

**Opinion No. 7/2009 (The Niger)**

**Communication addressed to the Government on 15 October 2008**

**Concerning Mr Moussa Kaka**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group thanks the Government for providing it with the information requested.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)

4. The case referred to below was reported to the Working Group as follows: Moussa KAKA (Mr. Kaka hereafter), a citizen of the Niger, director of the private radio station Radio Saraouniya and journalist working as correspondent of Radio France Internationale (RFI) in the Niger, was arrested at his place of work, Radio Saraouniya, Place du Marché, Niamey, on 20 September 2007 by agents of the investigation squad of the National Gendarmerie. He was held by the Police for 72 hours and then transferred to the civilian prison in Niamey. He was not presented to a judge, as the law requires, nor was he informed of the reason for his detention.
5. On 25 September 2007, Mr. Kaka was finally presented to a judge. He was charged with “complicity in infringing upon the authority of the State” on the grounds of his alleged ties with the armed opposition group Niger Movement for Justice (MNJ), created in February 2007 and operating in the north of the country. The maximum penalty for the offence in question is life imprisonment.
6. The charges against Mr. Kaka are only based on recordings of conversations between Mr. Kaka and senior MNJ officers. On 17 November 2007, the investigating judge decided not to use the recordings because, reportedly, they had been made illegally. He ordered the removal of the tapes containing the conversations from the investigation file because the recordings had been obtained by means incompatible with the legislation in force. Since these recordings constituted the only real evidence in support of the charges brought against him, Mr. Kaka should have been released.
7. However, the prosecutor appealed this decision. On 12 February 2008, the Court of Appeal of Niamey refused to release Mr. Kaka pending the appeal. The Court overturned the decision taken by the judge in November 2007 and decided to assign Mr. Kaka’s file to another judge. Subsequent to this, Mr. Kaka’s lawyers decided to lodge an appeal with the Supreme Court of the country. On 15 May 2008, the Court rejected Mr. Kaka’s appeal regarding the invalidation of the recordings, and his request for provisional release. After a further provisional-release request made by Mr. Kaka’s lawyer during a hearing in June 2008; the senior investigating judge of the court of Niamey granted such a release on 23 June 2008. On the same day, the prosecuting authorities appealed that decision, and Mr. Kaka continues to be detained. He is currently held at the central prison of Niamey, where he shares an 8 square meter cell with 14 other detainees. He receives food from and visits by his family.
8. On 16 September 2008, the State Counsel’s Office / public prosecutor of the Court of Appeal of Niamey requested changing the charges brought against Mr. Kaka from “complicity in infringing upon the security of the State” to “probable acts aimed at infringing upon the security of the State”.
9. However, Mr. Kaka’s lawyers rejected this new charge on the grounds that the amendment would be plausible only in wartime and stressed that the authorities systematically considered rebellions in the country’s north as “criminal acts organized by criminals and drug traffickers”, not as situations involving war or conflict.
10. The source stresses that Mr. Kaka had for years been the target of harassment and threats by the authorities of the Niger for his journalistic activities. In August 2005, Mr. Kaka was arrested and detained for four days after interviewing an individual who was suspected to be a rebel and who had claimed responsibility for an attack in the country’s north. On 14 July 2007, Mr. Kaka was publicly threatened with death by Mr. Moumouni Boureima, Chief of Staff of the Armed Forces (FAN).
11. The source adds that the authorities have for years harassed, arbitrarily detained and sentenced journalists in an attempt to restrict freedom of expression. The journalists arrested had been covering cases of mismanagement by the Government or other political issues.

12. On 30 August 2007, the Higher Council on Communication (CSC) of the Niger prohibited live radio broadcasts of debates on the situation in the Agadez region in the north of the country. In June 2008, the Government closed the National Press Association until further notice. A state of emergency (or “cautionary”) decree for the Agadez region, issued in August 2007 and subsequently renewed a number of times, is still in force. This decree is said not only to allow the army and the police to exercise apparently unlimited powers to arrest and detain suspects for more than 48 hours (during which a detainee must normally be presented to a judge, magistrate or judicial civil servant), but also to authorize the army to execute MNJ members.

13. In its reply of 21 April 2009, the Government confirmed that Mr. Moussa Kaka was actually arrested by members of the investigation squad of the National Gendarmerie on the basis of serious evidence of his implication in unfortunate events occurring in the northern part of the country.

14. According to article 71 of the Code of Criminal Procedure, the time limit for police custody is 48 hours, renewable only once. After such a renewal, Mr. Kaka was brought before the public prosecutor, who needed to carry out further investigations before referring the case to the investigating judge, who issued a detention order regarding Mr. Kaka on 25 September 2007.

15. In its reply, the Government states that police custody is legitimate detention. Arbitrary detentions are based on no convention, law or regulation. During police custody, the accused persons enjoy the right to be assisted by an adviser of their choice. They are also entitled to a medical examination. They are notified of the charges brought against them in order that they may explain their acts.

16. The Government adds that, on 17 November 2007, the investigating judge formed the opinion that he should remove certain documents from the file and then release the accused, on the grounds that those documents had been obtained illegally. The public prosecutor immediately lodged an appeal having a suspensive effect on the decision.

17. The Indictments Chamber, to which the case was referred, invalidated the decision of the investigating judge and, according to the Government, assigned the case to “another, more experienced judge, who could treat the file with greater competence and impartiality”. The defence then filed an appeal on points of law against the Indictments Chamber decision, and the Supreme Court, by decision dated 15 May 2008, upheld that decision.

18. The Government further indicates that, on 16 September 2008, subsequent to the acceptance by the investigating judge of another request for provisional release, the prosecutor lodged again an appeal and subsequently requested a reclassification of the offence with which Mr. Kaka was initially charged as “acts possibly infringing upon the security of the State”.

19. Mr. Kaka was released and his file was transmitted, by committal for trial, to the criminal court so that he may be judged in accordance with the law.

20. Lastly, the Government states that, during his detention, Mr. Kaka received preferential treatment in one of the facilities reserved for State officials, in a country governed by the rule of law, where there is no restriction on freedom of expression and where a draft Act is currently prepared at the National Assembly regarding the decriminalization of offences under the legislation on the press.

21. The source confirmed that the Court of Appeal of Niamey ordered the provisional release of Mr. Kaka and committed him for trial by the criminal court of Niamey for “the offence of acting against the integrity of the national territory in agreement with members of MNJ” under article 80 of the Criminal Code. That offence carries one to ten

years in prison. Mr. Kaka has been detained for more than a year, from 25 September 2007 to 7 October 2008.

22. Subsequent to the Government's reply and notwithstanding Mr. Kaka's release after more than one year of deprivation of liberty, the Working Group considers, by virtue of paragraph 17 (a) of its methods of work (section "Action taken on communications"), that it must render an opinion on whether or not this person's deprivation of liberty was arbitrary, given the duration of the detention, his status as a journalist and the freedom of expression concomitant with that occupation.

23. In that connection, the Working Group notes that the Government does not deny that Mr. Kaka was arrested on 20 September 2007 and that a detention order regarding him was issued only on 25 September 2007, namely five days or 120 hours later. Since the time limit for police custody is 48 hours renewable only once, namely four days or 96 hours, it follows that during the remaining 24 hours, when he was not brought before the investigating judge, Mr. Moussa Kaka remained in police custody in violation of the national legislation. That is perhaps what the Government refers to when stating in its reply that the public prosecutor "needed to carry out further investigations".

24. It is therefore possible to think, in agreement with the source, that he was detained in prison before being presented to a judge. In that case, his detention lacks any legal basis that would justify such deprivation of liberty.

25. Moreover, the Working Group notes that, as the source maintains, no specific fact has been invoked in support of the proceedings initiated against Mr. Kaka, and that the Government merely asserts that he is implicated in unfortunate events occurring in the northern part of the country.

26. Similarly, the charge and its amended version, which are based on the notion of "complicity in infringing upon the authority of the State", do not offer a clear description of any precise facts.

27. This lack of specific details in the charges brought does not allow the accused to defend himself appropriately and therefore constitutes a violation of the right to a fair trial, all the more so since there has been no denial of the fact that the sole evidence consists of telephone conversations, whose recording has been illegal according to article 22 of the Constitution of 9 August 1999, articles 59 *et seq.* of order No. 99-045 of 26 October 1999 on the regulation of telecommunications, and articles 60 and 416 of the Code of Criminal Procedure. In November 2007, the investigating judge in charge of the case ordered the tapes removed from the investigation file and invalidated. These recordings of conversations between Mr. Kaka and MNJ members had been made by means incompatible with the legislation in force. However, the case was taken away from the judge who had invalidated the recordings, considering them to be illegal, and assigned to "another, more experienced judge, who could treat the file with greater competence and impartiality".

28. The Working Group notes that these illegally obtained recordings constituted the only real evidence in support of the charges brought against Mr. Kaka, who should therefore have been released in November 2007.

29. Lastly, the Working Group notes, and is astonished, that the Government has kept silent on the harassment and threats suffered by Mr. Kaka for years; on the allegations of harassment of other journalists interested in the Government's activity; on the prohibition by CSC, on 30 August 2007, of live radio broadcasts of debates regarding the situation in the Agadez region; and on the closing of the National Press Association in June 2008.

30. In the absence of clearly formulated charges concerning specific and legally defined acts and in view of Moussa Kaka's capacity as journalist, the afore-mentioned facts are

such as to establish that he has been a victim in respect of the exercise of his freedom of expression.

31. Thus, on the basis of these elements as a whole and considering that Mr. Moussa Kaka has been provisionally released, the Working Group, in accordance with paragraph 17 (a) of its methods of work, renders the following Opinion:

The detention of Mr. Moussa Kaka has been arbitrary and in violation of the provisions of articles 9, 10 and 19 the Universal Declaration of Human Rights and of articles 9, 14 and 19 of the International Covenant on Civil and Political Rights, and falls into categories I, II and III of the criteria used in considering cases submitted to the Working Group.

32. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation.

Adopted on 7 May 2009