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Views

Communication No. 1813/2008

Submitted by:	Ebenezer Derek Mbongo Akwanga (represented by counsel, Kevin Laue, The Redress Trust)
Alleged victim:	The author
State party:	Cameroon
Date of communication:	20 June 2008 (initial submission)
Document reference:	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 October 2008 (not issued in document form)
Date of adoption of Views:	22 March 2011
Subject matter:	Torture and ill-treatment in detention; unfair trial
Procedural issues:	Same matter being examined under another procedure of international investigation or settlement; non-exhaustion of domestic remedies
Substantive issues:	Prohibition of torture; right to liberty and security of the person; humane treatment in detention; fair trial
Articles of the Covenant:	7, 9, 10 and 14
Articles of the Optional Protocol:	5 (2a); 5 (2b)

* Made public by decision of the Human Rights Committee.

On 22 March 2011 the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1813/2008.

[Annex]

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (101st session)

concerning

Communication No. 1813/2008*

Submitted by:	Ebenezer Derek Mbongo Akwanga (represented by counsel, Kevin Laue, The Redress Trust)
Alleged victim:	The author
State party:	Cameroon
Date of communication:	20 June 2008 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 2011,

Having concluded its consideration of communication No. 1813/2008, submitted to the Human Rights Committee on behalf of Mr. Ebenezer Derek Mbongo Akwanga on his own behalf, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 20 June 2008, is Mr. Ebenezer Derek Mbongo Akwanga, a Cameroonian national born on 18 November 1970 in Southern Cameroons and currently residing in the United States of America. He alleges violations by Cameroon[1] of articles 7, 9, 10 and 14. The author is represented by counsel, Mr. Kevin Laue, The Redress Trust.

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The texts of individual opinions signed by Committee members Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Sir Nigel Rodley, Ms. Margo Waterval and Mr. Fabián Omar Salvioli, are appended to the present decision.

[1] The Covenant and the Optional Protocol entered into force for Cameroon on 27 June 1984.

The facts as submitted by the author

2.1 Since his student days, the author was a political activist and leader of the Southern Cameroons Youth League (SCYL) and campaigned peacefully for the rights of the people of Southern Cameroons. On 24 March 1997, the author was travelling as a passenger in a car which was stopped in Jakiri, Bui Division, North-West Province.[2] Without warning, the State party's security agents fired shots at the tyres of the vehicle. The author recognized among the security agents a plain-clothes member of the political security network of the Yaoundé police. Large numbers of people swarmed around the car and in the resulting chaos, the author managed to escape. Later that night, the author was detained by about 10 armed police officers. He was handcuffed and led towards a van without being told why he was being arrested. When he asked questions, he was hit with a rifle butt, causing him to faint. He regained consciousness in a cell at the Jakiri Gendarmerie Brigade where he was questioned about his identity. His legs were chained and he was kicked and beaten with batons and doused with stinking water until he fainted. In total, he was detained for about 13 hours at Jakiri Gendarmerie Brigade.

2.2 On 25 March 1997, the author was driven to the Kumbo Gendarmerie, where he was stripped naked and, with his chained legs forcibly stretched out, he was beaten with a machete on the soles of his bare feet and then forced to dance on sharp gravel, singing the praise of President Biya in French. He was then placed in a very hot cell and subjected to a constant loud thumping noise. He spent five hours at Kumbo Gendarmerie. In the afternoon of that same day, he was driven to the Gendarmerie Legion at Up Station, Bamenda, where plastic bags were melted over his bare thighs, he was paraded naked in front of female officers, mocked and denied food and water. He was also suspended upside down from an iron bar between his knees and beaten on the soles of his bare feet. During these periods of torture, the author was interrogated and asked to confess to the crime of trying to divide the country. He was repeatedly accused of being part of an armed and violent secessionist movement, which he consistently denied. He spent five days in this place of detention.

2.3 On 29 March 1997, the author was taken to the National Headquarters of the Gendarmerie, Secretariat of the State for Defence in Yaoundé. He was identified as "*élément très dangereux*" and put in a cell with hardened criminals, who had been instructed by the gendarmerie to make him "uncomfortable". For 25 days he was forced to sleep near the toilet on a urine-soaked bare floor and he was not allowed to bathe. He was only able to crawl, as standing with his chained legs was painful. After the third day, he was interrogated and again consistently accused of being involved in an armed and violent secessionist movement.

2.4 On 2 June 1997, the author was taken to Kondengui Maximum Security Prison in Yaoundé, accused of activities incompatible with State security and attempting to split Southern Cameroons from Cameroon, however the allegations were confused and constantly changing. He was forced to share an overcrowded cell with 40 to 50 inmates, with wood-plank bunks for only 15. The prison was infested with rats and insects. After two weeks in this prison, the author became ill with a high fever and amoebic dysentery. The prison hospital he was taken to was under-resourced and lacked medicine. The author was assaulted by guards and other prisoners on numerous occasions. He spent nearly three months in this prison.

[2] According to Amnesty International, AFR 17/03/1999, more than 50 people from Cameroon's English-speaking provinces were detained for over two years in connection with violent events in North-West Province in March 1997 before being brought before a military court in the capital Yaoundé.

2.5 On 29 August 1997, the author was taken to Mfou Special Prison in the department of Méfou-et-Afamba, where he was placed in a dark, filthy cell with no windows. A few hours later he was placed in a communal cell, where other inmates abused him when they found out that he was involved in Southern Cameroons activities. Food in prison was always inadequate both in quantity and quality. On 6 June 1998 after 10 months in prison, the author became very ill.[3] He managed to alert some colleagues who publicized his illness and as a result he was hospitalized. In Mfou District Hospital, he was diagnosed as suffering from excessive torture and trauma with partial paralysis. A month later he was returned to prison. During the following 18-month period, the author was held incommunicado with no access to family, friends or lawyers. On 4 February 1999, he was transferred back to Kondengui Maximum Security Prison.

2.6 On 8 April 1999, the author was given papers in prison that he was to be arraigned at Yaoundé military court on 14 April 1999. The documents were in French and, although he could not understand them, he had to sign them. No lawyers were present. The charges were: aggravated theft, assassination, hostilities against the nation, attempted secession, non-denunciation of criminal activities, insurrection, revolution and complicity. The evidence presented consisted of a map of Southern Cameroons, Southern Cameroons National Council membership cards, fund-raising collection boxes, bows and arrows, and four "den guns".[4] There was only one Southern Cameroonian officer on the bench, who, when he agreed with the defence on the issue of translation, was replaced by a supporter of the Government. On the second day of the trial, the charges were changed and neither the accused nor the defence could understand them as they remained unclear. These new charges included offences under laws passed two years after the offences were said to have been committed, and were based on the evidence of those officers who had arrested and tortured the author. The author denied and continues to deny that he had committed any crimes. On 6 October 1999, the author was sentenced to 20 years' imprisonment.

2.7 The author remained in Kondengui Maximum Security Prison to serve his sentence. He became ill with a pulmonary infection and spent nine months in the prison infirmary in 2001. In March 2003, he was admitted to Yaoundé Central Hospital. On 9 July 2003, the author escaped from hospital to Nigeria, where he remained for two and a half years. In Nigeria he was hospitalized and a doctor noted in his file that he had been subjected to physical and psychological torture.

2.8 The author was recognized as a refugee by the Office of the United Nations High Commissioner for Refugees. In February 2006, he was granted refugee status in the United States of America. In November 2007, a psychotherapist recorded the psychological impact of the torture the author had suffered and referred to persistent nightmares, extreme anxiety, fear, panic attacks, depression and insomnia.

The complaint

3.1 The author submits that the ill-treatment and torture he suffered during his arrest and at the various places of detention where he was held constitute a breach of article 7. These places were Jakiri Gendarmerie Brigade;[5] Kumbo Gendarmerie; Bamenda Gendarmerie; Yaoundé Gendarmerie Headquarters, where the author was required to sleep in sordid

[3] He had difficulties moving the right side of his body and speaking. He vomited and defecated blood. He suffered from loss of vision.

[4] Traditionally made guns which do not use bullets but gunpowder and are fired during traditional ceremonies.

[5] See communication No. 334/1988, *Bailey v. Jamaica*, Views adopted on 12 May 1993; communication No. 255/1987, *Linton v. Jamaica*, Views adopted on 22 October 1992.

conditions and the authorities failed to intervene when fellow prisoners tormented him physically and psychologically;[6] the Kondengui Maximum Security Prison in Yaoundé, where the author was subjected to inhuman conditions, as a direct result of which he fell seriously ill and could not obtain proper treatment;[7] and lastly, the Mfou Special Prison, where the author was held incommunicado from 29 August 1997 to 4 February 1999, which facilitated the practice of torture and ill-treatment.[8] The author submits that the treatment he suffered during his arrest and in successive places of detention amounts to torture or at least cruel, inhuman or degrading treatment, contrary to articles 7 and 10 of the Covenant.

3.2 The author states that the events described constitute a violation of his rights under article 9 as he was never informed at the time of his arrest of the reasons for his arrest; he was not brought promptly before a judicial body and was severely tortured; he was deprived of his liberty for more than two years before being brought before a military court and during this period he had no opportunity to challenge any aspect of his detention.

3.3 With respect to article 10, the author refers to the Committee's jurisprudence, according to which the Standard Minimum Rules for the Treatment of Prisoners are effectively incorporated in article 10.[9] The author submits that he was held in a cell with 55 people sharing 15 beds, in violation of rule 9. Moreover, contrary to rules 10 to 21, he did not have adequate bedding, clothing, food and hygiene facilities. Furthermore, he did not receive adequate medical care (rules 22 to 26). In addition, in breach of article 10, paragraph 2, the author, who was a remand prisoner, was not segregated from convicted prisoners. He was denied access to the outside world for 18 months and therefore contends that his incommunicado detention was in breach of article 10.[10]

3.4 As regards article 14, the author submits that the composition of the military court and the conduct of the trial violated his rights to a fair trial, as the military court operated under the authority of the Ministry of Defence, which also has authority over the persons who tried, detained and charged the author. Moreover, he asserts that the information used by the prosecutor was obtained by torture. The author had no access to a lawyer during his pretrial detention and during the trial he had little opportunity to communicate with his lawyer, who had no access to the indictment and was therefore not able to prepare the author's defence adequately. Moreover, the prosecution relied on written evidence proving that armed attacks had been planned; however, this evidence was not produced in court. The author also submits that he was tried by a military court although he was a civilian.[11]

3.5 With regard to the exhaustion of domestic remedies, the author submits that during his incarceration, petitions were made by political parties, such as the Social Democratic

[6] See communication No. 868/1999, *Wilson v. the Philippines*, Views adopted on 30 October 2003, para. 2.1.

[7] See communication No. 115/1982, *Wight v. Madagascar*, Views adopted on 1 April 1985, para. 15.2-17; communication No. 1152/2003 and 1190/2003, *Bee and Obiang v. Equatorial Guinea*, Views adopted on 30 November 2005, para. 6.1; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 10 August 1994, para. 9.4; communication No. 188/1984, *Portorreal v. Dominican Republic*, Views adopted on 5 November 1987, para. 9.2.

[8] See communication No. 704/1996, *Shaw v. Jamaica*, Views adopted on 4 June 1998; communication No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.7; general comment No. 20, 10 March 1992, para. 11.

[9] See for example communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 10 August 1994, para. 9.3, concluding observations on the United States of America, CCPR/C/79/Add.50, para. 34.

[10] See communication No. 917/2000, *Arutyunyan v. Uzbekistan*, Views adopted on 13 May 2004.

[11] See Concluding observations by the Human Rights Committee, Cameroon, CCPR/C/79/Add.116, para. 21.

Front (SDF) and international NGOs calling for his release, but these were ignored. The author was not allowed any visits by his family, friends or lawyers who, because of their genuine fear of intimidation, could not take any steps to have access to him, nor was it possible for him to bring any legal action from prison. Due to the fact that the author subsequently escaped from prison and fled abroad, he is prevented from returning to the State party to pursue any local remedies.

3.6 The author further submits that one of the defence lawyers tried to obtain the judgement or sentencing papers from the Military Court and Appeals Court of Centre Province, which confirmed the initial sentence, but without success. Proceedings to challenge the jurisdiction of the Military Court and for the trial to be heard under the jurisdiction of the common law and in a language which the author could understand, filed before the Supreme Court on 10 December 1997, were ignored by the Military Court, which proceeded with the trial. To date, the motion before the Supreme Court is still pending. The author submits that it would be futile and dangerous for him to do any more than he already attempted while in custody. He recalls the Committee's jurisprudence according to which the effectiveness of remedies against ill-treatment cannot be dissociated from the author's portrayal as a political opposition activist.[12] He adds that his isolation in prison prevented him from availing himself of remedies, in particular as he was detained incommunicado in inhumane conditions. He further submits that, even if he had been allowed access to remedies, any attempt to sue the State would have been futile, as the judiciary is not independent.[13] He adds that claims for compensation would also be ineffective, as the law on compensation came into force after the events concerned had occurred and the perpetrator must stand trial for torture. Therefore, the author claims that he has no adequate or available remedy in Cameroon either in law or practice.

State party's observations on admissibility and merits

4.1 On 8 July 2009, the State party submitted its observations on admissibility and merits. The State party refers to the facts as submitted by the author and notes that on 23 March 1997, dynamite, detonators and nitrate were stolen from a powder magazine. On 27 March 1997, administrative buildings in Jakiri were attacked causing death, serious injury and kidnapping. The investigations led to the arrest of 67 persons. The author had stated in his testimony of 5 April 1997 that as the President of the youth of the Southern Cameroon's National Council (SCNC), he was in charge of stealing explosives, which were then hidden at the home of a member of the SCNC in Jakiri. The author was arrested when he was on the way to retrieve the explosives. The State party further submits that the author was part of a military trial against 67 members of the SCNC and that he was sentenced on 5 October 1999 to 20 years' imprisonment and a fine of 100,000 francs for the possession of illegal weapons and war munitions and aggravated theft. While the case was pending before the Court of Appeal, the author took advantage of a medical evacuation at the Central Hospital and escaped on 9 July 2003. On 15 December 2005, the Court of Appeal confirmed the first instance judgement and issued an arrest warrant against the author. Counsel for the author filed an appeal to the Supreme Court.

4.2 The State party submits that the communication should be declared inadmissible under article 5, paragraph 2 (a) of the Optional Protocol, as the same matter has been submitted on behalf of the author and 17 others to the African Commission on Human and

[12] See communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 10 August 1994, para. 8.2; communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 10 May 2005, para. 4.11.

[13] See US Department of State Report on Human Rights, 1997 and 1999, Special Rapporteur on torture, Sir Nigel Rodley, E/CN.4/2009/Add.2, 11 November 1999, para. 58.

People's Rights. On 25 November 2006, during the Commission's fortieth session, the case was heard; however, a decision remains pending.

4.3 Furthermore, the State party submits that the communication should be declared inadmissible for the author's failure to exhaust domestic remedies under article 5, paragraph 2 (b) of the Optional Protocol.[14] The author could have brought an application to the competent criminal court ("*tribunal répressif competent*") on the basis of article 132 bis of the Criminal Code to complain about the torture he had suffered, or on the basis of article 332 et seq. of the Code of Criminal Procedure to request that the proceedings be annulled because of the absence of an interpreter and of generally fair trial guarantees. In order to justify why he failed to exhaust domestic remedies, the author claims that permission for visits was not given and that he cannot return to Cameroon to introduce an application because of his escape. The State party submits that no instructions to refuse visits to the author have been issued to the competent authorities and that the author was hospitalized twice under surveillance and could have introduced his court actions at that time.

4.4 On the merits, the State party submits that investigations into this grave incident were carried out in full respect of the legislation in force at the time. Referring to the Committee's jurisprudence, the State party notes that it is for the national authorities to decide how to investigate a crime, as long as the investigation is not conducted in an arbitrary manner.[15] Torture and ill-treatment are of a criminal nature and therefore the onus of proof is on the author. The State party argues that the medical certificate issued by a Nigerian doctor only states that the author has an ulcer and diabetes, without establishing a link between this diagnosis and the violence that the author alleges he has suffered.

4.5 With regard to the author's allegations that his rights to liberty and security have been violated, the State party argues that the SCNC is a secessionist movement, all actions of which are illegal and prohibited. The author is being untruthful when he alleges that he did not know the reasons for his arrest, when it was thanks to his testimony that the person holding the stolen goods could be identified.

4.6 With regard to detention conditions, the State party acknowledges the problems of detention conditions in its prisons, in particular dilapidation, overcrowding, criminality and a lack of means to finance the construction of new prisons. Nevertheless, with the help of the European Union, prison conditions in Douala and Yaoundé have been significantly improved since June 2002. In the Kondengui Prison, detainees receive a daily food ration that can be supplemented by visitors. It also has an infirmary, run by a medical doctor, and a referral system has been established with Yaoundé Central Hospital. With regard to the allegations of torture in Mfou Prison, the author himself acknowledged that the torture was committed by his fellow detainees. In the absence of any proof that this treatment has been instigated by the authorities, the State party submits that it cannot be held responsible for acts by private individuals and recalls that it paid for the author's medical treatment following these acts of violence.

4.7 With regard to the author's allegations that his right to a fair trial was violated, the State party underscores that the trial was conducted in accordance with the legislation in

[14] See communication No. 1010/2001, *Aouf v. Belgium*, Views adopted on 17 March 2006; communication No. 1103/2002, *Castro v. Colombia*, Inadmissibility decision of 28 October 2005; communication No. 1218/2003, *Platonov v. Russian Federation*, Views adopted on 1 November 2005; communication No. 1302/2004, *Khan v. Canada*, Inadmissibility decision adopted on 25 July 2006; communication No. 1374/2005, *Kurbogaj v. Spain*, Inadmissibility decision adopted on 14 July 2006.

[15] See communication No. 1070/2002, *Kouidis v. Greece*, Views adopted on 28 March 2006.

force. With regard to the author's complaint relating to article 14, paragraph 3 (f) of the Covenant, the State party explains that French was used at the hearings; however those parties who did not speak or understand French benefited from the services of an official interpreter.

Author's comments on the State party's submission

5.1 On 22 September 2009, the author submitted his comments on the State party's observations on the admissibility and merits. He reiterates that he was held for two years without trial and that neither he nor his defence lawyer could properly understand the initial charges or the subsequent modified charges. He further claims that he was sentenced for crimes that had not been clearly explained and that he never saw the judgement.

5.2 With regard to admissibility, the author argues that he is not aware of any complaint submitted on his behalf to the African Commission on Human and People's Rights. He notes that he never authorized any lawyer to submit such a complaint. He further notes that the State party has not submitted any documentation in this regard and that the alleged complaint is not available in the public domain. Recalling the Committee's jurisprudence,[16] according to which the "same matter" in article 5, paragraph 2 (a) of the Optional Protocol must be understood as including the same claim concerning the same individual, submitted by him or by someone else capable of acting on his behalf before the other international body, the author submits that the allegedly pending complaint before the African Commission on Human and Peoples' Rights does not constitute the "same matter" as it does not concern the same persons: the State party mentions that the complaint before the African Commission was submitted on behalf of 18 persons, while the author is the sole complainant in the present communication. Furthermore, the facts of the author's complaint in the present communication relate to his detention from 24 March 1997 to 9 July 2003, while the facts on which the alleged complaint before the African Commission on Human and Peoples' Rights is based remain unclear.

5.3 With regard to the State party's argument that the author failed to exhaust domestic remedies, the author disputes the State party's statement that he did not exhaust any remedies before submitting his communication to the Committee. He notes that he was tried by a military court and that his appeal was decided on 15 December 2005. With regard to bringing a complaint of torture under Act No. 97/009 of 10 January 1997, the author argues that the court considered only a few matters and that once an official is found guilty, the Government usually dissociates itself from that official, making it impossible for the victim to obtain compensation. Moreover, the author was held incommunicado and therefore did not have the possibility to file any complaint. The author also submits that the remedy is not effective in view of the grave nature of the torture and ill-treatment that he suffered.[17] He further notes that the State party did not dispute that he was not allowed to receive visits but only said that it had given no instructions in this regard. Furthermore, the author argues that it is unreasonable to suggest that he could have engaged in any proceedings during the rare moments when he had access to medical treatment for his ill health, for which the State party is responsible.

[16] See communication No. 75/1980, *Fanali v. Italy*, Views adopted on 31 March 1983, para. 7.2; communication No. 1155/2003, *Unn et al. v. Norway*, Views adopted on 23 November 2004, para. 13.3; communication No. 6/1977, *Millan Sequeria v. Uruguay*, Views adopted on 29 July 1980, para. 9.

[17] See communication No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 19 August 1997, para. 5.2; communication No. 778/1997, *Coronel et al. v. Colombia*, Views adopted on 29 November 2002, para. 6.4.

5.4 The author argues that the fair trial protection guarantees under the Criminal Procedure Code are not applicable because his case was tried before a military court. On 10 December 1997, the author filed a motion before the Supreme Court to challenge the jurisdiction of the military court and to request that the trial be heard under common-law jurisdiction and in a language that the author could understand; however, this motion remains pending. Recalling the Committee's jurisprudence,[18] the author of a communication does not need to resort to remedies that objectively have no prospect of success.

5.5 With regard to the merits, the author denies any involvement in any theft of explosives or other illegal activity and denies having given any testimony on 5 April 1997. On the contrary, he claims that 5 April 1997 falls within the period during which he was tortured at the National Gendarmerie headquarters in Yaoundé. Furthermore, he underlines that all of the evidence brought against him was unreliable either because torture had been practised or because due process was not applied.

5.6 With regard to the torture and ill-treatment suffered by the author, he recalls the Committee's jurisprudence, according to which the State party has an obligation to investigate torture and that the investigation must be prompt, impartial, thorough and independent.[19] The author further argues that the State party has not responded to the specific allegations he has made and that its observations amount to a broad denial.[20] Moreover, with regard to the medical certificate issued by a Nigerian doctor in 2003, he disputes the State party's argument that it relates only to a stomach ulcer and diabetes. He refers to two additional medical reports of 2007 and 2009 in which the psychological impact of the torture was recorded and argues that these three medical reports, together with his detailed narrative, exonerate him from the burden of proof and demonstrate beyond any shadow of a doubt that torture had taken place.

5.7 The author further notes that the State party acknowledged that detention conditions are bad when it referred to improvements made from June 2002 to December 2006. The State party has also admitted that the author was physically and mentally abused by other inmates. With reference to the Committee's general comment, the author underlines that the State party failed in its obligation to comply with the Standard Minimum Rules for the Treatment of Prisoners and that it failed to prevent him from being attacked by others.[21]

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes the State party's argument that the communication should be declared inadmissible pursuant to article 5, paragraph 2 (a) of the Optional Protocol, as the same matter is pending before the African Commission on Human and Peoples' Rights. It

[18] See communication Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 7 April 1989, para. 12.3; communication No. 147/1983, *Arzuaga Gilboa v. Uruguay*, Views adopted on 1 November 1985, para. 7.2.

[19] See communication No. 1070/2002, *Kouidis v. Greece*, Views adopted on 28 March 2006, paras. 7.4 and 9; general comment No. 20, article 7, forty-fourth session, 1992, para. 14; communication No. 107/1981, *Almeida de Quinteros et al. v. Uruguay*, Views adopted on 21 July 1983, para. 15.

[20] See communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 24 April 2006, para. 9.4.

[21] General comment No. 21, article 10, para. 3, forty-fourth session, 1992.

also notes that the author claims that he never authorized anybody to submit a complaint on his behalf to the African Commission on Human and Peoples' Rights and that he does not have any knowledge of such a submission. The Committee recalls its jurisprudence, according to which article 5, paragraph 2 (a) of the Optional Protocol cannot be so interpreted so as to imply that an unrelated third party, acting without the knowledge and consent of the alleged victim, can preclude the latter from having access to the Human Rights Committee.[22] Accordingly and in absence of any documentation from the State party, the Committee concludes that article 5, paragraph 2 (a) of the Optional Protocol is not an impediment to the admissibility of the present communication.

6.3 The Committee also notes the State party's argument that the author failed to exhaust domestic remedies, as he could have introduced an application under the Code of Criminal Procedure to complain about the torture that he suffered and about the trial proceedings. It also notes the author's contention that he was unable to file a complaint of torture as he was held incommunicado and that the remedy is not effective in view of the grave nature of the torture and ill-treatment that he suffered. With regard to remedies concerning the trial proceedings, the Committee notes the author's argument that the Code of Criminal Procedure is not applicable in a trial before a military court and that on 10 December 1997 he filed a motion to the Supreme Court challenging the proceedings, which, however, remains pending.

6.4 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of article 5, paragraph 2 (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[23] With regard to the author's failure to raise claims of torture and unfair proceedings before the domestic courts, the Committee observes that the State party has merely listed in abstract terms the existence of remedies under the Code of Criminal Procedure, without relating them to the circumstances of the author's case and without showing how they might provide effective redress. The Committee notes that during the author's detention from 24 March 1997 to 9 July 2003, he was allegedly held incommunicado, a fact that the State party has refuted with the general statement that no instructions had been given to the competent authorities to refuse visits to the author. In the present case, the Committee considers that the remedy under the Code of Criminal Procedure was de facto not available to the author. With regard to the author's claims concerning the fairness of the proceedings, the Committee notes that on 10 December 1997, he filed a motion before the Supreme Court to challenge the jurisdiction of the military court and to request that the trial be heard under common-law jurisdiction in a language that he could understand. The Committee notes that this motion remains unanswered and, therefore, considers that the delay in responding to the author's motion of 1997 to the Supreme Court is unreasonable. Accordingly, the Committee concludes that article 5, paragraph 2 (b) of the Optional Protocol does not preclude it from examining the author's communication.

6.5 The Committee finds that, for purposes of admissibility, the author has sufficiently substantiated his claims under articles 7, 9, 10 and 14, of the Covenant and therefore proceeds to its consideration of the merits.

[22] See communication No. 74/1980, *Miguel Angel Estrella v. Uruguay*, Views adopted on 29 March 1983, para. 4.3.

[23] See communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5; communication No. 433/1990, *A.P.A. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1 of the Optional Protocol.

7.2 The Committee notes the author's detailed description of the torture he suffered in different places of detention, particularly at the time of his arrest, at the Jakiri Gendarmerie Brigade and at the Kumbo Gendarmerie. It notes the State party's argument that torture and ill-treatment are matters of criminal law and that the onus of proof therefore lies on the author. In light of the information provided to the Committee and, in particular, the detailed allegations of torture suffered by the author and the impact on his health shown by the three medical certificates submitted, the Committee concludes that the State party has violated article 7 of the Covenant.

7.3 The Committee notes that the State party has not contested the information concerning the author's conditions of detention and ill-treatment by fellow prisoners, and particularly the ill-treatment to which he was subjected in detention. The Committee recalls that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners.[24] It considers, as it has repeatedly found in respect of similar substantiated claims,[25] that the author's conditions of detention, as described, violate his right to be treated with humanity and with respect for the inherent dignity of the human person and are, therefore, contrary to article 10, paragraph 1 of the Covenant. Furthermore, the Committee finds that the fact the author was detained with convicted prisoners during his pretrial detention constitutes a violation of article 10, paragraph 2, of the Covenant.

7.4 With regard to the alleged violation of article 9, the Committee notes the State party's argument that the author knew the reasons for his arrest, as it was thanks to his testimony that the holder of the stolen goods could be identified. The Committee notes that this does not clarify whether the author was informed of the reason for his arrest at the time of his arrest. It further notes that the State party has not contested the author's prolonged pretrial detention from 24 March 1997 to 5 October 1999, without an opportunity to challenge the lawfulness of his detention. Recalling its general comment,[26] the Committee finds that nothing suggests that at the time of arrest, the author was informed of the reasons for his arrest, that he was ever brought before a judge or judicial officer, or that he ever was afforded the opportunity to challenge the lawfulness of his arrest or detention. In the absence of relevant State party information on these claims, the Committee considers that the facts before it indicate a violation of article 9, paragraphs 2, 3 and 4, of the Covenant.

7.5 The Committee notes the State party's argument that the author's trial was conducted according to the legislation in force and that he benefited from an official interpreter during the hearings. It also notes the author's argument that the court was not independent, that he had little opportunity to communicate with his lawyer, who had no access to the indictment and was therefore not able to prepare his defence adequately, and that the written evidence on which the indictment was based was not produced in court. The

[24] General comment No. 21 [44] on article 10, paras. 3 and 5; communication No. 1134/2002, *Fongum Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

[25] See for example: communication No. 908/2000, *Xavier Evans v. Trinidad and Tobago*, Views adopted on 21 March 2003; and communication No. 1173/2003, *Abdelhamid Benhadj v. Algeria*, Views adopted on 20 July 2007.

[26] General comment No. 8, article 9, sixteenth session, 1982.

Committee recalls its general comment No. 32,[27] in which it considers that the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate for the task and that recourse to military courts is unavoidable. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14. In the present case, the State party has not shown why recourse to a military court was required. In commenting on the gravity of the charges against the author, it has not indicated why the ordinary civilian courts or other alternative forms of civilian court were inadequate for the task of trying him. Nor does the mere invocation of conduct of the military trial in accordance with domestic legal provisions constitute an argument under the Covenant in support of recourse to such courts. The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14.[28] The Committee concludes that the trial and sentencing of the author by a military court discloses a violation of article 14 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the rights of Mr. Akwanga under article 7; article 10, paragraphs 1 and 2; article 9, paragraphs 2, 3 and 4; and article 14.

9. In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which should include a review of his conviction with the guarantees enshrined in the Covenant, an investigation of the alleged events and prosecution of the persons responsible, as well as adequate reparation, including compensation. The State party is under an obligation to avoid similar violations 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 guarantee 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.

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

[27] General comment No. 32, article 14, CCPR/C/GC/32, para. 22.

[28] See communication No. 1172/2003, *Madani v. Algeria*, Views adopted on 28 March 2007, para. 8.7.

Annex

Individual opinion of Committee members Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Sir Nigel Rodley and Ms. Margo Waterval

The signatories of this concurring opinion wish to reaffirm that they consider that military courts should not in principle have jurisdiction to try civilians.

Military functions fall within the framework of a hierarchical organization and are subject to rules of discipline that are difficult to reconcile with the independence of judges called for under article 14 of the Covenant and reaffirmed in the Bangalore Principles on the independence of the judiciary.

Furthermore, whenever States give military courts jurisdiction to try non-military persons, they must explain in their reports under article 40 of the Covenant or in a communication under the Optional Protocol the compelling reasons or exceptional circumstances that force them to derogate from the principle laid out above.

In all cases, military courts that try persons charged with a criminal offence must guarantee such persons all the rights set out in article 14 of the Covenant.

(*Signed*) Ms. Christine **Chanet**

(*Signed*) Mr. Ahmad Amin **Fathalla**

(*Signed*) Ms. Zonke Zanele **Majodina**

(*Signed*) Ms. Iulia **Motoc**

(*Signed*) Sir Nigel **Rodley**

(*Signed*) Ms. Margo **Waterval**

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Individual opinion of Committee member Mr. Fabián Omar Salvioli

1. I concur with the Views of the Human Rights Committee on communication No. 1813/2008 submitted by Mr. Ebenezer Derek Mbongo Akwanga, but feel obliged to place on record my thoughts on an issue about which, regrettably, my views differ from those of the majority of Committee members. I am referring to the scope of military jurisdiction within the framework of the International Covenant on Civil and Political Rights, and follow the same reasoning expressed in my individual opinion on communication No. 1640/2007 (*Abdelhakim Wanis El Abani v. Libyan Arab Jamahiriya*).

2. In paragraph 7.5 of its Views on the present communication, the Committee stresses that there was a violation of article 14 because the State party was unable to justify the need to have the author tried by a military court and that, consequently: "The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14.[a] The Committee concludes that the trial and sentence of Abbassi Madani by a military court discloses a violation of article 14 of the Covenant."

3. I must state unequivocally that the treatment of this point in general comment No. 32 is most regrettable. In its decision on the Akwanga case, the Committee has missed a clear opportunity to declare that the trial of civilians by military courts is incompatible with article 14 of the Covenant and to correct this regressive aspect of human rights law. A close reading of article 14 would indicate that the Covenant does not go so far as even to suggest that military justice might be applied to civilians. Article 14, which guarantees the right to justice and due process, does not contain a single reference to military courts. On numerous occasions — and always with negative consequences as far as human rights are concerned — States have empowered military courts to try civilians, but the Covenant is completely silent on the subject.

4. The Committee's reasoning in drafting general comment No. 32 should have been the exact opposite of what it was: since the trial of civilians by military courts is an exceptional exercise of jurisdiction (the trial of non-members of the military in the military justice system) and, moreover, since it takes place at an exceptional court (as military justice represents an exception to ordinary justice), it is a doubly exceptional exercise of jurisdiction and, as such, should have been explicitly provided for in the Covenant in order to be compatible with the Covenant, as it obviously removes civilians from the purview of those who are their natural judges.

5. Lest we forget, exceptions and restrictions to rights (in this case, a restriction on the right to be judged by a "natural judge" as part of the right to justice and due process) must in turn be interpreted restrictively and should not be so readily deemed to be compatible with the Covenant.

6. The idea is not — nor is it the Committee's role — to adapt the interpretation of the Covenant to take account of actual practices on the part of States that in fact entail proven human rights violations, but rather to help States parties to meet modern standards of due process by explicitly indicating what modifications, if any, must be made to domestic legislation in order to bring it into line with the Covenant.

[a] See communication No. 1172/2003, *Madani v. Algeria*, Views adopted on 28 March 2007, paragraph 8.7.

7. Military jurisdiction, as applied throughout the world since the Second World War, with tragic results, has led without exception to the entrenchment of impunity for military personnel accused of serious mass violations of human rights. Moreover, when the military criminal justice system is applied to civilians, the outcome is convictions obtained on the basis of proceedings vitiated by abuses of all kinds, in which not only does the right to a defence become a chimera but much of the evidence is obtained by means of torture or cruel and inhuman treatment.

8. The Covenant does not prohibit the use of military courts, nor is it the intention of this opinion to call for their elimination. The jurisdiction of the military criminal justice system should, however, be contained within suitable limits if it is to be fully compatible with the Covenant: *ratione personae*, military justice should apply to serving military personnel, never to civilians or retired military personnel; *ratione materiae*, military courts should be competent to try disciplinary offences, never ordinary offences and certainly not human rights violations. Only under these conditions can military jurisdiction be compatible with the Covenant.

9. General comment No. 32 is an important legal document with respect to the human right to due process, but its treatment of the issue under discussion here is highly regrettable. Almost four years have passed since it was adopted, and the Committee should take steps to correct the notion that military courts may try civilians; its current position is completely out of step with modern standards of international human rights protection and with the most enlightened doctrine on the subject.

10. The Committee does not need to draft a new general comment in order to move forward *pro homine* on this particular point, but merely to take account of developments in the system of human rights protection. Individual communications under the Optional Protocol involving cases before the Committee in which, as in the Akwanga case, a civilian is tried by a military court and concluding observations on State party reports under article 40 of the Covenant also provide appropriate opportunities to perform this indispensable legal task and thereby contribute to the better fulfilment of the object and purpose of the Covenant.

11. As soon as this position is adopted, States parties, as members of the international community, will in good faith adjust their domestic legislation, and military courts with the power to try civilians will become part of a sad past that has happily been left behind.

12. Throughout its history, the Committee has made notable contributions to international human rights law and has been a source of inspiration to other international and regional jurisdictions. On the issue addressed in this opinion, however, the Committee is moving — for not much longer, I hope — in exactly the opposite direction.

13. As has been seen in thousands of cases and, regrettably, once again here, in the Akwanga case — although the Committee did not find it necessary to consider it in greater depth, in the absence of any justification by the State party of the need to try the victim in a military court — the abolition of military courts' jurisdiction over civilians is an outstanding issue in urgent need of a clear and appropriate response from the Human Rights Committee.

14. Moreover, the Committee ought to have pointed out, in paragraph 9 of its Views, that the State party should amend its domestic legislation so as to ensure that military courts have no jurisdiction whatsoever over civilians, as a way to avoid a repetition of incidents such as those described in the present communication.

(*Signed*) Fabián **Omar Salvioli**

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]