

# Lawyers' Rights Watch Canada

*NGO in Special Consultative Status with the Economic and Social Council of the United Nations*

**Promoting human rights by protecting those who defend them**

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Friday, March 31, 2017

His Excellency Paul Biya  
President of the Republic of Cameroon  
Office of the President  
P.O. Box 100  
Yaoundé, Cameroon  
By email: [cellcom@prc.cm](mailto:cellcom@prc.cm)

His Excellency Philemon Yang  
Prime Minister of the Republic of Cameroon  
Office of the Prime Minister  
Yaoundé, Cameroon  
Email: [spm@spm.gov.cm](mailto:spm@spm.gov.cm)

Dear President Biya and Prime Minister Yang;

**Re: Arbitrary arrest, detention and trial of Anglophone rights advocates**

Lawyers' Rights Watch Canada (LRWC) is a committee of lawyers and others who promote human rights and the rule of law through advocacy, education and research. LRWC is a non-governmental organization in Special Consultative Status with the Economic and Social Council of the United Nations.

LRWC writes to object to the misuse of criminal law powers to arrest, detain and prosecute jurists, educators and other members of English-speaking communities in Cameroon for exercising their democratic rights to engage in dissent and protest. The arrest, detention, prosecution and trial of Nkongho Felix Agbor-Balla and Dr. Fontem Aforteka'A Neba are, according to the facts and law summarized below, are arbitrary and in violation of Cameroon's domestic law and international law obligations. The Government of Cameroon appears to be wrongly using criminal law powers to silence and punish leading community members calling for reforms to address unequal access by members of the English-speaking minority in Cameroon to education, employment, access to courts and legal remedies, and other essential services. Other prominent Anglophones believed to have been similarly arbitrarily arrested, charged and brought before a military court are:

- Mancho Bibixy, radio show host arrested 19 January 2017;
- Justice Paul Ayah, Deputy Attorney General for Yaoundé arrested 21 January 2017;
- Justice Sokem Ngale Mborh, Attorney General for the South West Region arrested 25 January 2017;
- Robert Fon, lawyer arrested 16 March 2017.

LRWC calls on the Government of Cameroon to:

1. Immediately release from detention Nkongho Felix Agbor-Balla, Dr. Fontem Aforteka'A Neba, Bibixy Mancho, Justice Paul Ayah, Justice Sokem Ngale Mborh and Robert Fon;
2. Discontinue all military court prosecutions and proceedings against Nkongho Felix Agbor-Balla, Dr. Fontem Aforteka'A Neba, Bibixy Mancho, Justice Paul Ayah, Justice Sokem Ngale Mborh and Robert Fon;
3. Withdraw current charges against Nkongho Felix Agbor-Balla, Dr. Fontem Aforteka'A Neba, Bibixy Mancho, Justice Paul Ayah, Justice Sokem Ngale Mborh and Robert Fon;
4. Ensure an independent investigation of the deaths that occurred and allegations of unnecessary and excessive use of force by police and security forces during the protests in Bamenda on 8 December 2016;
5. Ensure lawful prosecutions before civilian courts of all those identified by the investigation(s) as suspected perpetrators;
6. Comply with Cameroon's international and domestic law obligations to respect and ensure the rights of people subjected to criminal proceedings, including those named in this letter, to: liberty, freedom from arbitrary detention, the presumption of innocence, pre-trial release, trial before an independent, competent and impartial civilian court, and to be fully represented by counsel of choice;
7. Ensure that the people named and others are not arrested, detained or prosecuted for exercising internationally protected rights to freedoms of expression, association and assembly and the essential democratic right to participate in public affairs by engaging in protests.<sup>1</sup>

## **Background**

Since October 2016 people in the South West and North West regions of Cameroon have publicly voiced opposition to what is seen as systemic discrimination and marginalization of the English-speaking population and violations of the agreement made at unification (1961). The Cameroon Anglophone Civil Society Consortium (CACSC), an organization promoting Anglophone rights in Cameroon had been meeting with government authorities to discuss the reforms needed to comply with the requirements of the 1961 unification agreement to ensure the following: English and French as equal entities, two official languages, legal and education systems in English and French. Lawyers, educators and students went on strike to protest the use of French in courts and schools in English-speaking regions. A protest in Bamenda on 8 December 2016, in response to a meeting by the ruling party, left at least four people killed apparently as a result of use of force (shooting, water-cannons and teargas) by police and security forces to prevent and disperse gathering of protesters. Amnesty International called for an immediate investigation of the use of “excessive force” and urged the Government of Cameroon to “refrain from the use of unlawful force in its response to the protests.”<sup>2</sup>

Instead of mounting investigations, the Government of Cameroon responded, on 17 January 2017, by banning the activities of CACSC and arresting Nkongho Felix Agbor Balla and Fontem Aforteka'A Neba without an arrest warrant and without informing them of the reason for their arrest. Nkongho Felix Agbor Balla is a lawyer and the President of CACSC. Fontem Aforteka'A Neba is a university professor, leader of a teachers' union and Secretary General of CACSC. Both men were interrogated

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<sup>1</sup> See *The Right to Dissent: A guide to international law obligations to respect, protect and fulfill the right of all persons to participate in public affairs by engaging in criticism, opposition and dissent*, Lois Leslie for LRWC, March 2017 [*The Right to Dissent*]. Available at: <http://www.lrwc.org/library/know-your-rights-index/right-to-dissent/>.

<sup>2</sup> Cameroon: Excessive force that led to deaths of protesters must be urgently investigated, 9 December 2016. Available at <https://www.amnesty.org/en/latest/news/2016/12/cameroon-excessive-force-that-led-to-deaths-of-protesters-must-be-urgently-investigated/>.

and detained by an order of the "Commissaire du Gouvernement" of the Military Tribunal of Yaoundé and charged with a variety of apparently illegitimate and unfounded charges, namely,

"terrorism, hostility against the motherland, secession, insurrection, contempt of public authorities, and collective rebellion",

"incitement to civil war by bringing the inhabitants of the South and Northwest regions to arm themselves against other citizens", and

"attempt to modify the constitutional laws, notably the federalist system, through violence" (referred to collectively as "the charges").

There are no credible reports that any of the people charged advocated or engaged in violence.

On 13 February 2017, the men were brought before a military court in Yaoundé. Both plead not guilty and the 'trial' was postponed to March 23, 2017 with both remaining in detention. The military court proceedings have since been set to continue on 27 April 2017. If convicted, both Mr. Balla and Mr. Neba could face the death penalty.

### **International Human Rights Obligations of Cameroon**

The arrests, detentions, charges and military court proceedings contravene provisions of the UDHR, ICCPR and the Banjul Charter and constitute an illegitimate use of criminal law powers. Contravened are provisions guaranteeing rights to: liberty, freedoms of expression, association, assembly and to participate in public affairs, pre-trial release, freedom from arbitrary detention, the presumption of innocence, representation by legal counsel, and fair trial by a civilian court that is impartial, competent and independent.

As a member of the United Nations (20 September 1960), Cameroon has agreed to respect rights guaranteed by the *Universal Declaration of Human Rights* (UDHR). As a member of the African Union and as a party to the *African Charter on Human and Peoples' Rights* (Banjul Charter) and the *International Covenant on Civil and Political Rights* (ICCPR),<sup>3</sup> Cameroon has legal obligations to adopt measures that effectively ensure rights to liberty, freedom from arbitrary detention, freedoms of expression, association and assembly, rights to participate in public affairs, to the presumption of innocence, pre-trial release and fair trial by a competent, impartial and independent civilian court.

In accordance with the *Constitution of the Republic of Cameroon* (Constitution), the legal obligations arising from the Banjul Charter and the ICCPR override any conflicting national law. The Preamble to the Constitution affirms "attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and The African Charter on Human and Peoples' Rights, and all duly ratified international conventions." Article 45 of the Constitution stipulates that "duly approved or ratified treaties and international agreements shall, following their publication, override national laws." That traditional values must conform to and not displace internationally protected rights is made clear by Article 1(2), which requires Cameroon to "...recognize and protect traditional values that conform to democratic principles, human rights and the law."

### ***International law prohibits use of military courts to try civilians***

Military courts<sup>4</sup> are sometimes used to prosecute or determine the rights of civilians for the purpose of asserting executive control over independent judicial decision-making and allowing for procedures that deviate from standards applied by regular civilian courts. Exceptional circumstances are often cited as justification. There is international consensus that trials of civilians by military tribunals contravene the non-derogable right to a fair trial by a competent, independent and impartial court to

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<sup>3</sup> Cameroon ratified the Banjul Charter on 20 June 1989 and the ICCPR on 24 January 1984.

<sup>4</sup> The text on the right to trial by civilian courts has been taken from, *Right to Trial by Civilian Courts: International law on the use of military tribunals to determine the rights of civilians*, Working Paper, Prepared by Erika Chan, Gail Davidson and Catherine Morris, 2015.

the extent that they violate rights guaranteed by instruments such as the UDHR,<sup>5</sup> ICCPR<sup>6</sup> and the Banjul Charter. The African Commission on Human and Peoples' Rights (ACHPR) has determined that military tribunals lack authority to try civilians.<sup>7</sup>

Military courts are a division of the armed services and thus part of the executive branch of government and are not part of the independent judicial branch of government. Without access to competent, independent and impartial tribunals, there is no means of enforcing state duties to ensure internationally protected rights in accordance with treaty obligations, and no meaningful access to remedies for violations. As the *Basic Principles on the Independence of the Judiciary*<sup>8</sup> state:

Everyone has the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

The UN Human Rights Committee (HR Committee), through Concluding Observations on States' reports, General Comments interpreting the ICCPR and Views regarding complaints, agrees that "the jurisdiction of military tribunals is restricted to offences of a strictly military nature committed by military personnel."<sup>9</sup> In 1984, the HR Committee affirmed in its General Comment 13 that military tribunals are prohibited from trying civilians except in extraordinary, objectively determined and narrowly defined circumstances such as cases where fair, independent and impartial civilian courts are unavailable.<sup>10</sup>

In July 2014, the UN Working Group on Arbitrary Detention (WGAD) stated that in its experience, "military tribunals are often used to deal with political opposition groups, journalists and human rights defenders."<sup>11</sup> The WGAD concluded that, "Judges should always be independent and impartial. In contrast, two of the core values of a military officer are obedience and loyalty to her or his supervisors. Under international law, military tribunals can only be competent to try military personnel for military offences."<sup>12</sup>

The ACHPR has interpreted the Banjul Charter as prohibiting the use of military tribunals to determine the rights of civilians. In the case of *Media Rights Agenda v. Nigeria*, the ACHPR found that special tribunals set up by the military regime with an ouster of the jurisdiction of the ordinary courts "violates the right to have one's cause heard, under Article 7.1."<sup>13</sup>

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<sup>5</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Articles 7-11, available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 12 December 2014].

<sup>6</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 12 December 2014].

<sup>7</sup> Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006), Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux to the UN Commission on Human Rights in 2006 [*Decaux Principles*]. Available at: <http://www1.umn.edu/humanrts/instree/DecauxPrinciples.html>.

<sup>8</sup> *Basic Principles on the Independence of the Judiciary*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 5, para 21, available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

<sup>9</sup> *Decaux Principles*, *supra* note 7.

<sup>10</sup> UN Human Rights Committee (HR Committee), CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984, paragraph 4 [CCPR General Comment No. 13], available at: <http://www.refworld.org/docid/453883f90.html> [accessed 16 December 2014].

<sup>11</sup> UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 30 June 2014, A/HRC/27/48, para available at: <http://www.refworld.org/docid/53eb29a04.html>. The WGAD has considered issues of military justice in a number of its reports available at:

<http://www.ohchr.org/EN/Issues/Detention/Pages/Issues.aspx>.

<sup>12</sup> *Ibid*, para. 85.

<sup>13</sup> *Media Rights Agenda v. Nigeria*, Comm. No. 224/98, paras. 60-66 (ACHPR 2000); [http://www1.umn.edu/humanrts/africa/comcases/105-93\\_128-94\\_130-94\\_152-96.html](http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152-96.html).

The ACHPR confirmed the prohibition in the *Resolution on the Right to a Fair Trial and Legal Aid in Africa*,<sup>14</sup> which states in Principle L:

**L. RIGHT OF CIVILIANS NOT TO BE TRIED BY MILITARY COURTS:**

- a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.
- b) While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines.
- c) Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.

***Charges constitute a violation of rights to freedom of expression***

The arrests, detentions and prosecutions of Nkongho Felix Agbor-Balla, Dr. Fontem Aforteka'A Neba, and the others referred to violate international law as being based on the exercise of freedoms of expression to engage in public debate about and opposition to, practices and policies seen as discriminatory to the English-speaking minority.

International law outlines a cumulative three-part test that must be met for the legitimate and legal restriction of the right to the freedom of expression. Any restriction must:

- be provided by law;
- pursue one of the fundamental values or interests identified as a legitimate ground for restriction set out in the respective treaty; and
- be “necessary” to protect that fundamental value or interest.<sup>15</sup>

A limitation must be narrowly interpreted and the necessity for any restrictions must be convincingly established. A limitation that is in accordance with a clear law serving a legitimate aim will not pass the test unless it can be demonstrated that it is truly necessary to achieve that aim. The necessity for any limitation is judged within the context of the needs of a democratic society and its institutions. A limitation must be directly related to the specific need on which it is predicated and must be proportionate to that need and applied in an objective and non-discriminatory manner. In exercising its supervisory jurisdiction, the court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made.

The list of the possible grounds for restricting the freedom of expression under the ICCPR and the Banjul Charter is exhaustive. Domestic authorities may not legitimately rely on any other ground falling outside the grounds provided for under the treaties.

In addition, a law restricting freedom of expression must be of general application. The ACHPR has ruled that overly broad limitations are illegitimate.<sup>16</sup>

In their *Joint Declaration on Universality and the Right to Freedom of Expression*,<sup>17</sup> the Special Rapporteurs (SR) on Freedom of Expression of the UN, ACHPR, Organization of American States (OAS) and Organization for the Security and Cooperation of Europe’s Representative on the Freedom of the Media stated that certain types of legal restrictions on freedom of expression can never be justified by reference to local traditions, culture and values, but rather constitute human rights violations:

- i. Laws which protect religions against criticism or prohibit the expression of dissenting religious beliefs.

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<sup>14</sup> ACHPR *Resolution on the Right to a Fair Trial and Legal Aid in Africa*, 2003, available at: <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>

<sup>15</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, March 2011, A/HRC/17/27 at para. 24.

<sup>16</sup> ACHR, *Constitutional Rights Project and Others v. Nigeria*, Communication Nos. 140/94, 141/94 and 145/95 (2000), para. 40.

<sup>17</sup> UN, OAS, OSCE, ACHPR, *Joint Declaration on Universality and the Right to Freedom of Expression*, 6 May 2014.

ii. Laws which prohibit debate about issues of concern or interest to minorities and other groups which have suffered from historical discrimination or prohibit speech which is an element of the identity or personal dignity of these individuals and/or groups.

iii. Laws which provide for special protection against criticism for officials, institutions, historical figures, or national or religious symbols.<sup>18</sup>

The charges create restrictions which fall under category ii—prohibiting debate about issues of concern or interest to minorities that have suffered from historical discrimination—and, category iii—providing special protection against criticism for officials and institutions. As such the charges constitute a violation of Cameroon’s international and domestic law obligations to protect and ensure rights to freedom of expression.

### ***Arrests, detentions contravene rights and are arbitrary***

The WGAD has defined detention as arbitrary when one of more of the following conditions exists.<sup>19</sup>

- Category I – It is clearly impossible to invoke any legal basis justifying the deprivation of liberty;
- Category II – The deprivation results from the exercise of the rights or freedoms guaranteed by, *inter alia*, Article 19 of the UDHR and ICCPR;
- Category III – When the total or partial non-observation of international norms relating to the right to a fair trial as specified by the UDHR and ICCPR are of such gravity as to render the deprivation of liberty arbitrary.

The HR Committee has determined that ‘arbitrariness’ “is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law ...”<sup>20</sup>

The arrests and detentions are arbitrary as resulting from the exercise of rights to expression, association, assembly and to participate in public affairs guaranteed by the UDHR, ICCPR and the Banjul Charter. The detentions are also arbitrary under Category III as resulting from grave deprivations of rights to have charges and pre-trial release determined by a civilian court.

### ***Detention violates rights to presumption of innocence and pre-trial release***<sup>21</sup>

The arrests were conducted without warrants and the detainees have been denied access to a civilian court to determine the legality of detention. The manner of the arrests and detentions therefore violate rights to liberty, the presumption of innocence and to pre-trial release.

With regards to arrests without warrants, the *Principles and Guidelines on The Right to a Fair Trial and Legal Assistance in Africa*, para. M(1)(b), state that a person may only be arrested and detained “pursuant to a warrant, on reasonable suspicion or for probable cause.”<sup>22</sup> Cases, such as the ones referred to in this letter, in which individuals have been arrested without warrant or summons and kept in detention without a court order, have been found to violate the right to freedom from arbitrary arrest and detention in ICCPR Article 9(1).<sup>23</sup> The ACHPR has interpreted indefinite detention as

<sup>18</sup> *Ibid*, para (1)(f).

<sup>19</sup> Fact Sheet No. 26, The Working Group on Arbitrary Detention.

<sup>20</sup> *Mukong v. Cameroon*, Communication No. 458/1991, UN Human Rights Committee (HRC), 21 July 1994, para. 9.8

<sup>21</sup> See *Pre-Trial release and the right to be presumed innocent: A handbook on international law rights to pre-trial release*, Lois Leslie, LRWC, 2013. available at <http://www.lrwc.org/handbook-pre-trial-release-and-the-right-to-be-presumed-innocent/>

<sup>22</sup> African Commission on Human and Peoples' Rights. *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. Banjul: African Commission on Human and Peoples' Rights, 2003. Available at: [http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33\\_guide\\_fair\\_trial\\_legal\\_assistance\\_2003\\_eng.pdf](http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf).

<sup>23</sup> HR Committee: Communication No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, at para. 8.

arbitrary and a violation of Article 6 of the *Banjul Charter*,<sup>24</sup> as it has the detention of persons without charge and without the possibility of bail.<sup>25</sup> Under international law, pre-trial detention is considered an extraordinary measure that must be used only when a competent court has determined that there are risks of flight, interference with evidence or reoccurrence, *and* detention is the only means to prevent established risk(s).

This interpretation has been confirmed on many occasions by the HR Committee and the ACHPR. Under para. M(1)(e) of the *Principles and Guidelines on The Right to a Fair Trial and Legal Assistance in Africa* persons arrested on a criminal charge must not be kept in custody pending trial unless there is sufficient evidence that makes it necessary to prevent such person from fleeing, interfering with witnesses or posing a clear and serious risk to others.<sup>26</sup>

## Conclusion

LRWC calls on the Government of Cameroon to comply with its international law obligations arising from, *inter alia*, the UDHR, ICCPR and the Banjul Charter and to:

1. Immediately release from detention Nkongho Felix Agbor-Balla, Dr. Fontem Aforteka'A Neba, Bibixy Mancho, Justice Paul Ayah, Justice Sokem Ngale Mborh and Robert Fon;
2. Discontinue all military court prosecutions and proceedings against Nkongho Felix Agbor-Balla, Dr. Fontem Aforteka'A Neba, Bibixy Mancho, Justice Paul Ayah, Justice Sokem Ngale Mborh and Robert Fon;
3. Withdraw current charges against Nkongho Felix Agbor-Balla, Dr. Fontem Aforteka'A Neba, Bibixy Mancho, Justice Paul Ayah, Justice Sokem Ngale Mborh and Robert Fon;
4. Ensure an independent investigation of the deaths that occurred and allegations of unnecessary and excessive use of force by police and security forces during the protest in Bamenda on 8 December 2016;
5. Ensure lawful prosecutions before civilian courts of all those identified by the investigation as suspected perpetrators;
6. Comply with Cameroon's international and domestic law obligations to respect and ensure the rights of people subjected to criminal proceedings, including those named in this letter, to: liberty, freedom from arbitrary detention, the presumption of innocence, pre-trial release, trial before an independent, competent and impartial civilian court, and to be fully represented by counsel of choice;
7. Ensure that the people named and others are not arrested, detained or prosecuted for exercising internationally protected rights to freedoms of expression, association and assembly and the essential democratic right to participate in public affairs by engaging in protests.<sup>27</sup>

LRWC looks forward to your response.

Sincerely,



Gail Davidson, Executive Director, LRWC

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<sup>24</sup> *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Témoins de Jehovah v. DRC* (25/89-47/90-56/91-100/93), at para. 42.

<sup>25</sup> African Commission on Human and Peoples' Rights, Communication No. 102/93, *Constitutional Rights Project v. Nigeria*, at para. 55.

<sup>26</sup> *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *supra* note 2221.

<sup>27</sup> For more information see *The Right to Dissent*, *supra* note 1.

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**Release Imprisoned Anglophone Rights Advocates, Withdraw Charges and Discontinue  
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