

OPINION No. 5/1999 (TUNISIA)

Communication addressed to the Government on 4 May 1998 (urgent appeal dated 2 October 1997)

Concerning Khemais Ksila

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.
2. The Working Group expresses its appreciation to the Government for having promptly provided the information requested.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);
 - (ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (iii) When the complete or partial non-observance of the international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).
4. In the light of the allegations made, the Working Group welcomes the Government's cooperation. It transmitted the Government's reply to the source of the communication, which has made known its comments thereon.
5. According to the complaint, Khemais Ksila, Vice-President of the Human Rights League, on 29 September 1997, published a proclamation denouncing the policy of the Tunisian Government and calling for extreme vigilance because of the situation in Tunisia at that time; the establishment of a "security arsenal" and serious violations of human rights. He also denounced the harassment to which he had been subjected, notably the threats against him and his family, the loss of his job, the confiscation of his passport and surveillance. For those reasons, he announced that he would begin a hunger strike. On the same day he was arrested and - according to the complaint - taken to an unknown location.

6. The complaint also refers to various violations of guarantees established by law, such as the absence of an arrest warrant, the change in the composition of the court without a new trial, the non-public nature of the trial because of the police presence, and the disappearance of the person concerned.

7. The Working Group is grateful to the Government for its very comprehensive reply and notes that full information was sent promptly following the urgent action which the Working Group initiated as soon as it learned of the arrest. The Working Group also notes all the guarantees which Mr. Ksila has enjoyed during the proceedings: as soon as the proclamation became known, proceedings were initiated and the Government Procurator issued an arrest warrant; Mr. Ksila was immediately brought before the Procurator; he was tried and sentenced at first instance to three years' imprisonment for defamation of public order, one year's imprisonment for publishing in bad faith false information liable to disturb public order, and one year's imprisonment for inciting citizens to break the law of the land. The penalties were ordered to be served concurrently in a single three-year sentence, together with a fine. He appealed against the verdict, but the court of appeal confirmed it. He then applied for a judicial review, but the application was rejected by the Court of Cassation.

8. In the Government's view, the criminal acts committed by Mr. Ksila necessitate his dismissal from the post of Vice-President of the Tunisian Human Rights League. They constitute an ordinary offence, dishonest and defamatory allegations against the public authorities and appeals to citizens to disobey the law of the land, to engage in rebellion and resort to violence.

9. In the opinion of the Working Group, the alleged violations of the legally established guarantees have not been proved and, even if they were, they would not be of sufficient gravity to confer an arbitrary character on the deprivation of liberty. Account should also be taken of the fact that the trial suspensions were accepted at the request of the defendant's own defence counsel. Similarly, the claim that the prisoner disappeared is nullified by the fact that he was brought before the Procurator on the day he was arrested.

10. As to the substance relating to the acts committed, which the Government describes as "ordinary offences", the Working Group considers that the action for which Mr. Ksila was sentenced to three years' imprisonment was the publication of a proclamation in which he announced his intention to go on hunger strike because of the situation in Tunisia, the violations of human rights, and the persecution and threats to which he and his family had been subjected. He ended by making an appeal for civil disobedience. On that point, the complaint and the Government's reply concur.

11. The acts which gave rise to the court sentence cannot, either individually or jointly, be considered to constitute incitement to violence and were not in themselves liable to provoke a breach of public order. The defamation of public order is simply one of the most traditional forms of peaceful protest, and the same may be said of the publication in bad faith of false information liable to disturb public order and of incitement to citizens to break the law of the land. What was involved was simply the expression, by one or more of the mass media, of a

thought or opinion and, consequently, the lawful exercise of the right to freedom of expression and opinion which are established by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights.

12. The announcement of a hunger strike, too, cannot be regarded as unlawful or as such a harmful act that it constitutes a breach of public order.

13. The Working Group has carefully read the document in question and, contrary to the information given by the Government, it has found in it no appeal for violence; it has, on the contrary, found that it amounted to nothing more than vigorous political criticism and an appeal for peaceful protest.

14. The Working Group's mandate provides that it must inquire into cases of arbitrarily imposed detention, provided that the national courts have not reached a final decision concerning conformity with national legislation, and the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned.

15. In the opinion of the Working Group, as it has maintained in previous opinions (see Opinion No. 1/1998), if the final judgement of a country's judicial body of final instance is consistent with internal legislation but not with international human rights instruments, it must be regarded as arbitrary within the terms of Commission on Human Rights resolutions 1997/50 and 1998/41.

16. In the light of the foregoing, the Working Group renders the following opinion: The detention of Khemais Ksila is arbitrary since it constitutes an infringement of article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, and falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

17. Having rendered this opinion, the Working Group requests the Government:

(a) To take the necessary steps to remedy the situation, in conformity with the standards and principles set forth in the Universal Declaration of Human Rights; and

(b) To consider the possibility of amending its legislation in order to bring it into line with the Declaration and the other relevant standards of international law which it accepts.

Adopted on 20 May 1999