

OPINION NO. 57/2011 (Egypt)

Communication addressed to the Government on 8 August 2011

Concerning Messrs. Mohammed Amin Kamal and Ahmed Jaber Mahmoud Othman

The State is a Party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. The Human Rights Council assumed the mandate by its decision 2006/102. The mandate was extended for a further three-year period by resolution 15/18 adopted on 30 September 2010.
2. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - I. 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 sentence or despite an amnesty law applicable to him) (Category I);
 - II. 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 (UDHR) 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 (ICCPR) (Category II);
 - III. When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the UDHR 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).
 - IV. When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (Category IV);
 - V. When the deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights (Category V).

Submissions

Communication from the Source

3. **Mr. Mohammed Amin Kamal and Mr. Ahmed Jaber Mahmoud Othman**, both born in 1993, usually residing in Cairo, were allegedly arrested by the Egyptian military on 3 February 2011. Messrs. Kamal and Othman were both minors at the moment of their arrest and subsequent trial.

4. It is reported that Messrs. Kamal and Othman were arrested in First Faisan district, Giza for breaching the curfew in place at the time in Cairo. According to the information received, the two minors were taken by the military to the base of the Military Prosecutor (C-28).

5. At the base of the Military Prosecutor, Messrs. Kamal and Othman were allegedly subjected to various acts of torture and other ill-treatment, including electrical shocks and severe beatings. According to the source, they were also insulted and told that they constituted threats to the country's peace and security.

6. Reportedly, Messrs. Kamal and Othman were held in incommunicado detention until their trial. They were not allowed family visits nor telephone calls. Their families only learned about their arrest and trial through the newspapers.

7. On 9 February 2011, Messrs. Kamal and Othman were tried before a military court despite the fact that they are civilians and minors. They were sentenced to five years of imprisonment. On 10 February 2011, they were transferred to El Wadi el Gaded prison, where they remain to date. On 19 February 2011, their sentences were confirmed by the Military Governor.

8. The source submits that their detention runs counter to articles 9 and 10 of the UDHR and articles 9 and 14 of the ICCPR which establish that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal. Moreover, in the source's view, the detention of these two minors contravenes article 37(b) and (d) of the CRC. The source contends that Messrs. Kamal and Othman have not benefited from adequate legal and other assistance, for they had only six days between the moment of arrest and the actual trial as a result of which they were sentenced to five years of imprisonment. Similarly, such an expedited procedure casts doubt on the independence and impartiality of the competent military tribunal.

9. The source is of the view that the violations of the right to a fair trial were of such gravity as to amount to an arbitrary deprivation of liberty, in particular the fact that Messrs. Kamal and Othman did not benefit from the right to appeal in contravention of Article 14(5) of the ICCPR.

Response from the Government

10. By letter dated 8 August 2011, the Working Group requested the Government to provide it with a detailed response on the allegations presented by the source. No response was received within the prescribed delay of 60 days. Nor has the Government requested an extension for its reply in accordance with paragraph 16 of

the Methods of Work. In these circumstances, the Working Group is in a position to render an opinion on the basis of the information at its disposal.

Discussion

11. In the present case, the two minors were arrested by the military and tried under the military procedure. They were detained incommunicado, tortured and tried in an expeditious manner and condemned to a heavy sentence in the absence of their families and lawyers. The Working Group regrets that the Government has provided no response to these serious allegations of human rights violations.

12. Two issues arise in the present case. The first one relates to the detention of minors and the second one to the trial of civilians before a military jurisdiction.

13. With respect to the detention of minors, article 37(b) of the CRC provides that “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”. Article 37(d) clarifies that “[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”.

14. The Working Group refers to the interpretation accorded by the Committee on the Rights of the Child, whereby States parties shall “develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. These should include care, guidance and supervision, counselling, probation, foster care, educational and training programmes, and other alternatives to institutional care (art. 40(4))” (CRC Committee, General Comment No. 10, CRC/C/GC/10, 25 April 2007, para. 23).

15. No such measures have been sought by the authorities in the present case. In the view of the Working Group, the fact that Messrs. Kamal and Othman were arrested, brought for trial and sentenced without having sufficient time to prepare their defence or to confer with a lawyer and without their family being informed, is in breach of the above provisions of the CRC.

16. With respect to the second issue under consideration, reference shall be made to General Comment No. 13 which stated that “quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice”. In this respect, the Human Rights Committee, in its General Comment No. 32 (UN Doc. CCPR/C/GC/32, para. 22) has reaffirmed that the guarantees enshrined in Article 14 of the ICCPR are applicable to common and exceptional jurisdictions of a civil and military character.

17. According to the Human Rights Committee, trial of civilians by military or exceptional jurisdictions should be limited to those cases in which the State party can show that the resort to such a tribunal is absolutely necessary and justified on objective and serious grounds where, in respect of particular group of persons and

offences in question, the civil and ordinary jurisdictions are not in a position to undertake the trial.

18. According to established precedent, the Working Group is of the view that military courts are not, in principle, entitled to try civilians (see e.g. Opinion No. 27/2008 (Egypt)). The Working Group has on several occasions emphasised the need for a distinct treatment between adults and minors, in particular as far as rules of procedure are concerned (see e. g. Opinion No. 45/2008 (India); Opinion No. 38/2008 (Sudan); Opinion No. 16/2004 (Myanmar) and Opinion No. 9/2002 (Philippines)).

19. In the present case, the Government has not rebutted the allegations of serious violations of the basic guarantees of the right to a fair trial. Nor has the Government taken into account the fact that the defendants are minors or applied the procedure different from that governing the trial of adults. The Working Group notes that Messrs. Kamal and Othman did not benefit from the right to appeal, in contravention of Article 14(5) of the ICCPR. The Working Group is concerned that violations of human rights continue to be committed in Egypt on a regular basis following the events of 11 February 2011.

Disposition

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

The deprivation of liberty of Mr. Mohammed Amin Kamal and Mr. Ahmed Jaber Mahmoud Othman is arbitrary and constitutes a breach of article 37 of the CRC, articles 9, 10 and 11 of the UDHR and articles 9 and 14 of the ICCPR, falling within category III of the categories applicable to the cases submitted to the Working Group.

21. As a result of the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation, which would include the immediate release of Messrs. Kamal and Othman and adequate reparation to them in accordance with article 9(5) of the ICCPR.

Adopted on 17 November 2011