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Human Rights Council Working Group on Arbitrary Detention

Opinion adopted by the Working Group on Arbitrary Detention at its seventy-second session (20–29 April 2015)

No. 5/2015 (Syrian Arab Republic)

Communication addressed to the Government on 15 January 2015

concerning **Bassel Khartabil**

The Government has not replied to the communication.

The State is party to the International Covenant on Civil and Political Rights.¹

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 the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), 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);

¹ The Syrian Arab Republic acceded to the Covenant on 21 April 1969.



(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. Bassel Khartabil is an information technology professor and software engineer. He has been active in spreading the use of open web technologies across the Arab world, advocating for unrestricted use of the Internet. He has used cell phone-recorded videos to document public demonstrations in the Syrian Arab Republic and shared them with the media.

4. On 15 April 2012, Mr. Khartabil was arrested as he was leaving work, in Al-Mezzeh district, Damascus, by both uniformed and plain-clothes members of Military Security Branch No. 215. No warrant was produced for his arrest. The following week, security forces brought Mr. Khartabil to his house, which they searched, and confiscated his computer and other documents. Mr. Khartabil was then taken to an unknown location and remained incommunicado for more than nine months.

5. On 21 September 2012, a joint urgent appeal (SYR 8/2012) was transmitted to the Government of the Syrian Arab Republic by the Chair-Rapporteur of the Working Group on Arbitrary Detention, the Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. At that time, the special procedures mandate holders expressed their concern about the allegations that Mr. Khartabil was being subjected to incommunicado detention in an unknown location, had been subjected to torture and ill-treatment and had been denied contact with his family and access to a lawyer. They also expressed concern for his psychological and physical integrity, taking into consideration his condition as a diabetic.

6. On 26 December 2012, Mr. Khartabil's family first made contact with him, at which time they learned that after his arrest he had been detained in the Military Security Branch No. 215 secret detention centre for five days, before being transferred to Military Investigation Branch No. 248. The source informs that Mr. Khartabil was heavily tortured while detained in those branches, and his family found him psychologically traumatized and in poor physical condition. In particular, Mr. Khartabil's health situation had seriously deteriorated, as his diabetes was not given the required medical attention. The source conveys that Mr. Khartabil told his family that a few weeks after his arrest he was transferred to Adra Prison, where he was detained in solitary confinement for the remaining eight months.

7. On 9 December 2012, Mr. Khartabil was brought before a military prosecutor, who charged him with "spying for an enemy state" under articles 272 and 274 of the Syrian Penal Code, and referred his case to a military field court. It is reported that during the

hearing, which only lasted a few minutes, the military prosecutor did not provide evidence against Mr. Khartabil nor did he let him present his defence. Furthermore, he was not granted access to a lawyer.

8. Following his appearance before a military prosecutor, Mr. Khartabil was immediately transferred to Sidnaya Prison. On 24 December 2012, he was transferred back to Adra Prison, where he remains detained, awaiting his trial in reportedly extremely poor conditions.

9. The source submits that the deprivation of liberty of Mr. Khartabil is arbitrary and falls under categories I, II and III. In the source's view, the nine-month period of Mr. Khartabil's detention (from the time of his arrest to his appearance before the military prosecutor) is without any legal basis, as he was never informed of the reason for his arrest and detention, and is contrary to article 9 of the Universal Declaration of Human rights, article 9 of the Covenant and articles 104, 424 and 425 of the Syrian Code of Criminal Procedure.

10. Further, the source submits that Mr. Khartabil's deprivation of liberty results from the exercise of his right to free expression, as guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. In the source's view, the charges against him are indicative that the prosecution against Mr. Khartabil is based on his role in sharing information through social media, through which he commented on the current political regime.

11. The source further submits that Mr. Khartabil has not been guaranteed the international norms of due process and guarantees to a fair trial during the period of his deprivation of liberty, in violation of article 10 of the Universal Declaration of Human Rights and articles 9 (2)–(4) and 14 (3) (b) of the Covenant. Mr. Khartabil was detained incommunicado for nine months before being brought before a judicial authority for the first time, which is when he was officially charged. As he was not allowed access to a lawyer, he was unable to exercise his right to provide a full defence. Following the expeditious appearance before the military prosecutor, he remains held in pretrial detention awaiting the deferral of his case before a military field court.

12. Furthermore, the source fears that, due to the alleged torture that Mr. Khartabil was submitted to while detained in several secret detention centres of the Military Investigation Branch, forced confessions may later be used as compelling evidence to convict him, in breach of article 14 (3) (g) of the Covenant.

13. The source informs that Decree No. 109 of August 1968, by which Syrian military field courts are established, in particular article 5, allows the courts to disregard regular civilian legislation, thereby permitting them to hold trials in secret, with no lawyers present, and giving the judges wide jurisdiction on sentences. Article 6 states that defendants do not have the right to appeal their sentences, including death sentences. In support, the source refers to the report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/24/46), paragraph 43 of which states: "No legal representation, family visits or appeals were allowed, yet judges may confer capital sentences." The source submits that Mr. Khartabil, as a civilian, should not be forced to appear before these exceptional military courts, as this infringes upon his right to be brought before a competent, independent and impartial tribunal established by law pursuant to article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

Response from the Government

14. The Working Group regrets that the Government has not responded to the allegations it transmitted on 15 January 2015.

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

Discussion

Violation of the freedom of expression

16. The Government chose not to rebut the prima facie reliable allegations submitted by the source, according to which Mr. Khartabil, an information technology professor, has been detained for advocating unrestricted use of the Internet and for sharing cell phone-recorded videos of public demonstrations in the Syrian Arab Republic.

17. The Working Group, in its deliberation No. 8 on the deprivation of liberty linked to or resulting from the use of the Internet, emphasized that the application of any measure of detention against Internet users, taken in the framework of a criminal investigation, proceeding or conviction or by an administrative authority, undoubtedly amounts to a restriction on the exercise of the freedom of expression. Unless it complies with the conditions prescribed by international law, such restriction by the authorities is arbitrary, hence unlawful (see E/CN.4/2006/7, para. 39).

18. In the present case, the Government failed to present to the Working Group any information that would indicate that Mr. Khartabil's peaceful, non-violent activity constituted a threat to national security or public order. Nor did the Government present any facts in support of the charges of "spying for an enemy State".

19. Also in its deliberation No. 8, the Working Group noted that the peaceful, non-violent expression or manifestation of one's opinion, or dissemination or reception of information, even through the Internet, if it does not constitute incitement to national, racial or religious hatred or violence, remains within the boundaries of freedom of expression. Hence, deprivation of liberty applied on the sole ground of having committed such actions is arbitrary (Ibid., para. 47).

20. The Working Group considers that Mr. Khartabil has been deprived of liberty for having peacefully exercised his right to freedom of expression as guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Thus, the deprivation of his liberty falls within category II.

Violation of the right to a fair trial and to liberty and security

21. For nine months after his arrest on 15 April 2012, Mr. Khartabil was detained incommunicado without access to legal assistance, in violation of article 14 of the Covenant.

22. Since his arrest, for more than two years, Mr. Khartabil has not been brought before a judicial authority, which constitutes a grave violation of article 9 (3) of the Covenant, pursuant to which anyone detained on a criminal charge shall be brought promptly, within a few days, before a judge or other officer authorized by law to exercise judicial power. A military prosecutor cannot be considered as a judicial authority for the purpose of article 9 (3) as he or she is not independent, objective and impartial.²

23. Moreover, Mr. Khartabil has been detained for more than two years without trial. Such prolonged detention without trial constitutes a grave violation of articles 9 (3) and 14

² See, for instance, Human Rights Committee, communications No. 1547/2007, *Munarbek Torobekov v. Kyrgyzstan*, para. 6.2, and No. 1278/2004, *Reshetnikov v. Russian Federation*, para. 8.2.

(3) (c) of the Covenant. Any detainee has a right to trial within a reasonable time or to release (art. 9 (3)), and any accused person shall have the right to be tried without undue delay (art. 14 (3) (c)).

24. In December 2012, a military prosecutor referred the case against Mr. Khartabil, who is a civilian, to a military field court, which violates his right to be heard by an independent and impartial tribunal, as provided for in article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. In this regard, the Working Group reiterates its position that military justice should be incompetent to try civilians (see E/CN.4/1999/63, para. 80).

25. In its previous opinions concerning the Syrian Arab Republic (see, for instance, opinions No. 38/2011 and No. 37/2011), the Working Group expressed its concerns regarding incommunicado detention, denial of access to counsel and the use of military tribunals. The Working Group also recalls that, in its concluding observations on the Syrian Arab Republic, the Human Rights Committee remained concerned about numerous allegations that the procedures of military courts do not respect the guarantees laid down in article 14 of the Covenant (see CCPR/CO/71/SYR, para. 70).

26. The Working Group considers that the non-observance of the international norms relating to the right to a fair trial established in articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant in this case is of such gravity as to give the deprivation of liberty of Mr. Khartabil an arbitrary character. Thus, the deprivation of liberty of Mr. Khartabil falls within category III.

Disposition

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

The deprivation of liberty of Mr. Khartabil is arbitrary, being in contravention of articles 10 and 19 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights; it falls within categories II and III of the categories applicable to the cases submitted to the Working Group for consideration.

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

29. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Khartabil and accord him an enforceable right to compensation in accordance with article 9 (5) of the Covenant.

30. In accordance with article 33 (a) of its revised methods of work, the Working Group considers it appropriate to refer the allegations of torture to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

[Adopted on 21 April 2015]
