



## INDIVIDUAL COMPLAINT

The Case of Hervé Mombo Kinga

To the attention of:  
United Nations Working Group on Arbitrary Detention

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*Individual Complaint* brief prepared and submitted by:  
The Human Rights Foundation Center for Law and Democracy

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Authors:  
Céline Assaf-Boustani, International Legal Associate, Human Rights Foundation  
Michelle Gulino, Legal and Policy Fellow, Human Rights Foundation

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Human Rights Foundation  
350 Fifth Avenue, Suite 4202  
New York, NY 10118  
[www.hrf.org](http://www.hrf.org)

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## **A. Procedural elements**

### **a. Mandate of the U.N. Working Group on Arbitrary Detention**

In accordance with the most recent mandate of the U.N. Working Group on Arbitrary Detention (hereinafter “WGAD”), clarified and extended by resolution 1997/50 and 24/7 of 26 September 2013, the tasks of the WGAD are:<sup>1</sup>

- (a) To investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned;
- (b) To seek and receive information from Governments and intergovernmental and non-governmental organizations, and receive information from the individuals concerned, their families or their representatives;
- (c) To act on information submitted to its attention regarding alleged cases of arbitrary detention by sending urgent appeals and communications to concerned Governments to clarify and to bring to their attention these cases;
- (d) To conduct field missions upon the invitation of Government, in order to understand better the situations prevailing in countries, as well as the underlying reasons for instances of arbitrary deprivation of liberty;
- (e) To formulate deliberations on issues of a general nature in order to assist States to prevent and guard against the practice of arbitrary deprivation of liberty and to facilitate consideration of future cases;
- (f) To present an annual report to the Human Rights Council presenting its activities, findings, conclusions and recommendations.

### **b. Standing of the Human Rights Foundation to submit an individual complaint**

Pursuant to the mandate of the WGAD, the “Manual of Operations of the Special Procedures of the Human Rights Council” (hereinafter “Manual of Operations”),<sup>2</sup>

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<sup>1</sup> Resolutions 1997/50, 2000/36, and 2003/31 were adopted by the U.N. Commission on Human Rights extending the mandate of the Working Group on Arbitrary Detention. The Human Rights Council, which “assume[d] . . . all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights” pursuant to U.N. General Assembly Resolution 60/251, G.A. Res. 60/251, ¶ 6 (15 Mar. 2006), has further extended the mandate through Resolution 6/4, 15/18, and 20/16.

and the publication “Working with the United Nations Human Rights Programme, a Handbook for Civil Society” (hereinafter “Handbook for Civil Society”),<sup>3</sup> the Human Rights Foundation (hereinafter “HRF”), a nongovernmental human rights organization, can provide information on a specific human rights case or situation in a particular country, or on a country’s laws and practices with human rights implications.

### **c. Grounds for the submission of an individual complaint**

#### **i. Working methods**

According to the working methods of the WGAD, deprivation of liberty will be considered arbitrary if it falls into one of the following categories:<sup>4</sup>

- a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (*Category I*);
- b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by Articles 7, 13-14, and 18-21 of the Universal Declaration of Human Rights<sup>5</sup> and, insofar as States parties are concerned, by Articles 12, 18-19, 21-22, and 25-27 of the International Covenant on Civil and Political Rights (*Category II*);<sup>6</sup>

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<sup>2</sup> See Manual of Operations of the Special Procedures of the Human Rights Council (Aug. 2008) ¶ 23, 38 and 133, available at [https://www.ohchr.org/Documents/HRBodies/SP/Manual\\_Operations2008.pdf](https://www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf).

<sup>3</sup> See Working with the United Nations Human Rights Programme, a Handbook for Civil Society (2008), available at [https://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook\\_en.pdf](https://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf).

<sup>4</sup> See Methods of work of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/33/66 (12 July 2016), available at <https://www.ohchr.org/EN/Issues/Detention/Pages/MethodsOfWork.aspx>.

<sup>5</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (2 Dec. 1948). While declarations adopted by the U.N.’s General Assembly are not always binding (this term is often used to deliberately state that the parties do not intend to create binding obligations but merely disclose certain aspirations), some instruments called “declarations,” which initially had no binding force, acquired this characteristic as a result of State practice and became customary international law. See Mary Robinson, U.N. High Commissioner for Human Rights, Statement by the High Commissioner for Human Rights at the European Colloquy, Organised by the Council of Europe (2 Sept. 1998) (“Many of the provisions of the Declaration have become part of customary international law, which is binding on all states whether or not they are signatories to one or more multilateral conventions concerning human rights. Thus, what started its existence as a solemn but non-binding proclamation of rights and freedoms has, at least in some respects, acquired through state practice the status of universal law.”).

<sup>6</sup> International Covenant on Civil and Political Rights, 16 Dec. 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

- c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (*Category III*);
- d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (*Category IV*);
- e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (*Category V*).

## **ii. Arbitrary deprivation of liberty in the present case**

The case of Hervé Mombo Kinga falls under Categories I, II, III, and V of the working methods of the WGAD. The detention of Kinga, articulated in detail below, should be considered arbitrary under these categories because: (1) the State of Gabon deprived Kinga of his liberty as a result of his exercise of the rights guaranteed by Article 19 of the Universal Declaration of Human Rights (hereinafter “UDHR”) and Article 19 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”); (2) Gabon’s non-observance of international norms governing the rights to freedom from torture and arbitrary arrest and detention, as well as the due process right to a presumption of innocence, pursuant to Articles 5, 8, 9, and 11 of the UDHR and Articles 7, 9, and 14 of the ICCPR, was sufficiently grave so as to give the deprivation of liberty an arbitrary character; and (3) the deprivation of liberty constituted a violation of international human rights law that prohibits discrimination based on political opinion or other statuses, as enshrined in Article 7 of the UDHR and Article 26 of the ICCPR. Therefore, HRF argues that the case of Hervé Mombo Kinga adequately satisfies the requirements by which to submit an individual complaint to the WGAD.

HRF will pursue the regular communications procedure before the WGAD in order to have the ability to provide comments on any State response, as well as continue rendering an opinion on the arbitrary nature of Hervé Mombo Kinga’s detention, as necessary.

#### **d. Confidentiality waiver**

In accordance with the Manual of Operations, and in communications sent to States, the identity of the petitioner can remain confidential. However, the Manual of Operations also allows the petitioner to request the publication of its identity. Accordingly, *HRF waives its right to confidentiality* and requests that its identity be revealed in the event that, as part of the procedure involving investigation of individual cases, an allegation letter is sent to the State of Gabon in connection with the information supplied herein.

#### **e. Consent given by the victim**

Hervé Mombo Kinga, through his son, Jonathan Obama Mombo, has authorized the Human Rights Foundation to submit this individual complaint on his behalf, to the WGAD.

### **B. Questionnaire**

The following questionnaire was retrieved from the Fact Sheet No. 26 of the WGAD (Annex V), available on the website of the United Nations (“U.N.”) High Commissioner for Human Rights, in accordance with the Manual of Operations.<sup>7</sup> The focus of this individual complaint is the arbitrary arrest and detention of Hervé Mombo Kinga, which began on August 28, 2017, in retaliation for his exercise of his right to freedom of expression, as guaranteed by the UDHR and ICCPR.

#### **a. Identity**

Family name: Mombo Kinga  
First name: Hervé  
Sex: Male  
Birthdate: July 9, 1974  
Nationality/Nationalities: Gabonese  
Profession: Business Owner  
Address of usual residence: PK11 Libreville, Gabon

#### **b. Circumstances of the arrest**

##### **i. Date and place of arrest**

On August 28, 2017, Hervé Mombo Kinga was arrested by the Specialized Police of Gabon without an arrest warrant, at his cyber café in Libreville, Gabon.

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<sup>7</sup> See “Model Questionnaire to be Completed by Persons Alleging Arbitrary Arrest or Detention,” U.N. Working Group on Arbitrary Detention, *available at* <http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>.

## ii. Chronology of events

Hervé Mombo Kinga is a 44-year old Gabonese citizen. Prior to his detention, Kinga worked as a blogger activist and owned a cyber café in Libreville. As a blogger, Kinga openly criticized the Gabonese government and voiced support for the 2016 presidential election losing candidate, Jean Ping. He projected videos next to his café<sup>8</sup> and had no criminal history.

In August 2017, Kinga participated in peaceful demonstrations against the contested electoral results elevating President Ali Bongo. During the same time, he began indiscriminately filming Gabonese citizens living in deprived conditions — conditions applicable to a majority of Gabonese people — to expose the corruption and poor governance of Bongo’s regime. On one occasion, Kinga posted the videos he had filmed to his Facebook page. On August 28, 2017, Kinga was arrested by the Specialized Police as he was opening his cyber café.

Police officers did not provide a reason while arresting Kinga, nor did they present an arrest warrant at the time of his arrest, as is required by both domestic and international law. After his arrest, Kinga was taken to the Documentation Center of the Specialized Police (the “Documentation Center”), which is under the president’s control. After three (3) days, on August 31, 2017, Kinga was transferred to the Central Prison of Libreville by judicial order. He was not granted the right to be represented by a lawyer until the day he was formally placed in detention. International law, however, necessitates that anyone who is arrested and detained, should have prompt access to “legal aid at all stages of the criminal justice process.”<sup>9</sup> Kinga’s detention order was given before the investigating judge had even heard Kinga, an action which violates Article 108 of Gabon’s Penal Procedure Code.<sup>10</sup> Kinga was charged with “insulting the head of State,” under Article 158 of the Penal Code, and “incitement to violence” and “participating in propaganda that disturbs the public order,” under Article 88 of the Penal Code. Such crimes carry prison sentences of up to ten (10) and five (5) years, respectively.<sup>11</sup> Additionally, Kinga’s lawyer was not permitted to consult Kinga’s file, which, as later acknowledged by the prosecutor, insufficiently corroborates the charges against Kinga.

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<sup>8</sup> *Amnesty International Report 2017/18: The State of the World’s Human Rights*, AMNESTY INTERNATIONAL, at 169 (2018), available at <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>.

<sup>9</sup> Principles and Guidelines, at Principle 3 and 11. *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, A/RES/67/187, annex (28 March 2013) [hereinafter Principles and Guidelines], available at [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf).

<sup>10</sup> Penal Procedure Code of Gabon (1961, rev. 2004), art. 108.

<sup>11</sup> Penal Code of Gabon (1963), arts. 158 and 88, respectively.

In the Central Prison of Libreville, Kinga was kept in solitary confinement — which can itself “amount to torture”<sup>12</sup> — for one (1) month and six (6) days. In this cell, Kinga was psychologically tortured. He was kept with very limited light and air coming from a small opening in the ceiling, making it impossible to ascertain whether it was day or night. Through this opening, rather than through the door, Kinga received his minimal food ration. Although detainees are usually allowed three (3) meals per day, Kinga was only given food once per day, only after sunset. This food ration was thrown over the wall to him, as if he were an animal. He was unable to shower and lacked access to any toilet facilities; instead, he was forced to relieve himself in a plastic bag in his cell. Kinga was not provided a mattress and was relegated to sleeping on the floor, although he could not properly lie down in the painfully small cell; this cell was less than 5.4m<sup>2</sup>, the minimum acceptable size of a cell as specified by the U.N.<sup>13</sup> Additionally, during this time, Kinga was not permitted to contact his family or to leave his cell. This treatment contradicts Gabon’s Constitution, which states: “No one may be humiliated, mistreated, or tortured, even during moments of arrest or imprisonment.”<sup>14</sup>

While Kinga’s lawyer wrote to the prison director, the Minister of Justice, and the U.S. Ambassador to Gabon on October 2, 2017 regarding Kinga’s dire human rights condition, none took any action to change his situation. Given that Kinga’s pre-trial detention is illegal under local law, Kinga’s attorney submitted three (3) requests to release Kinga on bail: on September 18, 2017, December 5, 2017, and January 3, 2018. In January 2018, Kinga’s lawyer also wrote to the attorney general to highlight the arbitrary nature of Kinga’s detention, but nothing came of these numerous efforts. On January 19, 2018, Kinga’s lawyer again presented a brief to the investigating judge,<sup>15</sup> demonstrating that the available facts did not amount to evidence of a crime, and there was thus no evidence to support Kinga’s charges. Additionally, on August 1, 2018, Kinga’s lawyer wrote to the prosecutor discussing the inhumane conditions of Kinga’s detention. Under Article 135 of Gabon’s Penal Code, public officials who neglect or refuse to comply with legal claims for arbitrary and unlawful detention, are to be met with imprisonment and possibly a fine.<sup>16</sup>

It was only after Kinga’s lawyer wrote a timely and impactful letter to the Ambassador to the European Union on October 2, 2017, that Kinga was transferred the following day to another cell with comparatively improved conditions. The geopolitical context of Gabon’s relations with France and the EU, discussed *infra* in

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<sup>12</sup> See *Solitary Confinement Should be Banned in Most Cases, UN Expert Says*, UN NEWS (18 Oct. 2011), <https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says>.

<sup>13</sup> “A Prison Evaluation Checklist for Post-Conflict Settings,” UNITED NATIONS, *available at* [https://www.unodc.org/documents/justice-and-prison-reform/FINAL\\_GFP\\_Prison\\_Evaluation\\_Checklist\\_-\\_July\\_2014.pdf](https://www.unodc.org/documents/justice-and-prison-reform/FINAL_GFP_Prison_Evaluation_Checklist_-_July_2014.pdf).

<sup>14</sup> CONSTITUTION (1991, rev. 2011) (Gabon), art. 1(1).

<sup>15</sup> Gabon subscribes to an inquisitorial legal system, as opposed to an adversarial legal system.

<sup>16</sup> Penal Code, *supra* note 11, at arts. 134–135.

Section B.c.i.1., helps explain the reason why Kinga's prison conditions were finally improved.

While Kinga is no longer in solitary confinement today, he remains in detention and continues to experience the residual injurious effects of his arbitrary arrest and detention and solitary confinement. Kinga currently awaits a hearing which has not been scheduled to date. Under these conditions, Kinga's future remains unfair and uncertain.

**c. Describe the circumstances of the arrest and/or the detention and indicate precise reasons why you consider the arrest or detention to be arbitrary**

**i. Background information**

**1. Geopolitical Context: Aftermath of the 2016 presidential election and Gabon-European Union (EU) Relations**

The state of political affairs within Gabon sheds light on the situation of Kinga's arrest and detention. Given its strategic location, Gabon performs a key function in the stability of the Central African region.<sup>17</sup> Yet, the country has failed to live up to this role and set a socio-political example within the region. Ali Bongo Ondimba has been president of Gabon since 2009, succeeding his father who was Africa's longest-serving dictator after nearly forty-two (42) years in power.<sup>18</sup> Bongo's first election was one shrouded in violence, which intensified during the most recent presidential election in 2016.

It is in this context that Kinga expressed his support for presidential candidate Jean Ping, the former African Union Chair who ran against incumbent Bongo, garnering 48.2% of the vote to Bongo's 49.8%, by a margin of fewer than 6,000 votes.<sup>19</sup> Gabonese people took to the streets in protest, resulting in over 800 arrests, potentially dozens of deaths of Ping's supporters, and over 100 people injured.<sup>20</sup>

While the Gabonese government has attempted to portray its electoral process as free and fair, Gabon's electoral system reveals palpable fraud and the makings of an electoral coup. For instance, in 2016, Libreville's 3<sup>rd</sup> arrondissement, where Ali

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<sup>17</sup> *Gabon and the EU*, EUROPEAN UNION EXTERNAL ACTION (11 May 2016), [https://eeas.europa.eu/generic-warning-system-taxonomy/404\\_en/12272/Gabon%20and%20the%20EU](https://eeas.europa.eu/generic-warning-system-taxonomy/404_en/12272/Gabon%20and%20the%20EU).

<sup>18</sup> *See Gabon Election: Jean Ping Takes Ali Bongo to Court*, BBC NEWS (9 Sept. 2016), <https://www.bbc.com/news/world-africa-37316746>.

<sup>19</sup> *Gabon Election: Justice Minister Quits Over Disputed Result*, BBC NEWS (5 Sept. 2016), <https://www.bbc.com/news/world-africa-37281970>.

<sup>20</sup> *Id.*

Bongo's allies and the Republican Guard voted, had the greatest number of polling stations and the least electoral supervision; however, it is not the largest or most heavily populated arrondissement.<sup>21</sup> There were also localities with more registered voters than actual residents; economist Mays Mouissi determined that 34% of localities in Gabon had "an atypical number of registered voters in relation to their official population."<sup>22</sup>

In the aftermath of the election chaos, Justice Minister Seraphim Moundounga resigned, the EU also questioned the legitimacy of the election results, and France proposed a recount of the votes.<sup>23</sup> Gabon and the EU have been involved in political and economic negotiations since 2000, with the signing of the Cotonou Agreement, which forms the basis of their partnership.<sup>24</sup> This partnership has also involved civil society organizations in a dialogue on matters pertaining to democracy and respect for human rights. In Gabon, the signs of electoral fraud and aftermath of violence and abuse against dissidents, brought increased attention to the human rights abuses by Ali Bongo's authoritarian regime.

EU electoral missions normally deploy election observers at least six (6) months prior to an election, whereas they only arrived one (1) month prior to the 2016 presidential election in Gabon, thereby making it even more difficult to detect every element of the sophisticated fraudulent voting system in place.<sup>25</sup> The EU observer mission, however, did note a discrepancy between the number of non-voters in the province, as well as blank and invalid ballots, and the voter participation rate.<sup>26</sup>

Additional signs of electoral fraud pervaded the 2016 election. In Bongo's home stronghold province of Haut-Ogooué, where official figures cited a voter turnout of 99.93%, Bongo received 95% of the votes.<sup>27</sup> The EU mission noted that voter turnout in other provinces was only about 48%.<sup>28</sup> Indeed, EU chief polls observer Mariya Gabriel, noted that the "integrity of the provisional results for [Bongo's home] province" raised doubt.<sup>29</sup> The Gabonese government has also rejected requests by its opposition and civil society to submit the electoral file to an audit.<sup>30</sup>

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<sup>21</sup> Céline Assaf-Boustani & Marc Ona Essangui, *Au Gabon, "des Élections Présidentielles ni Libres, ni Justes,"* L'EXPRESS (24 Aug. 2016), [https://www.lexpress.fr/actualite/monde/afrique/au-gabon-des-elections-presidentielles-ni-libres-ni-justes\\_1823948.html](https://www.lexpress.fr/actualite/monde/afrique/au-gabon-des-elections-presidentielles-ni-libres-ni-justes_1823948.html).

<sup>22</sup> *Id.*, translated.

<sup>23</sup> Gérauds Wilfried Obangome, *Gabon Leader Under Scrutiny as EU Questions Election Win,* REUTERS (6 Sept. 2016), <https://www.reuters.com/article/us-gabon-election-election/gabon-leader-under-scrutiny-as-eu-questions-election-win-idUSKCN11C112>.

<sup>24</sup> *Gabon and the EU*, *supra* note 17.

<sup>25</sup> Assaf-Boustani & Ona Essangui, *supra* note 21.

<sup>26</sup> Obangome, *supra* note 23.

<sup>27</sup> *Justice Minister Quits Over Disputed Result*, *supra* note 19.

<sup>28</sup> Obangome, *supra* note 23.

<sup>29</sup> *Id.*

<sup>30</sup> Assaf-Boustani & Ona Essangui, *supra* note 21.

## *Arbitrary Arrests and Detentions*

Although Gabon's constitution proscribes arbitrary detention,<sup>31</sup> the Gabonese government has nonetheless failed to uphold these prohibitions. Ali Bongo has utilized and abused the judiciary in order to arbitrarily arrest and imprison activists who criticize him, contest him, or call for reform, on baseless charges such as “disturbing the public order” or “insulting the president”; some activists are even tortured for peacefully exercising their right to freedom of expression.<sup>32</sup>

Numerous individuals have been arrested on politically-motivated charges for their work as journalists, and for supporting opposition leader Jean Ping. For instance, on April 14, 2017, Jean Ping's assistant, Alain Djally, was blindfolded by plainclothes men, mistreated, and arrested in Libreville without a warrant and only allowed access to a lawyer on the day after his arrest.<sup>33</sup> Djally was kept in solitary confinement during his entire detention, until June 23, 2017.<sup>34</sup> Additionally in June 2017, Juldas Biviga, a journalist from Radio Massanga, was arrested along with union leader Marcel Libama, for defamation after a radio interview in which Libama accused a Gabonese prosecutor of an abuse of power.<sup>35</sup> Biviga and Libama were brutally beaten in prison.

These blatant threats to freedom of expression, and signs of a disregard for rule of law in Gabon, represent some of Bongo's government's most serious efforts to establish control over both the flow of information in the country, and to crush dissenters.

### **2. Circumstances leading to increased media censorship, a crackdown on bloggers, and suppression of activists in Gabon**

Gabon's legal system formally guarantees freedom of the press but impedes it in practice. The media are entirely controlled by the government, which manipulates public opinion and neutral information and thereby inhibits the opportunity for, *inter alia*, free and fair elections in Gabon.<sup>36</sup>

On January 2, 2017, a Communications Code with nebulous provisions took effect in Gabon.<sup>37</sup> The Code covers an overly-broad spectrum of media and all forms of

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<sup>31</sup> CONSTITUTION (1991, rev. 2011) (Gabon), art. 1(29) (“No one may be arbitrarily detained”).

<sup>32</sup> Assaf-Boustani & Ona Essangui, *supra* note 21.

<sup>33</sup> *Amnesty International Report 2017/18*, *supra* note 8, at 168.

<sup>34</sup> *Id.*

<sup>35</sup> “Freedom in the World 2018: Gabon,” FREEDOM HOUSE 11 (13 Sept. 2018), *available at* <https://www.justice.gov/eoir/page/file/1093811/download>.

<sup>36</sup> See Assaf-Boustani & Ona Essangui, *supra* note 21.

<sup>37</sup> *New Communications Code Puts Gabon's Media in Straitjacket*, REPORTERS WITHOUT BORDERS (9 Dec. 2016), <https://rsf.org/en/news/new-communication-code-puts-gabons-media-straitjacket>.

digital, broadcast, and print production, limiting the freedom of expression and “encourag[ing] self-censorship”<sup>38</sup> without providing any clear legal framework by which to protect journalists, bloggers, and others who post content online. Although Article 181 of the Code notes that “abuses of freedom of expression” will be penalized, these abuses are not defined, nor are the penalties for various offenses. Article 11 forbids censorship “except in cases envisaged by the law,” but no such law is cited. Furthermore, the Code includes a requirement for media and all forms of broadcast to “contribute to the country’s image and national cohesion.”<sup>39</sup>

In June 2017, a newspaper with political opposition leanings, *Les Echos du Nord*, was banned by the National Council of Communication, based on what were cited as defamatory statements against President Bongo and Prime Minister Issoze-Ngondet.<sup>40</sup> Throughout these crackdowns on the media and other broadcasters of information, Gabon was ranked 108<sup>th</sup> of 180 countries in the World Press Freedom Index.<sup>41</sup>

**ii. The arbitrary nature of the detention pursuant to Category I, Category II, Category III, and Category V**

As a member state of the U.N., Gabon is bound to protect, promote, and respect the individual rights and fundamental freedoms laid out in the UDHR. Moreover, as a state party to the ICCPR,<sup>42</sup> Gabon is also bound to uphold its commitment to respect and ensure the protection of the rights and freedoms recognized under the covenant. The arrest and detention of Hervé Mombo Kinga was clearly without justification and arbitrary under *Category I, Category II, Category III, and Category V* of the WGAD’s working methods.<sup>43</sup>

**a. Deprivation of liberty was arbitrary under Category I: Violation of Article 9 of the UDHR, Articles 9(2) and 14(3) of the ICCPR, and Article 131 of Gabon’s Penal Procedure Code**

Arrest is arbitrary under *Category I* when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty. Article 9 of the UDHR prohibits arbitrary arrest, providing that “no one shall be subjected to arbitrary arrest [or] detention [...].” Articles 9(2) and 14(3) of the ICCPR require a person to be informed about

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<sup>38</sup> *Id.*

<sup>39</sup> *Amnesty International Report 2017/18, supra* note 8, at 168.

<sup>40</sup> *Id.*

<sup>41</sup> “2018 World Press Freedom Index,” REPORTERS WITHOUT BORDERS (2018), <https://rsf.org/en/gabon>.

<sup>42</sup> Gabon acceded to the ICCPR on 21 January 1983, [https://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=81&Lang=EN](https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=81&Lang=EN).

<sup>43</sup> The U.N. Commission on Human Rights considers “arbitrary” those deprivations of liberty which for one reason or another are contrary to relevant international provisions laid down in the Universal Declaration of Human Rights or in the relevant international instruments ratified by the States (Resolution 1991/42, as clarified by resolution 1997/50).

the reason for arrest and the charges laid against the arrested person. The WGAD also noted in a previous opinion that when a person deprived of liberty remains ignorant of the charges against him, it is a violation of Articles 9(2) and 14(3) of the ICCPR.<sup>44</sup> Additionally, Article 131 of Gabon's Penal Procedure Code explains that detention should only be ordered when it constitutes the only way to preserve evidence and prevent pressure on witnesses and victims, as well as meetings between the accused and accomplices, or to preserve the public order.<sup>45</sup> When these conditions are not fulfilled, the investigating judge must order the immediate release of the pre-trial detainee.<sup>46</sup>

The Gabonese government did not invoke any legal basis for Kinga's arrest and detention. Gabonese security forces arbitrarily arrested Kinga and failed to promptly inform him of the reasons for his arrest — either verbally or in writing — and the charges against him. Kinga's detention order did not list proper reasons for detention, as prescribed by Article 131 of the Penal Procedure Code. To be sure, none of the Article's requirements for detention was satisfied by Kinga's detention order or by his actions, as there was no evidence provided to show that Kinga had participated in any of the crimes he is accused of, let alone any crime whatsoever, and he fully cooperated with the authorities and represented no threat to the public order. The detention order was not given after an initial examination of, and appearance by, Kinga, as required by Gabonese law, but rather, before the investigating judge had heard Kinga. Furthermore, the prosecutor even conceded that Kinga's file did not sufficiently establish the charged offenses.

These circumstances clearly violate international and domestic law, namely Article 9 of the UDHR, Articles 9(2) and 14(3) of the ICCPR, and Article 131 of Gabon's Penal Procedure Code, thus rendering Kinga's arrest legally baseless and his detention arbitrary under Category I.

**b. Deprivation of liberty was arbitrary under Category II: Violation of Article 19 of the UDHR, Article 19 of the ICCPR, Article 1(2) of the Gabonese Constitution, and Article 9 of the African Charter on Human and Peoples' Rights (Banjul Charter)**

Deprivation of liberty is arbitrary under *Category II* when it results from a violation of the exercise of rights guaranteed under Article 19 of the UDHR and Article 19 of the ICCPR, that is, if an individual is arrested while exercising the freedom of expression, which includes seeking, receiving, and imparting information through any media. Specifically, Article 19(2) of the ICCPR provides that “everyone shall have the right to freedom of expression; this right shall include freedom to seek,

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<sup>44</sup> Ernest Bennett et al v. Haiti, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2001/14/Add.1 at 112, ¶ 6 (2000).

<sup>45</sup> Penal Procedure Code, *supra* note 10, at art. 131.

<sup>46</sup> *Id.*

receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Furthermore, Article 1(2) of the Gabonese Constitution provides for the freedom of expression, as well as the freedom of thought, opinion, and communication.<sup>47</sup> Finally, the Banjul Charter, which Gabon ratified on February 20, 1986,<sup>48</sup> explicitly states in Article 9: “Every individual shall have the right to express and disseminate his opinions within the law.”

Kinga was arrested on the offenses of insult to the Head of State, participation in propaganda, inciting violence, and disturbing the public order, after posting a video online depicting the poor conditions that Gabon’s citizens endure.<sup>49</sup> Kinga merely sought to contest the presidential election results through peaceful expression conforming to the fundamental rights protected by both international law and by the Gabonese Constitution. By posting his personal images and media online, Kinga was thus exercising his right to facilitate the imparting of information to others through an online platform meant for public consumption. Yet, because of the crackdown on activists and independent media in Gabon, unwarranted charges of incitement, propaganda, and disturbing the public order, are the norm for citizens such as Kinga, who merely seek to protest peacefully and are consequently persecuted by the Gabonese government for their chosen methods of expression.

By depriving Kinga of his freedom of expression, the Gabonese government has violated Article 19 of the UDHR and Article 19 of the ICCPR, as well as Article 1(2) of Gabon’s Constitution and Article 9 of the Banjul Charter, giving Kinga’s deprivation of liberty an arbitrary character under Category II.

**c. Deprivation of liberty was arbitrary under Category III: Violation of Articles 5, 8, and 11 of the UDHR, Articles 7, 9, and 14 of the ICCPR, and Articles 1(1) and 1(23) of the Gabonese Constitution**

Detention is arbitrary under *Category III* where the “total or partial non-observance of the international norms relating to the right to a fair trial including those spelled out in the UDHR and other relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.”<sup>50</sup>

The Gabonese government has violated several norms of international human rights law relating to fair trial in Kinga’s matter, including the principle of the

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<sup>47</sup> CONSTITUTION, *supra* note 14, at art. 1(2) (“The liberty of consciousness, thought, opinion, expression, communication...are guaranteed to all...”).

<sup>48</sup> “Ratification Table: African Charter on Human and Peoples’ Rights,” AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS (2018), <http://www.achpr.org/instruments/achpr/ratification/>.

<sup>49</sup> See *Amnesty International Report 2017/18*, *supra* note 8, at 169.

<sup>50</sup> *Individual Complaints and Urgent Appeals*, OHCHR, <https://www.ohchr.org/en/issues/detention/pages/complaints.aspx>.

presumption of innocence enshrined in Article 11 of the UDHR, Article 14(2) of the ICCPR, and Article 1(23) of the Gabonese Constitution. Furthermore, torture is prohibited by Article 5 of the UDHR, Article 7 of the ICCPR,<sup>51</sup> Article 5 of the Banjul Charter, and Article 1(1) of Gabon's Constitution, which states: "No one may be humiliated, mistreated or tortured, even during moments of arrest or imprisonment."<sup>52</sup>

Specifically, the arbitrariness of Kinga's deprivation of liberty by the Gabonese government and courts, is established by the nature of his: (1) arrest, wherein he was not presented with an arrest warrant; (2) denial of prompt legal defense; and (3) continued unwarranted charges and disregard for his bail requests. The latter point will be primarily analyzed within the context of the non-observance of Kinga's right to an effective remedy and the presumption of innocence, under Articles 8 and 11 of the UDHR and Article 14 of the ICCPR.

#### (1) Lack of Arrest Warrant

Articles 9(2) and 14(3)(a) of the ICCPR enshrine a detainee's right to be informed of the charges against him. Article 9(2) states: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." General Comment No. 35 additionally lays out two requirements for the benefit of a person being detained: first, the detainee "shall be informed, at the time of arrest, of the reasons for the arrest," and second, the detainee must be promptly informed of any charges against him.<sup>53</sup> Furthermore, Article 14(3)(a) states that "everyone shall be entitled to...be informed promptly and in detail...[of] the nature and cause of the charge against him." Finally, Principles 10 to 13 of the Body of Principles state that those arrested must be informed of the reason of arrest.<sup>54</sup>

Here, Kinga was not presented with an arrest warrant or informed of any charges against him at the time of his arrest. Rather, he was arbitrarily taken into custody by the Specialized Police who did not explain the reasons for his arrest at that time. As such, and without having been presented with an arrest warrant, Kinga's deprivation of liberty was arbitrary.

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<sup>51</sup> UDHR and ICCPR Articles 5 and 7 both provide that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

<sup>52</sup> CONSTITUTION, *supra* note 14.

<sup>53</sup> General Comment No. 32, Article 9: Liberty and Security of Person, U.N. Human Right Committee, CCPR/C/GC/35 (16 Dec. 2014).

<sup>54</sup> *E.g.*, Principle 10, Body of Principles ("Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.").

## (2) Lack of Prompt Access to Legal Counsel

Article 14(3)(d) of the ICCPR states that anyone facing criminal charges has the minimum guarantee “to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require...” According to Basic Principle 11 of the Body of Principles, a “detained person and his counsel...shall receive prompt and full communication of any order of detention together with the reasons therefore.” Additionally, the Principles and Guidelines affirm the procedural right of a detainee to access legal counsel. Under Principle 3, “States should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offense punishable by a term of imprisonment or the death penalty, is entitled to legal aid at all stages of the criminal justice process.”<sup>55</sup>

During his three-day arrest at the Documentation Center, Kinga was held incommunicado. He was not given the option of retaining a lawyer to “receive prompt and full communication” of his order of detention, or to represent and present evidence in his defense. Rather, Kinga only first received representation by his lawyer on August 31, 2017, three (3) days after his transfer to the Documentation Center. Even thereafter, Kinga’s lawyer was not permitted to consult Kinga’s case file. Although Article 14(3) of the ICCPR provides for the right to legal defense, including preparation of a defense and the ability to communicate with counsel of one’s own choosing, Kinga was not given a sufficient or timely period during which to communicate effectively with his legal counsel. This denial of access to legal counsel supports the arbitrary nature of Kinga’s deprivation of liberty.

## (3) Continued Unwarranted Charges and Disregard for Bail Requests

Article 11 of the UDHR and Article 14 of the ICCPR enshrine the right to a fair trial and the right to be presumed innocent until proven guilty, while Article 8 of the UDHR provides for an individual’s right to an effective remedy. Article 11 states that “no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence.” Under Article 14(2) of the ICCPR, “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law.”<sup>56</sup> Additionally, Article 1(23) of the Gabonese Constitution holds: “All defendants are to be presumed innocent until proven guilty.”

Despite the established international law outlining these requirements, the observance of norms relating to trials in Gabon, repeatedly fail to meet

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<sup>55</sup> Principles and Guidelines, *supra* note 9, at Principle 3.

<sup>56</sup> *See also* Basic Principle 36, Body of Principles (“A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”).

international fair standards. Gabon is not a democratic country in which the fundamental rights of citizens are respected, or where there is independence and separation of powers. Rather, it is ruled by a fully authoritarian regime.<sup>57</sup> The government has increasingly cracked down on civil society and dissenters, thus violating the constitutionally-recognized freedom of expression. The regime has denied detained individuals the rights surrounding a fair trial, as well as immediate access to a defense attorney.

Kinga's arrest and continuous detention under wrongful charges were carried out in this context of full authoritarianism, as the state of Gabon failed to observe minimum international standards of due process guaranteed by the UDHR. Gabon is therefore required to provide Kinga a fair hearing before an impartial and independent judicial body. This right to be tried by an impartial and independent tribunal is absolute and cannot afford any exceptions,<sup>58</sup> and the requirement of independence includes the "independence of the judiciary from political interference by the executive branch and legislature."<sup>59</sup>

Kinga was treated as guilty prior to any opportunity for a hearing, and before the investigating judge had heard Kinga, as is required by law. Having been held in pre-trial detention for nearly seventeen (17) months at the time of this petition, the very act of Kinga's continued detention during this entire time period does not presume him innocent. Additionally, Kinga was treated as though guilty of the most heinous crime when he was left in solitary confinement and subjected to psychological torture; his cell lacked light and air, food was rationed only once per day, and he was not provided a mattress or toilet facilities. The investigating judge extended Kinga's pre-trial detention and repeatedly ignored bail requests by his lawyer, which reflects a violation of the right to an effective remedy under Article 8 of the UDHR. Furthermore, the court has refused Kinga's appeals to drop his wrongful and invalid charges altogether. The government has failed to uncover and produce any clear and sufficient evidence against Kinga to support the criminal charges of either insulting the Head of State or inciting violence. Shortly after

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<sup>57</sup> See STEVEN LEVITSKY & LUCAN WAY, *COMPETITIVE AUTHORITARIANISM HYBRID REGIMES AFTER THE COLD WAR 6–7* (Cambridge University Press) (2010) ("Full authoritarianism is a regime in which no viable channels exist for opposition to contest legally for executive power. This category includes closed regimes in which national-level democratic institutions do not exist and hegemonic regimes in which formal democratic institutions exist on paper but are reduced to façade status in practice. In hegemonic regimes, elections are so marred by repression, candidate restrictions, and/or fraud that there is no uncertainty about their outcome. Much of the opposition is forced underground and leading critics are often imprisoned or exiled.")

<sup>58</sup> See General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Human Right Committee, CCPR/C/GC/32 (23 Aug. 2007), para.19; *see also*, Gonzalez del Rio v. Peru, Communication No. 263/1987 (2 Nov. 1992), para. 5.2. ("The Committee recalls that the right to be tried by an independent and impartial tribunal is absolute right that may suffer no exception.")

<sup>59</sup> *Id.* at para. 19.

Kinga's arrest, the case prosecutor even acknowledged that Kinga's file was insufficient to establish the offense as charged.

The sole reason for bringing unwarranted criminal charges against Kinga, was to punish him for his opinions and support for the incumbent president's rival, in violation of his freedom of expression, guaranteed under both domestic and international law. Due to the aforementioned reasons, Kinga's wrongful charges and continued detention and open case, lack any basis and violate international legal principles, thereby rendering his detention arbitrary under Category III.

**d. Deprivation of liberty was arbitrary under Category V: Violation of Article 7 of the UDHR, Article 26 of the ICCPR, and Articles 1(2) and 2 of the Gabonese Constitution**

Equality before the law and non-discrimination are other vital principles of international human rights law. Detention is arbitrary under *Category V* when “the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinions; gender; sexual orientation; or disability or another status, and which aims towards or can result in ignoring the equality of human rights.”<sup>60</sup>

Article 7 of the UDHR provides that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.” Article 26 of the ICCPR provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law [...] and the law shall prohibit any discrimination [...] such as race, color, sex, language, religion, political or other opinion....” Furthermore, Article 1(2) of the Gabonese Constitution provides for freedom of opinion, while Article 2 states that Gabon “assures equality for all citizens before the law, making no distinction of...opinion.”<sup>61</sup> Discrimination based on divergent political opinions, is therefore a violation of international law.

Here, Kinga publicized online his political opinions that contested the presidential election results of August 27, 2016. He used a peaceful means of posting his opinions and first-hand imagery in order to facilitate a campaign of awareness among the Gabonese people. He was specifically targeted by the Gabonese government because he held, and shared online, political opinions that those in power perceived as a threat. Kinga's questionable arrest and ongoing detention are thus representative of forms of discrimination based on his political opinions, and his status as a human rights activist blogger.

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<sup>60</sup> *Individual Complaints and Urgent Appeals*, *supra* note 50.

<sup>61</sup> CONSTITUTION, *supra* note 14, at art. 2.

Therefore, the Gabonese government violated Article 7 of the UDHR and Article 26 of the ICCPR, as well as Articles 1(2) and 2 of the Constitution, giving Kinga's deprivation of liberty an arbitrary character under Category V.

### **C. Identity of the person submitting the case**

1. Family name: Assaf-Boustani
2. First name(s): Céline
3. Status: International Legal Associate at the Human Rights Foundation
4. Address (telephone, fax, e-mail):  
350 Fifth Avenue, Suite 4202  
New York, NY 10118  
Tel: +1 (212) 246-8486  
E-mail: [celine@hrf.org](mailto:celine@hrf.org)  
Website: [www.hrf.org](http://www.hrf.org)
5. Please state whether you want your identity to be kept confidential: As stated above, the Petitioner waives its right to confidentiality.

### **D. Petition**

In accordance with resolution 24/7 of 26 September 2013, HRF hereby submits this individual complaint to the WGAD, and respectfully calls on the WGAD to initiate the procedure involving the investigation of individual cases toward reaching an opinion of the WGAD declaring Hervé Mombo Kinga's detention to be arbitrary and in violation of international law. To this end, as mentioned in a previous section, the Petitioner will pursue the regular communications procedure before the WGAD in order to have the ability to provide comments on any State response. Specifically, the Petitioner calls on the WGAD to:

- a. Initiate a procedure involving the investigation of Hervé Mombo Kinga's case, and send an allegation letter to the State of Gabon inquiring about the case generally, and specifically about the legal basis for his arrest, detention, and/or cruel and inhumane treatment, each of which is arbitrary and in violation of international law;
- b. Issue an opinion declaring that Hervé Mombo Kinga's deprivation of liberty and detention were arbitrary and in violation of international law, as a result of *Category I*, *Category II*, *Category III*, and *Category V* violations; and
- c. Ask the State of Gabon to take measures to release Hervé Mombo Kinga from arbitrary detention and guarantee that Kinga will not be further subjected to arbitrary detention, psychological torture, or any other

measure as a result of his exercise of the rights to freedom of expression and opinion, as guaranteed under international law.