

From the President

His Excellency Paul Biya
President of the Republic of Cameroon
Office of the President
P.O. Box 100
Yaoundé
Cameroon



By email: cellcom@prc.cm

25 April 2017

Your Excellency

Prolonged detention - Lawyer Nkongho Felix Agbor and others

The Law Society is a professional body representing more than 166,000 lawyers in England and Wales. Its aims include upholding the independence of the legal profession, the rule of law and human rights around the world. The Law Society has Special Consultative Status with the Economic and Social Council of the United Nations since 2014.

We understand that on 30 March 2017, the Minister of Justice and Keeper of the Seals announced that certain measures would be taken, such as the inclusion of a Common Law Section as part of the Supreme Court and National School of Administration and Magistracy (ENAM), and the recruitment of more Anglophone teachers at ENAM, as well as court officers. We also understand that the internet shutdown has been lifted in the Anglophone regions. Although the Law Society welcomes such measures to the extent that these address concerns that gave rise to the demonstrations of lawyers and other civil society actors in Cameroon recently, we remain concerned about the fact that Nkongho Felix Agbor, Fontem Aforteka'A Neba, Paul Ayah Abine, and others are being tried by a military tribunal pursuant to Law No. 2014/028 of 28 December 2014 on the suppression of acts of terrorism.

We refer to our letter of 13 February 2017, regarding the arrest and detention of Nkongho Felix Agbor, Fontem Aforteka'A Neba, Paul Ayah Abine, and others. In that letter, we referred to international and regional standards on the lack of jurisdiction of military tribunals over civilians, the rights to freedom of expression, the right to liberty and security of the person, and other rights. We understand that Nkongho Felix Agbor and Fontem Aforteka'A Neba were arrested and detained on 17 January 2017 and were detained formally by order of 20 January 2017 of the "Commissaire du Gouvernement" of the Military Tribunal of Yaoundé.

We are concerned about the jurisdiction of a military tribunal to rule on cases regarding civilians, and the death penalty that applies to the crimes that the detainees have been charged with. We are also concerned about their arrest and detention, about possible violations of their right to freedom of expression, association, peaceful assembly, as well as their right to a fair trial. We understand that at a hearing on 27 April 2017, the military tribunal will need to decide whether to keep the accused in detention or release them. In this regard, the following international and regional standards apply.

As reiterated by Lawyers Rights Watch Canada and others, pre-trial detention is viewed in international law as an option to be used only when strictly necessary and as a last resort. A

Representing, promoting and supporting solicitors

113 Chancery Lane London WC2A 1PL Dx 56 Lon/Chancery Ln
t: 020 7242 1222 f: 020 7831 0344 www.lawsociety.org.uk

presumption in favour of pre-trial release is based on the presumption of innocence and the right to liberty and security of the person, and must be afforded to all persons equally. International and regional standards provide that pre-trial detention can only be justified when used to prevent the accused from absconding, committing a serious offence, or interfering with the administration of justice. Whatever the justification, detention should be used only as a last resort, when, following a consideration of the widest possible range of alternatives, a Court determines that detention remains necessary to address the risk identified.

The International Covenant on Civil and Political Rights, acceded to by Cameroon on 27 June 1984

Article 9(3): [...] It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

UN Human Rights Committee, General Comment No. 8: Article 9 (Right to liberty and security of persons), 1982

Para. 3: “[p]re-trial detention should be an exception and as short as possible.”

UN Human Rights Committee, *Womah Mukong v. Cameroon*, U.N. Doc. CCPR/C/51/D/458/1991 (1994), para. 9.8:

The Committee notes that the State party has dismissed the author's claim under article 9 by indicating that he was arrested and detained in application of the rules of criminal procedure, and that the police detention and preliminary enquiries by the examining magistrate were compatible with article 9. It remains however to be determined whether other factors may render an otherwise lawful arrest and lawful detention "arbitrary" within the meaning of article 9.

The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. As the Committee has observed on a previous occasion, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances... Remand in custody must further be necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime.

UN Human Rights Committee, *Aleksander Smantser v. Belarus*, U.N. Doc. CCPR/C/94/D/1178/2003, 23 October 2008, para. 10.3:

"[bail should be granted] except in situations where the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction of the State party."

UN Human Rights Committee, *Hill v. Spain*, U.N.Doc CCPR/C/59/D/526/1993, 2 April 1997, para. 12.3:

"bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party."

Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September, 1990, A/Conf.144/28/Rev.1, p. 158.

"Considering that it is desirable, for humanitarian, social and economic reasons, to reduce the application of pre-trial detention to the minimum compatible with the interests of justice.

Recommends that Member States use pre-trial detention only if circumstances make it strictly necessary and as a last resort in criminal proceedings.

2b. Pre-trial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offences and there is a danger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are left free".

UN Body of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment

39. Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)

2.3 In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of noncustodial measures, from pre-trial to post-sentencing dispositions. The number and types of noncustodial measures available should be determined in such a way so that consistent sentencing remains possible.

3.4. Non-custodial measures imposing an obligation on the offender, applied before or instead of formal proceedings or trial, shall require the offender's consent.

3.5. Decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority, upon application by the offender.

6.1. Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

6.2. Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

6.3. The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

African Charter on Human and Peoples' Rights

Article 6: Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Principles and Guidelines on The Right to a Fair Trial and Legal Assistance in Africa

Para. M(1)(e) (Right to liberty and security)

Unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial. However, release may be subject to certain conditions or guarantees, including the payment of bail.

African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa

10.b: Pre-trial detention is a measure of last resort and should only be used where necessary and where no other alternatives are available.

11 a. Judicial authorities shall only order pre-trial detention:

- i. On grounds that are clearly established by law and which are consistent with international standards, and not motivated by discrimination of any kind such as on the basis of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, disability or any other status; and
- ii. If there are reasonable grounds to believe that the accused has been involved in the commission of a criminal offence that carries a custodial sentence, and there is a danger that he or she will abscond, commit further serious offences or if there is a danger that the release of the accused will not be in the interests of justice [...]

c. Judicial authorities shall clearly demonstrate in the reasons for their decisions that they have considered alternatives before making a pre-trial detention order.

d. Judicial authorities shall provide written reasons for decisions to order pre-trial detention. This should include clear demonstration that alternatives to pre-trial detention were considered.

e. Persons subject to pre-trial detention orders shall have the right to challenge the lawfulness of their detention at any time and to seek immediate release in the case of unlawful or arbitrary detention, and compensation and/or other remedies as set out in Part 8 of these Guidelines.

[...]

g. The burden of proof on the lawfulness of initial detention orders, and the lawfulness and necessity of extended or continued pre-trial detention, lies with the State.

12. a. Regular review of pre-trial detention orders shall be provided for in national law. Judicial authorities and detaining authorities shall ensure that all pre-trial detention orders are subject to regular review.

b. In making a pre-trial detention order, or in extending or renewing pre-trial detention, judicial authorities shall ensure that they have thoroughly considered the need for continued pre-trial detention and shall give consideration to the following issues:

- i. Assess whether sufficient legal reasons exist for the arrest or detention and order release if they do not exist.
- ii. Assess whether the investigating authorities are exercising due diligence in bringing the case to trial.
- iii. If the individual is suspected of a criminal offence, assess whether in the circumstances of the case of the individual, the detention pending trial is necessary and proportionate. In such assessment, among other things, responsibilities as primary caretakers should be taken into consideration.
- iv. Enquire about and take means necessary to safeguard the well-being of the detainee.

c. Judicial authorities shall provide written reasons for orders to extend or renew pre-trial detention.

African Commission on Human and Peoples' Rights, Principles and Guidelines on Human and People's Rights while Countering Terrorism in Africa

C. Pre-Trial and Pre-Conviction Deprivation of Liberty:

There is a presumption of liberty and pre-trial detention shall be an exceptional measure that shall be used as a means of last resort, and alternatives to pre-trial detention shall be employed at as early a stage as possible. Unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with the administration of justice, or posing a clear and serious risk to others, States must ensure that they are not kept in custody prior to, or pending, the final outcome of their trial. If a court grants bail/provisional release, any refusal by the executive to implement that order undermines the independence of the judiciary.

African Commission on Human and Peoples' Rights, Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. DRC (25/89-47/90-56/91-100/93), para. 42:

Article 6 of the African Charter guarantees the right to liberty and security of person. The indefinite detention of those who protested against torture, as described in communication 25/89, violates Article 6.

African Commission on Human and Peoples' Rights, Constitutional Rights Project v. Nigeria (II) (2000) AHRLR 248 (ACHPR 1999), para. 19:

A subsidiary issue is the length of time that has elapsed since their arrest. In a criminal case, especially one in which the accused is detained until trial, the trial must be held with all possible speed to minimise the negative effects on the life of a person who, after all, may be innocent.

African Commission on Human and Peoples' Rights, Zegveld and Another v Eritrea (2003) AHRLR 84 (ACHPR 2003), para. 56:

The African Commission holds the view that the lawfulness and necessity of holding someone in custody must be determined by a court or other appropriate judicial authority. The decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the state can provide appropriate justification. Therefore, persons suspected of committing any crime must be promptly charged with legitimate criminal offences and the state should initiate legal proceedings that should comply with fair trial standards as stipulated by the African Commission in its Resolution on the Right to Recourse and Fair Trial and elaborated upon in its Guidelines on the Right to Fair Trial and Legal Assistance in Africa.

In light of the arbitrary arrest and prolonged detention of Nkongho Felix Agbor, Fontem Aforteka'A Neba, Paul Ayah Abine, and others, as well as the abovementioned international and regional standards, we respectfully urge that the relevant authorities:

1. release the aforementioned persons without delay;
2. ensure that, pending any further proceedings and only if required and in compliance with international norms, non-custodial measures are applied;
3. ensure that the persons who have been arrested and detained are tried by an ordinary court, not by a military tribunal, and that they can appeal any judgment rendered through an independent, impartial, judicial proceeding that is open to the public and in which all rules regarding due process are respected.

We will continue to monitor the situation of Nkongho Felix Agbor, Fontem Aforteka'A Neba, Paul Ayah Abine, and others who have been arrested and detained in Cameroon.

Yours sincerely,



Robert Bourns
President

Direct Line: +44 20 7242 1222
Email: president@lawsociety.org.uk

cc.

Mr Laurent Easo
Minister of Justice and Keeper of the Seals
Ministry of Justice
BP 466
Yaoundé
Cameroon

Mr Martin Belinga Eboutou
Director of Civil Cabinet
Presidency of the Republic of Cameroon
P.O. Box 100
Cameroon
Email: cellcom@prc.cm

Mr Ferdinand Ngoh Ngoh
Secretary General of the Presidency
PO Box 100
Yaoundé
Cameroon
Email: cellcom@prc.cm

Honourable Cavaye
Speaker of the National Assembly
PO Box 4808
Yaoundé
Cameroon
Email: ndumjt@yahoo.com

Yeguié

Djibril

Mr Justice Daniel Mekobe Sone
President of the Supreme Court
B P 1957
Yaoundé
Cameroon

His Excellency Philemon Yang
Prime Minister of the Republic of Cameroon
Office of the Prime Minister
Yaoundé
Cameroon
Email: spm@spm.gov.cm

The African Commission on Human and People's Rights
31 Bijilo Annex layout
Kombo North District
Western Region
P.O. Box 673
Banjul
The Gambia
Email: au-Banjul@africa-union.org

High Commission of Cameroon
84 Holland Park, Kensington, London W11 3SB
United Kingdom
Email: info@cameroonhighcommission.co.uk

British High Commission in Yaounde
Avenue Winston Churchill
Yaounde
Centre Region
547
Cameroon
Email: bhc.yaounde@fco.gov.uk

Ms. Sofia Shariff
Foreign & Commonwealth Office
King Charles St
London SW1A 2AH
United Kingdom
Email: Sofia.Shariff@fco.gov.uk

Ms Katalaina Sapolu
Rule of Law Division
Commonwealth Secretariat
Marlborough House
Pall Mall, London SW1Y 5HX
United Kingdom
Email: k.sapolu@commonwealth.int