



General Assembly

Distr.: General
10 July 2012

Original: English

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-third session 30 April–4 May 2012

No. 3/2012 (Israel)

Communication addressed to the Government on 13 February 2012

Concerning Khader Adnan Musa

The Government has not replied to the communication.

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

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed that mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its working methods, the Working Group transmitted the above-mentioned communication to the Government.

2. 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 the detainee) (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 for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Khader Adnan Musa, a Palestinian man, married and father of two daughters, residing in Occupied Palestinian Territory, is a baker and master's student in Economics at Birzeit University.

4. On 17 December 2011, at approximately 3.30 a.m., Mr. Musa was arrested by the Israeli army at his home. The soldiers blindfolded Mr. Musa and tied his hands using plastic shackles before leading him out of his house. He was allegedly beaten while in a military jeep on the way to Dutan settlement. He was neither presented with an arrest warrant nor informed of the charges or reasons for his arrest. At approximately 8.30 a.m., Mr. Musa was transferred to Megiddo prison. In protest at his arrest, Mr. Musa went on a hunger strike and is refusing medical treatment until he is released. According to the source, this attitude is due inter alia to the fact that he previously spent a total of six years in Israeli prisons, mainly under administrative detention orders. Reportedly, this is the eighth time that Mr. Khader has been detained by Israeli authorities.

5. On the morning of 18 December 2011, Mr. Musa was taken to Al-Jalameh interrogation centre where he was also given a medical examination. The prison doctors informed Mr. Musa of his injuries and that he was suffering from gastric illness and disc problems in his back. However, instead of receiving any treatment, Mr. Musa was taken for interrogation.

6. During the interrogation sessions, Mr. Musa was allegedly insulted and humiliated as the officers used abusive language about his wife, sister, children and mother. He answered all general questions during the first interrogation session and thereafter manifested his protest by refusing to speak. The interrogation sessions continued for the following 10 days, excluding Mondays.

7. On 21 December 2011, the Israeli Prison Service placed Mr. Musa in a cell for seven days of isolation due to his hunger strike. He was forbidden any family visits. While in isolation, Mr. Musa was still subjected to daily two to three-hour interrogation sessions.

8. On 29 December 2011, it is reported that the Physicians for Human Rights were able to medically examine Mr. Musa and declared Mr. Musa's life to be at risk.

9. On 30 December 2011, because of his deteriorating health from his hunger strike, Mr. Musa was transferred to Ramleh prison hospital.

10. According to the source, it was only on 8 January 2012, that an Israeli military judge ordered the administrative detention of Mr. Musa for a period of four months. The administrative detention order was issued pursuant to a Military Order 1651 enacted in 2009. The order is allegedly based on secret information collected by the Israeli authorities that was not made available to Mr. Musa or his lawyer.

11. Reportedly, the military judge stated that on the basis of the medical assessment of the Israeli Prison Service physician, Mr. Musa's medical condition was acceptable and provided no grounds for reducing or cancelling the administrative detention order.

12. The source reports that on 6 February 2012, Mr. Musa was transferred to Ziv hospital in Safed due to a deteriorating health condition. The authorities have allegedly refused to allow Mr. Musa to be examined by an independent doctor.

13. On 7 February 2012, Mr. Musa's administrative detention order was confirmed by an Israeli military judge for a period of four months. The source reports that during the confirmation hearing, the military judge stated that she had ruled out alternatives to administrative detention owing to Mr. Musa allegedly hiding from the Israeli Occupying Forces. This is notwithstanding the fact that Mr. Musa had been arrested in his own home. Reportedly, the judge also stated that the secret file, on which his administrative detention is based, contained information that he constituted a threat to Israeli security. Concomitantly, the judge admitted that this same secret file was insufficient to bring charges against Mr. Musa.

14. The source contends that Mr. Musa's detention is deprived of any legal basis. The use of administrative detention in international humanitarian law is only permissible if "the security of the Detaining Power ... makes it absolutely necessary" and insofar as it is subject to "regular procedure" (arts. 42 and 78 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) and art. 4 of the International Covenant on Civil and Political Rights). The source submits that if the authorities had evidence to support Mr. Musa's administrative detention then he could have been charged under military orders and tried in a military court. The source emphasized that administrative detention should not be used simply because there is insufficient evidence to support a potential conviction.

15. The source further indicates that, although the administrative detention orders issued by the Israeli military commander are the subject of review and appeal by the Court of Administrative Detainees, the Administrative Detainees Appeals Court and the Israeli High Court of Justice, Mr. Musa's lawyer has not been permitted to have access to "secret evidence" used against his client. According to the information received, the Israeli prosecuting authorities have provided no evidence for Mr. Musa's detention nor have they substantiated the allegation that he constitutes a security threat.

16. In the light of the foregoing, the source submits that Mr. Musa's administrative detention is in breach of articles 9 and 14 of the International Covenant on Civil and Political Rights and articles 9 and 10 of the Universal Declaration of Human Rights.

Response from the Government

17. The Working Group regrets that the Government has not responded to the allegations transmitted by the Group.

18. Despite the absence of any information from the Government, the Working Group considers it is in the position to render its opinion on the detentions of Mr Musa in conformity with paragraph 16 of its methods of work.

Further comments from the source

19. The source informed the Working Group that Mr. Musa was released on 17 April 2012. According to the source, Mr. Musa ended his hunger strike on 21 February after an agreement was reached between his lawyer and the State prosecution that he would end his hunger strike in return for a pledge from the Israeli authorities that his detention order would not be extended beyond 17 April. Subsequently, Mr. Musa was returned to Ramleh

prison hospital after his health had stabilized and he remained there until his release on 17 April 2012.

Discussion

20. The Working Group recalls that provisions of article 14 of the International Covenant on Civil and Political Rights on the right to a fair trial are applicable where sanctions, because of their purpose, character or severity, must be regarded as penal even if, under domestic law, the detention is qualified as administrative.¹ Given the nature of the sanctions applied to Mr. Musa under Military Order 1651, the provisions of article 14 of the Covenant on the right to a fair trial are applicable in his case even though under domestic law his detention is qualified as administrative.

21. The right to a fair trial includes the right to have access to material on which the charges are based as provided for in article 14, paragraph 3 (b), of the Covenant (the right to have adequate facilities for the preparation of defence).² Article 14, paragraph 3 (a), also provides for the right to be informed promptly and in detail of the nature and cause of the charges brought against the person.

22. In the case under consideration, in violation of article 14, paragraph 3 (b), of the Covenant, neither the detainee nor his counsel was provided with access to the “secret evidence” upon which Mr. Musa has been deprived liberty. This violation deprived Mr. Musa of the right to have adequate facilities for the preparation of his defence. In violation of article 14, paragraph 3 (a), Mr. Musa was not informed of the nature and cause of any charges for which he was arrested.

23. The Working Group also reiterates that protective provisions contained in international human rights law must be given greater weight than arguments of *lex specialis* of international humanitarian law given the circumstances in the Occupied Palestinian Territory, which has been under military occupation for more than forty years.³

24. In this regard, the Working Group recalls the statements and observations of the Human Rights Committee, including its general comment No. 29 (2001) on derogation during a state of emergency and its concluding observations on reports submitted by Israel (CCPR/C/79/Add.93 and CCPR/CO/78/ISR). In particular, the Committee emphasized that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including its article 4 which covers situations of public emergency that threaten the life of the nation. Nor, according to the Committee, “does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law” (CCPR/CO/78/ISR, para. 11).

¹ See Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 15; communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, para. 9.2.

² General comment No. 32, para. 15.

³ Opinion No. 5/2010 (Israel), para. 33.

25. The Committee further expressed its concern about the sweeping nature of measures during the state of emergency that appear to derogate from Covenant provisions other than article 9, derogation from which was notified by the State party upon ratification. In the Committee's opinion, "these derogations extend beyond what would be permissible under those provisions of the Covenant which allow for the limitation of rights (e.g. articles 12, paragraph 3; 19, paragraph 3; and 21, paragraph 3). As to measures derogating from article 9 itself, the Committee expressed its concern about "the frequent use of various forms of administrative detention, particularly for Palestinians from the Occupied Territories, entailing restrictions on access to counsel and to the disclosure of full reasons of the detention. These features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 more extensively than what in the Committee's view is permissible pursuant to Article 4" (CCPR/CO/78/ISR, para. 12).

26. Furthermore, as was noted in another case concerning Israel, military tribunals are not independent and impartial. They consist of military personnel who are subject to military discipline and dependent on superiors for promotion.⁴ Thus, Mr. Musa was deprived of his right to a fair hearing by an independent and impartial tribunal as provided for in article 14, paragraph 1, of the Covenant.

27. The Working Group considers that Mr. Musa was denied the fundamental rights contained in articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. His case, therefore, falls into categories I and III of the categories applied by the Working Group.

28. In another opinion concerning Israel,⁵ the Working Group expressed its grave concern of the practice of serial administrative detention which assumed alarming proportion among States of all denominations. The Working Group emphasized that administrative detention is only permitted in strictly limited circumstances and only if "the security of the State ... make it absolutely necessary" and only in accordance with "regular procedure" (arts. 42 and 78 of the Fourth Geneva Convention and art. 4 of the Covenant).⁶

29. Although Mr. Musa was released, the Working Group, given the circumstances of the case, considers it appropriate, in accordance with paragraph 17 (a) of its methods of work, to render an opinion whether or not the deprivation of liberty was arbitrary, notwithstanding the release.

Disposition

30. In the light of the preceding, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Mr. Musa was arbitrary, being in contravention articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights; it falls into categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group.

31. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Musa and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

⁴ Opinion No. 5/2010 (Israel), para. 31.

⁵ Ibid.

⁶ See *ibid.*

32. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to accord him an enforceable right to compensation in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

[Adopted on 1 May 2012]
