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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-sixth session, 22-26 August 2016

Opinion No. 38/2016 concerning Ali Salad Mohamed (Somalia)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the 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 1/102 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.
2. In accordance with its methods of work (A/HRC/30/69), on 17 June the Working Group transmitted a communication to the Government of Somalia concerning Ali Salad Mohamed. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. 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 him or her) (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);

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(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination on the grounds of birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Ali Salad Mohamed was born in 1954 and lives in the Mohamed Haibe district of Hargeisa, Somaliland.

5. On 14 February 2014, the police raided and searched the home of Mr. Salad Mohamed. The police officers indicated that they were carrying out an operation and looking for Mr. Ahmed Ali Salad, the son of Mr. Salad Mohamed, who they said was accused of fraud following the alleged transfer of an estimated half a million dollars to Dubai or China while he had been working with Zakhir, a money transfer company based in the Sudan that is owned by a Sudanese businessman. At the time of the raid, Mr. Ahmed Ali Salad was not at home.

6. On 15 February 2014, a man representing the above-mentioned Sudanese businessman and some village elders visited the home of Mr. Salad Mohamed to ask about the whereabouts of his son, Mr. Ahmed Ali Salad.

7. On 16 February 2014, Mr. Salad Mohamed met with men representing the Sudanese businessman in a hotel. He indicated that he had not been involved in the business between his son and the Sudanese businessman and he was not aware of any money transaction. He also informed them that his son was in Bossaso City, in Puntland.

8. On 6 April 2014, the police raided the home of Mr. Salad Mohamed again and arrested him without issuing any arrest warrant. However, the police officers indicated that the arrest was related to the crime his son had allegedly committed.

9. Mr. Salad Mohamed was held in detention without charges at the Hargeisa central police station until 29 April 2014, when he was informed of the charges against him. In the charge sheet dated 28 April 2014 that the Hargeisa Regional Prosecutor office submitted to the court, Mr. Salad Mohamed was charged under the Somali Penal Code for “providing assistance to a suspected person” (art. 297), “fraudulent insolvency” (art. 497) and “non-observance of orders of the authorities” (art. 505).

10. The trial against Mr. Salad Mohamed started on 3 May 2014. On 30 August 2014, the Hargeisa Regional Court sentenced Mr. Salad Mohamed to two years of imprisonment under article 297 of the Penal Code; one year of imprisonment under article 497; and three months of imprisonment under article 505. The Court also sentenced Mr. Salad Mohamed and his son to pay \$555,525 to the Sudanese businessman.

11. On 1 December 2014, the Hargeisa Regional Appeal Court upheld the judgment of the Regional Court.

12. In January 2015, the lawyer of Mr. Salad Mohamed appealed to the Supreme Court. However, he was later informed that the Court would not consider the request as it had not been submitted within the required time frame. The lawyer submitted a complaint letter to the Supreme Court requesting it to review the appeal.

13. The source submits that the continued deprivation of liberty of Mr. Salad Mohamed is arbitrary and falls under categories I and III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. In its view, Mr. Salad

Mohamed was arrested without a warrant and no legal reason was provided to him at the time of the arrest. He was held without charges until 29 April 2014. The source argues that there was no legal basis to justify the detention of Mr. Salad Mohamed between 6 and 29 April 2014, in violation of article 9 of the Covenant.

14. In addition, the source argues that Mr. Salad Mohamed was arrested, detained and sentenced for the crime of fraud allegedly committed by his son. The source adds that the detention of Mr. Salad Mohamed has been used as a means to pressure the appearance of his son.

15. The source also submits that Mr. Salad Mohamed was not guaranteed the international norms of due process and guarantees to a fair trial during the period of his deprivation of liberty, in violation of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant. The source argues that the judgment of the court that tried Mr. Salad Mohamed had been influenced by people with political connections.

16. On 9 May 2016, the Supreme Court agreed to consider the case. The source initially raised concerns about the independence of the Court and indicated that it was influenced by people with political connections. However, the source later informed the Working Group that, on 23 July 2016, the Court had issued a decision to drop the charges against Mr. Salad Mohamed, who was immediately released from prison in the wake of the decision. The source also noted, however, that the Office of the Attorney General had appealed against the decision of the Court.

Non-response from the Government

17. On 17 June 2016, the Working Group transmitted the allegations from the source to the Government of Somalia under its regular communication procedure. The Working Group requested the Government to provide it with detailed information by 16 August 2016 about the current situation of Mr. Salad Mohamed and any comment on the source's allegations. It also requested the Government to clarify the factual and legal grounds justifying the detention of Mr. Salad Mohamed. It further requested the Government to provide it with details regarding the conformity of the legal proceedings against him with international human rights treaties to which Somalia is a party.

18. The Working Group regrets that it did not receive a response from the Government of Somalia to that communication. The Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

19. In its jurisprudence, the Working Group has established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breaching international requirements constituting arbitrary detention, then the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.¹ In the present case, the Government of Somalia has chosen not to challenge the prima facie credible allegations made by the source. Under paragraph 15 of its methods of work, the Working Group may render an opinion in the absence of a response from the Government.

20. First of all, the Working Group notes that Mr. Salad Mohamed was arrested on 4 April 2016 without a warrant, and no legal reason was provided to him at the time of his arrest. This would constitute a violation of the international norms against arbitrary liberty deprivation, including article 9 of the Universal Declaration of Human Rights, and the

¹ See, for example, A/HRC/19/57, para. 68, and opinion No. 52/2014.

Covenant, article 9 (2) of which states that anyone who is arrested shall be informed, at the time of arrest, of the reasons for the arrest.

21. The source also reports that Mr. Salad Mohamed was held in detention without charge from 6 April 2014 until 29 April 2014. Such deprivation of liberty, conducted without promptly informing the accused of the charges against him or her, constitutes a violation of the international norms on detention, including article 9 (2) of the Covenant, which states that anyone who is arrested shall be promptly informed of any charges against him or her.

22. The Working Group believes that the above-mentioned deprivation of liberty of Mr. Salad Mohamed, conducted in violation of article 9 (2) of the Covenant, is without legal basis and falls within category I of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

23. The source alleges that Mr. Salad Mohamed was arrested, detained and sentenced for the crime of fraud that had been allegedly committed by his son, in order to pressure the appearance of his son. However, taking into account all the circumstances of the case, the Working Group views that, at the time of writing, it is not in a position to make a legal analysis of the allegation owing to a lack of sufficient and substantial information.

24. With regard to the submission that the judicial process leading to the deprivation of liberty of Mr. Salad Mohamed had not been impartial and had been influenced by people with political connections, the Working Group also opines that, at the time of writing, it is not in a position to pass a judgment owing to a lack of sufficient and substantial information.

25. The Working Group recognizes that the Supreme Court of Somalia, on 23 July 2016, issued a decision to drop the charges against Mr. Salad Mohamed, who was immediately released from prison. However, while noting that the Office of the Attorney General has appealed against the decision of the Court, the Working Group wishes to emphasize that the requirements under international law concerning the right to a fair trial and the demand of justice must be met throughout the possible further judicial process.

26. In accordance with paragraph 17 (a) of its method of work, the Working Group reserves the right to render an opinion, on a case-by-case basis, as to whether a deprivation of liberty was arbitrary, notwithstanding the release of the person concerned.

Disposition

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

The deprivation of liberty of Mr. Salad Mohamed, being in contravention of article 9 of the Universal Declaration of Human Rights and article 9 (1) and (2) of the International Covenant on Civil and Political Rights, was arbitrary, falling under category I of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

28. Consequent to the opinion rendered, the Working Group requests the Government of Somalia to take the necessary steps to remedy the situation of Mr. Salad Mohamed without delay and bring it into conformity with the standards and principles set forth in the international norms on detention, including the Universal Declaration of Human Rights and the Covenant.

29. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to accord Mr. Salad Mohamed an enforceable right to an effective remedy, including reparations, in accordance with article 8 of the Universal Declaration of Human Rights, article 9 (5) of the Covenant and the Body of Principles for

the Protection of All Persons under Any Form of Detention or Imprisonment (A/RES/43/173).

Follow-up procedure

30. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on actions taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether compensation or other reparations have been made to Mr. Ali Salad Mohamed;

(b) Whether an investigation has been conducted into the violation of Mr. Ali Salad Mohamed's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Government with its international obligations in line with the present opinion;

(d) Whether any other action has been taken to implement the present opinion.

31. The Government is invited to inform the Working Group of any difficulties that it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

32. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to undertake its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of the progress made in implementing its recommendations, as well as any failure to take action.

33. The Working Group recalls that the Human Rights Council has called for all States to cooperate with the Working Group, to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.

[Adopted on 26 August 2016]