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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-ninth session, 21-25 August 2017

Opinion No. 44/2017 concerning Ali Abdul Rahman Mahmoud Jaradat (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 that mandate and most recently extended it for a three-year period in its resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 10 May 2017, the Working Group transmitted to the Government of Israel a communication concerning Ali Abdul Rahman Mahmoud Jaradat. 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. Ali Abdul Rahman Mahmoud Jaradat is a 62-year-old Palestinian journalist and writer who usually resides in the city of Al-Bireh in the West Bank. Mr. Jaradat is married and has two children and a grandson.

5. According to the source, Mr. Jaradat has been subjected to continuous arrest raids for years. He has spent a total of 14 years in Israeli prisons and detention centres, 11 of which were under administrative detention orders, without charge or trial. He has spent approximately 139 months under administrative detention orders issued on the basis of a secret file that neither he nor his lawyer can review, which severely hinders the lawyer from defending him and denies him the right to a fair trial.

6. The longest period that Mr. Jaradat has spent continuously under administrative detention was in 1994 and spent 52 months in administrative detention. Mr. Jaradat was arrested again in 2002 and spent 39 consecutive months in administrative detention. He was also detained for a number of short periods — lasting a few months — under administrative detention orders. Prior to the most recent arrest and detention, Mr. Jaradat was arrested in 2008 and spent two years in administrative detention. He was released on 1 March 2010.

Arrest and alleged administrative detention

7. The source reports that, at 4 a.m. on 24 July 2016, dozens of military vehicles surrounded Mr. Jaradat's home. Initially, one group of Israeli occupation forces raided the neighbour's house and asked for their identity cards, while another group surrounded Mr. Jaradat's house. According to the source, Mr. Jaradat's youngest son was surprised to see soldiers of the occupation forces sitting and standing on the balcony when he opened the door. The soldiers immediately started interrogating Mr. Jaradat's son asking him his name and age, about his studies, whether he throws rocks at soldiers and participates in demonstrations. They kept him outside until they finished their questioning then they entered and raided the house. Reportedly, Mr. Jaradat and his wife woke up to find themselves surrounded by soldiers. They did not need any explanation because it was a scene that they were used to and had been subjected to for years. The soldiers asked Mr. Jaradat for his identity card, told him to bring his medicine, and arrested him. Mr. Jaradat said goodbye to his wife and son, however, he was not able to say goodbye to his daughter and grandson.

8. According to the source, Mr. Jaradat was arrested on the basis of Military Order No. 1651, article 31 (detention for interrogation), and was immediately placed in administrative detention without a charge or trial. He was reportedly not subjected to a serious interrogation nor was he presented with charges or accusations, which is a violation of international law, conventions and guarantees of fair trial. According to the source, that 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 Palestinians.

9. Although 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 before the Israeli High Court of Justice, Mr. Jaradat'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.

10. The source 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.

11. The source reports that, as a consequence, Mr. Jaradat has no effective means within the Israeli military court system of challenging his detention. At the time of submission of the present communication by the source, Mr. Jaradat had been detained for 366 days (1

year) in Ofer Prison by the Israeli Prison Service, under Military Order No. 1651, article 285 (administrative detention).

Background information

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

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

14. Detainees subject to administrative detention orders are reportedly not informed of the reasons for their detention; neither are their lawyers. At the judicial review of a detention order, which is held in 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 periods 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.

15. The source notes that, although international humanitarian law permits 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. 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".

Personal circumstances

16. According to the source, Mr. Jaradat's arrest on 24 July 2016, came just after his grandson was born, which makes it harder for the family. They are reportedly not allowed to visit him for "security reasons". His wife had been denied visitation rights for "security reasons" since her husband's first detention, however, his children used to visit him when they were underage, accompanied by the families of other prisoners, since their mother could not visit. Now, his children have also been denied visitation rights and are only allowed to see their father once every six months. Mr. Jaradat's grandson cannot visit him, as the occupation authorities do not consider him a first-degree relative.

17. The source states that Mr. Jaradat's health does not allow him to endure detention conditions as before. His health condition reportedly deteriorated during his last arrest and detention, when he had open-heart surgery in prison, and he is suffering from high blood pressure and diabetes.

Category III

18. The source submits that the circumstances surrounding Mr. Jaradat's imprisonment amount to arbitrary detention under category III.

19. The source notes that, administrative detention is permitted under international law in strictly limited circumstances: only if the security of the State make it absolutely necessary and only in accordance with "regular procedure".

20. The source submits that Mr. Jaradat's imprisonment amounts to arbitrary detention for the following reasons:

(a) If the authorities had evidence supporting the administrative detention of Mr. Jaradat, he could have been charged under military orders and tried in the military courts; 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 subject to review by and appeal before a military court, the lawyer is not permitted to see the "secret information" against his client, which makes the right of review illusory;

(c) The use of administrative detention orders under international law is strictly limited to situations of "absolute necessity" that "threatens the life of the nation". It is difficult to accept that this stringent requirement has been met in Mr. Jaradat's case, given that the Israeli prosecuting authorities have provided no evidence for his detention, but are claiming that he poses an unspecified security risk.

(d) He has been arbitrarily denied his fair trial rights that are guaranteed by article 14 of the Covenant, including:

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

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

(iii) To examine or have examined witnesses against him.

21. On 16 August 2017, the Working Group was informed that Mr. Jaradat had been released on 20 July 2017.

22. The Working Group notes that, in accordance with paragraph 17 (a) of its methods of work, it reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. The Working Group therefore proceeds to its consideration of Mr. Jaradat's case.

Response from the Government

23. On 10 May 2017, the Working Group transmitted the source's allegations to the Government of Israel through its regular communications procedure, requesting that the Government provide, by 10 July 2017, detailed information about Mr. Jaradat's current situation and any comments on the source's allegations.

24. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

25. 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.

26. 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.

27. The Working Group notes that the source has submitted that the arrest and detention of Mr. Jaradat falls under category III since there was no evidence to support the administrative detention under the Israeli Military Order No. 1651; that Mr. Jaradat's lawyer was not allowed to see any evidence against him, thus making it impossible for him to challenge the detention order; that Mr. Jaradat's administrative detention did not meet the requisite standards of "absolute necessity" which "threatens the life of the nation", as required by international law; and that Mr. Jaradat was held in detention without trial or

even the prospect of a trial. The Working Group also notes that the Government of Israel has chosen not to rebut any of these allegations.

28. The Working Group further notes that Mr. Jaradat has spent close to 12 months in administrative detention under a secret detention order issued by the Israeli army on the basis of secret information and that he was released on 20 July 2017 without any charge or trial.

29. In that regard, the Working Group recalls that, the Human Rights Committee, in its general comment No. 35 (2014) on liberty and security of person, stated that, to the extent that States parties impose administrative detention not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. 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 the State 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. States also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for in article 9, 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 is taken (para. 15).

30. In the present case, the Government has not shown that there was a "present, direct and imperative threat" to national security to justify Mr. Jaradat's detention. Moreover, there was neither a prompt nor regular review of his continued detention. In fact, Mr. Jaradat was arrested on 24 July 2016 and, despite his recent release, is still to formally learn what charges against him legitimized his detention for a period of close to 12 months. The administrative detention order issued by the occupation authorities does not specify the reasons for his arrest nor the charges against him. Moreover, no explanation of the reasons for Mr. Jaradat's detention nor access to any evidence that served as the basis for the issuance of the order has been provided to his lawyer.

31. The Working Group notes the state of emergency existing in Israel but, in that connection, recalls the Human Rights Committee's concluding observations on the fourth period 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 the state of emergency measures must be of an exceptional and temporary nature and limited to the extent strictly required.[1] The Committee had also made the same recommendation to Israel during its previous reporting cycle, in 2010.[2] The Committee also remained concerned at the practice of administrative detention that was often based on secret evidence.[3]

32. 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. The latter concerns notice of criminal charges and, as stated by the Human Rights Committee in its general comment No. 35, that right "applies in connection with ordinary criminal prosecutions as well as with military prosecutions or other special regimes directed at criminal punishment" (para. 29). In the present case, Mr. Jaradat has been denied that right.

33. The Working Group also recalls that 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.[4] This right, which is, in fact, a peremptory norm of

[1] See CCPR/C/ISR/CO/4, para. 10.
[2] See CCPR/C/ISR/CO/3, para. 7.
[3] See CCPR/C/ISR/CO/4, para. 10.
[4] See A/HRC/30/37, paras. 2-3.

international law, applies to all forms of deprivation of liberty,[5] 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, security 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.[6] Moreover, 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.[7]

34. In the present case, Mr. Jaradat's lawyer has been effectively prevented from challenging the legality of Mr. Jaradat's continued detention as he has been denied access to all documents supporting the administrative detention. This is a clear violation of article 9 of the Covenant.

35. The present case also raises the broader issue of the compatibility of administrative detention orders issued under Israeli Military Order No. 1651 with international human rights law. In this connection, the Working Group is in agreement 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.[8]

36. 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.[9]

37. 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 in this category as Mr. Jaradat has been in detention for close to one year without knowing the reasons for his detention, which makes it impossible for him to challenge the legality of the continued detention. 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. Jaradat falls under category III.

38. Finally, the Working Group notes the sheer number of administrative detention orders to which Mr. Jaradat has been subjected, and that his most recent arrest follows the same pattern. In the absence of any explanation from the Government, taking note of the pattern that has emerged through the number of cases that has been brought before it, in the past, with similar facts[10] and noting the general manner in which those administrative detention orders were used against Palestinians in particular, as highlighted by the Human Rights Committee,[11] the Working Group concludes that the present arrest and detention of Mr. Jaradat, who is a Palestinian, falls under category V.

39. Given the pattern of cases involving 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.

[5] Ibid., para. 11.
[6] Ibid., annex, para. 47 (a).
[7] Ibid., annex, para. 47 (b).
[8] See CCPR/C/ISR/CO/4, para. 10.
[9] Ibid.
[10] See opinions No. 13/2016, No. 24/2016 and No. 3/2017.
[11] See CCPR/C/ISR/CO/4, para. 10.

40. Finally, the Working Group reiterates[12] that it would welcome the opportunity to work constructively with the Government of Israel in addressing its serious concerns relating to the arbitrary deprivation of liberty. 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

41. Although Mr. Jaradat 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 Ali Abdul Rahman Mahmoud Jaradat, 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 III and V.

42. Consequent upon the opinion rendered, the Working Group requests the Government of Israel to take the steps necessary to remedy the situation of Mr. Jaradat 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.

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

44. 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.

Follow-up procedure

45. 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 Mr. Jaradat;

(b) Whether an investigation has been conducted into the violation of Mr. Jaradat'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 Israel with its international obligations in line with the present opinion;

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

46. 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.

47. 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.

[12] See also opinions No. 3/2017 and No. 31/2017.

48. 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.[13]

[*Adopted on 21 August 2017*]

[13] See Human Rights Council resolution 33/30, paras. 3 and 7.