



# 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. 2764/2016\*, \*\*

<i>Communication submitted by:</i>	Cyrille Gervais Moutono Zogo
<i>Alleged victims:</i>	Achille Benoit Zogo Andela (father of the author)
<i>State party:</i>	Cameroon
<i>Date of communication:</i>	28 October 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 26 April 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	8 November 2017
<i>Subject matter:</i>	Criminal proceedings for misappropriation of public funds; prolonged detention
<i>Procedural issues:</i>	Non-substantiation of claims; exhaustion of domestic remedies; incompatibility with the provisions of the Covenant
<i>Substantive issues:</i>	Right to an effective remedy; inhuman or degrading treatment; arbitrary detention; imprisonment for non-fulfilment of contractual obligations; non-retroactivity of criminal law; right to recognition as a person before the law; discrimination
<i>Articles of the Covenant:</i>	2 (3); 7; 9 (1), (3), (4) and (5); 11; 14 (1), (2), (3) (c) and (5); 15 (1); 16; and 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1. The author of the communication dated 28 October 2014 is Cyrille Gervais Moutono Zogo, a national of Cameroon residing in France, who is submitting the communication on behalf of his father, Achille Benoit Zogo Andela, a national of Cameroon, born in Yaoundé

\* Adopted by the Committee at its 121st session (16 October–10 November 2017).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelić, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.



on 10 April 1956 and currently held in the central prison in Yaoundé. The author claims a violation by Cameroon of his father's rights under articles 2 (3); 7; 9 (1), (3), (4) and (5); 11; 14 (1), (2), (3) (c) and (5); 15 (1); 16; and 26 of the Covenant. The Optional Protocol entered into force for the State party on 27 September 1984. The author is not represented.

### **The facts as submitted by the author**

2.1 Mr. Zogo Andela is 59 years old. He has been held in Kondengui Central Prison in Yaoundé since 29 March 2011, the date on which he was detained by the Criminal Investigation Service.

2.2 The offence of which Mr. Zogo Andela is accused relates to the failure to fulfil a contract between the Société camerounaise de leasing maritime (SCLM), of which he was chairman and chief executive, and the Autonomous Sinking Fund of Cameroon. Mr. Zogo Andela is accused of the fraudulent withholding of property belonging to the State of Cameroon, following the misappropriation of 20 ships acquired by the State at a cost of 30 billion CFA francs. He was reportedly also charged with failure to pay the Treasury the proceeds of the use of the above-mentioned trawlers, for whose management he was responsible.

2.3 The case relates to a financing agreement under which Cameroon received a loan of US\$ 40 million from the Instituto de Crédito Oficial, of Spain, on 30 October 1996 for the construction of 20 fishing boats by Spanish shipyards for the use of the Cameroonian private sector. The same day, the Cameroonian Minister of Finance signed a reassignment agreement with SCLM, represented by Mr. Zogo Andela. Under this lease-purchase contract, the Government of Cameroon allowed SCLM the use of the shrimp trawlers to which the agreement related against a lease payment until the charges relating to the funds received from the Instituto de Crédito Oficial had been fully paid off, with lease payments corresponding to the due dates of the debt. The period of payment provided for was 15 years, beginning 12 months after the date of delivery of the final boat, as regards Credit A, and eight and a half years from the date of delivery of each boat for Credit B.

2.4 According to the author, the use of the boats was regularly disrupted by the Cameroonian administration; the boats were boarded on numerous occasions without any legal basis and applications for fishing licences and certificates of seaworthiness were denied. This was detrimental to the efficient management of SCLM and prevented it from paying the first three tranches of payments due, namely a sum of about 1.8 billion CFA francs, including principal and interest. SCLM then suggested to its partner in the agreement, the State of Cameroon, that the arrears of payments should be rescheduled. No action was taken on this suggestion.

2.5 On 4 October 2002, the Government issued instructions to terminate the agreement, to recover the arrears and to reclaim the vessels. Thus, beginning in March 2003, the vessels were impounded and placed under the management of various officials and a number of secret charter parties were indiscriminately signed, while not a single centime was returned to the Cameroonian Treasury. A letter of termination written by the Head of the Government on 23 June 2003 formalized the decision to dispossess SCLM of its vessels.

2.6 On 10 October 2008, the Autonomous Sinking Fund of Cameroon lodged a claim against Mr. Zogo Andela for misappropriation of public funds and unlawful withholding of property. On 29 March 2011, he was arrested at his home in Douala by the Criminal Investigation Service and transferred to the headquarters of the Criminal Investigation Service in Yaoundé.

2.7 On 30 March 2011, Mr. Zogo Andela was brought before the government procurator at the Mfoundi high court in Yaoundé. The same day, he was charged by the examining magistrate with the offence of misappropriation of public funds and unlawful withholding of property and was remanded in custody. On 31 March 2011, the examining magistrate ordered that all Mr. Zogo Andela's bank accounts and those of all his companies should be frozen. On 14 November 2011, pursuant to a rogatory commission, his house was searched and his property seized.

2.8 His remand in custody was initially set for a period of six months but was twice extended, in accordance with article 221 of the Cameroonian Criminal Procedure Code, for a total legal period of 18 months.

2.9 Well before the end of the legal duration of this period in custody, Mr. Zogo Andela, assisted by counsel, had, on 14 September 2011, submitted an application for the examining magistrate in charge of the case to withdraw the remand warrant issued on 30 March 2011, drawing attention, in the first instance, in *limine litis*, to the statute of limitations applicable in the case, as the events had occurred in 1996 and the preliminary inquiry had been opened only in 2008, or 12 years later. Under Cameroonian criminal law, the statute of limitations is 10 years. He also drew attention to the lack of jurisdiction *ratione loci* and *ratione materiae* of the court, the government procurator and the examining magistrate under article 294 of the Cameroonian Criminal Procedure Code, which provides that:

“A court shall have jurisdiction over a case when it is:

- (a) The court of the place of commission of the offence; or
- (b) The court of the place of residence of the accused; or
- (c) The court of the place of arrest of the accused.”

2.10 According to the author, the offences of which Mr. Zogo Andela is accused could not have been committed in Yaoundé, since the allegedly misappropriated funds derived exclusively from fishing boats operating off the coast of Douala and not Yaoundé, which has no seashore. Moreover, the accused was arrested at his home in Douala and has never had an address or a domicile in Yaoundé. The author therefore maintains that the Mfoundi high court lacked territorial jurisdiction to hear the case.

2.11 Mr. Zogo Andela further requested the withdrawal of the remand warrant on the grounds that the examining magistrate lacked subject-matter jurisdiction, since the case was of a civil and commercial rather than a criminal nature, between two legal persons, namely the State of Cameroon and SCLM, a limited liability company that, on 30 October 1996, had signed a lease-purchase contract. The failure to execute this contract was the cause of the legal proceedings against Mr. Zogo Andela, who, as a natural person, was investigated instead of SCLM.

2.12 On 10 October 2011, Mr. Zogo Andela’s claims based on the statute of limitations and the lack of jurisdiction of the court and the judge were dismissed by the examining magistrate. On 13 October 2011, Mr. Zogo Andela appealed against that decision before the inquiry control chamber of the Centre Region court of appeal in Yaoundé, repeating his principal claims. On 24 July 2012, the Court ruled that the appeal was inadmissible under article 269 of the Criminal Procedure Code.<sup>1</sup> In the author’s view, the ruling lacked a legal basis and, moreover, had been rendered more than 10 months after the statutory deadline, which, under article 275 (2) of the Criminal Procedure Code, is 10 days. Moreover, Mr. Zogo Andela was notified of this decision only on 17 September 2012. He consequently lodged a new appeal before the Supreme Court of Cameroon on 20 September 2012.

2.13 According to the author, the Supreme Court never heard the appeal, even though, under article 474 (3) and (4) of the Criminal Procedure Code, the Supreme Court is required to rule on an appeal within 20 days. It should thus have ruled on the appeal by 10 October 2012, at the latest. The Court has still not ruled on the case.<sup>2</sup>

2.14 On 21 September 2012, Mr. Zogo Andela learned that a committal order had been issued on 12 September 2012 transferring his case to the newly created Special Criminal Court, in other words before he had been notified of the ruling of the Centre Region court of appeal of 24 July 2012. It was on the basis of this committal order that Mr. Zogo Andela had been kept in custody. The author maintains that this procedure is unlawful and that the

<sup>1</sup> Article 269 provides that “The defendant may appeal only against rulings in respect of remand in custody, judicial supervision, request for expert or counter-expert opinion and of restitution of articles seized.”

<sup>2</sup> The Supreme Court issued its judgment on 1 July 2015, after the initial submission of the communication to the Committee (see the State party’s observations, below).

case has never been the subject of a judicial inquiry since the transfer to the Special Criminal Court. Moreover, Mr. Zogo Andela was never formally notified of the committal order.

2.15 On 22 November 2012, Mr. Zogo Andela applied to the President of the Supreme Court to challenge the committal order of 12 September 2012 transferring his case to the Special Criminal Court, citing, among other things, a violation of his rights to a defence, *lis alibi pendens*, a conflict of jurisdictions and abuse of power. The author maintains that, as in the case of the other remedies pursued, the application to the Supreme Court turned out to be unsuccessful and ineffective.

2.16 In view of the fact that his remand warrant had expired on 30 September 2012, after two six-month extensions, Mr. Zogo Andela filed a petition with the President of the Mfoundi high court for a writ of habeas corpus, applying for immediate release, in accordance with the provisions of articles 584 ff. of the Criminal Procedure Code. This request was refused on 18 October 2012, on the basis of the committal order to the Special Criminal Court of 12 September 2012.

2.17 On 24 October 2012, Mr. Zogo Andela applied to the President of the Centre Region court of appeal to complain of an infringement of his presumption of innocence and the biased and illegal nature of the committal order that had been issued against him. As far as he knows, no action was taken on this application.

2.18 On 30 October 2012, Mr. Zogo Andela lodged an appeal against the first-instance decision on the habeas corpus petition of 18 October 2012. On 26 November 2012, the President of the Centre Region court of appeal, which heard the appeal, issued an interlocutory decision ordering a stay of judgment on Mr. Zogo Andela's application for immediate release until the Supreme Court had ruled on his pending appeals going back over more than three years. Mr. Zogo Andela was notified of this decision only on 14 February 2014, or more than 15 months after its adoption. Consequently, Mr. Zogo Andela was prevented from exercising his right of appeal against the decision.

2.19 On 13 April 2015, Mr. Zogo Andela lodged another appeal with the President of the Mfoundi high court, pursuant to article 584 (1) of the Criminal Procedure Code, requesting immediate release on the grounds of the illegality of his arrest and detention. The first hearing of the case was held on 12 May 2015 and adjourned to 19 May 2015. The case was then adjourned again to 26 May 2015 "in connection with preparations for the national day on 20 May 2015" and then deferred once more until 9 June 2015, without discussion, on the sole grounds that the representative of the public prosecution service had already requested the dismissal of the appeal, citing the committal order to the Special Criminal Court of 12 September 2012.

2.20 On 21 May 2015, Mr. Zogo Andela was taken to the office of the President of the Special Criminal Court, where he was informed that his case had been listed for hearing, and he was notified of the date of the first hearing. He pointed out that the committal order to the Special Criminal Court had been contested before the Supreme Court, in an appeal that was still pending. After a long discussion and the categorical refusal of Mr. Zogo Andela to sign the required notifications, the President of the Court consented to the suspension of the listing of the case until the Supreme Court had ruled on his application for the committal order to be annulled and on his other requests.

2.21 Mr. Zogo Andela also appealed to the President of the Republic on 7 August 2014, but no action was taken. On 27 April 2015, he appealed to the National Commission on Human Rights and Freedoms, but there, too, no action was taken.

2.22 The author maintains that his father, Mr. Zogo Andela, has still not been tried for the charges levelled against him since he was first investigated in 2011. He was remanded in custody five years ago and no measure of investigation has been conducted since that time.

2.23 Since his incarceration, Mr. Zogo Andela has developed a number of ailments: heart disease, high blood pressure, diabetes and problems with his eyes and teeth.<sup>3</sup> For lack of financial resources, he has not had access to medical assistance since 27 November 2013, despite the marked deterioration in his state of health.

2.24 Moreover, all Mr. Zogo Andela's personal and professional property has been frozen since 31 March 2011 and this has prevented him from obtaining paid legal or medical services. In addition, his house was searched on 14 November 2011 and his property was seized the same day.

2.25 On 14 October 2016, the author informed the Committee that, following the notification of the first hearing before the Special Criminal Court on 12 October 2016, he had submitted a new application to the Supreme Court for the annulment of the various adjudicatory acts and the listing of the case by the Special Criminal Court. Mr. Zogo Andela was forced to leave his cell to attend court but refused to participate in what he described as a travesty of justice.

### **The complaint**

3.1 The author considers, with reference to article 2 (3) of the Covenant, that, given the numerous fruitless attempts that Mr. Zogo Andela has made to obtain justice, he has been deprived of the right to an effective remedy.

3.2 The author claims that, in the case of Mr. Zogo Andela, the State of Cameroon has committed a violation of article 9 (1), (3), (4) and (5) of the Covenant, in that he considers the arrest and detention to have been arbitrary. Mr. Zogo Andela has been in custody since 30 March 2011, while the maximum legal term for pretrial detention provided by the Criminal Procedure Code expired on 30 September 2012. It has now been over five years, therefore, that he has been in detention as an accused person without having stood trial.

3.3 The author claims a violation of article 11 of the Covenant, in that he considers that the dispute between Mr. Zogo Andela and the State of Cameroon is of a contractual nature and that his imprisonment is therefore illegal.

3.4 The author argues that there has been a violation of the provisions of article 14 (1) of the Covenant against Mr. Zogo Andela, in that he has not been given a fair and public hearing by a competent and impartial tribunal. In addition, he claims that the principle of the devolutive effect of an appeal has been violated, inasmuch as the committal of the case to the Special Criminal Court prevented the appeal court from hearing his appeal and thus violated his right to a fair trial. It is his view that the examining magistrate secretly drew up a fraudulent committal order without having carried out a judicial inquiry. This constituted deliberate delaying tactics, which revealed the biased and unlawful nature of the committal order. He also considers that Mr. Zogo Andela was not afforded the presumption of innocence, in violation of article 14 (2).

3.5 Moreover, in view of the numerous and excessive delays in the consideration of the case of Mr. Zogo Andela, and the fact that he has still not been brought to trial, the author maintains that there has been an excessive procedural delay, in violation of article 14 (3) (c) of the Covenant.

3.6 In addition, according to the author, the Special Criminal Court is a newly created special tribunal that does not recognize the principle of a second hearing, in violation of article 14 (5) of the Covenant.

3.7 The principle of the non-retroactivity of criminal law has also been disregarded, in that Mr. Zogo Andela was imprisoned prior to the establishment of the Special Criminal Court assigned to hear his case, in violation of article 15 (1) of the Covenant. Moreover, in Cameroon, criminal business law is governed by Act No. 2003/008 of 10 July 2003, which penalizes business offences with a maximum term of 5 years' imprisonment. The Act is of

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<sup>3</sup> The author attaches a medical certificate dated 26 August 2016, which confirms the presence of cervicobrachial neuralgia and notes a previous history of type II diabetes, heart disease and high blood pressure.

a later date than the Criminal Code of November 1965, which provides for life imprisonment for the offence of misappropriation of public funds. The principle of enforcing the less severe criminal statute should therefore be applied.

3.8 According to the author, article 16 of the Covenant was violated, in that the criminal procedure that was applied did not distinguish properly between the juridical personality of the company SCLM, a legal person, and Mr. Zogo Andela, a natural person, thus denying him his juridical personality.

3.9 The author also considers that Mr. Zogo Andela was discriminated against in violation of article 26, in that he was the only person to be charged in the case, while no charges were brought against senior officials, even though they had since 2003 unlawfully managed and retained the vessels in contention.

3.10 The author therefore requests the Committee to rule that Mr. Zogo Andela's detention is arbitrary and to recommend that the Cameroonian Government should proceed to his immediate release and indemnify him in the amount of US\$ 200 million for professional, material, physical, moral and psychological damage.<sup>4</sup>

#### **State party's observations on admissibility and merits**

4.1 In its observations of 19 December 2016, the State party challenges the admissibility of the communication, emphasizing that the author has not exhausted all available domestic remedies as required under article 5 (2) (b) of the Optional Protocol. Secondly, the State party holds that the author's complaints are ill-founded.

4.2 The State party begins by recalling the facts, including the circumstances in which Cameroon, in order to develop and modernize its deep-sea fishing activities, decided to take a direct loan with Spain, in an amount of US\$ 40 million, returnable in 15 years in the form of 30 half-yearly payments of equal value. A company was set up for the use of the boats, the Société camerounaise de leasing maritime (SCLM), of which Mr. Zogo Andela was appointed chief executive. A reassignment agreement was then signed on 30 October 1996 between the State of Cameroon and SCLM and the State hired out 20 fishing boats to the company under a lease-purchase agreement. The proceeds of the use of the boats would in turn go towards servicing the debt through a mechanism to set up an escrow account that was opened to guarantee the timely payment of the loan. The account was supposed to show a credit balance of at least 2 billion CFA francs before the loan schedule came into effect. The State thus retained ownership of the 20 vessels until the debt was completely cleared. It may be noted that the agreement gave the State the right, in the event of failure by SCLM to meet any one of its obligations, to take back the vessels without prior warning and without prejudice to any legal or regulatory actions.

4.3 According to the State party, matters did not, unfortunately, go according to plan. The use made of the boats by Mr. Zogo Andela clearly showed that he was engaged in misappropriation. Thus, he took complete control over SCLM, removing the other owners involved in the project and giving some of the boats his own name (Andela). Moreover, on the pretext of looking for new markets, he moved 12 boats to the Congo, Mozambique, Senegal and Mauritania in order to avoid their being under State control. The majority shareholder and managing director of all these companies was Mr. Zogo Andela. These companies signed charter parties for fishing boats with SCLM and paid a rental. On 1 July 2000, a rider was signed in Dakar, amending a charter party signed in 1999 and raising the flat fee per boat to 15 million CFA francs.<sup>5</sup> In the contracts signed in these countries with various operators, the companies thus created were presented as being the owners of the fishing boats.

4.4 Despite the successful use of the vessels, no money was ever paid into the escrow account. The State thus took on the responsibility of repaying the debt, in the sum of

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<sup>4</sup> Calculated as follows: professional damage: 85 billion CFA francs, or US\$ 170 million; physical, corporal and psychological damage and damage to the family: 7 billion CFA francs, or US\$ 14 million; moral damage: 2.5 billion CFA francs, or US\$ 5 million; and expenses arising from his defence: 5 million CFA francs, or US\$ 1 million.

<sup>5</sup> The State party encloses this document.

US\$ 40 million. Moreover, Mr. Zogo Andela did not meet any of his obligations under the reassignment agreement. Despite a number of calls to order, no progress was made. In accordance with article 19 of the reassignment agreement, therefore, the Minister of Finance and Budget terminated the agreement in a letter dated 20 June 2003 and invited the chief executive of SCLM to take all the necessary steps to moor the fishing boats in Douala. These instructions were not obeyed. The State was therefore forced to initiate action to recover the vessels. The eight boats that were berthed in Cameroonian territorial waters were boarded and brought back to the port of Douala. Of the 12 other boats taken to five different countries, namely Spain, Senegal, Mozambique, Mauritania and the Congo, some had been destroyed and others seized and sold by foreign creditors. Operations to recover the six boats in the Congo were systematically hindered by actions carried out by employees of Mr. Zogo Andela. One boat was set on fire (Andela VII) and another sank (Andela X).

4.5 The State party reiterates that the Government was forced to bear the servicing of the debt that had been contracted, initiate proceedings to establish its right of ownership over the vessels that had been removed abroad and, on some occasions, take humanitarian action to relieve the wretched plight of the seamen abandoned abroad.

4.6 As regards procedure, the State party asserts that the author's statement that a request for the withdrawal of the remand warrant was submitted before an examining magistrate in *limine litis* on 14 September 2011 is incorrect. In fact, the file shows that the examination began on 28 July 2011. On that date, the accused put forward no defence. When questioned, he denied the facts. He can therefore not maintain that his request was submitted in *limine litis*. The request of 14 September 2011 related mainly to a defence of non-jurisdiction and a bar to proceedings. The main purpose of the request therefore related not to his release but to the merits of the case.

4.7 According to the State party, Cameroonian law does contain mechanisms whereby a person may request release from detention, particularly articles 222–235 of the Criminal Procedure Code, but these were not invoked by Mr. Zogo Andela.

4.8 As for the question of the remand in custody, the examining magistrate complied with the provisions of article 218 (2) of the Criminal Procedure Code, under which he issued a remand warrant, giving reasons for his decision to remand the accused in custody.<sup>6</sup> Notification of this order, issued on 30 March 2011, was sent the same day to Mr. Zogo Andela, who did not engage any judicial remedy against the decision. Nor did he submit a request for release during the course of the proceedings pursuant to the provisions mentioned above. The defence of non-jurisdiction and the bar to proceedings cannot constitute a judicial remedy against the examining magistrate's decision to deprive him of his liberty. In the view of the State party, the author is maliciously attempting to change the subject of his appeal.

4.9 According to the State party, the Centre Region court of appeal, contrary to the claims of the author, gave a correct interpretation of article 269 of the Criminal Procedure Code when it decided to dismiss Mr. Zogo Andela's appeal of 24 July 2012, since the subject of the application to the examining magistrate related to a defence of non-jurisdiction and a bar to proceedings, whereas article 269 of the Criminal Procedure Code provides that an accused may appeal only against rulings in respect of remand in custody. The limitation of the scope of action by an examining magistrate against which an accused may seek a remedy is intended specifically to avoid a paralysis of inquiry proceedings aimed at causing delays. The appeal by the accused against a committal order by the examining magistrate is thus inadmissible, particularly since such an action must be seen in the light of the accused's refusal to attend court. The Supreme Court confirmed that judgment in its ruling of 1 July 2015, holding that "in submitting a defence in *limine litis* before the examination of the merits while not appealing against the order that indisputably

<sup>6</sup> The State party encloses the order: "In view of the fact that the accused is being prosecuted for misappropriation of public funds, which is provided for and penalized under articles 74 and 184 of the Criminal Code, and that these criminal acts are sufficiently serious and complex, his detention is consequently necessary in the interests of uncovering the truth. We therefore order that Mr. Zogo Andela be remanded in custody."

justifies his remand in custody, in accordance with article 218 (2) of the Criminal Procedure Code, which relates to remand in custody within the meaning of article 269 of the Code, the appellant cannot claim to have appealed in accordance with the requirements of the aforementioned article 269 of the Code.”

4.10 The State party concludes that the proceedings initiated by Mr. Zogo Andela against the actions of the examining magistrate did not constitute an application for release within the meaning of articles 222–235 of the Criminal Procedure Code and that he did not exhaust the available remedies for release, with or without bail.

4.11 The State party then turns to the proceedings brought by Mr. Zogo Andela for a writ of habeas corpus to challenge the legality of his detention, in which he challenged the handling of the judicial inquiry. The author argued that the continuation of the inquiry by the examining magistrate after Mr. Zogo Andela had lodged an appeal against the order dismissing the defence of non-jurisdiction constituted a violation of the principle of the devolutive effect of the appeal and other principles relating to the right to a fair trial. The State party’s reply to that is that the examining magistrate was fully within his rights, pursuant to the applicable law, to continue the judicial inquiry after Mr. Zogo Andela had lodged his appeal. Article 287 of the Criminal Procedure Code states unambiguously that “Appeals against a ruling delivered during a preliminary inquiry other than that relating to a committal order or a no-case ruling shall not suspend preliminary inquiry.” The State party adds that the file and the records of the inquiry — the register in which all the actions of an examining magistrate are entered in chronological order — show unequivocally that a judicial inquiry was indeed conducted in this case. The examining magistrate was engaged in investigative procedures uninterruptedly from 30 April 2011 to 12 September 2012, holding hearings both of the claimants for criminal indemnification and of witnesses, and issuing rogatory commissions, both within Cameroon and abroad.<sup>7</sup>

4.12 The State party adds that, throughout the proceedings, Mr. Zogo Andela was invited to express his views. The file of the proceedings was placed at the disposal of his counsel on every occasion, as required under article 171 (1)–(4) of the Criminal Procedure Code. On the first occasion, on 28 July 2011, during the examination on the merits, Mr. Zogo Andela denied the facts and then stated that he refused to express his views. On the second occasion, on 14 September 2011, his counsel put forward a defence: the fact that the offences were time-barred, the lack of territorial jurisdiction of the examining magistrate and the lack of subject-matter jurisdiction of the criminal court.<sup>8</sup> On the third occasion, on 2 August 2012, Mr. Zogo Andela refused to attend court, on the grounds that his counsel were absent. The State party adds that, although the accused’s right of silence is enshrined under article 170 of the Criminal Procedure Code and could constitute a defence strategy, such a strategy cannot impede the course of a judicial inquiry. Mr. Zogo Andela’s appeals challenging the legality of the proceedings on the grounds that the term of his detention had expired and that the judicial inquiry was continuing after he had lodged an appeal against the order of the examining magistrate, who had dismissed the defence of lack of jurisdiction and the bar to proceedings, are no more than delaying tactics.

4.13 The State party adds, with regard to the question of delays, that the author’s claim concerning the late notification of the examining magistrate’s order (para. 2.14) should not be upheld, inasmuch as Mr. Zogo Andela has, since 21 September 2012, declined to accept a copy of the report of the proceedings or to sign it, as is attested in the report.<sup>9</sup>

4.14 As regards the jurisdiction of the Special Criminal Court, the State party notes that only this Court has jurisdiction to hear cases relating to misappropriation of public funds exceeding the sum of 50 million CFA francs. The Supreme Court has thus terminated its hearing of the appeal lodged by Mr. Zogo Andela, and the case pending before the Special Criminal Court is under consideration, with due regard for the rights of the defence. The

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<sup>7</sup> Documents provided by the State party.

<sup>8</sup> The State party encloses the record of the examination.

<sup>9</sup> Document enclosed.



date of the first hearing of the accused before the Special Criminal Court was set for 12 October 2016.<sup>10</sup>

4.15 The Special Criminal Court was established by Act No. 2011/028 of 14 December 2011 (as amended by Act No. 2012/11 of 16 July 2012). Article 2 of the Act provides that the Court is competent “to have cognizance, in cases where the sum involved is not less than 50 million CFA francs, of offences of misappropriation of public funds and related offences provided for under the Criminal Code and the international agreements ratified by Cameroon.” It is thus a court of special jurisdiction and not, as the author maintains, a special tribunal. The principle of a second hearing remains unaffected. Article 11 of the Act provides that an appeal may be lodged against the decisions of the Special Criminal Court.<sup>11</sup>

4.16 As regards the referral to the Special Criminal Court in the light of the principle of non-retroactivity stipulated under the Covenant, the State party says that Act No. 2011/028 is a procedural law, taking immediate effect. Article 15 of the Act provides that:

“(1) Courts seized of a matter relating to the facts set out in article 2 of the present Act either as part of a judicial inquiry or in trial proceedings shall terminate their hearing;

(2) Upon the promulgation of the present Act, orders of committal or partial cessation or transfer of proceedings by the examining magistrate of a court of major jurisdiction issued in trials relating to the facts set out in article 2 above shall be brought before the Court.”

4.17 Thus, in the case in question, the examining magistrate of the Mfoundi high court closed the judicial inquiry with an order of committal and partial cessation on 12 September 2012, that is, following the promulgation of the Act. The principle according to which the most severe criminal provisions must not be applied retroactively has thus not been violated.

4.18 As regards the continued detention of Mr. Zogo Andela and the author’s complaint on the basis of article 9, the State party points out that a warrant issued in the context of a judicial inquiry had legitimated the detention, given that article 262 of the Criminal Procedure Code provides that “(b) Where [a defendant] is committed to the court having jurisdiction over misdemeanours, the committal order shall not put an end to the measures of detention or judicial supervision taken against him, when the maximum penalty provided for the offence is greater than the period of custody.” It is thus in the interests of justice that the detention should continue.

4.19 As regards the author’s complaint under article 11 of the Covenant, and his argument that the facts relate to commercial litigation and are not criminal offences, the State party notes that it is for the courts to assess and determine the facts, as they are currently doing. They have not yet adopted a position and it is therefore not for the Committee to pronounce on the matter. Moreover, the Committee has consistently held that the prohibition of imprisonment for debt under article 11 does not apply to criminal offences related to civil debts. In the case in question, Mr. Zogo Andela is being prosecuted for misappropriating public funds, an offence provided for and penalized under article 184 of the Criminal Code. For these reasons, article 11 of the Covenant should not apply.

4.20 As for article 2 (3), the State party maintains that, insofar as he has not exhausted domestic remedies to apply for his release, even though such remedies are available, Mr. Zogo Andela is not in a position to argue that he has been deprived of an effective remedy.

<sup>10</sup> The State party encloses the record of notification of the first hearing.

<sup>11</sup> Article 11: “(1) A court hearing a case pursuant to article 2 of the present Act, and courts of first instance or of major jurisdiction hearing cases of misappropriation of public funds where the sum involved is less than 50 million (50,000,000) CFA francs and related cases provided for under the Criminal Code and the international agreements ratified by Cameroon, shall rule in first instance and without right of appeal. Their decisions may be subject only to an application;

(2) An application by the Public Prosecution Service shall relate to the facts and to points of law;

(3) An application by other parties shall relate only to points of law;

(4) In cases of judicial review, the Supreme Court shall assume cognizance of the case and issue a decision.”

4.21 As regards the arguments based on article 16, the State party points out that the criminal liability of legal persons does not exclude the individual liability of the natural persons who have committed or been accessory to the acts in question. Mr. Zogo Andela should not try to hide behind the legal personality of the company that he represented in order to escape prosecution.

4.22 Lastly, according to the State party, the author's allegations under article 26 are unfounded, in that the author has not shown in what way the situation of the other persons prosecuted for misappropriation of public funds was identical to that of Mr. Zogo Andela or established any improper difference in treatment.

4.23 The State party invites the Committee to reject the author's claims as being unfounded and to recognize that it is not the Committee's function to issue financial sanctions against States.

#### **Author's comments on the State party's observations**

5.1 On 2 March 2017, the author conveyed his comments on the State party's observations. He also added a further complaint under article 7 of the Covenant, arguing that the appalling living conditions and detention conditions to which Mr. Zogo Andela was subjected had had an impact on his health. In addition, all his property and assets had been unjustly frozen. Mr. Zogo Andela was thus unable to care for himself properly, to eat adequately or to honour his financial commitments, including his counsel's fees. The author therefore alleged that the decision to freeze Mr. Zogo Andela's accounts, to sell his property unlawfully and to seal up the furniture in his house, over and above his detention, and the denial of care and food in line with the diet prescribed by his doctors, were detrimental to his physical health and constituted inhuman and degrading treatment.

5.2 As far as the legal aspect is concerned, the author maintains and reiterates his claims that the remedies have been ineffective and that Mr. Zogo Andela was not required to request release on bail, since he submitted a bar to proceedings on the basis of the statute of limitations applying to his case, which ought to have obliged the examining magistrate not to examine the case and to order the withdrawal of the remand warrant issued on 30 March 2011.

5.3 The author contests the Supreme Court's conclusions of 1 July 2015. He says that no judicial inquiry was held in the case of Mr. Zogo Andela and accuses the State party of having fabricated false evidence<sup>12</sup> to fit the circumstances. He reiterates his assertion that the detention of Mr. Zogo Andela without trial since 30 March 2011 is excessive.

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

##### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee notes that the State party contests the admissibility of the communication on the grounds that domestic remedies were not exhausted within the terms of article 5 (2) (b) of the Optional Protocol.

6.4 In that respect, the Committee takes note of the author's claims under article 9 (1), (3), (4) and (5) of the Covenant concerning the detention of Mr. Zogo Andela, which he contends is arbitrary. The Committee notes the argument put forward by the State party that the author has not exhausted domestic remedies, inasmuch as he has not used the available

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<sup>12</sup> Reference is made to the documents provided by the State party and mentioned in para. 4.11, above.

mechanisms for requesting release, particularly articles 222–235 of the Criminal Procedure Code, which relate to applications for release, with or without bail.

6.5 The Committee notes the claim that the author bases on article 9 (5) of the Covenant, through which he seeks to obtain redress for Mr. Zogo Andela's detention, which he qualifies as arbitrary. The Committee observes, however, that this allegation has not been presented before the State party's courts. The Committee recalls that, according to its jurisprudence, authors must avail themselves of all legal remedies in order to fulfil the requirement contained in article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective and available to the author.<sup>13</sup> Consequently, this part of the communication should be declared inadmissible under article 5 (2) (b) of the Optional Protocol.

6.6 The Committee observes that on 14 September 2011 Mr. Zogo Andela requested the examining magistrate to withdraw the remand warrant, arguing that the magistrate lacked jurisdiction *ratione loci* and *ratione materiae*, and invoking the statute of limitations. His application was denied by the examining magistrate on 10 October 2011. Mr. Zogo Andela then appealed against this ruling before the inquiry control chamber of the Centre Region court of appeal in Yaoundé, which ruled the appeal inadmissible. He subsequently, on 20 September 2012, filed an appeal with the Supreme Court of Cameroon, which was also denied.

6.7 The Committee further notes that after his remand warrant was extended twice, and because his pretrial detention no longer had a legal basis as from 30 September 2012 once it had exceeded the 18 months allowed by the Criminal Procedure Code, on 5 October 2012, Mr. Zogo Andela filed a petition with the President of the Mfoundi high court for a writ of habeas corpus, applying for immediate release in accordance with the provisions of article 584 of the Criminal Procedure Code (para. 2.16). His request was denied on 18 October 2012. On 30 October 2012, Mr. Zogo Andela filed an appeal against the ruling, which was rejected. On 13 April 2015 he filed a new petition for a writ of habeas corpus (para. 2.19); it too was rejected.

6.8 In the light of these circumstances, the Committee can only conclude that the domestic remedies have been exhausted in respect of Mr. Zogo Andela's detention since 30 September 2012. The Committee thus declares that the claim based on a violation of article 9 (1), (3) and (4) of the Covenant admissible under article 5 (2) (b) of the Optional Protocol.

6.9 The Committee notes the author's argument that Mr. Zogo Andela was deprived of an effective remedy in violation of article 2 (3) of the Covenant. The Committee recalls that article 2 of the Covenant may be invoked by individuals only in relation to other provisions of the Covenant and considers that the author's claims in that regard should be declared inadmissible under article 2 of the Optional Protocol.<sup>14</sup>

6.10 In connection with article 7 of the Covenant, the Committee notes, first, the author's allegations concerning the living conditions of Mr. Zogo Andela, which are due to his detention, and the freezing of his assets, which results from the judicial proceedings in his case. The author has also drawn attention to the worrying health condition of Mr. Zogo Andela and the refusal of the prison authorities to provide him with care and a diet suitable for his state of health. The Committee observes that, according to the evidence contained in the file, the author has not brought these allegations before the domestic courts. Moreover, he has not sufficiently substantiated this claim before the Committee, apart from the production of a medical certificate dated 26 August 2016, which describes Mr. Zogo Andela's medical history.<sup>15</sup> The Committee therefore considers that this part of the

<sup>13</sup> See communications Nos. 1003/2001, *P.L. v. Germany*, decision of inadmissibility adopted on 22 October 2003, para. 6.5, and 1813/2008, *Akwanga v. Cameroon*, Views adopted on 22 March 2011, para. 6.4.

<sup>14</sup> See communication No. 1632/2007, *Picq v. France*, decision of inadmissibility of 30 October 2008, para. 6.4.

<sup>15</sup> See footnote 3, above.

communication, too, should be declared inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol.<sup>16</sup>

6.11 The Committee takes note of the author's allegations concerning the violation of his rights under article 11, inasmuch as Mr. Zogo Andela considers himself to have been imprisoned for the breach of a contractual obligation. The Committee recalls that, according to its jurisprudence, the prohibition of detention for debt does not apply to criminal offences related to civil law debts and that, when a person commits fraud or negligent or fraudulent bankruptcy, he or she may be punished with imprisonment, even when he or she is no longer able to pay the debts.<sup>17</sup> The Committee points out that, in this case, Mr. Zogo Andela is the subject of criminal proceedings for misappropriation of public funds, an offence provided for and penalized under article 184 of the Criminal Code, and that his assertion that the offence of which he is accused relates to failure to fulfil a contractual obligation cannot be upheld. Thus, since the facts fall well within the scope of a criminal offence, and do not relate to a failure to fulfil a contractual obligation, the Committee considers that this claim is incompatible *ratione materiae* with article 11 of the Covenant and should therefore be declared inadmissible pursuant to article 3 of the Optional Protocol.<sup>18</sup>

6.12 The Committee takes note of the author's claim under article 14 (1) and (2) that Mr. Zogo Andela did not receive a fair and public hearing by a competent and impartial court and that the referral of the case to the Special Criminal Court violated his right to a fair trial and the presumption of innocence. The author also argued that the continuation of the inquiry by the examining magistrate after an appeal had been lodged against the order dismissing the defence of lack of jurisdiction constituted a violation of the devolutive effect of the appeal and other principles of the right to a fair trial.

6.13 The Committee notes that most of the author's claims relate to the application of domestic law by the courts of the State party under article 14 (1). The reply of the State party was that the examining magistrate was within his rights in continuing the judicial inquiry after Mr. Zogo Andela had lodged his appeal, since he was authorized to do so under article 287 of the Criminal Procedure Code. The Committee recalls that it is in general for the courts of States parties to consider the facts and the evidence or the application of domestic legislation in a given case, unless it can be established that the assessment of the evidence or the application of the legislation was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>19</sup> The Committee therefore declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.14 The Committee notes the author's allegation under article 14 (5) that the Special Criminal Court is a special tribunal that does not recognize the principle of a second hearing. The Committee recalls that article 14 (5) of the Covenant establishes that any person found guilty of an offence has the right to have the conviction and sentence reviewed by a higher tribunal according to law. The Committee notes in the present case that Mr. Zogo Andela is accused of the crimes of misappropriation of public funds and unlawful withholding of property, punishable under the Criminal Code of Cameroon, for which he has not yet been tried. As such, he is not, *ratione personae*, a victim, and thus the claim made under article 14 (5) of the Covenant must be rejected on grounds of inadmissibility, in accordance with article 1 of the Optional Protocol.

6.15 The Committee has taken note of the author's allegation that article 15 of the Covenant was violated, in that Mr. Zogo Andela was taken into custody prior to the establishment of the Special Criminal Court responsible for hearing his case. The Committee points out that the accused is being prosecuted for misappropriation of public

<sup>16</sup> See, among others, *Akwanga v. Cameroon*, para. 6.4, and communication No. 2325/2013, *Foumbi v. Cameroon*, decision adopted on 28 October 2014, para. 8.5.

<sup>17</sup> See communication No. 1342/2005, *Gavrilin v. Belarus*, Views adopted on 28 March 2007, para. 7.3.

<sup>18</sup> See communication No. 1312/2004, *Latifulin v. Kyrgyzstan*, Views adopted on 10 March 2010, para. 7.2.

<sup>19</sup> See communications Nos. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision adopted on 2 November 2004, para. 7.3; 886/1999, *Bondarenko v. Belarus*, Views adopted 3 April 2003, para. 9.3; and 1138/2002, *Arenz et al. v. Germany*, decision on admissibility, adopted 24 March 2004, para. 8.6.

funds, an offence punishable under article 184 of the 1965 Cameroonian Criminal Code, for acts committed between 1996 and 2003, and that the change of court changed neither the legal characterization of the offence nor the applicable penalty. The Committee therefore concludes that the author's claim under article 15 is incompatible *ratione materiae* with the rights enshrined in the Covenant and is thus inadmissible by virtue of article 3 of the Optional Protocol.

6.16 With regard to the author's argument, under article 16, that the criminal liability of Mr. Zogo Andela is not involved, inasmuch as such liability should be that of the legal person of the SCLM company of which he was chairman and chief executive, the Committee considers that this claim, too, should be dismissed, as Mr. Zogo Andela is personally accused of certain offences that he reportedly committed while directing SCLM and has been prosecuted as an individual in that capacity. This claim is thus incompatible *ratione materiae* with article 16 and should be declared inadmissible by virtue of article 3 of the Optional Protocol.

6.17 With regard to the claim under article 26, the Committee notes that the author has apparently not lodged his claim with the domestic courts. Furthermore, the Committee considers that the author has not sufficiently founded the claim, as he has failed to show a difference in treatment from that of other persons under the State party's jurisdiction on the basis of any of the grounds listed under article 26 of the Covenant. The Committee therefore declares this part of the communication inadmissible under article 2 and article 5 (2) (b) of the Optional Protocol.

6.18 The Committee considers that the author has sufficiently substantiated for the purposes of admissibility his claims under article 9 (1) (3) and (4) and article 14 (2) and (3) (c) of the Covenant, and therefore proceeds to a consideration of those claims on the merits.

#### *Consideration of the merits*

7.1 In accordance with article 5 (1) of the Optional Protocol, the Committee has considered the communication in the light of all the information made available to it by the parties.

7.2 The Committee recalls that, in accordance with article 9 of the Covenant, no one may be subjected to arbitrary arrest or detention. The Committee further recalls that after an initial determination has been made that pretrial detention is necessary, there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives.<sup>20</sup> Article 9 (3) provides that "Anyone arrested or detained on a criminal charge ... shall be entitled to trial within a reasonable time or to release". The Committee notes that since being indicted, Mr. Zogo Andela has been in pretrial detention since 30 March 2011. It further notes that the courts of the State party have justified keeping him in detention on purely procedural grounds, as the case has been transferred to the Special Criminal Court, without a substantive examination of his detention being carried out. The Committee notes that no review of the lawfulness of the detention has been performed. That being the case, and considering that the State party has not advanced any grounds that would justify Mr. Zogo Andela's continued detention, the Committee finds a violation of article 9 (1), (3) and (4).

7.3 With regard to the claim of excessive procedural delays, the Committee takes note of the author's allegation that Mr. Zogo Andela, since being indicted in 2011 and remanded in custody more than six years ago, has still not been tried for the offences of which he is accused. The Committee also notes the other procedural delays of which the author complains, including the decision by the Centre Region court of appeal of 24 July 2012 following the appeal lodged by Mr. Zogo Andela, which was issued more than 10 months after the expiry of the time limit laid down by Cameroonian law (para. 2.12). Moreover, the Committee notes that it was only on 1 July 2015 that the Supreme Court ruled on the appeal

<sup>20</sup> General comment No. 35 (2014) on article 9 (liberty and security of person), para. 38; see also communication No. 1085/2002, *Taright et al. v. Algeria*, Views adopted on 15 March 2006, paras. 8.3 and 8.4.

lodged by the accused on 20 September 2012 (paras. 2.12 and 2.13), or almost three years later.

7.4 The Committee recalls that, under article 14 (3) (c), everyone has the right “to be tried without undue delay”.<sup>21</sup> The Committee further recalls that Mr. Zogo Andela was arrested on 29 March 2011; that he was brought before the government procurator of the Mfoundi high court on 30 March 2011; that he was charged, the same day, with the offences of misappropriation of public funds and unlawful withholding of property and that he was thus remanded in custody. The State party argued that the examining magistrate had been engaged in numerous investigative procedures between April 2011 and September 2012 and that the case had then been transferred under a committal order to the Special Criminal Court. The material before the Committee also shows that a first hearing was held before the Special Criminal Court on 12 October 2016 (para. 2.25). The Committee has taken note of the State party’s information on the charges brought against Mr. Zogo Andela, the complexity of the case and the procedural requirements under the Criminal Procedure Code. However, the State party did not provide any specific grounds to justify the long delay between the indictment of Mr. Zogo Andela on 30 March 2011 and the first hearing on 12 October 2016. Moreover, the State party did not provide the Committee with any information on the subsequent progress of the trial after that first hearing. The Committee is of the view that such a delay was all the more serious in that Mr. Zogo Andela has been in pretrial detention continuously since his arrest in 2011.

7.5 In the light of the information submitted to the Committee, and in the absence of satisfactory explanations by the State party, the Committee concludes that there has been a violation of article 14 (3) (c). Having come to this conclusion, the Committee decides not to consider separately the claim made by the author on the basis of article 14 (2) 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), (2), (3) and (4) and of article 14 (3) (c) of the Covenant in the case of Mr. Zogo Andela.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to furnish the author with an effective remedy. This requires States parties to provide full redress to persons whose rights under the Covenant have been violated. In the present case, the State party is required, inter alia, to: (a) immediately release Mr. Zogo Andela pending his trial; (b) bring Mr. Zogo Andela to trial without delay; and (c) provide Mr. Zogo Andela with appropriate compensation for the violations that he has suffered. The State party also has an obligation to take measures to ensure that similar violations do not occur in the future.

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 or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s Views. The State party is also requested to publish the Committee’s Views and to distribute them widely in the official languages.

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<sup>21</sup> See, in particular, *Taright v. Algeria*, para. 8.5.