



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2396/2014\*, \*\*

<i>Communication submitted by:</i>	Floribert Ndjabu Ngabu, Pierre Célestin Mbodina Iribi and Bède Djokaba Lambi Longa (represented by counsel, A.W. Eikelboom, P.J. Schüller and G. Sluiter)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Democratic Republic of the Congo
<i>Date of communication:</i>	28 November 2011 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 27 May 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	29 October 2020
<i>Subject matter:</i>	Arbitrary arrest; arbitrary detention; the right to be brought promptly before a judge; compensation for arbitrary detention
<i>Procedural issue:</i>	Lack of cooperation by the State party
<i>Substantive issue:</i>	Right to liberty and security of the person
<i>Article of the Covenant:</i>	9
<i>Article of the Optional Protocol:</i>	4 (2)

1. The authors of the communication are Floribert Ndjabu Ngabu, Pierre Célestin Mbodina Iribi and Bède Djokaba Lambi Longa, nationals of the Democratic Republic of the Congo born in 1971, 1974 and 1966, respectively. They claim that the State party has violated their rights under article 9 of the Covenant. The Democratic Republic of the Congo acceded to the Optional Protocol to the Covenant on 1 November 1976. The authors are represented by counsel, A.W. Eikelboom, P.J. Schüller and G. Sluiter.

#### The facts as submitted by the authors

2.1 The authors were actively involved in organizations that opposed the party in power in the State party. Mr. Ngabu was head of the Front des nationalistes et intégrationnistes. He

\* Adopted by the Committee at its 130th session (12 October–6 November 2020).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christof Heyns, Bamariam Koita, David H. Moore, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



was arrested in Kinshasa on 27 February 2005. In January 2005, Mr. Iribi, a representative of Front des nationalistes et intégrationnistes, arrived in Kinshasa from Ituri Province. On 9 March 2005, he was arrested, along with several other members of this group, including Germain Katanga. Following his arrival in Kinshasa, Mr. Longa, spokesperson for the Union des patriotes congolais, was arrested on 19 March 2005, together with several other members of the Union, including Thomas Lubanga.

2.2 Following their arrests, the authors were held in various detention centres in the Democratic Republic of the Congo until they were transferred, on 27 March 2011, to The Hague, to testify before the International Criminal Court. At the time of the submission of the present communication, they were still being held in The Hague.

2.3 Upon being arrested, the authors were informed that they were suspected of being involved in the murder, on 25 February 2005, of nine Bangladeshi United Nations peacekeepers in Ituri.<sup>1</sup> No evidence was ever provided. The authors were in Kinshasa at the time of the murders. It was only on 18 April 2006, by which time they had been in detention without cause<sup>2</sup> for over a year, that the Chief Military Prosecutor filed a petition with the Military High Court to extend the pretrial detention of the authors and of five other individuals. In the petition, the Chief Military Prosecutor recalls that the accused were placed in pretrial detention on 19 March 2005 and that, according to article 209 of the Code of Military Justice, the pretrial detention period cannot be extended for more than 12 consecutive months, unless a competent court authorizes a further extension. The petition states that the authors are accused of committing murders that constitute crimes against humanity in Ituri between May 2003 and December 2005. The authors point out that this period covers nearly an entire year during which they were in detention. In their applications for provisional release, they submit that their arrests were unlawful and that their detention is also unlawful, owing to its duration and the absence of evidence to support it.<sup>3</sup>

2.4 By its ruling of 1 December 2006, the Military High Court authorized an extension of the authors' detention by 60 working days, on the ground that it was necessary in order to conclude the investigation.<sup>4</sup> It again authorized an extension of 60 working days on 10 April

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<sup>1</sup> A letter from the authors' counsel, dated 18 May 2010, states that the authors were initially charged with a breach of State security and subsequently with the murder of nine peacekeepers.

<sup>2</sup> In its ruling of 1 December 2006, the Military High Court notes that "the detention of the accused from 9 March 2005 to 9 March 2006 falls within the competence of the Chief Military Prosecutor, as set out in article 209 (1), to extend the period of detention for one month and subsequently on a month-to-month basis for as long as the investigation so requires. The authors' detention was authorized by the orders to extend the detention period and justified by the ongoing requirements of the investigation. The Public Prosecutor's Office cannot be held responsible for the period of pretrial detention from 20 April, on which date the application for an extension from the Public Prosecutor's Office was received by the registry of the Military High Court, to the current day; indeed, the situation was the result of the irregular configuration of the Military High Court, which at the time was awaiting a decision by the State's leadership in order to establish a normal composition. ... Therefore, the alleged unlawfulness of the authors' pretrial detention is unfounded. In that connection and despite the possible irregularities relating to the detention that preceded the Military High Court's involvement in the case, the Court states that it is well established that the judge is not in a position to assess the lawfulness of the detention preceding his or her involvement in the case; the judge's duty is exclusively to allow the detention to continue if it appears warranted, and not to rule on the lawfulness of the detention in the first place or on any irregularities relating to the period of detention that has already elapsed. The only oversight in respect of detention provided for in article 209 of the Code of Military Justice, which allows a military judge to review the pretrial detention orders of public prosecutors, becomes necessary only in cases where the pretrial detention period exceeds 12 consecutive months, and not before. A court review of a period of detention lasting fewer than 12 months would be illegal under the Code of Military Justice, which gives the Chief Military Prosecutor full oversight over such detention."

<sup>3</sup> In its ruling, the Military High Court notes the detainees' claim that some of them were not brought before a judge prior to being placed in detention. The file does not specify whether that applies also to the authors of the present communication.

<sup>4</sup> The Court rejected the authors' application for provisional release in view of the flight risk and of the serious nature of the charges against them.

2007.<sup>5</sup> No further extension was granted. Thus, at the time of the submission of the present communication, the authors had been in detention without cause for nearly four and a half years.

2.5 Mr. Longa sent letters requesting his release to the Chief Military Prosecutor in May 2006 and to the First President of the Military High Court in June 2007. In the latter letter, he maintained that his detention after the last period of extension had expired, was unlawful. He received no answer. On 4 December 2009, the counsel for the authors and four other detainees raised the same issue in a letter he sent to the Chief Military Prosecutor, copies of which were sent to the Minister of Defence, the Minister of Justice, the Minister of Human Rights and the First President of the Military High Court. In that letter, he noted that the last extension, the validity of which had expired on 10 June 2007, had thus greatly been exceeded, but that the Chief Military Prosecutor appeared unconcerned about the welfare of his clients.

2.6 On 18 May 2010, having received no response, the new counsel for the detainees sent an open letter to the President of the State party, in which he stated that his clients had been detained at the Central Prison of Kinshasa for over five years; that they had been initially accused of a breach of State security, then of the murder of nine peacekeepers, and most recently for crimes against humanity; and that no extension of their detention had been granted past 10 June 2007. He maintained that their being kept in detention constituted a violation of the right to presumption of innocence, the right to proper treatment while in detention, the right to a fair trial, the right to be tried within a reasonable amount of time and due process. The President of the Senate confirmed that the letter had been received but no action was taken.

2.7 In March 2011, the authors were transferred to The Hague at the request of the International Criminal Court. On 19 October 2011, the Court confirmed that the authors' detention was under the exclusive authority of the Democratic Republic of the Congo, following a request by the Court to facilitate their testifying at the Court's headquarters.

### **The complaint**

3.1 The authors claim a violation of their rights under article 9 of the Covenant. Regarding article 9 (1), no evidence of the charges brought against the authors has ever been presented. In any event, the charge that they were involved in the murder of nine peacekeepers in February 2005 was apparently dropped more than a year later, when the Military High Court was asked to formally place the authors in pretrial detention, in the light of new charges against them involving crimes against humanity. Even though the authorities of the State party stated before the Military High Court that it would receive information – presumably incriminating – from the International Criminal Court, the latter has not, to the authors' knowledge, supplied any such information. In the absence of any other elements, it is assumed that such information does not exist. Given the lack of evidence, the arrests must be considered as arbitrary. The authors refer to the case of *Ilonge and Shandwe v. Democratic Republic of the Congo*, in which the Committee found that the detention of civilians by order of a military court for months on end without possibility of challenge must be characterized as arbitrary detention within the meaning of article 9 (1) of the Covenant.<sup>6</sup>

3.2 As for their claim under article 9 (2) of the Covenant, the authors submit that they were not informed immediately of the grounds for their detention. Furthermore, the charges proved false.

<sup>5</sup> Following the submission of the Chief Military Prosecutor's second petition for an extension of the detention period, dated 2 March 2007, the authors again applied to the Military High Court for provisional release. The authors point out that the Military High Court granted the second extension on 10 April 2007, but did not rule on the period of detention that followed the initial extension and that preceded its granting of the second extension. The two rulings of the Military High Court refer to the need to uphold individual freedoms, including the right of all detainees to be brought before a judge without undue delay and to be tried within a reasonable time, as a basis for the competent court to keep extensions as short as possible.

<sup>6</sup> *Ilonge and Shandwe v. Democratic Republic of the Congo* (CCPR/C/86/D/1177/2003), para. 6.5.

3.3 The authors also claim that the State party violated article 9 (3) of the Covenant. The initial extension of their pretrial detention was granted eight months after the Chief Military Prosecutor applied for it. Therefore, the authors were not brought promptly before a judge. According to them, the Committee has already stated that delays must not exceed a few days and that pretrial detention should be an exception and as short as possible.<sup>7</sup> Furthermore, the extensions granted cover only the period from 1 December 2006 to 2 July 2007.

3.4 In addition, the Committee has stated that the decisions of the Military Court cannot be appealed, thereby implying a violation of article 9 (4) of the Covenant.<sup>8</sup>

3.5 Under articles 9 (5) and 2 (3) (a) of the Covenant and paragraph 15 of the Committee's general comment No. 31 (2004), the State party must provide the authors with effective, enforceable remedies, including financial compensation for the moral and material damages suffered. In addition, the authors demand to be released immediately and request the Committee to invite the State party to take measures to give effect to its obligations under the Covenant and the Optional Protocol and to avoid similar violations from occurring in future. Furthermore, the authors request the Committee's views on the issue of the responsibility of third parties, including the Netherlands and the International Criminal Court, in respect of their continued detention.

3.6 In their case file, the authors also note that they claimed, in letters sent to the Chief Military Prosecutor in December 2009 and to the President of the Democratic Republic of the Congo in May 2010, that their right under article 19 (2) of the State party's Constitution,<sup>9</sup> namely the right to have their case heard promptly, had been violated, since, at the time the letters were drafted, their trial before a judge had still not been set.

#### **Lack of cooperation by the State party**

4. On 27 May 2014, 11 February 2015, 25 November 2015 and 19 October 2018, the Committee requested the State party to submit its observations on the admissibility and merits of the communication. The Committee regrets the State party's failure to provide any information with regard to the admissibility or the substance of the authors' allegations. It recalls that article 4 (2) of the Optional Protocol obliges States parties to examine in good faith all allegations brought against them and to make available to the Committee all the information at their disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that they are substantiated.

#### **Authors' additional comments**

5.1 In their additional comments of 15 November 2019 and of 27 and 28 February 2020, the authors note that they were sent back to the Democratic Republic of the Congo following the Dutch authorities' rejection of their applications for asylum. Mr. Longa was detained in The Hague until 18 October 2012. He was then transferred to the military prison of Ndolo, in the Democratic Republic of the Congo, before being provisionally released on 27 September 2013. Mr. Ngabu and Mr. Iribi were sent back to the Democratic Republic of the Congo on 6 July 2014. They were also placed in the military prison of Ndolo and were still being held there at the time of submission of their additional comments. They maintain that their conditions in detention were substantially below international standards, despite the protection measures ordered by the International Criminal Court.

5.2 The authors state that their trial before the Military High Court has begun but is proceeding very slowly. The Court is currently hearing witnesses. Conditions in detention are substantially below international standards. The authors complain of a number of incidents relating to their trial, including changes in the composition of the Court, motions for the disqualification of several judges, including a former member of a rebel group opposed to the authors, unjustified delays, a lack of means made available to the defence by the Court, the refusal of witnesses to appear in court, threats made by the government law

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<sup>7</sup> Human Rights Committee, general comment No. 8 (1982), paras. 2–3.

<sup>8</sup> *Ilombe and Shandwe v. Democratic Republic of the Congo*, para. 6.4.

<sup>9</sup> This article provides that "all persons have the right to have their case heard promptly by a competent judge".

officer against the authors, the classification of certain documents implicating the State party's regime on the grounds that they constitute military secrets, the refusal of the presiding judge to summons senior officials and the failure to conduct a proper inspection of the alleged crime scenes. The authors attach letters sent by Mr. Ngabu to the First President of the Military High Court and to the President of the State party, respectively dated 5 November 2018 and 22 March 2019, in which he requests his provisional release.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee recalls that article 5 (2) (b) of the Optional Protocol precludes it from considering any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that the authors have claimed that their detention is unlawful and have requested their release in letters to the Military High Court, the Chief Military Prosecutor and the President of the Democratic Republic of the Congo; and that copies of those letters were sent to the Minister of Defence, the Minister of Justice and the Minister of Human Rights. It notes that, in this case, the State party does not contest the exhaustion of all available domestic remedies by the authors or the admissibility of the complaint. The Committee therefore finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee considers that the complaint raises substantive issues under article 9 of the Covenant and that those issues should be examined on the merits. As the Committee finds no obstacles to the admissibility of the present communication, it declares it admissible and proceeds with its consideration of the merits.

#### *Consideration of the merits*

7.1 The Human Rights Committee has considered the communication in the light of all the information submitted to it, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the authors' claim that they suffered a violation of their rights under article 9 (1) of the Covenant with regard to their respective arrests and their detention, for which no justification was given until the beginning of their trial before the Military High Court. The Committee notes that, according to the case file, once the validity of the last extension granted by the Chief Military Prosecutor on 9 March 2006 had lapsed, there were no legal grounds for keeping the authors in detention except over two non-consecutive periods of 60 working days, the second of which ended on 2 July 2007. The Committee recalls that deprivation of liberty that lacks any legal basis is arbitrary and unlawful.<sup>10</sup> In the absence of a response from the State party that contradicts the authors' allegations, the Committee finds that the lack of authorization to detain the authors, notably since 2 July 2007, constitutes a violation of article 9 (1) of the Covenant.

7.3 As for the alleged violation of article 9 (2) of the Covenant, the Committee notes that the authors complain that they were not immediately informed of the reasons for their respective arrests. Nevertheless, it observes that the authors also state that they were informed of the charges involving the murder, on 25 February 2005, of nine Bangladeshi United Nations peacekeepers in Ituri upon being arrested, even if those charges were apparently dropped subsequently. The authors also acknowledge that the Chief Military Prosecutor subsequently filed a petition with the Military High Court to extend the pretrial detention of

<sup>10</sup> Human Rights Committee, general comment No. 35 (2014), paras. 11 and 22.

the authors and of five other individuals, who had been accused of murders constituting crimes against humanity. In the absence of any other relevant information, the Committee, noting that the authors were informed of the charges against them at the time of their arrests, finds that the facts before it do not disclose a violation of the authors' rights under article 9 (2) of the Covenant.

7.4 Regarding the alleged violation of article 9 (3) of the Covenant, the Committee notes that the authors claim that, although the Chief Military Prosecutor extended their detention from 9 March 2005 to 9 March 2006, the first court-approved extension was granted on 1 December 2006 – more than one and a half years after they were placed in detention. The Committee recalls its case law,<sup>11</sup> which establishes that article 9 (3) of the Covenant provides for the right of any individual charged with a criminal offence to have his or her placement in detention reviewed by a court. It is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.<sup>12</sup> The Committee notes that the State party has not provided information demonstrating that the Chief Military Prosecutor had the institutional objectivity and impartiality necessary to be considered an “officer authorized by law to exercise judicial power” within the meaning of article 9 (3) of the Covenant; therefore, the authors' claim that the Chief Military Prosecutor is not impartial must be duly considered. In these circumstances, the Committee concludes that the facts as submitted disclose a violation of the authors' rights under article 9 (3) of the Covenant.

7.5 The Committee also notes the alleged violation of article 9 (4) in that the authors did not have access to a remedy in order to challenge the lawfulness of their detention. The Committee observes that the authors applied to the Military High Court regarding the unlawfulness of their detention, but that the Court, in its decision of 1 December 2006, declared itself incompetent to rule on the lawfulness of the first 12 months of the authors' detention on the basis of the domestic legislation of the State party on the matter. The Committee further notes that letters requesting the authors' release, which were sent to the First President of the Military High Court and to the President of the Democratic Republic of the Congo, and copies of which were sent to the Minister of Defence, the Minister of Justice and the Minister of Human Rights, have gone unanswered. In the absence of any information from the State party refuting these allegations or of any other relevant information, the Committee concludes that, in the present case, the State party has violated article 9 (4) of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 9 (1), (3) and (4) of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to take the appropriate steps to (a) review the lawfulness of the detention of Mr. Ngabu and of Mr. Iribi in the light of the safeguards set out in the Covenant and immediately to release them or to apply alternative measures that are less prejudicial to their right to liberty, if warranted; and (b) provide the authors with adequate compensation. The State party is also under an obligation to prevent similar violations from occurring in the future.

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<sup>11</sup> See, inter alia, *Kulomin v. Hungary* (CCPR/C/56/D/521/1992), para. 11.3; *Platonov v. Russian Federation* (CCPR/C/85/D/1218/2003), para. 7.2; *Ashurov v. Tajikistan* (CCPR/C/89/D/1348/2005), para. 6.5; *Reshetnikov v. Russian Federation* (CCPR/C/95/D/1278/2004), para. 8.2; and *Ismailov v. Uzbekistan* (CCPR/C/101/D/1769/2008), para. 7.3.

<sup>12</sup> Human Rights Committee, general comment No. 35, para. 32.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when a violation is found to have occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

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