

HUMAN RIGHTS COMMITTEE

Koné v. Senegal

Communication No. 386/1989*

21 October 1994

CCPR/C/52/D/386/1989*

VIEWS

Submitted by: Famara Koné

Victim: The author

State party: Senegal

Date of communication: 5 December 1989 (initial submission)

Date of decision on admissibility: 5 November 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 1994,

Having concluded its consideration of communication No. 386/1989 submitted to the Human Rights Committee by Mr. Famara Koné under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Famara Koné, a Senegalese citizen born in 1952 and registered resident of Dakar, currently domiciled in Ouagadougou, Burkina Faso. He claims to be a victim of violations of his human rights by Senegal but does not specifically invoke

his rights under the International Covenant on Civil and Political Rights.

The facts as submitted by the author:

2.1 The author submits that in 1978, he joined the "Movement for Justice in Africa" (Mouvement pour la Justice en Afrique), whose aim is to assist the oppressed in Africa. On 15 January 1982, he was arrested in Gambia by Senegalese soldiers, allegedly for protesting against the intervention of Senegalese troops in Gambia after an attempted coup on 30 July 1981. He was transferred to Senegal, where he was detained for over four years, pending his trial, until his provisional release on 9 May 1986.

2.2 Mr. Koné claims, without giving details, that he was subjected to torture by investigating officers during one week of interrogation; he indicates that, since his release, he has been in need of medical supervision as a result. He further notes that despite his persistent requests to the regional representative(s) of the U.N. High Commissioner for Refugees, he was denied refugee status both in Gambia and Benin (1988), as well as in the Ivory Coast (1989) and apparently now in Burkina Faso (1992).

2.3 The author states that, after presidential elections in Senegal on 28 February 1988, he was re-arrested and detained for several weeks, without charges. He was released on 18 April 1988 by decision of the regional court of Dakar (Tribunal régional). He contends that, after participating in a political campaign in Guinea-Bissau directed against Senegal, he was once again arrested when he sought to enter Senegal on 6 July 1990. He was detained for six days, during which he claims to have been once again tortured by the security police, which tried to force him to sign a statement admitting attacks on State security and cooperating with the intelligence services of another State.

2.4 According to the author, his family in Dakar is being persecuted by the Senegalese authorities. On 6 June 1990, the regional court of Dakar confirmed an eviction order served by the departmental court (Tribunal départemental) of Dakar on 12 February 1990. As a result, the author and his family had to leave the house in which they had resided for the past forty years. The decision was taken at the request of the new owner, who had bought the property from the heirs of the author's grandfather in 1986. The author and his father challenged the validity of the act of sale and reaffirmed their right to the property. The municipal authorities of Dakar, however, granted a lease contract to the new owner on the basis of the act of sale, thereby confirming - without valid grounds in the author's opinion - the latter's right to the property.

2.5 As to the requirement of exhaustion of domestic remedies, the author affirms, without giving details, that as an opponent to the government, it is not possible for him to lodge a complaint against the State party's authorities. In this context, he claims that he has been threatened on several occasions by the security police.

The complaint:

3. Although the author does not invoke any of the articles of the International Covenant on

Civil and Political Rights, it appears from the context of his submissions that he claims violations of articles 7, 9 and 19.

The State party's information and observations:

4.1 The State party contends that the author is not at all a victim of political persecution and has not been prevented from expressing his opinions, but that he is merely a person rebellious to any type of authority.

4.2 Concerning the author's allegation of torture and ill-treatment, the State party indicates that torture constitutes a punishable offence under the Senegalese Criminal Code, which provides for various penalties for acts of torture and ill-treatment, increasing in severity to correspond with the gravity of the physical consequences of the torture. Other provisions of the Criminal Code provide for an increase of the punishment if the offence is committed by an official or civil servant in the exercise of his functions. Pursuant to article 76 of the Code of Criminal Procedure, the author could have and should have submitted a complaint to the competent judicial authorities against the police officers held responsible for his treatment. The State party further points out that Mr. Koné had the possibility, forty-eight hours after his apprehension, to be examined by a doctor, at his own request or that of his family, under article 56, paragraph 2, of the Code of Criminal Procedure.

4.3 Concerning the author's allegation of arbitrary detention in 1982, the State party points out that Mr. Koné was remanded by order of an examining magistrate. As this order was issued by an officer authorized by law to exercise judicial power, his provisional detention cannot be characterized as illegal or arbitrary. Furthermore, articles 334 and 337 of the Penal Code criminalize acts of arbitrary arrest and detention. After his provisional release (élargissement) on 9 May 1986, Mr. Koné could have seized the competent judicial authorities under article 76 of the Code of Criminal Procedure.

4.4 With regard to the allegations pertaining to the eviction order, the State party observes that the judgment which confirmed the order (i.e. the judgment of the Tribunal régional) could have been appealed further to the Supreme Court, pursuant to article 3 of Decree No. 60-17 of 3 September 1960, concerning the rules of procedure of the Supreme Court) and article 324 of the Code of Civil Procedure. Furthermore, as the Senegalese courts have not yet ruled on the substance of the matter, i.e. the title to the property, the author could have requested the civil court to rule on the substance.

The Committee's admissibility decision:

5.1 During its 43rd session, the Committee considered the admissibility of the communication. It noted that the author's claim concerning the eviction from his family home related primarily to alleged violations of his right to property, which is not protected by the Covenant. Since the Committee is only competent to consider allegations of violations of any of the rights protected under the Covenant, the author's claim in respect of this issue was deemed inadmissible under article 3 of the Optional Protocol.

5.2 Concerning the claim that the author had been tortured and ill-treated by the security police, the Committee noted that the author had failed to take steps to exhaust domestic remedies since he allegedly could not file complaints against Senegalese authorities as a political opponent. It considered, however, that domestic remedies against acts of torture could not be deemed a priori ineffective and, accordingly, that the author was not absolved from making a reasonable effort to exhaust them. This part of the communication was therefore declared inadmissible under article 5, paragraph 2(b), of the Protocol.

5.3 As to the allegations relating to articles 9 and 19, the Committee noted that the State party had failed to provide information on the charges against Mr. Koné, nor on the applicable law governing his detention from 1982 to 1986, from February to April 1988 and in July 1990, nor sufficient information on effective remedies available to him. It further observed that the State party's explanation that the period of detention 1982-1986 could not be deemed arbitrary simply because the detention order was issued by judicial authority did not answer the question whether the detention was or was not contrary to article 9. In the circumstances, the Committee could not conclude that there were effective remedies available to the author and considered the requirements of article 5, paragraph 2(b), of the Optional Protocol to have been met in this respect.

5.4 On 5 November 1991, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 9 and 19 of the Covenant. The State party was requested, in particular, to explain the circumstances under which the author was detained from 1982 to 1986, in 1988 and in 1990, indicating the charges against him and the applicable legislation, and to forward to the Committee copies of the detention order(s) issued by the examining magistrates and of the decision of the Tribunal régional of Dakar of 18 April 1988.

The State party's information on the merits of the communication:

6.1 In its submission on the merits, the State party provides the information requested by the Committee. As to the period of detention 1982-1986, it observes that the author was detained pursuant to a detention order (mandat de dépôt) issued by the Senior Examining Magistrate of Dakar, after having been formally charged with acts threatening national security. This was duly recorded under No. 406/82 in the register of complaints of the prosecutor's office of Dakar as well as under registry number 7/82 at the office of the examining magistrate. The acts attributed to the author are an offence under Section 80 (Chapter I) of the Senegalese Penal Code.

6.2 The procedure governing provisional custody is governed by article 139 of the Code of Criminal Procedure, which provides for the issuance of a detention order upon request of the Department of Public Prosecutions. Paragraph 2 of this article stipulates that a request for release on bail must be rejected if the public prosecutor's office files a written objection to the request. Notwithstanding, a request for release on bail may at any moment be formulated by the accused or his representative. The magistrate is obliged to rule, by reasoned decision (par ordonnance spécialement motivée) within five days of the receipt of the request. If the magistrate does not decide within the deadline, the accused may directly appeal to the

competent chamber of the Tribunal Correctionnel (article 129, paragraph 5); and if the request for release on bail is rejected, the accused may appeal in accordance with the provisions of article 180 of the Code of Criminal Procedure.

6.3 Upon concluding his investigations in the case, the examining magistrate concluded that the charges against Mr. Koné were substantiated and accordingly, ordered his case to be tried by the criminal court of Dakar. However, in the light of the author's character and previous documented behaviour, the magistrate considered it appropriate to request a mental status examination and, pending its results, ordered the author's provisional release on 9 May 1986, by judgment No. 1898. The judicial procedure never led a judgment on the merits, as the author fell under the provisions of Amnesty Law No. 88-01 of 4 June 1988.

6.4 In its additional comments on the merits, dated 25 February 1994, the Senegalese Government recounts the circumstances under which the author was held in detention between 1982 and 1986. It states that after his arrest, Mr. Koné was brought before an examining magistrate who, applying the provisions of article 101 of the Code of Criminal Procedure, informed him, by way of an indictment, of the charges entered against him, advised him of his right to choose counsel from among the lawyers listed in the Roster, and placed him under a detention order on 28 January 1982. At the conclusion of a legitimate preliminary investigation, he was committed for trial by the examining magistrate, pursuant to a committal order dated 10 September 1983. The State party specifies that the author "never formulated a request for release throughout the investigation of his case", as authorized by articles 129 and 130 of the Code of Criminal Procedure. The State party concludes that "no expression of any intention to obstruct his provisional release can be deduced from these proceedings".

6.5 The State party stresses that after he was committed to the competent court, the author received a notice to appear before the court on 10 December 1983; the case was not, however, heard on that date; a series of postponements followed. The State party adds that the author "did not file a request for provisional release until mid-May 1986, a request which was granted pursuant to an interlocutory judgment rendered on 9 May 1986".

6.6 With regard to the purpose of Amnesty Law No. 88-01 of 4 June 1988, which was applied to the author, the State party points out that the law does not apply only to the Casamance events, even though it was passed in the context of efforts to contain them. It adds that "the detention period of the person concerned coincided with a period of serious disturbances of national public order caused by the Casamance events, and the State Security Court, the only court of special jurisdiction in Senegal, had to deal with the cases of 286 detainees between December 1982 and 1986", when that Court consisted only of a president, two judges, one government commissioner, and an examining magistrate.

6.7 The State party notes furthermore that, although under the terms of article 9, paragraph 3, of the Covenant, pre-trial detention should not be the rule, it may nevertheless constitute an exception, especially during periods of serious unrest, and given that the accused, committed for trial and summoned to appear on a fixed date, had never expressed a wish of any kind to be granted provisional release. It concludes that the preliminary investigation and

inquiry were conducted in an entirely legitimate manner, in accordance with the applicable legal provisions and with the provisions of article 9 of the Covenant.

6.8 In further submissions dated 4 and 11 July 1994, the State party justifies the length of the author's pre-trial detention between 1982 and May 1986 with the complexity of the factual and legal situation. It notes that the author was a member of several revolutionary groups of Marxist and Maoist inspiration, which had conspired to overthrow several governments in Western Africa, including in Guinea Bissau, Gambia and Senegal. To this effect, the author had frequently travelled to the countries neighbouring Senegal, where he visited other members of this revolutionary network or foreign government representatives. It also observes that it suspected the author of having participated in an unsuccessful coup attempt in Gambia in December 1981, and that he had sought to destabilize the then Government of Sekou Touré in Guinea. In the light of these international ramifications, the State party claims, the judicial investigations in the case were particularly complex and protracted, as they necessitated formal requests for judicial cooperation with other sovereign states.

6.9 In a final submission dated 2 September 1994, the State party reiterates that the detention of Mr. Koné was made necessary because of well-founded suspicions that his activities were endangering the State party's internal security. After his release on bail, the State party observes, no judicial instance in Senegal has ever been seized by Mr. Koné with a request to determine the lawfulness of his detention between January 1982 and May 1986. Given the author's "passivity" in pursuing remedies which were available to him, the State party concludes that the author's claims are inadmissible on the basis of non-exhaustion of domestic remedies.

6.10 Concerning the author's detention in 1988, the State party affirms that Mr. Koné's detention did not last two months but only six days. He was arrested and placed in custody on 12 April 1988, upon orders of the Public Prosecutor of Dakar, and charged with offences against the Law on States of Emergencies (Law 69-26 of 22 April 1969, Decree No. 69-667 of 10 June 1969 and No. 88-229 of 29 February 1988, Ministerial Decree No. 33364/M.INT of 22 March 1988). He was tried, together with eight other individuals, by a Standing Court (Tribunal des Flagrants Délits), which, by judgment No. 1891 of 18 April 1988, ordered his release.

6.11 The State party observes that the author has neither been re-arrested nor been the target of judicial investigations or procedures since his release in April 1988. If he had been arrested or detained, there would have been a duty, under articles 55 and 69 of the Code of Criminal Procedure, to immediately notify the Office of the Public Prosecution. No such notification was ever received. Furthermore, had the author been detained arbitrarily in 1990, he could, upon release, have immediately filed a complaint against those held responsible for his detention; no complaint was ever received in this context.

6.12 The State party concludes that there is no evidence of a violation of any provisions of the Covenant by the Senegalese judicial authorities.

7.1 In his comments, the author seeks to refute the accuracy of the State party's information and chronology. Thus, he claims that he was first requested on 2 September 1983 to appear before the Tribunal Correctionnel on 1 December 1983. On this occasion, the president of the court requested further information (complément d'information) and postponed the trial to an unspecified subsequent date. On the same occasion and not in the spring of 1986, as indicated by the State party, a mental status examination was ordered by the court. The author forwards a copy of a medical certificate signed by a psychiatrist of a Dakar hospital, and which confirms that a mental status examination was carried out on the author on 25 January 1985; it concluded that Mr. Koné suffered from pathological disorder (pathologie psychiatrique) and needed continued medical supervision ("pathologie ... à traiter sérieusement").

7.2 The author reiterates that he was tried on 1 December 1983 by the Tribunal Correctionnel, that the court adjourned to consider its findings until 15 December 1983, and that his family was present in the courtroom. According to him, that version can be corroborated by the prison log.

7.3 As for the State party's argument that he never filed a request for provisional release, the author simply notes that he had protested his arbitrary detention to several members of the judiciary visiting the prison where he was held, and that not until 1986 did a member of the staff of the Government Procurator's office and the prison's social services suggest that he request provisional release.

7.4 The author affirms that his arrest in January 1982 was the result of manoeuvres orchestrated by the Senegalese ambassador in Gambia, who had been angered by the author's leading role, between 1978 and 1981, in several demonstrations, which had inter alia caused damage to the building of the Senegalese Embassy in Banjul¹.

7.5 Concerning the period of detention in 1988, the author recalls that he was arrested "around 2 March 1988" together with several other individuals and questioned about the violent incidents that had accompanied the general elections of February 1988. He was released "around 20 March 1988", after having addressed a letter to President A. Diouf about his allegedly arbitrary detention. On 6 April 1988, he was re-arrested, and after six days spent in a police lock-up, indicted on 12 April 1988. On 18 April 1988, he was released by decision of the Tribunal Régional of Dakar².

7.6 The author reaffirms that he was placed once more in custody in 1990; he claims that he was arrested at the border and transferred to Dakar, where he was detained by agents of the Ministry of the Interior. He was booked and made to sign a statement (procès-verbal) on 12 July 1990, which accused him inter alia of offences against State security. He ignores why he was released on the same day.

7.7 Finally, the author affirms that he was once more apprehended on 20 July 1992 and detained for several hours. He was allegedly questioned in relation with a manifestation that had taken place in a popular quarter of Dakar. The Government apparently suspects him of sympathizing with the separatist Movement of Casamance's Democratic Forces (Mouvement

des Forces Démocratiques de la Casamance - MFDC) in the South of the country, where separatists have clashed violently with government forces. The author denies any involvement with the MFDC and claims that as a result of constant surveillance by the State party's police and security services, he suffers from nervous disorders.

7.8 The author concludes that the State party's submissions are misleading and tendentious, and affirms that these submissions seek to cover serious and persistent human rights violations in Senegal.

Examination of the merits:

8.1 The Human Rights Committee has examined the communication in the light of all the information provided by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that the author does not question the legal nature of the charges against him, as described in the State party's submission under article 4, paragraph 2, of the Optional Protocol - he does however reject in general terms the factual accuracy of part of the State party's observations, while some of his statements contain blanket accusations of bad faith on the part of the State party. Conversely, the State party's submission does not address issues under article 19 other than by affirming that the author is adverse to any type of authority, and confines itself to the chronology of administrative and judicial proceedings in the case. In the circumstances, the Committee has examined whether such information as has been submitted is corroborated by any of the parties' submissions.

8.3 As to the claims of violations of article 9, the Committee notes that, in respect of the author's detention from 1982 to 1986 and in the spring of 1988, the State party has provided detailed information about the charges against the author, their legal qualification, the procedural requirements under the Senegalese Code of Criminal Procedure, and the legal remedies available to the author to challenge his detention. The records reveal that these charges were not based, as claimed by the author, on his political activities or upon his expressing opinions hostile to the Senegalese government. In the circumstances, it cannot be concluded that the author's arrest and detention were arbitrary or not based "on such grounds and in accordance with such procedure as are established by law". However, there are issues concerning the length of the author's detention, which are considered below (paragraphs 8.6 to 8.8).

8.4 As to the author's alleged detention in 1990, the Committee has taken note of the State party's argument that its records do not reveal that Mr. Koné was again arrested or detained after April 1988. As the author has not corroborated his claim by further information, and given that the copies of the medical reports he refers to in support of his claim of ill-treatment pre-date the alleged date of his arrest (6 July 1990), the Committee concludes that the claim of a violation of article 9 in relation to the events in July 1990 has not been sufficiently corroborated.

8.5 Similarly, the State party has denied that the author was arrested for the expression of

his political opinions or because of his political affiliations, and the author has failed to adduce material to buttress his claim to this effect. Nothing in the material before the Committee supports the claim that the author was arrested or detained on account of his participation in demonstrations against the regime of President Diouf, or because of his presumed support for the Movement of Casamance's Democratic Forces. On the basis of the material before it, the Committee is of the opinion that there has been no violation of article 19.

8.6 The Committee notes that the author was first arrested on 15 January 1982 and released on 9 May 1986; the length of his detention, four years and almost four months, is uncontested. It transpires from the State party's submission that no trial date was set throughout this period, and that the author was released provisionally, pending trial. The Committee recalls that under article 9, paragraph 3, anyone arrested or detained on a criminal charge shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release. What constitutes "reasonable time" within the meaning of article 9, paragraph 3, must be assessed on a case-by-case basis.

8.7 A delay of four years and four months during which the author was kept in custody (considerably more taking into account that the author's guilt or innocence had not yet been determined at the time of his provisional release on 9 May 1986) cannot be deemed compatible with article 9, paragraph 3, in the absence of special circumstances justifying such delay, such as that there were, or had been, impediments to the investigations attributable to the accused or to his representative. No such circumstances are discernible in the present case. Accordingly, the author's detention was incompatible with article 9, paragraph 3. This conclusion is supported by the fact that the charges against the author in 1982 and in 1988 were identical, whereas the duration of the judicial process on each occasion differed considerably.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation of article 9, paragraph 3, of the Covenant.

10. The Committee is of the view that Mr. Famara Koné is entitled, under article 2, paragraph 3(a), of the Covenant, to a remedy, including appropriate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to its Views.

[Adopted in English, French and Spanish, the English text being the original version.]

Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

*/ Made public by decision of the Human Rights Committee.

*/ Pursuant to rule 85 of the Committee's rules of procedure, Mr. Birame Ndiaye did not participate in the adoption of the Committee's Views.

1/ The author, in a letter dated 10 August 1992, admits to having broken windows in the building of the Senegalese Embassy in Banjul.

2/ The decision simply orders the release of the author and eight other co-accused, but is not motivated.