
Advance Edited Version

Distr.: General
18 December 2017

Original: English

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

Opinion No. 86/2017 concerning Salem Badi Dardasawi (Israel)

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/36/38), on 2 August 2017 the Working Group transmitted to the Government of Israel a communication concerning Salem Badi Dardasawi. 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 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, 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

4. Salem Badi Dardasawi is a 45-year old Palestinian, who usually resides in the city of Al-Bireh in the West Bank. He is an employee at the library of Al-Bireh municipality.

Previous arrests and administrative detention

5. According to the source, Mr. Dardasawi has been subjected to continued arrest raids and administrative detention for years. In 1988, when he was still a 16-year-old child, he was held in administrative detention for one year and six months. He was arrested again in 1990 (a few months after his release) and received another six months administrative detention order.

6. The source reports that in 2002, at the beginning of the second Intifada, the use of administrative detention by the Israeli Occupation Forces increased dramatically as thousands of Palestinians were rounded up and detained without charge or trial. The arrest campaigns reportedly targeted all Palestinians, including Mr. Dardasawi, who spent a further two years and three months in administrative detention, before being released in 2004.

7. Following his release in 2004, Mr. Dardasawi reportedly enrolled at Birzeit University to pursue a bachelor's degree. However, the Israeli Occupation Forces re-arrested him in 2006 and held him in administrative detention for another two years.

8. In 2008, Mr. Dardasawi resumed his studies at Birzeit University and graduated in 2010 with a degree in sociology. He was subsequently rearrested in 2012 during solidarity activities related to the hunger strike of Palestinian political prisoners. On that occasion, he received a sentence and was kept in detention from 20 January 2012 to 22 July 2013. Prior to his sentencing, Mr. Dardasawi was allegedly exposed to cruel interrogation for more than 45 days, despite the injuries he reportedly sustained during his arrest.

9. The source reports that Mr. Dardasawi was rearrested on 28 February 2014, he immediately received an administrative detention order and was released on 22 December 2014.

Current arrest and administrative detention

10. On 25 February 2016, the family of Mr. Dardasawi was reportedly surprised by the sound of explosives at the main door of the house and a vast number of Israeli Occupation Force officers entered the house. After checking the identity cards of everyone in the house, the officers arrested Mr. Dardasawi without providing him or his family with any information regarding the reason for his arrest or where he was being taken. He was initially held in Megiddo prison and was subsequently transferred to Ofer military prison.

11. According to the source, Mr. Dardasawi was arrested on the basis of Military Order No. 1651 (2009), article 31 (detention for interrogation), and he was immediately placed in administrative detention without charge or trial. He was reportedly neither subjected to a serious interrogation, nor presented with charges or accusations, which is a violation of international law, conventions and guarantees of a fair trial. The source notes that this also demonstrates that the Israeli Occupation Forces do not use administrative detention as a last resort for security reasons as they claim, but as a punitive measure against all Palestinians.

12. The source notes that administrative detention orders issued by military commanders under Israeli Military Order No. 1651 are reviewed by the Court of Administrative Detainees and the Administrative Detainees Appeals Court (both part of the Israeli military court system), and can be appealed to the Israeli High Court of Justice. However, Mr. Dardasawi's legal counsel has reportedly not been permitted to see any of the alleged evidence against his client and has had no means of effectively challenging his detention.

13. The source further notes that the administrative detention courts cannot be viewed as independent or impartial as they are staffed by military personnel who are subject to military discipline and dependent on their superiors for promotion. Moreover, military court judges

and prosecutors are colleagues in the same division in the Israeli army and report to the same commander.

14. The source reports that, as a consequence, Mr. Dardasawi has no effective means within the Israeli military court system of challenging his detention. At the time of the submission by the source, Mr. Dardasawi continued to be detained at Ofer military prison by the Israeli Prison Service under Military Order No. 1651, article 285 (administrative detention), and his detention may in reality continue indefinitely.

Background information

15. According to the source, administrative detention is a procedure that allows the Israeli military to hold detainees indefinitely on secret evidence without charging them or allowing them to stand trial.

16. In the occupied Palestinian West Bank, the Israeli army is reportedly authorized to issue administrative detention orders against Palestinian civilians on the basis of Military Order No. 1651. That order came into effect on 1 May 2010 and empowers military commanders to detain an individual for renewable periods of up to six months if they have “reasonable grounds to presume that the security of the area or public security require the detention”. On or just before the expiry date, the detention order is frequently renewed.

17. The source reports that there is no limit to the maximum amount of time an individual may be administratively detained, leaving room for indefinite detention. The grounds on which someone can be detained under Military Order No. 1651 are also unclear, leaving it up to the military commanders to decide what constitutes “public security” and “security of the area”.

18. According to the source, detainees subject to administrative detention orders are not informed of the reasons for their detention, neither are their lawyers. At the judicial review of a detention order, which is held in a closed hearing before a military judge, the judge can uphold, cancel or shorten the order. In most cases, however, administrative detention orders are reportedly confirmed for the same periods as those requested by the military commander. While the detainee can appeal the decision at the judicial review, in practice, the vast majority of appeals are rejected. According to the source, as of February 2017, 536 persons were being held under administrative detention orders.

19. The source notes that although international humanitarian law permits some limited use of administrative detention in emergency situations, the authorities are required to follow basic rules for detention, including a fair hearing at which the detainee can challenge the reasons for his or her detention.¹ As the occupying power in the West Bank, Israel is also bound by the rules governing occupation, which require it to use administrative detention only for “imperative reasons of security”.²

Personal circumstances

20. The source further notes that the continuous targeting of Mr. Dardasawi by the Israeli Occupation Forces and his regular imprisonment has prevented him from getting married and having a family. He lives in Al-Bireh with his parents, who are both in their seventies. His parents have not been able to visit him in prison owing to their age, but his brother and sister have been able to do so.

Allegations of arbitrary deprivation of liberty

21. The source submits that the circumstances surrounding Mr. Dardasawi’s imprisonment amount to arbitrary detention and fall within categories I and III of the of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

¹ International Covenant on Civil and Political Rights, art. 9.

² Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, art. 78.

22. The source notes that although administrative detention is permitted under international law in strictly limited circumstances, it is permissible only if the security of the State makes it absolutely necessary and only in accordance with regular procedure.³ Administrative detention should never be used as a substitute for criminal prosecution where there is insufficient evidence to obtain a conviction.

23. The source submits that the imprisonment of Mr. Dardasawi amounts to arbitrary detention for the following reasons:

(a) It is submitted that if the authorities had evidence supporting the administrative detention, then Mr. Dardasawi could have been charged under military orders and tried in the military courts. It is further submitted that administrative detention should never be used simply because there is insufficient evidence to support a conviction;

(b) Although the administrative detention orders issued by the Israeli military commander are the subject of review and further appeal by a military court, lawyers are not permitted to see the “secret information” that is held about their clients, making this right of review illusory;

(c) The use of administrative detention orders under international law is strictly limited to situations of absolute necessity which threaten the life of the nation.⁴ It is difficult to accept that this stringent requirement has been satisfied in Mr. Dardasawi’s case, given that the Israeli prosecuting authorities have provided no evidence for his detention and are instead claiming that he poses an unspecified security risk.⁵

24. The source further asserts that Mr. Dardasawi has been arbitrarily denied his fair trial rights guaranteed by article 14 of the Covenant, including:

(a) To be presumed innocent until proven guilty according to law;

(b) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law;

(c) To examine or have examined adverse witnesses.

Response from the Government

25. On 2 August 2017, 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 2 October 2017, detailed information about the current situation of Salem Badi Dardasawi and any comments on the source’s allegations.

26. On 9 August 2017, the Government of Israel sought an extension of the deadline to submit its response. In conformity with paragraph 16 of its methods of work, the Working Group granted an extension of two weeks for the Government to submit its response by 16 October 2017. The Working Group regrets that the Government of Israel did not reply to the communication.

Discussion

27. 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.

28. 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

³ See articles 42 and 78 of the Fourth Geneva Convention and article 4 of the International Covenant on Civil and Political Rights.

⁴ See article 42 of the Fourth Geneva Convention and article 4 of the Covenant.

⁵ In May 2009, the Committee against Torture was critical of the extensive use of administrative detention by Israel (see CAT/C/ISR/CO/4, para. 17).

prima facie credible allegations made by the source, despite having requested an extension of the deadline to reply, which was granted by the Working Group.

29. The source has submitted that the arrest and detention of Mr. Dardasawi is arbitrary and falls under categories I and III. The Working Group will consider these in turn.

30. The source has submitted and the Government of Israel has chosen not to challenge that Mr. Dardasawi was arrested by Israeli Occupation Force officers on 26 February 2016 without any arrest warrant or explanation of the reasons for his arrest.

31. The Working Group observes that Mr. Dardasawi was subjected to administrative detention on the basis of Military Order No. 1651 (2009), article 31 (detention for interrogation), and was immediately placed in administrative detention without charge or trial. In that regard, the Working Group concurs with the opinion of the Human Rights Committee in its general comment No. 35 (2014) on liberty and security of person that any such detention presents severe risks of arbitrary deprivation of liberty and would normally amount to arbitrary detention, as other effective measures addressing the threat, including the criminal justice system, would be available. Such administrative detention must therefore be most exceptional and as the Human Rights Committee has pointed out:

“If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention.”⁶

32. In the present case, the Working Group observes that Mr. Dardasawi has been in detention since 26 February 2016. The Government of Israel has had an opportunity but has failed to present to the Working Group what present, direct and imperative threat Mr. Dardasawi posed at the time of his arrest and how this threat has persisted during his detention for what is now nearly two years. That is an imperative requirement to ensure compliance with article 9 of the Covenant and ensure the legality of such administrative detention. The Working Group must thus conclude that this threat does not exist and the arrest and subsequent detention of Mr. Dardasawi therefore lacks legal basis, is contrary to article 9 of the Covenant and consequently is arbitrary, falling under category I.

33. The source has also submitted that the detention of Mr. Dardasawi is arbitrary and falls under category III, since Mr. Dardasawi’s lawyer has not been allowed to see any evidence against his client, thus making it impossible for him to challenge the detention order. The source has further submitted that Mr. Dardasawi is being held in detention without trial or even the prospect of a trial. The Working Group notes that the Government of Israel has had an opportunity but has chosen not to rebut any of these allegations.

34. In that regard, the Working Group again recalls that the Human Rights Committee, in its general comment No. 35, has required that any administrative detention is imposed only in the most exceptional circumstances, when there is a present, direct and imperative threat justifying such detention. The Working Group has already established that in the present case such a threat was absent.

35. However, the Human Rights Committee has further required that such administrative detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that the guarantees provided for in article 9 of the Covenant are fully respected in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision to detain him or her has been taken.⁷

36. In the present case, the Working Group observes that there has been neither a prompt nor a regular review of Mr. Dardasawi’s continued detention. In fact, Mr. Dardasawi was

⁶ General comment No. 35, para. 15.

⁷ Ibid.

arrested on 26 February 2016 and is still to formally learn what charges against him have legitimized his detention for a period of close to two years. Moreover, no explanation of the reasons for his detention nor access to any evidence that served as the basis for the issuance of the detention order have been provided to his lawyer.

37. The Working Group recalls that article 9 (2) of the Covenant requires that anyone who is arrested should not only be promptly informed of the reasons for his or her arrest, but also promptly informed of any charges against him or her. Mr. Dardasawi has been denied that right. The Working Group further observes that full compliance with the requirements of article 9 (2) is essential to enable the detained person to exercise the right to challenge the legality of detention as envisaged in article 9 (4) of the Covenant.

38. The right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.⁸ That right, which is, in fact, a preemptory norm of international law, applies to all forms of deprivation of liberty,⁹ and to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings, but also situations of detention under administrative and other fields of law, including military detention, administrative detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.¹⁰ It also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.¹¹

39. In the present case, Mr. Dardasawi's lawyer has been effectively prevented from challenging the legality of the continued administrative detention of his client as he has been denied access to any documents supporting the detention. That is a clear violation of article 9 (4) of the Covenant.

40. The Working Group notes the continuing long-term state of emergency existing in Israel. In that connection, it recalls the concluding observations of the Human Rights Committee on the fourth periodic report of Israel, in 2014, in which the Committee reiterated its concern at the ongoing state of emergency in Israel and reminded the Government that state of emergency measures must be of an exceptional and temporary nature and limited to the extent strictly required.¹² The Committee also made the same recommendation to Israel during its previous reporting cycle in 2010.¹³ The Committee was also concerned at the practice of administrative detention, which was often based on secret evidence.¹⁴

41. In addition, the present case yet again raises the broader issue of the compatibility of administrative detention orders issued under Israeli Military Order No. 1651 with international human rights law. In that connection, the Working Group has already expressed its agreement¹⁵ with the Human Rights Committee, which stated in 2014 that it remained concerned at the continuing practice of administrative detention of Palestinians, at the fact that, in many cases, the detention order was based on secret evidence and at the denial of access to counsel, independent doctors and family contacts.¹⁶ In its concluding observations, the Committee recommended that Israel end the practice of administrative detention and the use of secret evidence in administrative detention proceedings, and ensure that individuals subject to administrative detention orders were either promptly charged with a criminal offence or released.¹⁷

⁸ See A/HRC/30/37, paras. 2–3.

⁹ *Ibid.*, para. 11.

¹⁰ *Ibid.*, annex, para. 47 (a).

¹¹ *Ibid.*, annex, para. 47 (b).

¹² See CCPR/C/ISR/CO/4, para. 10.

¹³ See CCPR/C/ISR/CO/3, para. 7.

¹⁴ See CCPR/C/ISR/CO/4, para. 10.

¹⁵ See opinion No. 44/2017.

¹⁶ See CCPR/C/ISR/CO/4, para. 10.

¹⁷ *Ibid.*

42. The Working Group notes that derogations under article 9 of the Covenant, which lead to deprivation of liberty and which are unreasonable or unnecessary cannot be justified under article 4 of the Covenant. The Working Group is of the view that the present case falls within this category as Mr. Dardasawi has been in detention for nearly two years without knowing the reasons for his detention, which makes it impossible for him to challenge the legality of his continued detention. Furthermore, the Government of Israel has not provided any reasons that might justify his detention. The Working Group therefore concludes that the arrest and continued detention of Mr. Dardasawi is arbitrary and falls under category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

43. Finally, the Working Group notes the sheer number of administrative detention orders to which Mr. Dardasawi has been subjected, and that his most recent arrest follows the same pattern. In the absence of any explanation from the Government, the Working Group takes note of the pattern that has emerged through the number of cases with similar facts that have been brought before it in the past.¹⁸ The Working Group further notes the general manner in which such administrative detention orders were used against Palestinians in particular, as highlighted by the Human Rights Committee.¹⁹ The Working Group therefore concludes that the present arrest and detention of Mr. Dardasawi, who is a Palestinian, is arbitrary and also falls under category V.

44. Given the pattern of cases involving the arrest and detention of Palestinians under administrative detention orders on the basis of their nationality that it has noted, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.

45. Finally, the Working Group reiterates that it would welcome the opportunity to work constructively with the Government of Israel in addressing its serious concerns relating to arbitrary deprivation of liberty.²⁰ On 7 August 2017, the Working Group sent a request to the Government to undertake a country visit and hopes that it will receive a positive response from the Government as a sign of its willingness to enhance its cooperation with the United Nations special procedures.

Disposition

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

The deprivation of liberty of Salem Badi Dardasawi, being in contravention of articles 2, 3, 7 and 9 of the Universal Declaration of Human Rights and of articles 2, 4, 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

47. Consequent upon the opinion rendered, the Working Group requests the Government of Israel to take the steps necessary to remedy the situation of Mr. Dardasawi 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 International Covenant on Civil and Political Rights.

48. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Dardasawi immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

49. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.

¹⁸ See opinions No. 13/2016, No. 24/2016, No. 3/2017 and No. 44/2017.

¹⁹ See CCPR/C/ISR/CO/4, para. 10.

²⁰ See opinions No. 3/2017, No. 31/2017 and No. 44/2017.

Follow-up procedure

50. 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 Mr. Dardasawi has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Dardasawi;
- (c) Whether an investigation has been conducted into the violation of Mr. Dardasawi's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Israel with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

51. 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.

52. 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.

53. 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.²¹

[Adopted on 23 November 2017]

²¹ See Human Rights Council resolution 33/30, paras. 3 and 7.