

OPINION No. 24/2003 (ISRAEL)

Communication addressed to the Government on 2 May 2003.

Concerning: Matan Kaminer, Adam Maor, Noam Bahat and Jonathan Ben-Artzi.

The State has ratified the International Covenant on Civil and Political Rights

1. (Same text as paragraph 1 of opinion No. 20/2003.)
2. The Working Group conveys its appreciation to the Government for having provided the requested information in good time.
3. (Same text as paragraph 3 of opinion No. 20/2003.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, which has submitted comments on it. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.
5. According to the information submitted to the Working Group, upon being drafted into the Israeli Defence Forces (IDF) Matan Kaminer appeared at the Bakun Classification Base on his induction date (9 December 2002) but refused to be inducted. He was then arrested, his detention confirmed by the Military Court in Jaffa.
6. Adam Maor presented himself on 12 December 2002 when he was drafted into the IDF but also refused to be inducted and was immediately arrested. He was confined in a military camp pending judicial proceedings against him. He was held in open detention, meaning that he may temporarily leave the camp with the permission of the court.
7. Noam Bahat was arrested by the military on 10 December 2002 for non-compliance with an order to be inducted into the IDF. He was sentenced to imprisonment. He was also detained in open detention pending judicial proceedings. He requested to be released from military service because he was against the occupation of the Palestinian territories and the human rights violations taking place there. His request was rejected, as his arguments were of a political nature. It is submitted that under Israeli law conscientious objection may be recognized by a military committee in cases of "complete pacifism". It is alleged that Mr. Bahat's request to be heard by this committee was rejected. On 15 January 2003 he began a hunger strike protesting against his detention and that of all conscientious objectors and against the violations of the rights of the Palestinian people.
8. Jonathan Ben-Artzi was arrested by the military on 8 August 2002, upon refusing to be inducted into the IDF. He received a disciplinary sentence of 28 days' imprisonment, said to have been confirmed by a military court. Subsequently he received three separate sentences of 28, 28 and 23 days, because under Israeli law each refusal to serve constitutes a separate offence. He offered to perform alternative service, but this was denied. He requested to meet the military conscientious objection committee to present his arguments, but was denied. A military

disciplinary court sentenced Mr. Ben-Artzi to a prison term, which was confirmed by a military appeal court. He requested that the Supreme Court review his case, or, alternatively, that a civilian court hear it.

9. The source expressed doubts that a military court under Israeli law would comply with the criteria for an independent and impartial tribunal, arguing that only the presiding judge is a trained lawyer, the two other judges being army officers. To support his contention that the convictions were unlawful, the source invokes article 18, paragraph 2, of the International Covenant on Civil and Political Rights (ICCPR), which provides that “no one shall be subjected to coercion which would impair his freedom to have or to adopt a religion or belief of his choice”.

10. The Government provided the Working Group with the following information. With regard to the specific allegations raised by the source, Israel’s Security Service Law and the Military Judicial Law apply military jurisdiction to the four persons concerned as of the date on which they were obliged to enter military service. They enjoy the same rights and are subject to the same obligations as soldiers. Under the applicable legislation, a refusal to obey a legally given order by such persons constitutes a martial offence actionable either by disciplinary or by criminal proceedings. The Government goes on to say that no military system can reconcile itself with the existence of a principle whereby soldiers can dictate to it where they will serve and under what circumstances.

11. Matan Kaminer, Noam Bahat and Adam Maor did not at any point claim to be pacifists; their refusal to serve was based solely on their opposition to certain policies of the Israeli Government. Moreover, and contrary to the information provided by the source, Noam Bahat appeared before the Advisory Committee on 7 October 2002, and was found not to be a conscientious objector.

12. Mr. Kaminer, Mr. Bahat and Mr. Maor served disciplinary sentences for refusal to obey military orders and, following repeated refusals (each constituting a separate offence), they were indicted in a military court. An agreement was reached with each of them that they would remain in open detention for the duration of the proceedings. The terms of their open detention included leave from the base every third weekend, as is the general practice of soldiers in military service in Israel.

13. Adam Maor’s military service has since been postponed on medical grounds as of 12 May 2003. He was released on that date, and is no longer in military service.

14. Prior to the date of his induction, Jonathan Ben-Artzi claimed to be a conscientious objector to military service. He appeared before the Advisory Committee three times in order to make his case, contrary to the contention of the source. The Committee did not find that he was a pacifist, and Jonathan Ben-Artzi appealed to the Supreme Court sitting as High Court of Justice. The Supreme Court determined that the Committee’s conclusions were reasonable and rejected the appeal. The Government notes that, during his testimony, Mr. Ben-Artzi expressly stated that he did not object to the concept of war per se.

15. Jonathan Ben-Artzi served disciplinary sentences for refusal to obey military orders and, following repeated refusals (each constituting a separate offence), he was indicted in a military

court. During the proceedings in the military court, Mr. Ben-Artzi raised the claim of double jeopardy. The claim was rejected, as he had committed numerous offences of disobedience and the case before the court did not relate to any of the offences for which he had previously been indicted. An agreement was reached with him that he would remain in open detention for the duration of the proceedings.

16. Jonathan Ben-Artzi further claimed that his case should be tried before a civil and not a military court, and appealed to the Supreme Court sitting as High Court of Justice on these grounds. The appeal was rejected in a detailed and reasoned judgement, inter alia on the grounds that the military court system is professional, objective and impartial, applying legal proceedings similar to those applied in the civil court system, with meticulous safeguards to guarantee the defendant's rights. The defendant is represented by legal counsel of his choice and may summon witnesses; a right of appeal to the Supreme Court is equally available from both court systems.

17. In conclusion, the Government asserts that all of the above-mentioned individuals are not conscientious objectors to military service, as this term is generally understood. As explained in detail above, none of them is currently held in closed detention.

18. In its comments on the Government's reply the source acknowledges that Mr. Ben-Artzi had appeared before the conscientious objection committee three times, but he was on each occasion denied the right to be eligible, as pacifist, to refuse military service. The source also acknowledges that Mr. Ben-Artzi could not affirm before the military court that he would not have served with the Allies during the Second World War. This was the reason why the court concluded that, like Mr. Maor, Mr. Bahat and Mr. Kaminer, he could not be considered a pacifist, as he is not opposed to war per se. The source affirms that the basic ground for the four men refusing to perform military service is their conscientious moral objection to the military occupation of the Palestine territories.

19. The source asserts that although Adam Maor was in fact released temporarily, after his operation he was taken back to detention.

20. The source affirms that the Human Rights Committee in general comment No. 22 on article 18 of ICCPR interprets this article as permitting the right to conscientious objection to be derived therefrom.

21. The source refers to the 2001 annual report of the Working Group on Arbitrary Detention (E/CN.4/2001/14, paras. 91-94), in which the Working Group observed that repeated incarceration of conscientious objectors is directed towards changing their conviction and opinion and is therefore incompatible with article 18, paragraph 2, of ICCPR.

22. Finally, the source contests the admissibility of the Government's argument that the four people are not held in a closed detention system.

23. To assess whether the detention of these four individuals is arbitrary, the following questions need to be addressed:

(a) Has the holding of these four conscripts at a military base amounted to deprivation of liberty within the meaning of the Working Group's mandate?

(b) Have the international norms relating to the right to a fair trial been observed during the proceedings conducted against them?

(c) Is their prosecution for failing to obey a military order in breach of Israel's international obligations?

(d) Are the repeated penalties imposed on them for refusing to serve in the armed force in compliance with the requirements of the right to a fair trial?

24. The Government argued that Matan Kaminer, Adam Maor, Noam Bahat and Jonathan Ben-Artzi are being detained under an open detention system. The Working Group wishes to point out that according to the information provided by both the source and the Government it is beyond any doubt that they are forcibly held under conditions that are equivalent to deprivation of liberty, regardless of the fact that the terms of the open detention include leave from the military base every third weekend.

25. The source did not contest the detailed information provided by the Government that individuals who are denied conscientious objector status and are prosecuted for failing to comply with military orders enjoy the same protection under criminal procedural law as do civilians.

26. The source contends that the deprivation of liberty of Matan Kaminer, Adam Maor, Noam Bahat and Jonathan Ben-Artzi is arbitrary because it is imposed to punish the exercise of their freedom of conscience, which is a right protected under international law, inter alia by article 18 of ICCPR, to which Israel is a signatory.

27. The Working Group welcomes the growing body of national legislation that abandons the system of compulsory armed military service and the preparations being made in a number of States to replace this system with alternatives. International law is also undoubtedly evolving towards the recognition of the right of the individual to refuse, on grounds of religious belief or conscience, to bear and use arms or to serve in the army. But at the present time it cannot be said that this evolution has reached a stage where the rejection by a State of the right to conscientious objection is incompatible with international law. The Working Group also noted the reference by the source to general comment No. 22 of the Human Rights Committee.

28. The source also contends that the repeated penalties imposed on Matan Kaminer, Adam Maor, Noam Bahat and Jonathan Ben-Artzi for the same offence are incompatible with the principle of *non bis in idem* embodied in article 14, paragraph 7, of ICCPR.

29. The Government has made it clear to the Working Group that under Israeli law all four individuals in question have served disciplinary sentences more than once for refusing to obey military orders. Although the Government did not specify the number and duration of the detentions, it unequivocally stated that several, hence more than one, disciplinary sanctions entailing deprivation of liberty have been imposed against the four conscripts in question: "following repeated refusals (each constituting a separate offence) they were indicted in a military court". Moreover, the Government explained to the Working Group that one of the four persons, Mr. Ben-Artzi, raised before the court the claim of double jeopardy, but that the claim was rejected "... as he had committed numerous offences of disobedience, and the case before the court did not relate to any of the offences for which he had previously been indicted".

30. The explanation of the Government that after one conviction for not having obeyed an order to serve in the military repeated acts of disobedience are considered new offences did not convince the Working Group. Very much along the lines of its reasoning in its opinion No. 36/1999, and bearing in mind its recommendation 2 on detention of conscientious objectors (E/CN.4/2001/14, paras. 91-94), the Working Group is of the opinion that if after an initial conviction the convicted persons exhibit, for reasons of conscience, a constant resolve not to obey the subsequent summonses, additional penalties imposed for disobedience have the same content and purpose: to compel an individual to serve in the army. Therefore, the second and subsequent penalties are not compatible with the principle of *non bis in idem*, as contained in article 14, paragraph 7, of ICCPR, which states that “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted ...”. Moreover, repeated penalties for refusing to serve in the military would be tantamount to compelling someone to change his/her mind for fear of being deprived of liberty if not for life, then at least until the age at which citizens cease to be liable for military service.

31. In the light of the foregoing, the Working Group expresses the following opinion:

The second and subsequent deprivations of liberty of Matan Kaminer, Adam Maor, Noam Bahat and Jonathan Ben-Artzi are contrary to article 14, paragraph 7, of the International Covenant on Civil and Political Rights. The non-observance of the international norms relating to the right to a fair trial is of such gravity as to confer on the deprivation of liberty an arbitrary nature, falling within category III of the categories applicable to the consideration of cases submitted to the Working Group.

32. The Working Group therefore requests the Government to take the necessary steps to remedy the situation so as to bring it into line with the norms set forth in the International Covenant on Civil and Political Rights.

Adopted on 28 November 2003