. Mombo Kinga, simply seek to protest peacefully and are then persecuted by the Gabonese Government for their chosen methods of expression.

16. According to the source, by depriving Mr. Mombo Kinga of his right to freedom of expression, the Government of Gabon violated article 19 of the Universal Declaration of Human Rights, article 19 of the Covenant, article 1 (2) of the Constitution of Gabon and article 9 of the African Charter on Human and Peoples' Rights.

iii. Category III

17. According to the source, the Government of Gabon has violated several norms of international law pertaining to the right to a fair trial, including the notion of the presumption of innocence enshrined in article 11 of the Universal Declaration of Human Rights, article 14 (2) of the Covenant and article 1 (23) of the Constitution of Gabon. In addition, torture is prohibited under article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant, article 5 of the African Charter on Human and Peoples' Rights and article 1 (1) of the Constitution of Gabon.

18. The source maintains that no arrest warrant was served on Mr. Mombo Kinga and he was not informed of any charges brought against him at the time of his arrest. He was arbitrarily detained by the specialized police, who did not explain to him why he was being arrested. Accordingly, in the absence of an arrest warrant, Mr. Mombo Kinga's deprivation of liberty was arbitrary.

19. The source also reports that, following his arrest, Mr. Mombo Kinga was held incommunicado at the documentation centre for three days. He was not provided with the opportunity to secure the services of a lawyer in order to obtain full and prompt disclosure of the details of his detention order and to represent him and present evidence in his defence. Mr. Mombo Kinga's lawyer only began to represent him on 31 August 2017, three days after his transfer to the documentation centre. The lawyer was not subsequently allowed to consult his client's file. Although article 14 (3) of the Covenant provides for the right to a defence, including the preparation of a defence and the possibility to communicate with counsel of one's own choosing, Mr. Mombo Kinga was not able to communicate effectively with his legal counsel in a suitable or timely manner. This refusal of access to a lawyer provides confirmation of the arbitrary nature of Mr. Mombo Kinga's deprivation of liberty.

20. The source also argues that Mr. Mombo Kinga's arrest and continued detention on unjustified charges were carried out in a totally authoritarian manner, since the Gabonese State failed to comply with the minimum international standards of due process set forth in the Universal Declaration of Human Rights. Gabon therefore has a duty to ensure that Mr. Mombo Kinga receives a fair trial before an impartial and independent judicial body. The right to be tried by an impartial and independent tribunal is an absolute right which cannot be subject to any exception. The requirement of independence includes the independence of the judiciary from any political interference by the executive and legislative branches. However, according to the source, Mr. Mombo Kinga was considered guilty before any hearing was held and before he had appeared before the investigating judge as required by law. Mr. Mombo Kinga's continued pretrial detention, which had been ongoing for a period of almost 17 months at the time the present communication was submitted, violated the notion of the presumption of innocence. Mr. Mombo Kinga was treated as if he were guilty of the most heinous crime and was placed in solitary confinement and subjected to psychological torture. The investigating judge extended his pretrial detention and repeatedly ignored his lawyer's requests for bail, in violation of the right to an effective remedy under article 8 of the Universal Declaration of Human Rights. The court rejected Mr. Mombo Kinga's appeals for the dismissal of the unjustified charges brought against him, even though the Government failed to find and produce clear and sufficient evidence to support the criminal charges of insulting the Head of State and inciting violence. Shortly after Mr. Mombo Kinga's arrest, the Prosecutor himself acknowledged that the case file did not sufficiently substantiate the charges against him.

21. The source therefore concludes that unjustified criminal charges were brought against Mr. Mombo Kinga purely to punish him for his opinions and for supporting the rival of the outgoing President, in violation of his right to freedom of expression as guaranteed under national and international law. For these reasons, the unjustified accusations made against Mr. Mombo Kinga and his continued detention have no basis in law and violate the principles of international law, making his detention arbitrary under category III.

iv. Category V

22. The source claims that Mr. Mombo Kinga posted his political opinions online and questioned the results of the presidential election of 27 August 2016. He used peaceful means to publish his opinions and shared the images he had created himself in order to raise awareness among the Gabonese people. The Government of Gabon targeted him because he shared online political opinions that it perceived as a threat. Mr. Mombo Kinga's arrest and detention were therefore representative of forms of discrimination on the basis of his political opinions and his status as a human rights activist and blogger. Consequently, the Government of Gabon has violated article 7 of the Universal Declaration of Human Rights, article 26 of the Covenant and articles 1 (2) and 2 of the Gabonese Constitution, making Mr. Mombo Kinga's deprivation of liberty arbitrary under category V.

Response from the Government

23. On 24 January 2019, a communication relating to the allegations set out above was sent to the Government of Gabon. The Working Group, in accordance with its methods of work, set 25 March 2019 as the deadline for the Government's response. The Working Group notes that the Government has not replied to this communication and has not requested an extension of the deadline.

Discussion

24. The Working Group notes that Mr. Mombo Kinga was released from prison on 4 February 2019. Following his release, the Working Group has the option of filing the case or rendering an opinion as to the arbitrariness of the detention, in conformity with paragraph 17 (a) of its methods of work. In this case, in the light of the circumstances, and notwithstanding 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.

25. 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.

26. Firstly, the Working Group recalls the concerns previously expressed by the Committee against Torture with regard to conditions of detention, access to health care for prisoners, the excessive length of pretrial detention and the failings of the Gabonese system, particularly in Libreville Central Prison.¹ Furthermore, the Working Group notes that pretrial detention is used systematically by the Gabonese authorities.²

27. The Working Group notes that the source indicates that Mr. Mombo Kinga was arrested on 28 August 2017 without a warrant and has not received any explanation of the reasons for his arrest. Neither was he subsequently informed in a timely manner of the reasons for his arrest or of the charges against him. After his detention order was issued, Mr. Mombo Kinga had no contact with his family or his lawyer and was thus prevented from using any remedy to challenge the lawfulness of his arrest and continued detention. This constitutes a violation of article 9 of the Covenant and article 9 of the Universal Declaration of Human Rights within the meaning of category I of arbitrary detention.

28. According to the information provided by the source, Mr. Mombo Kinga was arrested and detained after participating in peaceful demonstrations against the disputed election results. He also exposed the living conditions of the Gabonese people by sharing

¹ The Committee against Torture has highlighted the lack of information on the enforcement of the law adopted on 26 December 2009 that 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).

² CAT/OP/GAB/1, para. 44.

his videos and images online. The Working Group highlights the fact that freedom of expression and freedom of opinion are guaranteed under article 19 of the Covenant, article 19 of the Universal Declaration of Human Rights and article 9 of the African Charter on Human and Peoples' Rights. This freedom of expression may be restricted only under the conditions provided for in article 19 (3) of the Covenant, namely: (a) the restriction must be expressly provided for in law; (b) it must serve one of the legitimate objectives set out in paragraph 3 of the article; and (c) it must be proportionate and necessary to the achievement of that objective.³ However, the Working Group notes that none of these conditions has been met in this case. In its view, none of them would be relevant to a peaceful demonstration and the online publication of images and videos. Mr. Mombo Kinga is also entitled to the right to freedom of political association under article 22 of the Covenant. He cannot be deprived of his liberty for having supported a candidate in a presidential election. In short, Mr. Mombo Kinga's arrest and detention occurred after he exercised freedoms guaranteed by international instruments. The Working Group therefore considers that, in the absence of any justification in accordance with the above-mentioned provisions, the arrest and detention of Mr. Mombo Kinga were arbitrary under category II.

29. This conclusion implies that a trial would not be justified. However, in this case, the conclusion is compounded by allegations of violations of the right to a fair trial, which require examination.

30. The source also indicates that during the first three days he was held in police custody Mr. Mombo Kinga was not able to see his family or receive assistance from his lawyer, who was not allowed access to the case file. Moreover, the order for Mr. Mombo Kinga's detention was issued in advance of his appearance before the investigating judge. After the detention order was issued, he was placed in secret detention and had no further contact with the outside world. He had been in pretrial detention for 17 months at the time his complaint was submitted to the Working Group. The Government has chosen not to refute these facts, and the Working Group has no reason to doubt their veracity. The Working Group therefore concludes that there has been a violation of the right to legal assistance, the right to be heard and the right to be tried within a reasonable time. The right to a fair trial has therefore been compromised to such an extent that Mr. Mombo Kinga's continued detention was arbitrary under category III.

31. The Working Group is convinced that Mr. Mombo Kinga's arrest and detention came about as a result of his political activism on social media and his opposition to the ruling regime. Those activities also confer upon him the status of defender of freedom of expression and political opinion in the Gabonese social context. The Group has already concluded that the status of human rights activist is a protected status under article 26 of the Covenant.⁴ The Working Group recalls that international law requires States to take all necessary measures to ensure that the competent authorities protect everyone from arbitrary threats, pressures and actions directed against them in the exercise of the right to promote human rights, in accordance with article 12 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Consequently, the Working Group concludes that Mr. Mombo Kinga has been a victim of discrimination because of his political views and his criticism of the Government and of the ruling political party, in violation of article 26 of the Covenant and article 7 of the Universal Declaration of Human Rights. His arrest and detention are thus arbitrary under category V.

32. Lastly, the Working Group is particularly concerned about allegations of torture and ill-treatment reported by the source and allegedly suffered by Mr. Mombo Kinga during his interrogation and detention. The Working Group therefore deems it necessary to refer the matter to the relevant Special Rapporteur for further consideration of the circumstances of the case and, if necessary, appropriate action.

³ See Human Rights Committee, general comment No. 34 on the freedoms of opinion and expression, para. 22.

⁴ Opinion No. 48/2017, para. 50.

33. In accordance with its practice, the Working Group will refer to the relevant special procedures mandate holders the allegations falling within their competence, namely the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

Disposition

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

The deprivation of liberty of Hervé Mombo Kinga, being in contravention of articles 7, 8, 9, 11 and 19 of the Universal Declaration of Human Rights and of articles 9, 14, 19, 22 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

35. The Working Group requests the Government of Gabon to take the steps necessary to remedy the situation of Hervé Mombo Kinga 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 and the Universal Declaration of Human Rights, with the inclusion of a guarantee of non-repetition.

36. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Hervé Mombo Kinga an enforceable right to compensation or other reparations, in accordance with international law.

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

38. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the situation of human rights defenders, and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for appropriate action.

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

Follow-up procedure

40. 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 compensation or other reparations have been made to Hervé Mombo Kinga;
- (b) Whether an investigation has been conducted into the violation of Hervé Mombo Kinga's rights and, if so, the outcome of the investigation;
- (c) 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;
- (d) Whether any other action has been taken to implement the present opinion.

41. 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.

42. The Working Group requests the source and the Government to provide the above-mentioned 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.

43. 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.⁵

[Adopted on 25 April 2019]

⁵ See Human Rights Council resolution 33/30, paras. 3 and 7.