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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. 3/2016 concerning Farida Ali Abdul Hamid and Salim Mohamed Musa (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 Farida Ali Abdul Hamid and Salim Mohamed Musa. 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 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 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. Ms. Abdul Hamid, born on 9 May 1950, is a citizen of Egypt. She is married to a Libyan citizen and is the mother of 10 children, with whom she usually lives in the Al-Lethi neighbourhood of Benghazi, Libya. Mr. Musa, the 38-year-old son of Ms. Abdul Hamid, is a national of Libya.

5. On 14 May 2015, Ms. Abdul Hamid and her son Mr. Musa were arrested by the armed group Operation Room at a checkpoint in Almaqzaha area, Budizira, Benghazi. Operation Room is allied to the armed group Operation Dignity, whose ranks largely comprise elements of the Libyan army and other forces loyal to General Haftar. Ms. Abdul Hamid and Mr. Musa were arrested without any arrest warrant. They were not provided with any reason for their arrest, which was allegedly linked to the perceived involvement of their family members with armed groups opposed to Operation Dignity.

6. Ms. Abdul Hamid was brought to Budizira detention facility, where she was held incommunicado for three days. She was denied access to her family and lawyer during that period.

7. On 17 May 2015, she was transferred to Kuweifiya prison in Benghazi, which is under the control of the judicial police. Mr. Musa too has been detained at the Kuweifiya detention facility since the time of the arrest.

8. Ms. Abdul Hamid was last seen by her family in September 2015. Since then, her family has not visited her for fear of being arrested. Some family members have not been able to visit her because they have fled Benghazi for fear of being attacked by pro-Operation Dignity armed groups.

9. Concerns have been raised about the deteriorating health of Ms. Abdul Hamid. She suffers from a stomach cancer, for which she had to undergo surgery prior to her incarceration. She also suffers from asthma, high blood pressure and diabetes. The prison authorities confirmed that in December 2015 Ms. Abdul Hamid was brought to a hospital by an armed escort for a medical diagnosis and that she was sent back to Kuweifiya prison on the same day.

10. To date, Ms. Abdul Hamid and Mr. Musa have not been informed of the reason for their arrest, nor have they been charged. There appears to be no legal basis justifying their arrest and detention. They have no access to a lawyer and have not been brought before a court either.

11. The source submits that the continued deprivation of liberty of Ms. Abdul Hamid and Mr. Musa is arbitrary and falls under categories I and III of the Working Group's categories of arbitrary detention. It is the view of the Working Group that the imprisonment of these two individuals is without any legal basis and is thus in violation of article 9 (1) of the Covenant and could fall under category I.

12. The source further submits that Ms. Abdul Hamid and Mr. Musa have not been guaranteed the international norms of due process and guarantees to 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 Covenant. It argues that Ms. Abdul Hamid and Mr. Musa have been held in pretrial detention since 14 May 2015 without being informed of the reason for their arrest, without any charge or trial and without having access to a lawyer, in violation of articles 9 (2)-(4) and 14 (3) (a) and (c) of the Covenant.

Response from the Government

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

Discussion

14. Ms. Abdul Hamid and Mr. Musa have been detained by the armed group Operation Dignity acting on behalf and with the support of the Government of Libya.¹ Moreover, Operation Dignity was endorsed by the House of Representatives.² In its report on Libya containing detailed findings, the Office of the United Nations High Commissioner for Human Rights noted that, in November 2014, the House of Representatives issued a statement declaring that “Operation Dignity (and its commanders), is a legitimate military operation under the Commander of General Staff and the Interim Libyan Government deriving its legitimacy from the Libyan people”.³

15. Thus, for the purpose of this discussion, the Working Group considers that the applicants have been deprived of liberty by State actors or by armed groups acting on behalf of, or with the support, direct or indirect, consent or acquiescence of, the State.

16. The Working Group notes the finding of the above-mentioned investigation indicating that in the present case the detention has taken place in the context of the non-international armed conflict currently occurring in Libya.⁴ The Working Group also notes that there is a nexus between the detention and that conflict. As stated by the source, Ms. Abdul Hamid and Mr. Musa were detained because of the alleged involvement of their family members with armed groups opposed to Operation Dignity.

17. In that regard, the Working Group concurs with the opinion of the International Committee of the Red Cross (ICRC) concerning an internment, i.e. administrative detention for security reasons in situations of armed conflict. According to that opinion, “internment may not be used as a general deterrent to the future activity of another person”.⁵ Furthermore, as noted by ICRC, a careful evaluation of whether a high threshold has been met for applying “imperative security reasons” as a ground for detention must be carried out in relation to each person detained.⁶ These requirements have not been met in the case of Ms. Abdul Hamid and Mr. Musa.

¹ See A/HRC/31/47, paras. 3, 8-11 and 13 and footnote 1.

² Ibid., para. 11.

³ See the detailed findings contained in the report on Libya of the Office of the United Nations High Commissioner for Human Rights, in particular footnote 57. Available at www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Pages/ListReports.aspx.

⁴ Ibid., para. 21.

⁵ See ICRC, “Internment in armed conflict: basic rules and challenges”, opinion paper (November 2014), p. 9.

⁶ Ibid.

18. The administrative character of the detention in the present case does not per se deprive Ms. Abdul Hamid and Mr. Musa of their rights as detained persons. In particular, an internee shall be informed promptly of the reasons for internment,⁷ has the right to effective legal assistance,⁸ shall be given an effective opportunity to be heard promptly by a judicial or other authority and shall have the continuance of detention reviewed by a judicial or other authority.⁹ None of these rights have been respected in the case of Ms. Abdul Hamid and Mr. Musa.

19. The Government did not rebut the allegation of the absence of a real threat posed by Ms. Abdul Hamid and Mr. Musa. Indeed, even if such a threat existed at the time of the arrest, an internment should have ceased as soon as the individual had stopped posing a real threat to State security.¹⁰

20. The Working Group considers that the non-observance of the international human rights norms that prohibit arbitrary arrest and detention, namely article 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant in the case under consideration, is of such gravity as to give the deprivation of liberty of Ms. Abdul Hamid and Mr. Musa an arbitrary character.

21. Thus, the deprivation of liberty of Ms. Abdul Hamid and Mr. Musa falls within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

Disposition

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

The deprivation of liberty of Farida Ali Abdul Hamid and Salim Mohamed Musa has been arbitrary, being in contravention of article 9 of the Universal Declaration of Human Rights and article 9 (1) of the International Covenant on Civil and Political Rights; it falls within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

23. Consequent upon the opinion rendered, the Working Group requests the Government to take the steps necessary to remedy the situation of Ms. Abdul Hamid and Mr. Musa and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the Covenant.

24. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Ms. Abdul Hamid and Mr. Musa. Pursuant to article 9 (5) of the Covenant, they shall have an enforceable right to compensation.

25. In accordance with article 33 (a) of its methods of work, 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]

⁷ Ibid. See also the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

⁸ See the Body of Principles, principles 17 and 18.

⁹ Ibid., principle 11.

¹⁰ Jelena Pejic, "Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence", *International Review of the Red Cross*, vol. 87, No. 858 (June 2005), p. 382.