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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-eighth session, 13-22 November 2013

No. 41/2013 (Libya)

Communication addressed to the Government on 21 August 2013

Concerning Saif Al-Islam Gaddafi

The Government has not replied to the communication.

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

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former 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 2006/102 and extended it for a three-year period in its resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.

2. 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 the detainee) (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 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);

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(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 for reasons 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, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Saif Al-Islam Gaddafi (hereinafter Mr. Gaddafi) is a national of Libya.
4. On 26 February 2011, the United Nations Security Council adopted resolution 1970 (2011) by which the Council referred the situation in Libya since 15 February 2011 to the Prosecutor of the International Criminal Court (ICC). On 27 June 2011, ICC issued a warrant for Mr. Gaddafi's arrest having found reasonable grounds that he was responsible for committing crimes against humanity of murder and persecution in Libya.
5. According to the source, on or about 19 November 2011, Mr. Gaddafi was captured and detained near the Niger border in Obar, Libya, by forces of the National Transitional Council. Mr. Gaddafi was not shown a warrant or other decision by a public authority authorizing his detention. The source indicates that the Council did not carry out the arrest pursuant to the ICC warrant. Rather, the Council informed ICC that Mr. Gaddafi was being held as a prisoner of war in Zintan, Libya, and being investigated in relation to a number of crimes pursuant to national law.
6. The source reports that, on 1 May 2012, Libya requested that Mr. Gaddafi's case before ICC be determined as inadmissible, on the grounds that the Libyan judicial system was currently investigating Mr. Gaddafi for the same conduct as that alleged by the Court. On 31 May 2013, the ICC Pre-Trial Chamber released a decision rejecting Libya's request (ICC-01/11-01/11) as it determined that the Libyan authority was not investigating the same case as the Court had before it. Further, the Court concluded that the Libyan judicial system was presently incapable of carrying out the necessary investigation into Mr. Gaddafi.
7. The source submits that Mr. Gaddafi's arrest and continued detention exist outside any official legal framework within Libya. It relies on a report of the International Crisis Group dated 17 April 2013 which draws attention to the extent of the disarray within the Libyan judicial system.
8. The source cites the Government of Libya's submission of 24 January 2013 to ICC (ICC-01/11-01/11-258-Red2, para. 58), in which it conceded that in Mr. Gaddafi's case, there was no original detention order issued by the Prosecutor because he was captured in combat by rebel forces in the process of the commission of acts that amounted to a crime. In such circumstances, it reasoned, there was no need for the Prosecutor's office to issue a detention order under articles 108 and 109 of the Libyan Code of Criminal Procedure in order to have a lawful initial period of detention.
9. Mr. Gaddafi has been detained by National Transitional Council forces since his arrest. The source alleges that his actual location remains secret and that he is being detained incommunicado. Mr. Gaddafi is reportedly being held in a facility which is not a proper detention facility and which does not meet applicable international standards, as conceded by the Libyan authorities in its submissions to ICC (ICC-01/11-01/11-130-Red).

The source submits that this is in violation of article 122 of the Criminal Procedure Code, which only allows detention in such an ad hoc facility if a waiver to that effect from the Prosecutor-General is obtained and for a maximum period of 15 days. Although this period may be extended once by an investigating judge, to a maximum of 45 days, the source is not aware of the existence of any such waiver.

10. The source maintains that Mr. Gaddafi is being detained in isolation since his apprehension, in breach of articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights and principle 6 of the Body of principles for the protection of all persons under any form of detention or imprisonment. The fact that he has not been allowed to receive visits from any family members during his detention is, in the source's view, a breach of principles 15, 18 and 19 of the above-mentioned Body of principles.

11. The source submits that, in contravention of article 14 of the International Covenant on Civil and Political Rights, principles 17 and 18 of the Body of principles, and article 106 of the Criminal Procedure Code, Mr. Gaddafi has been kept in detention for over 21 months without access to a lawyer. He has also been interrogated and confronted with evidence without a defence lawyer having been assigned to him and without a lawyer being present during the interrogations. The source notes that the Government of Libya concedes that this is the case in its filings of 24 January 2013 and 4 March 2013 to ICC.

12. The source cited paragraph 787 of the report of the International Commission of Inquiry on Libya, dated 2 March 2012, which determined that until the date of its publication, Mr. Gaddafi had been held without any access to a lawyer or to members of his family and that he had not been able to challenge the lawfulness of his detention before a court.

13. The source further reports that Mr. Gaddafi was not informed in a prompt and timely manner of the charges that he faced and upon which his detention is presumably founded. He has still not been provided access to the case file or been informed of the extent of the charges against him. In the source's view, these facts represent breaches of articles 61, 105 and 108 of the Criminal Procedure Code, as well as of principle 10 of the Body of principles.

14. The source considers the absence of any judicial control over the arrest and detention of Mr. Gaddafi initially and for nearly one year to run contrary to principle 4 of the above-mentioned Body of principles. As a consequence, he was also prevented from challenging the legality of his detention, contrary to article 9, paragraphs 3- 4, of the International Covenant on Civil and Political Rights, and principles 4, 11, 32 and 37 of the Body of principles.

15. The extensions of Mr. Gaddafi's remand were authorized by the Prosecutor-General and not by a court, contrary to article 115 of the Criminal Procedure Code, which requires that the initial detention of a detained person be ordered by an investigating judge. Further, the source argues that the extension periods already granted and those contemplated would extend Mr. Gaddafi's detention beyond the maximum period of 90 days provided for, in breach of article 177 of the Code.

16. The source points out that although Mr. Gaddafi's subsequent detention, as of 30 October 2012, has been authorized by a court, these hearings were held in closed session and were not open to members of the public. Furthermore, in contravention of article 106 of the Criminal Procedure Code, the hearings took place without Mr. Gaddafi being legally represented.

17. In the source's view, Mr. Gaddafi should be immediately released from detention, as provided for in article 33 of the Criminal Procedure Code in cases where detentions fall foul of the provisions of the Code.

18. The source considers Mr. Gaddafi's continued detention to constitute a deprivation of liberty pursuant to former Commission on Human Rights resolution 1997/50. It submits that the circumstances of Mr. Gaddafi's detention render it arbitrary under category III of the categories applicable to the consideration of cases submitted to the Working Group.

19. The source conveys its concern that the Libyan authorities may attempt to assert that it is entitled to suspend or derogate from certain legal protections due to the situation in Libya or to the internal armed conflict which was in progress. The source submits that such an argument would not provide any basis for the continued denial of Mr. Gaddafi's fair trial rights and his right not to be arbitrarily deprived of his liberty. The source argues that the Body of principles apply whatever the circumstances and do not permit suspension in times of crisis. Further, certain core rights are viewed as peremptory norms of international law from which no derogation in times of emergency is possible. It draws the attention of the Working Group to its report of 10 January 2008 and to the Human Rights Committee's general comment No. 29 (2001) on states of emergency.

Response from the Government

20. The communication from the source was addressed to the Government on 21 August 2013. The Working Group also informed ICC that it was considering the case of alleged arbitrary detention of Mr. Gaddafi.

21. The Working Group regrets that the Government has not responded to the allegations transmitted to it.

22. Despite the absence of any information from the Government, the Working Group considers that it is in a position to render its opinion on the detention of Mr. Gaddafi in conformity with paragraph 16 of its methods of work.

Discussion

23. On 26 February 2011, the Security Council by its resolution 1970 (2011) referred the situation in Libya since 15 February 2011 to the ICC Prosecutor.¹

24. On 27 June 2011, the ICC Pre-Trial Chamber issued the warrant for the arrest of Mr. Gaddafi, having found reasonable grounds to believe that he was criminally responsible for the commission of crimes against humanity of murder and persecution in Libya.

25. In November 2011, Mr. Gaddafi was captured and detained by forces of the National Transitional Council. The Council informed ICC that Mr. Gaddafi was being held as a prisoner of war in Zintan, Libya, and being investigated in relation to a number of crimes pursuant to national law.

26. According to the Government's submission to ICC, investigations into Mr. Gaddafi's alleged criminal conduct began on the date of his capture, 23 November 2011, in particular with respect to financial crimes and corruption. A decision was taken on 17 December 2011 to extend this investigation to include crimes against the person under Libyan law. On 8 January 2012, the Prosecutor-General commenced the investigation against Mr. Gaddafi for serious crimes (including murder and rape) allegedly committed by him during the revolution (including in the period between 15 and 28 February 2011).²

¹ S/RES/1970 (2011).

² *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, Case No. ICC-01/11-01/11 (31 May 2013), para. 26.

Burden of proof

27. The Government chose not to rebut the prima facie reliable allegations submitted by the source. In this regard, the Working Group recalls that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is “generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out”.³

28. A similar approach has been adopted by the Human Rights Committee, according to which the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information.⁴

Violation of the right to legal assistance

29. In gross violation of article 14, paragraph 3, of the International Covenant on Civil and Political Rights, Mr. Gaddafi has been deprived of his right to legal assistance for two years in the case involving capital punishment. For two years he has had no access to a lawyer. He has been interrogated without having a defence counsel assigned to him and without a lawyer being present during the interrogations. This was confirmed by the Government in its filings of 24 January 2013 and 4 March 2013 to ICC. It was also confirmed by the United Nations Commission of Inquiry, which stated that Mr. Gaddafi was being held in Zintan, without any access to a lawyer and was not able to challenge the lawfulness of his detention before a court.⁵ Furthermore, the ICC Pre-Trial Chamber found that the Government did not show whether it would overcome the existing difficulties in securing assignment of a lawyer for Mr. Gaddafi.⁶

30. The ICC Pre-Trial Chamber also expressed its concern that the fact that Mr. Gaddafi was interrogated without the presence of his counsel was an impediment to the progress of proceedings against Mr Gaddafi.⁷

31. In this regard, the Working Group, while not bound by the view of the European Court of Human Rights, concurs with its view that “an accused often finds himself in a particularly vulnerable position at that stage of the proceedings ... In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer”.⁸ Similarly, the Trial Chamber of the International Criminal Tribunal for Rwanda in the *Bagosora et al.* case emphasized that the right to counsel is rooted in the concern that an individual, when detained by officials for interrogation, is often fearful, ignorant and vulnerable; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation.⁹

³ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 661, para. 55.*

⁴ See, for instance, *Butovenko v. Ukraine*, Human Rights Committee, No. 1412/2005, para. 7.3; *Medjnoune v. Algeria*, No. 1297/2004, para. 8.3; *Conteris v. Uruguay*, No. 139/1983, para. 7.2; *Bleier v. Uruguay*, No. 30/1978, para. 13.3.

⁵ Report of the International Commission of Inquiry on Libya (A/HRC/19/68 of 2 March 2012), para. 787.

⁶ *Gaddafi* admissibility decision (see footnote 2 above), para. 215.

⁷ *Ibid.*, para. 214.

⁸ *Pavlenko v. Russia*, Application No. 42371/02, Judgment (1 April 2010), para. 101.

⁹ *Bagosora et al.*, Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89 (C), Case No. ICTR-98-41-T (14 October 2004), para. 16.

32. Indeed, as was emphasized by the Human Rights Committee, in cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.¹⁰ Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused.¹¹

Other serious violations of the right to a fair trial

33. In violation of article 9, paragraphs 3-4, of the International Covenant on Civil and Political Rights, Mr. Gaddafi has never been brought before a judge in two years and was prevented from challenging the legality of his detention before the court. In fact, since his arrest, Mr. Gaddafi has been detained incommunicado by the Libyan authorities.

34. Mr. Gaddafi was not promptly informed of any charges against him as required by article 9, paragraph 3, of the International Covenant on Civil and Political Rights.

35. In violation of article 14, paragraph 3, of the International Covenant on Civil and Political Rights, Mr. Gaddafi was actually deprived of any facilities for the preparation of his defence. He has not been provided access to any evidence against him. Nor has he been able to interview witnesses who would testify on his behalf¹²

Government's inability to rectify the violations and to guarantee a fair trial

36. According to the recent report of the Office of the United Nations High Commissioner for Human Rights, "torture and other ill-treatment in Libya is an ongoing and widespread concern in many detention centres and torture continues today in Libya ... Detainees are usually held without access to lawyers ... The vast majority of an estimated 8,000 conflict-related detainees is also held without due process. ... 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, is a major factor in facilitating the torture or other ill-treatment of detainees."¹³

37. The report also states that "[t]he overall security situation in the country remains precarious and affects among others the judiciary with intimidation and attacks on prosecutors, judges and courthouses. Most recently, the President of the Court of Appeal in Derna was assassinated outside the courthouse on 16 June, and a retired senior judge was assassinated in Benghazi on 19 August, possibly as an act of revenge by a criminal that had been sent to prison by the victim".¹⁴

38. The ICC Pre-Trial Chamber in the Gaddafi case found that Libya was unable to secure the transfer of Mr. Gaddafi from his place of detention under the Zintan militia into the custody of the State authority and there was no concrete evidence that that problem might be resolved in the near future.¹⁵

39. The Pre-Trial Chamber also found that: "Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory. Due to these

¹⁰ *Aliboeva v. Tajikistan*, No. 985/2001, para. 6.4; *Saidova v. Tajikistan*, No. 964/2001, para. 6.8; *Aliev v. Ukraine*, No. 781/1997, para. 7.3; *LaVende v. Trinidad and Tobago*, No. 554/1993, para. 58.

¹¹ Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 31.

¹² See *Gaddafi* admissibility decision (footnote 2 above), para. 211.

¹³ *Torture and Deaths in Detention in Libya* (October 2013), Report of the United Nations Support Mission in Libya and the Office of the United Nations High Commissioner for Human Rights, p. 3.

¹⁴ *Ibid.*, p. 15.

¹⁵ *Gaddafi* admissibility decision (see footnote 2 above), para. 215.

difficulties, ... its national system cannot yet be applied in full in areas or aspects relevant to the case ... As a consequence, Libya is ... ‘otherwise unable to carry out [the] proceedings’ in the case against Mr. Gaddafi in compliance with its national laws ...”¹⁶

40. At the ICC hearing, the Government of Libya confirmed that significant practical impediments exist in securing any legal representation for Mr Gaddafi in view of the security situation in Libya and the risk faced by lawyers who act for associates of the former regime. The attempts to secure legal representation for Mr. Gaddafi had therefore failed.¹⁷

41. Furthermore, the ICC Pre-Trial Chamber held that “the Libyan Government has failed to substantiate its assertions that it envisages the implementation of protective measures for witnesses who agree to testify in the case against Mr Gaddafi”.¹⁸

42. Indeed, at the recent ICC hearings, the Government of Libya did not dispute the existence of serious security challenges across the country¹⁹ and the fact that an unspecified number of detention centres are yet to be transferred under the control of the central government.²⁰

Conclusion

43. In grave violation of his fundamental rights, Mr. Gaddafi has been deprived of liberty for two years, incommunicado, without having been able to appear before the judicial authorities to challenge the legitimacy of the detention, without access to a lawyer, without having any facilities for the preparation of his defence; which detention has been extended far beyond the maximum period of time and in violation of the procedure provided for in Libyan law.

44. The gravity of the violations, their nature in this case, and the Government’s inability to rectify the violations, has made it impossible to guarantee Mr. Gaddafi’s right to a fair trial in Libya. In this regard, the Working Group concurs with the view that “[w]here 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 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”.²¹

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

46. Thus the deprivation of liberty of Mr. Gaddafi falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

¹⁶ Ibid., para. 205.

¹⁷ Ibid., paras. 212-213.

¹⁸ Ibid., para. 211.

¹⁹ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, Case No. ICC-01/11-01/11 (11 October 2013), para. 278.

²⁰ Ibid., para. 270.

²¹ *Lubanga*, 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) (14 December 2006), para. 39.

Disposition

47. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Mr. Gaddafi has been arbitrary, being in contravention of article 10 of the Universal Declaration of Human Rights, and 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.

48. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Gaddafi 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.

49. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be both to discontinue the domestic proceedings against Mr. Gaddafi and further his detention under those proceedings without prejudice to the Government's obligations before ICC in the proceedings originating from the investigation into the situation referred to ICC by the Security Council.

50. The Working Group recalls the Human Rights Council's call for all States to cooperate with the Working Group, 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.²²

[Adopted on 14 November 2013]

²² Human Rights Council resolution 24/7 on arbitrary detention, paras. 3, 6 and 9.