

Opinion No. 39/2017

concerning Djibril Bassolé (Burkina Faso)

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 22 December 2016 the Working Group transmitted a communication concerning Djibril Bassolé to the Government of Burkina Faso. The Government replied to the communication on 10 March 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 Covenant (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. Djibril Bassolé, born on XX November XXXX, is a former minister of Burkina Faso and a diplomat. Between 2000 and 2014, he served as Minister of Security and Minister for Foreign Affairs of Burkina Faso.

5. After the protests of 29, 30 and 31 October 2014, the then President of the Republic, Blaise Compaoré, was forced to resign, flee the country and go into exile in Côte d'Ivoire. A transitional government was set up to organize the elections that were scheduled for October 2015. After a delay, the elections were held and the new President, Roch Marc Kabore, took office.

6. The source indicates that, although several senior officials had their homes burned down and were forced to go into exile because of the protests, Mr. Bassolé remained in the country and set up a political party called Nouvelle alliance du Faso (New Alliance of Faso) (NAFA), with the intention of standing in the first presidential elections after the transition.

7. The source alleges that the transitional government adopted an amendment to the Electoral Code on 7 April 2015 which barred NAFA from taking part in the presidential elections on the grounds that the leader of the party was a former minister of Mr. Compaoré's fallen regime. This amendment was contested before the Court of Justice of the Economic Community of West African States

(ECOWAS), which ruled, on 13 July 2015, that candidates exercising their civil and political rights could not be eliminated arbitrarily. The source indicates that, in the same ruling, the Court ordered the Government to restore the rights of Mr. Bassolé.

8. According to the source, the Constitutional Council ignored the Court's decision and issued a ruling on 10 September 2015 that excluded Mr. Bassolé from the forthcoming presidential elections.

9. On 16 September 2015, it was reported on social networks and by foreign media outlets that a group of soldiers from the official security regiment who had been responsible for the security of the former President had tried to seize power. The source alleges that this coup was rapidly suppressed and those involved were arrested. The source also claims that Mr. Bassolé was not in the capital at the time of the coup, that he did not want or support the coup, and that he returned to Ouagadougou only after the unrest had subsided.

10. The source states that the Government accused Mr. Bassolé of planning a revolt and mobilizing foreign forces and jihadi groups, in a press release dated 28 September 2015.

11. The source alleges that on 29 September 2015, after the press release had been issued, Mr. Bassolé was arrested at his home by the gendarmerie, with no explanation or arrest warrant. The source also states that there was no evidence against him when he was arrested and that it was only later that the judge tried to gather evidence to justify his arrest.

12. According to the source, Mr. Bassolé was then held in custody until 6 October 2015, when a detention order was issued. The source notes that, under the Code of Military Criminal Procedure, a person cannot be held in custody for longer than 72 hours; once that period has elapsed, an extension of no more than 48 hours may be granted at the request of the public prosecutor.

13. According to the source, Mr. Bassolé was accused of committing a State security offence and colluding with foreign forces to undermine national security.

14. On 6 November 2015, the transitional government issued a decree ending the leave of absence that had been granted to Mr. Bassolé, as a general in the gendarmerie, from 10 February 2015, and ordering him to return to work on 1 November 2015. The source states that the decree was issued without a specific request having been made by Mr. Bassolé, who was still in prison.

15. The source reports that, on 12 November 2015, recordings of conversations that Mr. Bassolé had allegedly had were posted online, then submitted as evidence in the case against him. The source claims, however, that those recordings had been doctored. Mr. Bassolé's interlocutor remains in detention, although the charges against M. Bassolé have been dropped.

16. On 26 November 2015, the military court handed down an order rejecting Mr. Bassolé's appointment of foreign counsel. The Court of Cassation, in a decision of 26 November 2016, and the Court of Justice of ECOWAS, in a decision of 1 July 2016, both ruled that the military court of Ouagadougou had violated Mr. Bassolé's procedural rights by depriving him of assistance from foreign counsel. The source indicates that Mr. Bassolé was deprived of the assistance of most of his lawyers for a period of six months during his detention.

17. The source states that Mr. Bassolé submitted four applications for conditional release, on 30 November 2015, 11 March 2016, 7 April 2016 and 1 August 2016 respectively, all of which were rejected. According to the source, a further application was rejected in a decision handed down on 24 June 2016, which is currently being appealed before the Court of Cassation.

18. On 7 April 2016, the detention order against Mr. Bassolé was extended by six months, without any clear justification. The source recalls that article 138 of the Code of Criminal Procedure provides that the investigating judge may only extend this kind of detention by way of an order in which specific reasons are given.

19. The source reports that an application for provisional release was submitted on 1 August 2016 and that no response had been received as at the date of submission of the present communication by the source in September 2016, even though the law provides that a response must be provided within 15 days. According to the source, unlike other persons accused in the same case, Mr. Bassolé has not been discharged by the review chamber of the military justice system, even though individuals who participated in the coup have stated publicly that Mr. Bassolé was not involved in the events.

20. Mr. Bassolé is still being held in the military short-stay prison and correctional facility and is on trial before the military court of Ouagadougou, which, according to the source, remains under the control of the political authorities. The source claims that certain judges have been taken off the case. During the past few months, for example, the investigating judge who had been seconded to the court and one of the military investigating judges assigned to the case have been dismissed. The country's highest authorities have also commented freely on the progress of the proceedings.

21. Lastly, the source alleges that Mr. Bassolé is unable to prepare his defence properly because the military court refuses to send a copy of the case file to his lawyers, and that he was heard only twice by the investigating judge in 2015, on 6 October 2015, when he was charged, and on 8 December 2015, for a hearing on the merits. The source indicates that, at the time of submission of this communication to the Working Group, no further hearing had been scheduled.

22. The source submits that the deprivation of liberty of Mr. Bassolé is arbitrary and falls under categories II and III.

23. The source alleges that articles 19 and 21 of the Universal Declaration of Human Rights and articles 19 and 25 of the Covenant have been violated, because Mr. Bassolé was deprived of the opportunity to stand in a fair presidential election. The source further alleges that the Electoral Code was amended to prevent members of the former regime from standing as candidates and that the Constitutional Court ignored the decision of the Court of Justice of ECOWAS to authorize such candidates. The source also indicates that, for the same reasons, Mr. Bassolé was reinstated to a military rank that prevented him from standing for election. Furthermore, he was arrested and placed in custody just a few weeks before the elections were due to be held.

24. In addition, the source claims that Mr. Bassolé's right to a fair trial has been clearly violated because he has been prevented from exercising the rights enshrined in articles 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

Response from the Government

25. On 22 December 2016, the Working Group transmitted the source's allegations to the Government of Burkina Faso under its regular communications procedure. The Working Group requested the Government to provide further information about the situation of Mr. Bassolé since his arrest, including any comments that it would like to make on the source's allegations, by 21 February 2017. The Working Group also requested the Government to clarify the factual and legal grounds for the detention of Mr. Bassolé and their compatibility with the obligations of Burkina Faso under international human rights law and, in particular, under the treaties that the State has ratified. On 20 February 2017, the Government requested that the Working Group extend the time limit and was granted an extension of 30 days. The Government submitted its reply on 10 March 2017.

26. In its reply, the Government addresses the source's arguments one by one. It starts by stressing the fact that Mr. Bassolé was a soldier assigned to the gendarmerie and that he clearly never lost that status, as he was given a promotion in 2014, in spite of several temporary postings. The Government acknowledges that Mr. Bassolé was granted leave of absence for two years, starting on 10 February 2015, and that this leave was terminated some nine months later, on 6 November 2015. The Government refers to a legal provision which stipulates that "a soldier on leave of absence may be recalled to duty if circumstances so require".

27. The Government also states that Mr. Bassolé was not excluded from the presidential elections in violation of the ruling of the Court of Justice of ECOWAS, but rather pursuant to a decision of the Constitutional Council declaring him ineligible, and that his party, in accordance with the ruling, had not been affected.

28. With respect to the source's allegations concerning Mr. Bassolé's arrest, the Government states that he was duly informed of the reasons for his arrest, not only when he was arrested but also during negotiations that took place before his arrest. According to the Government, as a result of those negotiations, Mr. Bassolé agreed to turn himself in at the gendarmerie rather than be arrested at his home. The Government indicates that the close relative who acted as an intermediary during the negotiations was also present when Mr. Bassolé went to the gendarmerie. The Government points out that Mr. Bassolé could not have turned himself in if he had not known what he was being

accused of. Lastly, the Government reports that a request for judicial assistance was issued before the arrest, on 28 September 2015.

29. In response to the source's allegation that Mr. Bassolé was arrested before there was any evidence against him, the Government quotes its Code of Criminal Procedure, which provides that a person may be arrested if there are serious and consistent indications that the person is guilty.

30. With regard to the source's allegations about the audio recording that was posted online, the Government indicates that it has not been proven whether that recording is the same as the one in the criminal case file. The Government recalls that the recording in the case file has been analysed by an expert, whose report is also included in the case file.

31. With regard to the various applications for provisional release that were rejected, the Government states that they were rightly rejected by the competent judicial body and that all possible remedies were provided.

32. Lastly, regarding the Government's public statements about Mr. Bassolé, the Government submits that, contrary to the source's allegations, no authority made a biased statement of any kind. It has provided an extract of a presidential statement on the matter. It also denies all other allegations on points of fact or law made by the source. It has attached various legal and regulatory texts to support its response.

Further comments from the source

33. The response from the Government was transmitted to the source on 23 March 2017. In its reply, the source highlights the failure to observe the principle of the separation of powers within the Government and points out that the person who signed the Government's response is also the person who brought criminal indemnification proceedings against Mr. Bassolé. It is not clear to the Working Group how this argument is linked to the information previously submitted by the source, so this argument will not be discussed below.

Discussion

34. The Working Group welcomes the cooperation of the parties in the present case.

35. 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). The Working Group will therefore assess the parties' arguments with regard to the two allegations.

36. Firstly, the source states that Mr. Bassolé's detention is arbitrary under category II because it violates articles 19 and 21 of the Universal Declaration of Human Rights and articles 19 and 25 of the Covenant. The source claims that Mr. Bassolé was deprived of his right to participate in the political life of his country by standing for election, even though he had established NAFA for that very purpose. Under the new Electoral Code adopted by the transitional government, NAFA and its leaders were excluded because of their links with the previous regime. On 13 July 2015, the Court of Justice of ECOWAS issued a binding decision in which it ordered Burkina Faso to amend the Electoral Code to authorize all candidacies, provided that the persons concerned have not committed a serious offence that renders them ineligible under the applicable law.

37. The Government, meanwhile, claims that Mr. Bassolé was an independent candidate, rather than a candidate representing NAFA. It maintains that, at the request of other candidates, he was declared ineligible by the Constitutional Council, on the basis of the Electoral Code, taking into account the decision of the Court of Justice of ECOWAS.

38. The Working Group underscores that, although Mr. Bassolé was not a party to the proceedings before the Court of Justice of ECOWAS, his political party was, so he was certainly concerned by them. Moreover, the Working Group does not subscribe to the Government's interpretation of the decision handed down by the Court of Justice of ECOWAS. It agrees with the Court of Justice that the type of exclusion provided for by the authorities constituted a breach of human rights. The Government provides no evidence of having amended the Electoral Code pursuant to that decision and the decision of the Constitutional Council does not mention any amendment of that kind. The Working Group therefore concludes that the unsatisfactory Electoral Code was still in force.

However, the source has not demonstrated a link between the arrest and detention of Mr. Bassolé

and his political position. Indeed, the source acknowledges that the charges brought against Mr. Bassolé are linked to the attempted coup. The Working Group considers that it does not have sufficient evidence to conclude that Mr. Bassolé was arrested and detained for having exercised protected rights.

39. Secondly, the source alleges that Mr. Bassolé's detention is arbitrary under category III because it violates articles 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

40. According to the source, immediately after the attempted coup in mid-September 2015, the Government issued a statement in which it accused Mr. Bassolé of trying to obstruct the electoral process by recruiting foreign forces and jihadis. It was only after that statement had been made that Mr. Bassolé was allegedly arrested at his home on 29 September 2015, with no explanation or arrest warrant, since no warrant was issued until 5 October 2015. The source also reports that audio recordings of conversations about the coup, allegedly involving Mr. Bassolé, were posted online on 12 November 2015.

41. The source indicates that, once Mr. Bassolé had been arrested and detained, the Government issued an order stating that he must rejoin the gendarmerie. That is the basis on which the Government now justifies Mr. Bassolé's referral to the military court which refused to allow him to be represented by foreign counsel. A decision from the Court of Cassation of Burkina Faso (May 2016) and the Court of Justice of ECOWAS (July 2016) were required before Mr. Bassolé was eventually authorized to receive assistance from his lawyers.

42. Lastly, the source alleges that Mr. Bassolé's many applications for provisional release were all rejected and that the detention order against him was extended for six months without justification in April 2016.

43. The Government provided a thorough response with several supporting documents. It gave a detailed account of the proceedings and the action taken, demonstrating that when Mr. Bassolé was arrested, a request for judicial assistance had already been issued, so there was a legal basis for the arrest.

44. The Government also contested the allegations about the audio recording posted online, denying all responsibility and indicating that there was no proof that the recording in the case file was the same as the one online. The Working Group does not have enough evidence to reach a conclusion on this matter.

45. With regard to the foreign lawyers who were not permitted to assist Mr. Bassolé, the Government acknowledges that the judge made a mistake. However, this error was rectified by both the supreme national court and the regional court, and Mr. Bassolé has been supported by his lawyers, including foreign counsel, ever since. Given that this violation was duly referred to the courts and remedied, it cannot be considered a procedural failing.

46. However, the Government does not deny that it ordered Mr. Bassolé to rejoin the gendarmerie when he was already in detention. The relevant decree was issued on 6 November 2015 and ordered him to resume his duties as of 1 November 2015, even though he was still in prison at that stage. By way of explanation, the Government merely states that it was an administrative measure, without giving further detail. A retroactive measure taken when the person concerned was already in detention raises legitimate concerns; it is therefore appropriate to follow the source's line of reasoning. The Working Group considers that, given the circumstances of this case, bringing Mr. Bassolé before the military courts constitutes an irrevocable violation of his right to a fair trial. The gravity of this ongoing violation is such that it renders the detention arbitrary; Mr. Bassolé should therefore be released immediately. In view of the accusations against Mr. Bassolé, however, his immediate release remains without prejudice to the Government.

47. The Working Group recalls here its consistent stance on military courts (opinion No. 51/2016, paras. 22 and 24-26) and guideline 4 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 (see A/HRC/30/37, para. 55). In this case, Mr. Bassolé was a gendarme on leave of absence, so he had the status of a civilian at the time of the events. On that basis, he should be

heard by the civil courts rather than the military courts. This circumstance supports the earlier conclusion that his right to a fair trial has been violated.

Disposition

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

The deprivation of liberty of Djibril Bassolé, being in contravention of articles 10 and 11 of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category III.

49. The Working Group requests the Government of Burkina Faso to take the steps necessary to remedy the situation of Djibril Bassolé without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

50. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to release Djibril Bassolé immediately and to accord him an enforceable right to compensation and other reparations, in accordance with international law.

Follow-up procedure

51. 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. Bassolé has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Bassolé;
- (c) Whether an investigation has been conducted into the violation of Mr. Bassolé'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 Burkina Faso with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

52. The Government is 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.

53. 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.

54. 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.¹

[Adopted on 28 April 2017]

¹See Human Rights Council resolution 33/30, paras. 3 and 7.