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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-seventh session, 21-25 November 2016

Opinion No. 51/2016 concerning Saado Jamaac Aadan (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. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/30/69), on 20 June 2016 the Working Group transmitted a communication to the Government of Somalia concerning Saado Jamaac Aadan. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights. 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 Covenant (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 on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

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disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

3. Ms. Aadan, born on 18 May 1972, is a nurse. She lives in Berbera, Somaliland.
4. On 12 March 2016, at approximately 10.30 p.m., Ms. Aadan was arrested at home by the police. At the time of the arrest, the police officers presented neither an arrest warrant nor a reason for the arrest.
5. During the initial stage of her detention, Ms. Aadan was not allowed to meet her lawyers or her family. As a result of international and national pressure on the authorities, Ms. Aadan received her first family visit on 12 April 2016.
6. Since Ms. Aadan was going to be tried before a military court, on 12 April 2016 her lawyers submitted a petition to the Supreme Court requesting the Chief Justice to have the case transferred from the military court to a civilian court. The request was rejected and the Chief Justice refused to provide his response in writing.
7. One of Ms. Aadan's lawyers was banned from practising law between 16 May and 11 June 2016 and prohibited from meeting with Ms. Aadan. Ms. Aadan's other lawyer was initially not allowed to meet with her either but eventually did so on 29 May 2016.
8. On 30 May 2016, Ms. Aadan and her lawyers were informed that she had been charged with "giving assistance to a suspected person" under article 297 of the Somali Penal Code. She was accused of communicating and sending money to men who had allegedly killed a police commander in the region of Saahil.
9. On the same day, Ms. Aadan was brought before a military court. When asked why Ms. Aadan, a civilian, was being tried before a military court, the authorities argued that since her alleged crime involved armed men, Ms. Aadan should be tried, with the armed men, before a military court.
10. According to the source, a civilian being tried before a military court violates article 104 (1) of the constitution of Somaliland. In Somaliland, trials conducted by a military court are often very swift and the hearings are not open to the public. In Ms. Aadan's case, only select members of her family have been allowed to attend court hearings. In military trials, both prosecutors and judges are military officers who have received no legal training. Moreover, the military courts in Somaliland often pronounce harsher punishments than civilian courts. In addition, a decision by a military court can be appealed to the Supreme Military Court only, whereas a decision by a civilian court can be appealed to an appeal court and finally to the Supreme Court. It is also possible to request the Supreme Court to review its decision.
11. Although Ms. Aadan pleaded not guilty, the military court recorded that she had pleaded guilty. The military court refused to correct that detail despite the request from her lawyer.
12. Ms. Aadan was detained at Hargeisa Central Police Station until 16 June 2016, when she was released during a court hearing. Also on 16 June 2016, the military Attorney General informed the court that his office had withdrawn criminal charges against Ms. Aadan. Subsequently, the presiding judge ordered her release. However, no written document was provided by the court. The decision was made orally during the hearing.
13. The source submits that the continued deprivation of liberty of Ms. Aadan between 12 March and 16 June 2016 is arbitrary and falls under categories I and III. In the view of

the Working Group, Ms. Aadan was arrested without a warrant and no reason was provided to her at the time of the arrest. She was held without charges until 30 May 2016. The source argues that there was no legal basis to justify the detention of Ms. Aadan between 12 March and 30 May, and that this constitutes a violation of article 9 of the Covenant.

14. The source submits that Ms. Aadan was not guaranteed the international norms of due process and guarantees to a fair trial during the period of her deprivation of liberty, in violation of articles 9 and 10 of the Universal Declaration of Human Rights and of articles 9 and 14 of the Covenant. The source argues that Ms. Aadan, despite being a civilian, has been brought before a military court and that said court is not equipped with qualified judges, that she was not allowed access to a lawyer until 29 May 2016, that one of her lawyers has never been allowed to meet with her, that she pleaded not guilty but that the military court's records show that she pleaded guilty and that the records were not corrected despite a request having been made by the lawyers, and that all the above constitute violations of article 14 (1)-(3) (a), (b) and (c) of the Covenant.

Response from the Government

15. On 20 June 2016, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 19 August 2016, detailed information about the current situation of Ms. Aadan and to comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying Ms. Aadan's detention and to provide details regarding the conformity of the legal proceedings against her with international human rights treaties to which Somalia is a party.

16. The Working Group regrets that it has not received a response from the Government to that communication. The Government has not requested an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

17. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

18. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

19. In view of the above, the Working Group notes that on 12 March 2016 Ms. Aadan was arrested at home and that the authorities presented neither an arrest warrant nor a reason for the arrest. During the initial stage of her detention, Ms. Aadan was not allowed to meet her lawyers or her family. On 12 April 2016, Ms. Aadan received her first family visit.

20. Ms. Aadan was held without charges until 30 May 2016 and was not allowed access to a lawyer until 29 May 2016. Although Ms. Aadan is a civilian, she was prosecuted and tried in the military justice system.

21. The Working Group takes note of the relevant developments in international law concerning the right to a fair trial, which are also reflected in its jurisprudence.

22. In that context, the Working Group recalls that the Human Rights Committee has noted that the provisions of article 14 apply to all courts and tribunals, including military tribunals. In the view of the Committee, the trial of civilians in military courts may raise

serious problems as far as the equitable, impartial and independent administration of justice is concerned.¹

23. Furthermore, in paragraph 11 of its general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, the Human Rights Committee recalled that States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by deviating from fundamental principles of fair trial.

24. The Working Group further notes that, according to the African Commission on Human and Peoples' Rights, in its interpretation of articles 7 and 26 of the African Charter on Human and Peoples' Rights, the only purpose of military courts shall be to determine offences of a purely military nature committed by military personnel and that military courts should not in any circumstances whatsoever have jurisdiction over civilians.²

25. The Inter-American Court of Human Rights too has stated that military courts should only have jurisdiction over offences of a purely military nature, in conformity with articles, 2, 8 and 25 of the American Convention on Human Rights. The Court has noted that, in a democratic society, military tribunals should have an exceptional and restrictive scope and should only address offences that are aimed at the protection of special juridical interests linked to the armed forces.³

26. The Working Group has consistently held the view that civilians should not be tried by military courts, as such courts cannot be considered independent and impartial tribunals for civilians.⁴ Furthermore, the Working Group has set out certain minimum guarantees that military justice must not fail to respect:

(a) Military tribunals should only be competent to try military personnel for military offences;

(b) If civilians have also been indicted in a case, military tribunals should not try military personnel;

(c) Military courts should not try military personnel if any of the victims are civilians;

(d) Military tribunals should not be competent to consider cases of rebellion, the sedition or attacks against a democratic regime, since in those cases the victims are all citizens of the country concerned;

(e) Military tribunals should never be competent to impose the death penalty.⁵

27. In view of the above, the Working Group is of the opinion that Ms. Aadan was denied the right to a fair trial guaranteed under article 14 of the Covenant.

28. The Working Group considers that the deprivation of liberty of Ms. Aadan is in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and of articles 9 and 14 of the Covenant. The Working Group finds that the violations are of such

¹ See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 22.

² See principle L (a) and (c) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

³ Inter-American Court of Human Rights, *Radilla Pacheco v. Mexico*, judgment of 23 November 2009, paras. 290-298; *Fernández Ortega et al. v. Mexico*, sentence of 30 August 2010, para. 178; and *Rosendo Cantú et al. v. Mexico*, sentence of 31 August 2010, paras. 162 and 167.

⁴ See, e.g., opinions No. 27/2008 (Egypt) and No. 11/2012 (Egypt).

⁵ See A/HRC/27/48, para. 69.

gravity as to give the deprivation of liberty an arbitrary character in accordance with category III.

Disposition

29. Although Ms. Aadan has been released, the Working Group, in accordance with paragraph 17 (a) of its methods of work, reserves the right to render an opinion as to whether or not the deprivation of liberty was arbitrary, notwithstanding the release. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Saado Jamaac Aadan was arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within category III.

30. Taking into account all the circumstances of the case, the Working Group considers that the adequate remedy would be to accord to Ms. Aadan an enforceable right to full reparations in accordance with international law.

Follow-up procedure

31. 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 action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether compensation or other reparations have been made to Ms. Aadan;
- (b) Whether an investigation has been conducted into the violation of Ms. Aadan'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.

32. The Government is invited to inform the Working Group of any difficulties 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.

33. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take 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 progress made in implementing its recommendations, as well as any failure to take action.

34. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them 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.⁶

[Adopted on 23 November 2016]

⁶ See Human Rights Council resolution 33/30, paras. 3 and 7.