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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fifth session, 18-27 April 2016

Opinion No. 4/2016 concerning Abdul Majed al-Gaoud, Jebril Abdulkarim al-Kadiki, Omar Suleiman Salem Muftah al-Mouallef, Abdulaiti Ibrahim al-Obeidi, Mansour Dao Ibrahim, Abu Zaid Omar Dorda, Saadi Muammer Mohammed Gaddafi, Abdalla Mahmoud Mohamed Hajazi, Ahmad Mohamed Ibrahim, Mustapha Mohammed Kharoobee, Ali Mahmoud Maria and Saad Masoud Saad Zayd (Libya)

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 27 January 2016, the Working Group transmitted a communication to the Government of Libya concerning Abdul Majed al-Gaoud, Jebril Abdulkarim al-Kadiki, Omar Suleiman Salem Muftah al-Mouallef, Abdulaiti Ibrahim al-Obeidi, Mansour Dao Ibrahim, Abu Zaid Omar Dorda, Saadi Muammer Mohammed Gaddafi, Abdalla Mahmoud Mohamed Hajazi, Ahmad Mohamed Ibrahim, Mustapha Mohammed Kharoobee, Ali Mahmoud Maria and Saad Masoud Saad Zayd. 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);

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(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);

(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 or 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. Abdul Majed al-Gaoud, born in 1944, was the mayor of Tripoli in the 1970s. He served in various ministries in the Government of Muammar Gaddafi. Between 1992 and 1996, he served as Prime Minister.

5. Jebril Abdulkarim al-Kadiki, born in 1944, was a general in the Libyan air force under the Government of Muammar Gaddafi.

6. Omar Suleiman Salem Muftah al-Moualleg, born on 12 February 1977, was a military police captain under the Government of Muammar Gaddafi.

7. Abdulaiti Ibrahim al-Obeidi, born in 1939, was the General Secretary of the committee for foreign relations and international cooperation in the Government of Muammar Gaddafi.

8. Mansour Dao Ibrahim, born in 1958, was a brigadier general in the army under the Government of Muammar Gaddafi.

9. Abu Zaid Omar Dorda, born on 1 April 1944, is a former head of the Libyan External Security Agency.

10. Saadi Muammer Mohammed Gaddafi, born on 27 May 1973, is the son of Muammar Gaddafi.

11. Abdalla Mahmoud Mohamed Hajazi, born in 1948 in Al Marj, Libya, is a former Chief of Defence for the Tripoli region.

12. Ahmad Mohamed Ibrahim, born in 1955, is a former Secretary-General of the international centre for research on *The Green Book*, issued by Muammar Gaddafi, which contained the ideology that guided the former regime. The Centre was dedicated to promoting that ideology.

13. Mustapha Mohammed Kharoobee, born on 6 December 1943, is a former member of the Revolutionary Command Council (the supreme executive and legislative authority).

14. Ali Mahmoud Maria, born on 14 November 1942, is a former Libyan ambassador to Egypt.

15. Saad Masoud Saad Zayd, born in 1948, was an army general under the Government of Muammar Gaddafi.

16. Mr. al-Gaoud was arrested at his home in Tripoli on 4 September 2011 by members of the Military Council. No arrest warrant was presented at the time of the arrest. He has remained in detention since that date. Despite his serious health problems, Mr. al-Gaoud was deprived of medication for 20 days. During the first few days after his arrest, he was interrogated by militia on multiple occasions. The interrogations were conducted in a coercive manner. When he was later interrogated by the prosecution, his lawyer was not allowed to be present. Mr. al-Gaoud was finally brought before a pretrial chamber in October 2013, two years after his arrest. He was not permitted visits from his defence lawyer for a significant period of time. The prosecution refused to transfer a copy of the case file to the defence team.

17. Mr. al-Kadiki was arrested in mid-November 2012 by a militia group. He was held in a military institute at the Al-Hadba detention facility, in Tripoli. Although he was brought before a judge in 2012, he had no legal representation until February 2013. Despite the fact that Mr. al-Kadiki suffers from health problems, he has not been able to see a doctor or receive medical treatment. On 28 July 2015, Mr. al-Kadiki was sentenced by the South Tripoli Appeals Court to 12 years of imprisonment. The charges on which Mr. al-Kadiki was convicted remain unclear in the light of the various changes made to the original indictment, which were not clarified in the judgment.

18. Mr. al-Mouallem was arrested on 4 January 2012 in Misrata by the military police. He was not presented with an arrest warrant at the time of his arrest. He has been detained at the Sikt military prison in Misrata. In mid-2013, a year and a half after his arrest, Mr. al-Mouallem was brought before a military court, although he was not a member of the military. He was interrogated by military police without the benefit of legal representation. Because he was from Tripoli, the lawyer appointed by the family of Mr. al-Mouallem was not allowed to enter the courtroom to represent Mr. al-Mouallem. Subsequently, the family appointed another lawyer from Misrata. Neither lawyer was permitted to visit Mr. al-Mouallem.

19. Mr. al-Obeidi was collected by a delegation from the National Transitional Committee from his house on 1 September 2011. He and the National Transitional Council escorts were ambushed by a militia from Misrata. Subsequently, Mr. al-Obeidi was taken into custody at the headquarters of the militia. At the request of the head of the National Transitional Committee, Mr. al-Obeidi was then transferred by the Tripoli Military Council to the Mitiga military base. Mr. al-Obeidi was held in solitary confinement for three weeks for no reason, interrogated by militia immediately after his arrest and threatened during interrogations. He had no access to a lawyer during the initial stage of his detention. His appointed lawyers were not allowed to meet him in private and did not have access to the case file prior to the commencement of the trial. Mr. al-Obeidi's lawyers received threats and were subjected to harassment. As a result, two of them withdrew from the case. The first hearing took place more than nine months after the arrest. On 17 June 2013, Mr. al-Obeidi was acquitted of the initial charges against him. However, he was not released from detention, notwithstanding the absence of any other order or decision providing a legal basis for his continued detention. In October 2013, Mr. al-Obeidi was brought before a pretrial chamber to answer a broader range of charges. On 28 July 2015, the South Tripoli Appeals Court acquitted Mr. al-Obeidi of the remaining charges against him. Subsequently Mr. al-Obeidi was released in July 2015 and obtained just compensation.

20. Mr. Dao was arrested on 20 October 2011 in Sirte by a militia from Misrata. He was detained for two years in a militia-run detention facility in Misrata before being transferred to a military police prison. At the end of 2011, a lawyer was appointed to represent Mr. Dao but withdrew at the beginning of 2012 after receiving death threats and being harassed on

two occasions when he tried, unsuccessfully, to visit Mr. Dao. A second lawyer was appointed in 2013. She was permitted to visit Mr. Dao approximately six times. Each visit was monitored and Mr. Dao was harassed and insulted during her visits. Mr. Dao was interrogated by the militia from Misrata and the local authorities without any legal representation, although he had requested access to a lawyer. It is reported that the prosecution attempted to coerce Mr. Dao into providing false statements against someone. On 28 July 2015, the South Tripoli Appeals Court sentenced Mr. Dao to death by firing squad.

21. Mr. Dorda was arrested at his home by a militia on 11 September 2011. No arrest warrant was presented or reason given for the arrest. He was then detained at various secret militia locations. Mr. Dorda reportedly fell from a second-floor window while being interrogated by the militia, which resulted in severe injuries to his back, pelvis, legs and internal organs. He was denied medical treatment and access to appropriate medical equipment, such as a catheter or wheelchair. Despite his health problems, he has not received any medication or treatment. He has spent five months in solitary confinement. The lawyer that Mr. Dorda's family hired was denied the right to visit him during the first year and a half of his detention. The lawyer was also denied the right to be present when Mr. Dorda was interrogated. Mr. Dorda's lawyer was shot by the militia the day before the commencement of the trial. Mr. Dorda was first brought before a judge on 5 June 2012, nine months after his arrest. He was brought before a pretrial chamber in October 2013, approximately two years after his arrest. On 28 July 2015, Mr. Dorda was found guilty of smuggling illegal immigrants into Libya, aiding and abetting murder and purchasing and distributing illegal drugs. The South Tripoli Appeals Court sentenced Mr. Dorda to death by firing squad.

22. Saadi Muammer Mohammed Gaddafi was granted asylum in the Niger in November 2011 on humanitarian grounds. Notwithstanding the fact that the authorities of the Niger acknowledged that Mr. Gaddafi could potentially face persecution in Libya, he was extradited from Niger to Libya on 6 March 2014 without any prior notice or warning. Mr. Gaddafi was subjected to ill-treatment and torture almost immediately upon his arrival. He was appointed a lawyer in May 2015, a year after his extradition to Libya. The trial proceedings commenced on 10 May 2015. His requests for confidential and privileged meetings with his legal representatives were denied. His defence witnesses were subjected to intense pressure.

23. Mr. Hajazi was arrested on 1 September 2011 at his home by members of a militia group without an arrest warrant. Although Mr. Hajazi had serious health problems, the prison stopped providing medication to him. Mr. Hajazi's lawyer was not allowed to visit him or attend interrogations. The first lawyer hired to represent Mr. Hajazi resigned after being threatened by prison guards following his first visit. To date, Mr. Hajazi has not been charged with any offence.

24. Mr. Ibrahim was arrested on 11 October 2011 in Sirte by a militia without an arrest warrant. He was subjected to beatings and other forms of abuse while in detention. Mr. Ibrahim was brought before a judge in August 2012, 10 months after his arrest. His lawyer was denied the right to visit him during the first several months of his detention. Mr. Ibrahim was beaten and his lawyer was threatened when he requested to meet his client in private. The lawyer resigned from the case due to these threats. The second lawyer subsequently appointed to represent Mr. Ibrahim was allowed to meet her client only in the courtroom. She was even prevented from attending some of the hearings, and when she insisted, the court guards threatened to set their dogs on her. The prosecution's case was based on evidence obtained by torture and the defence team was not allowed to call its own witnesses. In July 2013, Mr. Ibrahim was convicted by a court in Misrata and sentenced to death by firing squad.

25. Mr. Kharabee surrendered himself on 3 September 2012 to the Libyan Islamic Fighting Group after it threatened his family. Prior to 2011, the Group had operated as an Islamist militia in exile. Mr. Kharabee was held in isolation for six months. Mr. Kharabee's family hired two lawyers, but only one was allowed to visit him, and only on one occasion. His lawyers were not allowed to be present during interrogations. Mr. Kharabee suffered from cancer and, on 16 July 2015, died of the disease while in detention, 12 days before the verdict was to be issued.

26. Mr. Maria was abducted on 19 March 2013 from his family home in Cairo, Egypt. On 26 March 2013, he was extradited to Libya without any indication that the Egyptian authorities had sought, or received, any assurances concerning his safety or treatment upon his return to Libya, or guarantees that his right to a fair trial would be respected. After his rendition from Egypt, Mr. Maria was brought before a judge but did not have the benefit of legal representation at the hearings. He was not informed of the charges against him or of the factual basis for his detention. Although his family had hired a lawyer, Mr. Maria's legal counsel was not allowed to visit him. The lawyer was not informed of the time of the interrogations or the dates of the court hearings. As a result, he was not able to attend them and missed several hearings. One of Mr. Maria's lawyers was subjected to threats and other forms of harassment, including beatings, and his office was broken into several times.

27. Mr. Zayd was arrested in August 2011 by a militia. He was severely beaten after his arrest, resulting in the loss of several teeth. He was interrogated by the militia that arrested him. Since his arrest, Mr. Zayd has never been brought before a judge or permitted access to legal representation. Concerns have been raised that Mr. Zayd's health has deteriorated and that he needs immediate medical attention.

28. The source asserts that the State of Libya is responsible for the arbitrary deprivation of liberty of the aforementioned applicants. It indicates that the State provided payment and the mantle of authority to militias, which were directly responsible for detaining the applicants. The source states that the National Transitional Council of Libya has passed legislation (Law No. 38) in which the State endorses the illegal actions of the militias vis-à-vis persons in their custody by authorizing Libyan courts to admit evidence collected by such militias and/or obtained through illegal interrogation techniques, such as torture and inhuman treatment; the law also grants impunity to those militias for such actions. The source further alleges that Libyan officials, including the Prosecutor-General, failed to apply and respect Libyan law applicable to the detention, investigation and prosecution of the applicants.

29. The source submits that the deprivation of liberty of the individuals in question is arbitrary and falls under categories I, III and V of the Working Group's defined categories of arbitrary detention. In its view, all of the applicants were arrested, detained, and subjected to unfair and discriminatory procedures as a result of their perceived association with the former regime, which constitutes discrimination on ground of their political or other opinion, thereby falling within category V of the Working Group's defined categories of arbitrary detention, namely those relating to prisoners of conscience and political prisoners. The source indicates that although the illegality of these procedures was confirmed by the Supreme Court in its judgment of December 2012, the verdict was disregarded by the prosecuting authorities. In the meantime, the Government has issued regulations that impose penal sanctions and consequences on persons associated with the former regime, in violation of the presumption of innocence and the principle of individual criminal responsibility.

30. The source further submits that the arrest and continued detention of the aforementioned persons have no legal basis, and are thus in violation of article 9 (1) of the International Covenant on Civil and Political Rights and may fall under category I of the Working Group's defined categories of arbitrary detention. The individuals, who were

initially apprehended in Libya by militias, were not arrested pursuant to any warrant issued in accordance with Libyan law, or informed promptly of the reasons for their arrest and continued detention. Mr. Maria and Mr. Gaddafi, who were initially arrested in third countries (Egypt and Niger, respectively), were secretly rendered to Libya in the absence of any valid Libyan arrest warrant and in complete disregard of the risk by the countries which deported them/handed them over to Libyan authorities that they would be exposed to persecution in Libya. The source adds that none of the applicants has been detained pursuant to a detention order issued by a judge as required under Libyan law.

31. Furthermore, the source submits that none of the applicants has been guaranteed the international norms of a fair trial during the period of deprivation of liberty, in violation of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. They were not granted effective and timely access to legal representation or access to their case files during the pretrial stage, which impeded their ability to challenge the legality of their detention. Thus their detention is arbitrary and falls under category III of the Working Group's defined categories of arbitrary detention.

32. More specifically, the source stresses that four of the applicants, namely Mr. Gaddafi, Mr. Hajazi, Mr. Maria and Mr. Zayd, have never been charged. They have been interrogated without legal representation in a highly coercive and oppressive environment and have been denied the rights to communicate with their counsel in confidence and to be brought to trial without undue delay. The source concludes that under Libyan law and the regulations issued by the Government of Libya, these four persons should have been released from detention as they had not been charged with any criminal offence within the prescribed time period.

33. In addition, two of the applicants have been prosecuted, but no verdict has been reached. The legal proceedings against Mr. al-Mouallem commenced in 2013 but there has been no verdict yet. Mr. al-Gaoud, who was charged in the same proceedings as Mr. Dorda, Mr. Dao and Mr. al-Kadiki, was not referred to in the verdict issued by the court.

34. The source adds that four of the applicants, namely Mr. al-Kadiki, Mr. Dao, Mr. Dorda and Mr. Ibrahim, were convicted at first instance. The source argues that all four were deprived of the right to be assisted by a lawyer of one's own choosing during interrogations; the right to effective and independent legal representation; the right not to be compelled to testify against oneself or to confess guilt; the right to promptly access the evidence underpinning the charges; the right to call defence witnesses; and the right to be tried by an independent and impartial tribunal as guaranteed under article 14 (1) and (3) (b), (d), (e) and (g) of the International Covenant on Civil and Political Rights. The source specifies that Mr. Ibrahim was convicted in September 2013 and sentenced to death by firing squad. Although he appealed the verdict, the appeal proceedings have had not advanced. Mr. Dorda, Mr. Dao and Mr. al-Kadiki were convicted pursuant to a judgment rendered by the South Tripoli Appeals Court. Mr. Dorda and Mr. Dao were sentenced to death by firing squad, while Mr. al-Kadiki was sentenced to 12 years in prison. It would appear from the judgment that their convictions were primarily based on evidence obtained through ill-treatment and torture. Some of the offences for which they were convicted were not proscribed under Libyan law at the time when they allegedly committed them. For example, the source indicates that the prosecution changed the definition of the Libyan State in the wording of the charge from "acting against the Government of Libya", which existed as an offence under Libyan law at the time, to "acting against the 14 February revolution". Appeals against the verdict were filed on behalf of the three individuals. However, the Prosecutor-General announced that their right to appeal would be limited to matters of law and procedure.

Response from the Government

35. The Working Group regrets that the Government has not responded to the allegations transmitted by the Working Group on 27 January 2016.

Discussion

36. The applicants have been deprived of their liberty by State actors and armed groups acting on behalf or with the support of the Government of Libya.

37. In its recent report on Libya, the Office of the United Nations High Commissioner refers to interviews with former detainees who had been held in arbitrary detention. Some were unaware of the reasons for their arrest or detention, and few had been charged with any criminal offence. Virtually none had enjoyed the right to due process and most had also been denied other rights¹.

38. It was also found that, given the limited functioning of the courts, there was little recourse to judicial review of the legality of detentions.”²

39. In one of the previous reports of the Office of the United Nations High Commissioner for Human Rights concerning the situation in Libya, it was stated that detainees were usually held without access to lawyers. The Office observed that the current situation of prolonged detention and interrogation at the hands of armed brigades without experience or training in the handling of detainees or in conducting criminal investigations, and no effective judicial oversight, was a major factor in facilitating the torture or other ill-treatment of detainees.³ The Office also stated that the overall security situation in the country remained precarious and affected among others the judiciary with intimidation and attacks on prosecutors, judges and court houses.⁴

40. In a submission before the International Criminal Court, the Government of Libya had confirmed the existence of significant practical impediments to securing any legal representation in view of the security situation in Libya and the risk faced by lawyers acting for associates of the former regime.⁵

41. In its another submission before the International Criminal Court, the Government of Libya did not dispute the existence of serious security challenges across the country⁶ or that an unspecified number of detention centres had yet to be transferred to the control of the central Government.⁷

42. In the case under consideration, in grave violation of articles 9 and 10 of the Universal Declaration of Human Rights, as well as articles 9 and 14 of the International Covenant on Civil and Political Rights, the applicants have been deprived of liberty for up to several years without being brought before a judge, granted access to a lawyer or provided with facilities to prepare their defence.

¹ See A/HRC/31/47.

² Ibid., para. 142. See also A/HRC/30/37.

³ United Nations Support Mission in Libya, Office of the United Nations High Commissioner for Human Rights, “Torture and deaths in detention in Libya”, October 2013, p. 3.

⁴ Ibid., p. 15.

⁵ See *The Prosecutor v. Gaddafi and Al-Senussi*, decision on the admissibility of the case against Saif al-Islam Gaddafi, Case No. ICC-01/11-01/11, pretrial chamber, 31 May 2013, paras. 212-213.

⁶ See *The Prosecutor v. Gaddafi and Al-Senussi*, decision on the admissibility of the case against Abdullah Al-Senussi, Case No. ICC-01/11-01/11, pretrial chamber, 11 October 2013, para. 278.

⁷ Ibid., para. 270.

43. The gravity and nature of the violations, as well as the Government's inability to provide redress, have made it impossible to guarantee the applicants' right to a fair trial. In this regard, the Working Group concurs with the view that "where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his/her rights, no fair trial can take place ... Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial."⁸

44. The Working Group considers that, in the case under consideration, the non-observance of the international norms relating to the right to a fair trial, as set out in article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights, is of such gravity as to give the deprivation of liberty of the 12 individuals an arbitrary character.

45. Thus the deprivation of liberty of the applicants falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

Disposition

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

The deprivation of liberty of Abdul Majed al-Gaoud, Jebriil Abdulkarim al-Kadiki, Omar Suleiman Salem Muftah al-Mouallem, Abdulaiti Ibrahim al-Obeidi, Mansour Dao Ibrahim, Abu Zaid Omar Dorda, Saadi Muammer Mohammed Gaddafi, Abdalla Mahmoud Mohamed Hajazi, Ahmad Mohamed Ibrahim, Mustapha Mohammed Kharoobe, Ali Mahmoud Maria and Saad Masoud Saad Zayd has been arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights, as well as articles 9 and 14 of the International Covenant on Civil and Political Rights; it falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

47. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Messrs. al-Gaoud, al-Kadiki, al-Mouallem, Dao, Dorda, Gaddafi, Hajazi, Ibrahim, Maria and Zayd⁹ and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

48. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release them. Pursuant to article 9 (5) of the International Covenant on Civil and Political Rights, they have an enforceable right to compensation.

49. In accordance with article 33 (a) of the methods of work of the Working Group, 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 19 April 2016]

⁸ See *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Case No. ICC-01/04-01/06 (OA 4), App. Ch., 14 December 2006, para. 39.

⁹ The Working Group notes that Mr. Al-Obeidi was acquitted, released and obtained just compensation and Mr. Kharoobe died in detention.