

Opinion No. 34/2017

concerning Kamel Eddine Fekhar (Algeria)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 15 February 2017 the Working Group transmitted to the Government of Algeria a communication concerning Kamel Eddine Fekhar. The Government replied to the communication on 13 April 2017. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(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 or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(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).

Submissions

Communication from the source

4. Mr. Fekhar, an Algerian citizen born on X February XXXX, is a medical doctor and a human rights defender. He set up Tifawt, a foundation that works to protect and promote the rights of the Mozabite minority, to which he belongs, in the Mzab region. Mr. Fekhar was previously a member of the Algerian League for the Defence of Human Rights.

Arrest and detention

5. According to the source, Mr. Fekhar was arrested by the Algerian police at around 9.30 p.m. on 9 July 2015 while he was praying in a prayer room at his property in Ghardaïa. He was then detained at the police station in the city.

6. The arrest of Mr. Fekhar was ordered by the Public Prosecutor's Office. The source considers that the order issued by the Office had no legal basis. Another 27 individuals, including 6 minors, were arrested at the same time as Mr. Fekhar. The minors and four others were released shortly thereafter. A few days later, a further 20 individuals were arrested in connection with the same case.

7. On 15 July 2015, Mr. Fekhar was questioned by an investigating judge from the city of Ghardaïa and remanded in detention. On 16 July 2015, he was transferred to El Ménia prison. He remains in

pretrial detention. According to the source, 43 other individuals also remain in detention in connection with the same case.

8. During interrogation, Mr. Fekhar was reportedly accused of plotting with the other individuals arrested with him to establish a “harmful” organization and of seeking to divide the country under the pretext of exercising his freedom of expression. According to the source, 18 charges have been brought against Mr. Fekhar, including incitement to hatred, incitement to violence during peaceful or armed gatherings, arson, attempted murder and offences against national unity and security. Some of the charges carry the death penalty. Mr. Fekhar maintains that he is innocent and demands to be released.

9. The source considers that the charges are fabricated and that Mr. Fekhar has in fact been detained as a result of his legitimate and peaceful work in support of human rights in Algeria and his statements criticizing the behaviour of the security services towards the Mozabite population. According to the source, Mr. Fekhar had been detained on previous occasions for his activities as a human rights defender. The source also notes that the security services record indicates that Mr. Fekhar belongs to the Ibadi sect, with which the Mozabite minority is affiliated. The order issued by the investigating judge was upheld by the Indictment Division.

Previous arrests and detentions

10. The source notes that Mr. Fekhar was first arrested on 13 October 2004 during a protest held in Ghardaïa to highlight the social problems facing the city. He was accused of organizing an unauthorized demonstration and endangering national unity and security. He was detained for six months in Ghardaïa prison. According to the source, Mr. Fekhar was subjected to violence during his detention.

11. In 2005, Mr. Fekhar was arrested at a checkpoint in the city of Guelma. According to the source, he was accused of possessing CDs containing material that was “harmful” to national unity, notably photographs of demonstrations. He was detained by the police for three days.

12. In 2009, Mr. Fekhar was arrested again in Ghardaïa and accused of setting fire to a police car. The source emphasizes that the charges were brought based on statements allegedly given by a person who subsequently denied having made the accusations.

13. On 27 March 2013, Mr. Fekhar was arrested during a demonstration against Eid Zarbeya, an annual festival introduced by the local authorities in Ghardaïa several years ago. According to the source, the demonstrators were protesting against the amount of money spent on the festival, which they claimed was a means of whitewashing social problems and could be considered tantamount to promoting corruption. Mr. Fekhar was accused of destroying an Algerian flag and was sentenced to one year of imprisonment in 2014. The Court of Appeal upheld the conviction, which is currently being appealed before the Supreme Court.

Hunger strikes

14. Following his most recent arrest and placement in detention, Mr. Fekhar began a hunger strike on 15 July 2015. On 15 November 2016, Mr. Fekhar began a second hunger strike. According to the source, he was then subjected to ill-treatment and torture and was placed in solitary confinement without a mattress or blanket. On 3 January 2017, Mr. Fekhar began his fifth hunger strike, which is still ongoing.

15. According to the source, through these hunger strikes Mr. Fekhar is seeking to protest against his own detention, which he considers to be arbitrary, and against the detention of other human rights defenders on the basis of accusations that he considers to be fabricated. The source notes that Mr. Fekhar is also protesting against the judicial authorities’ refusal to consider the complaints he has lodged regarding the acts of torture and ill-treatment he allegedly suffered during his detention.

16. Mr. Fekhar's health has seriously deteriorated since he began his fifth hunger strike. According to the source, Mr. Fekhar is currently in poor health. He suffers from chest pains and vomits frequently, sometimes with traces of blood. The source notes that Mr. Fekhar was initially admitted to the clinic at El Ménia prison, but that it was not adequately equipped to provide suitable care to patients, owing in particular to the lack of heating and hot water and the absence of a properly functioning heart monitor. In the light of Mr. Fekhar's serious health problems, 11 other detainees

have, in a show of solidarity, reportedly joined him in his hunger strike. On 22 January 2017, Mr. Fekhar was transferred to Laghouat prison after his condition deteriorated.

17. The source submits that the detention of Mr. Fekhar constitutes arbitrary deprivation of liberty under categories II and III.

Category II

18. According to the source, the Algerian authorities stepped up their targeting of Mr. Fekhar following the establishment in 2014 of Tifawt, a foundation working to promote and protect the rights of the Mozabite minority in Algeria. As on the previous occasions when he had been arrested, Mr. Fekhar was apparently jailed because of his legitimate and peaceful work in support of human rights in Algeria.

19. In the source's view, Mr. Fekhar is a human rights defender who knows how to make his voice heard by participating in peaceful demonstrations to promote human rights in Algeria. According to the source, his work as a human rights defender and the fact that he belongs to the Mozabite minority are the real reasons for the judicial harassment, including several periods of arbitrary detention, to which he has been subjected.

20. Accordingly, the source considers that the detention of Mr. Fekhar is the result of his exercise of the rights guaranteed by articles 18 (freedom of thought, conscience and religion), 19 (freedom of opinion and expression) and 20 (freedom of peaceful assembly and freedom of association) of the Universal Declaration of Human Rights, and by articles 19 (freedom of opinion and expression), 21 (right of peaceful assembly) and 22 (freedom of association) of the International Covenant on Civil and Political Rights.

Category III

21. After more than 18 months in pretrial detention, no proceedings have been initiated against Mr. Fekhar. According to the source, this is due to the fact that there is no evidence in the case file to support the 18 charges against him. The source points out that pretrial detention is allowed under the Code of Criminal Procedure only as an exceptional measure. In addition, the source questions why only the case for the prosecution is being investigated. The judges have not considered any of the complaints lodged by Mr. Fekhar or his requests for witnesses to be heard. According to the source, the Algerian League for the Defence of Human Rights filed a complaint of abuse of authority against the Public Prosecutor's Office. Instead of referring the complaint to the public prosecutor attached to the Supreme Court, the Office reportedly declared it inadmissible.

22. In addition, Mr. Fekhar's lawyer has been subjected to constant harassment by the Algerian authorities and has been under judicial supervision since 13 July 2016. The source believes that this judicial supervision — which takes the form of weekly visits 600 kilometres away from the lawyer's place of residence and work, forcing him to travel 1,200 kilometres every week — is designed to hinder his activities.

23. The source submits that the delay in holding Mr. Fekhar's trial violates international fair trial standards and, in particular, article 14 (c) of the Covenant.

Response from the Government

24. On 15 February 2017, the Working Group transmitted the allegations from the source to the Algerian Government under its regular communication procedure. The Working Group requested the Government to provide, before 17 April 2017, further information on the situation of Mr. Fekhar since his arrest, including any comments it might wish to make regarding the allegations contained in the communication. The Working Group also requested the Government to clarify the facts and the legal provisions forming the basis for Mr. Fekhar's deprivation of liberty and their compatibility with the obligations of Algeria under international human rights law and, in particular, under the treaties that it has ratified. The Algerian Government sent its response to the Working Group on 13 April 2017.

25. In its response, the Government states that the arrest of Mr. Fekhar occurred after the riots in Ghardaïa in July 2015, when numerous acts of violence and vandalism were committed, creating a climate of terror among the population and leaving several people dead. According to the Government, Mr. Fekhar was arrested because he was one of the organizers of the riots and allegedly incited others to commit the criminal acts referred to above. His arrest occurred as part of an investigation into the establishment of a group with the specific aim of committing crimes and

inciting others to commit acts intended to compromise State security and national unity and disrupt public order.

26. The Government also indicates that the case was transmitted to the trial bench on 14 February 2017, that Mr. Fekhar challenged the indictment against him and that his complaint is currently pending before the Supreme Court.

27. In addition, the Government maintains that Mr. Fekhar's rights have been fully respected during his detention, that he has been treated in a dignified manner and that he has never been subjected to verbal or physical abuse.

28. In connection with Mr. Fekhar's state of health, the Government maintains that the law guarantees the right to medical care for all prisoners and that Mr. Fekhar has received all necessary care since his arrest. The Government adds that, since he began his hunger strike on 3 January 2017, Mr. Fekhar has received medical services. He was transferred to El Ménia Hospital on 15 January 2017 and subsequently to Laghouat University Hospital to continue receiving medical care. The Government believes that Mr. Fekhar's medical condition is now stable.

Further comments from the source

29. The Government's response was sent to the source for comment. The source replied on 20 April 2017.

30. The source refutes the Government's arguments, noting the lack of evidence to support its statements. In addition, the source notes that pretrial detention in Algeria is permitted for a maximum of four months and may be extended only once and only in exceptional circumstances.

31. The source also provided additional information on the lack of appropriate medical care for Mr. Fekhar in prison, despite his ill health and his ongoing hunger strike. Finally, the source reiterates the allegation that Mr. Fekhar's lawyer has been subjected to judicial harassment in retaliation for providing legal representation in the present case.

Discussion

32. The Working Group appreciates the cooperation of the parties in the present case.

33. Firstly, the Working Group recalls that an urgent appeal concerning Mr. Fekhar's situation was sent to the Government of Algeria on 31 January 2017 by the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.¹ The Working Group has considered the response provided by the Government on 3 March 2017 and welcomes this demonstration of cooperation, despite the fact that it fails to address fully all the issues raised by the special procedures mandate holders.

34. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).

35. In the present case, the Government decided to challenge the prima facie credible allegations made by the source, but it has refuted them merely by means of written statements, without providing any evidence to support its position. As the Working Group has stated previously, if no evidence is provided, the Government fails to cast reasonable doubt on the reliable account provided by the source (see Opinions No. 34/2015, para. 27, No. 26/2016, para. 22, and No. 27/2016, para. 36).

36. In addition, the accusations made by the Government against Mr. Fekhar lack substance, casting doubt on the fairness of the criminal process. Lastly, the Government has made no attempt to show why Mr. Fekhar, who was arrested in July 2015, remains in pretrial detention without his case having been heard. The Government asserts that the case was transferred to the trial bench in February 2017, implying that it was the challenge to the indictment before the Supreme Court that was delaying the process. Nevertheless, the fact remains that it took almost 18 months (from July

2015 to February 2017) for the case to be transferred, and that this period in itself exceeds the limits imposed by the Code of Criminal Procedure.

37. The Working Group is of the view that Mr. Fekhar is a staunch defender of human rights and that this is the real reason for the judicial harassment to which he has been subjected. By defending the rights of his fellow citizens, including members of the Mozabite minority, he is merely exercising his rights as protected by articles 19 (freedom of opinion and expression), 21 (freedom of assembly) and 22 (freedom of association) of the Covenant. Freedom of assembly does not encompass the commission of criminal acts; however, in the present case, the Government has failed to convince the Working Group that there were reasons to believe that Mr. Fekhar was responsible for the crimes committed during the demonstrations in Ghardaïa in July 2015.

38. The Working Group is also of the view that Mr. Fekhar has been subjected to discrimination in violation of the right to equality before the law (art. 26 of the Covenant) and the rights of ethnic, religious or linguistic minorities (art. 27 of the Covenant). As a member of the Mozabite minority and a defender of the rights of that community, Mr. Fekhar was subjected to continued harassment and numerous arrests and detentions. In the view of the Working Group, this constitutes an abuse of process against him on unfairly selective grounds. Arresting Mr. Fekhar in July 2015, and then holding him in pretrial detention ever since, constitutes part of the same strategy of judicial harassment in violation of the international standards mentioned above.

39. For the reasons cited above, the Working Group concludes that the detention of Mr. Fekhar is arbitrary under category II.

40. Furthermore, the source submits that there is no legal basis for Mr. Fekhar's detention since he has remained in pretrial detention beyond the authorized maximum period of eight months. In the present case, Mr. Fekhar was not brought before a judge until six days after his arrest, although article 9 (3) of the Covenant requires that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge". The law also guarantees the right to be tried within a reasonable time or to be released (arts. 9 (3) and 14 (3) of the Covenant). The fact that Mr. Fekhar has been held in pretrial detention since 15 July 2015 without his trial having commenced leads to the conclusion that these rights have been violated.

41. In addition, the Working Group is concerned about the harassment of Mr. Fekhar's lawyer. This harassment in retaliation for the legal assistance he is providing to Mr. Fekhar jeopardizes Mr. Fekhar's right to be represented by counsel of his own choosing, as provided in article 14 (3) (b) of the Covenant and in principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37).

42. Taken together, all of these violations of the right to a fair trial are sufficiently serious for the Working Group to conclude that the detention of Mr. Fekhar is arbitrary under category III.

43. The Working Group is deeply concerned about the state of Mr. Fekhar's health. It welcomes the steps that the Government reports it has already taken to stabilize Mr. Fekhar's condition. However, it is unlikely that his health will stabilize while he remains in detention and continues to be harassed. The Government should end Mr. Fekhar's detention and continue its efforts to ensure that his health is completely restored.

44. Finally, the Working Group is also concerned about the allegations of ill-treatment of Mr. Fekhar. Torture and ill-treatment are prohibited by article 7 of the Covenant and by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Algeria ratified on 12 September 1989. The prohibition of torture is a peremptory norm; States must never tolerate violations of this norm and have an obligation to investigate any instance of torture that puts a detainee at risk and at the same time fundamentally affects any criminal proceedings against him or her. As in similar situations in the past, the Working Group is of the view that the allegations of ill-treatment against Mr. Fekhar should be brought to the attention of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

45. The Working Group also considers it appropriate to refer the allegations in this case to the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the independence of judges and lawyers.

Disposition

46. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Kamel Eddine Fekhar, being in contravention of articles 9 (3), 14 (3), 19, 21, 22, 26 and 27 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II and III.

47. The Working Group requests the Government of Algeria to take the steps necessary to remedy the situation of Mr. Fekhar without delay and bring it into conformity with the relevant international norms, including those set out in the International Covenant on Civil and Political Rights.

48. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Fekhar immediately and accord him an enforceable right to reparation, including compensation and a guarantee of non-repetition, in accordance with international law, and to provide him with medical care as needed and appropriate for his state of health.

Follow-up procedure

49. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Fekhar has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Fekhar;
- (c) Whether an investigation has been conducted into the violation of Mr. Fekhar's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Algeria with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

50. The Government is further invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

51. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

52. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.²

[Adopted on 27 April 2017]

¹See

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=22963>.

²See Human Rights Council resolution 33/30, paras. 3 and 7.