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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 85/2019 concerning Salem Ghereby (Libya, Senegal and United States of America)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 24 August 2019 the Working Group transmitted to the Governments of Libya, Senegal and the United States of America a communication concerning Salem Ghereby. The Governments have not replied to the communication. Libya, Senegal and the United States are parties 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. Salem Gheryby was born in Zliten, Libya, in 1961. He became a teacher of history and geography and, in the early 1990s, fled to Pakistan and Afghanistan, where he continued to work as a teacher. In Pakistan, he met his wife, with whom he has three children.

5. The initial communication also included another person who has recently been released and requested not to be named in the present procedure.

(a) Arrest and detention

6. According to the source, Mr. Gheryby was arrested and detained by Pakistani forces in December 2001. He was transferred to the custody of the United States in Afghanistan that same month. In May 2002, he was sent to the detention facility located at Guantánamo Bay Naval Base. Allegedly, the Guantánamo Review Task Force of the United States cleared him for release in 2010, in the context of its recommendation for the release of 240 detainees and their subsequent transfer to other countries. However, the implementation of that recommendation was significantly delayed. In 2010, 24 detainees were transferred, but in 2011, 2012 and 2013, only 1, 3 and 11 detainees, respectively, were transferred. Such inactivity was due in part to the necessity of finding recipient States for the detainees who could not return to their home countries. In the case of Mr. Gheryby, he continued to be unlawfully detained in the Guantánamo Bay detention facility until his transfer to Senegal on 3 April 2016.

7. The source explains that Mr. Gheryby was likely initially arrested and detained owing to the prevalent use of bounties by the United States during the period following 2001. The source explains that \$5,000 was paid to those who aided in “the capture of Taliban or Al-Qaida fighters”. The Department of Defense of the United States has found that 86 per cent of all 780 detainees at Guantánamo Bay detention facility were arrested by the Pakistani authorities or the Northern Alliance, with their subsequent transfer to the custody of the United States, during the period when such bounties were being offered. Allegedly, the vast majority of all those held at the Guantánamo Bay detention facility were detained during that period, severely undermining any intelligence used to justify their detention.

8. The source explains that Mr. Gheryby was resettled in Senegal in 2016, with assurances that he would be granted permanent residence. On 26 March 2018, however, he was notified in writing that, based on the ending of his two-year residency permit in Senegal on 3 April 2018, the Government of Senegal and the Embassy of Libya to Senegal had decided to facilitate his return to Libya soon thereafter.

9. The source indicates that Mr. Gheryby agreed to return voluntarily to Libya, because Senegal had made it clear that it would not allow him to be reunited with his family there. His only option to reunite with his wife and three children therefore was to join them in Zliten, Libya. Mr. Gheryby stipulated that he would only consent to returning through Misrata airport, given that he would face a risk to his life from the militias that controlled the other airports. However, on 4 April 2018, Mr. Gheryby was instead flown to Tripoli. The source indicates that Mitiga International Airport in Tripoli is under the control of the Special Deterrence Force, which runs a detention facility there, about which, as recalled by the source, the United Nations has reported that detainees are subjected to torture, unlawful killing, denial of adequate medical treatment and poor detention conditions.

10. The source affirms that Mr. Gheryby has been held incommunicado since his arrival in Tripoli. The source specifies that Mr. Gheryby is in poor health. He is half blind and was affected by a car accident which has, at times, left him bedridden. Given his health situation, the source has serious concerns as to his ability to physically cope with further detention and as to his limited access to medical treatment.

11. According to the source, in November 2018, a Public Prosecutor in Libya confirmed verbally to one of Mr. Gheryby’s lawyers that he had been detained at the detention facility in Mitiga International Airport in Tripoli.

12. The source reports that, on 17 December 2018, officials of the Office of the Public Prosecutor verbally stated that they would grant Mr. Ghereby's family permission to visit him at the Mitiga detention facility. However, the officials never issued the relevant paperwork and no visit occurred.

13. In addition, according to the source, beyond the documented human rights abuses at the Mitiga detention facility, the strong possibility that Mr. Ghereby is detained there is of particular concern, considering the current conflict in Libya. There is a strong likelihood of further clashes between the Libyan National Army and the internationally recognized Government of National Accord, in and around the airport, as evidenced by the incidents that occurred in April and June 2019.

(b) Legal analysis

14. The source notes that the facts illustrate that Libya and Senegal have breached a number of international law obligations through the repatriation of Mr. Ghereby, knowing the likelihood that he would face torture, arbitrary detention and/or death.

15. The source recalls that torture is prohibited, pursuant to the Covenant and the African Charter on Human and Peoples' Rights and under various provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, instruments ratified by both Libya and Senegal. The source also recalls the absolute prohibition of refoulement, as set out in article 3 of the Convention against Torture.

16. The source argues that, in executing the forcible transfer of Mr. Ghereby (i.e., deporting him to Tripoli, when he had only consented to be transferred to Misrata), Senegal has breached its non-refoulement obligation under the Convention against Torture.

17. The source indicates that the Senegalese authorities were advised by Mr. Ghereby of his credible fear of persecution upon repatriation to Libya. Other organizations also informed Senegal of those concerns, both directly, through correspondence, and indirectly, through the Embassy of the United States to Senegal, the International Committee of the Red Cross and the press.

18. The risk that Mr. Ghereby would face torture and/or inhuman treatment if he was deported to Libya was therefore thoroughly conveyed to Senegal. In 2013, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the United Nations Support Mission in Libya (UNSMIL) released reports describing torture as an ongoing and widespread concern in many detention centres. Furthermore, for more than two years, the United Nations has drawn attention to the abuses carried out at the detention centre at Mitiga airport, where Mr. Ghereby was taken.

19. Therefore, the source notes that Senegal would have been well aware of the dangers that Mr. Ghereby faced in being deported to Libya, indeed because he had specifically brought those dangers to its attention. Mr. Ghereby made clear that he would not consent to returning to Libya through any airport other than Misrata, because he would face a risk to his life from the militias that controlled other airports.

20. In addition, the source claims that there are also procedural requirements associated with the non-refoulement obligation, including that each case should be individually, impartially and independently examined by the State party through competent administrative and/or judicial authorities and that the State must ensure access to a lawyer and the provision of a right of appeal against any deportation order, with suspensive effect of its enforcement. The source notes however that Mr. Ghereby was not afforded an opportunity to challenge his deportation in asylum proceedings or in any other way. Instead, he was collected from his apartment in Dakar on the understanding that he was being transferred to Misrata airport.

21. In the present case, the authorities of Senegal have clearly breached the non-refoulement obligation of Senegal by repatriating Mr. Ghereby to Libya through a different airport than the only one at which he had indicated that he would feel safe arriving.

22. The source considers that the circumstances described above give rise to potential breaches of other international legal obligations on the part of Libya and Senegal. They concern Mr. Ghereby's right to life, as protected by article 6 of the Covenant and article 4 of the African Charter on Human and Peoples' Rights. As explained above, the source is

unable to ascertain whether Mr. Ghereby is alive, given that, prior to his deportation, he openly expressed his fears for his life, should he be returned to Libya through any airport other than Misrata.

23. In addition, the source argues that the right to liberty of Mr. Ghereby, including the prohibition of arbitrary detention, as protected by article 9 of the Covenant and article 6 of the African Charter on Human and Peoples' Rights, has been violated.

24. The source cites the prohibition on enforced disappearance, as defined in article 2 of the Convention for the Protection of All Persons from Enforced Disappearance and the non-refoulement obligation preventing deportation where there are substantial grounds for believing that the deportee would be in danger of being subjected to enforced disappearance.

25. Given Mr. Ghereby's health situation and medical concerns, Libya and Senegal may have also breached obligations under the Convention on the Rights of Persons with Disabilities.

Response from the Governments

26. On 24 August 2019, the Working Group transmitted the allegations from the source to the Governments of Libya, Senegal and the United States, under its regular communications procedure, requesting each Government to provide detailed information, by 23 September 2019, about the current situation of Salem Ghereby and any comment on the source's allegations. However, none of the three Governments has responded to the communication.

Discussion

27. In the absence of a response from the Governments, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

28. 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 (A/HRC/19/57, para. 68). In the present case, the three Governments have chosen not to challenge the *prima facie* credible allegations made by the source.

Violations in the custody of the United States of America

29. Pursuant to the established jurisprudence of the Working Group concerning the detainees in the Guantánamo Bay detention facility, the Working Group considers that Mr. Ghereby was subjected to arbitrary detention in the custody of the United States for 14 years, from the time of his arrest in Pakistan until the time of his transfer to Senegal. In the present case, the Working Group follows its reasoning developed in its previous opinions related to detainees in the Guantánamo Bay detention facility.¹ The Working Group notes that, although the Guantánamo Review Task Force of the United States had cleared Mr. Ghereby for release in 2010, he continued to be deprived of his liberty until 2016. This shows that, at a minimum, his detention was lacking a legal basis during that period and amounts to a deprivation of liberty under category I. The initial violations of the rights of Mr. Ghereby led to his transfer to Senegal, as negotiated by the United States. His subsequent transfer, from Senegal to Libya, then led to a further arbitrary detention of Mr. Ghereby, as alleged by the source.

30. The Working Group notes that the situation stems from the fact that Mr. Ghereby was transferred from the custody of the United States to that of Senegal as a free man; the initial conditions of his stay in Senegal do not amount to a detention, even though the information before the Working Group does not contain any information on the status granted to him in Senegal. However, the public statements by officials of the United States support the assumption that he was granted protection:

¹ See opinions No. 70/2019; No. 89/2017, para. 66; No. 56/2016; No. 53/2016; No. 50/2014; No. 57/2013; No. 10/2013; No. 2/2009; No. 3/2009; and No. 29/2006.

The Department of Defense announced today the transfer of Salem Abdu Salam Ghereby ... from the detention facility at Guantanamo Bay to the Government of Senegal.

As directed by the president's Jan. 22, 2009, executive order, the interagency Guantanamo Review Task Force conducted a comprehensive review of this case. As a result of that review, which examined a number of factors, including security issues, Ghereby was unanimously approved for transfer by the six departments and agencies comprising the task force.

...

In accordance with statutory requirements, the secretary of defense informed Congress of the United States' intent to transfer these individuals and of the secretary's determination that these transfers [meet] the statutory standard.

The United States is grateful to the Government of Senegal for its humanitarian gesture and willingness to support ongoing U.S. efforts to close the Guantanamo Bay detention facility. The United States coordinated with the Government of Senegal to ensure these transfers took place consistent with appropriate security and humane treatment measures.²

Violations in Senegal

31. As noted in its revised deliberation No. 5 on deprivation of liberty of migrants, the Working Group recalls that the principle of non-refoulement must always be respected, and the expulsion of non-nationals in need of international protection, including migrants regardless of their status, asylum seekers, refugees and stateless persons, is prohibited by international law. Article 3 (1) of the Convention against Torture provides for the same principle, as does article 13 of the Covenant. The Working Group considers that the principle of non-refoulement applies to Mr. Ghereby in the present case. He agreed to be transferred to Libya, but through a specific airport, and his transfer anywhere else was carried out in the absence of his free will. Such a transfer constitutes a violation of the principle of non-refoulement.

32. In addition, given the protection granted to Mr. Ghereby, there was no legal basis for the Senegalese authorities to arrest and detain him and proceed with his unlawful refoulement to Libya. Furthermore, Senegal failed to provide him with an opportunity to challenge the arrest, the detention or the planned refoulement, contrary to its obligations under article 13 of the Covenant.³ There were no apparent compelling reasons of national security to justify such a failure to provide a review of the decision to transfer Mr. Ghereby to Libya, and Senegal did not present such an argument to the Working Group. As a result, his arrest and detention in Senegal were arbitrary and fall within category I.

Violations in Libya

33. According to the source, Mr. Ghereby was flown to Tripoli on 4 April 2018, and since then, he has been held in incommunicado detention. The source informs the Working Group that the detention facility where he is held in Mitiga International Airport is under the control of the Special Deterrence Force.

34. The Governments of Libya, Senegal and the United States have had the opportunity to respond to that allegation, but have chosen to remain silent, and the Working Group sees no reason not to believe the allegation. In addition, the Governments have given no indication of the reason for Mr. Ghereby's detention in Libya, including whether any charges have been brought against him. The Working Group recalls its previous opinions, in which it has held that deprivation of liberty by armed groups could lead to the

² United States, press statements of 4 April 2016 of the Department of Defense (available from www.defense.gov/Newsroom/Releases/Release/Article/712382/detainee-transfers-announced/) and of the Embassy of the United States to Senegal (available from <https://sn.usembassy.gov/senegal-offers-two-former-guantanamo-detainees-humanitarian-resettlement/>).

³ See opinion No. 11/2018, para. 57.

responsibility of Libya and reaffirms the reasoning set out in those opinions.⁴ The Working Group therefore concludes that there was no legal basis for the detention of Mr. Ghereby in Libya. Furthermore, the nature of his detention without any trial proceedings or any legal assistance or representation for over two years is in contravention to international norms on fair trial rights.⁵ The continuous detention of Mr. Ghereby in Libya falls within categories I and III.

Joint responsibility of the three States

35. The Working Group will now consider the responsibility of each of the three States concerned and recalls the principle of joint responsibility that also applies to States when more than one of them were involved in the perpetration of a violation.⁶

36. The Working Group notes that Mr. Ghereby is detained in Libya by the Special Deterrence Force, a non-State actor. That non-State actor is operating within the territory of a State and under the control of its authorities, whose responsibility is, as a result, engaged.⁷ The continuous detention of Mr. Ghereby since his arrival in Libya is therefore the responsibility of Libya. That detention would not have been possible, however, if Senegal had not unlawfully transferred Mr. Ghereby, and therefore Senegal is consequently jointly liable for the violation.

37. Moreover, the Working Group considers that the arrest, detention and unlawful refoulement by Senegal is the responsibility of Senegal. However, the residence of Mr. Ghereby in Senegal was itself the consequence of the arbitrary arrest and detention by the United States, which negotiated with Senegal for the initial transfer of Mr. Ghereby, as acknowledged in the statement of the Department of Defense (see para. 30 above). It was the obligation of the United States to remedy its wrongdoings by reinstating Mr. Ghereby in a situation of freedom, with no subsequent threat that could be linked to the abuse he suffered. The Working Group notes that, before the transfer from Senegal to Libya, the United States authorities were informed of the risk of persecution faced by Mr. Ghereby in case of such a transfer to Libya (see para. 17 above). The Working Group therefore considers that the United States had an obligation to ensure and guarantee that, if Mr. Ghereby was transferred to Senegal, he would not be subjected to further grave and irreparable violations and that the principle of non-refoulement would be respected.

38. The United States is jointly responsible for the violations that occurred in Senegal, because they would not have occurred if the United States had not initiated the abuse that led to the unlawful and extensive detention of Mr. Ghereby in the Guantánamo Bay detention facility. Moreover, the current abuse in Libya would not have occurred, if the initial abuse by the United States had not taken place, abuse which led to the transfer of Mr. Ghereby to Senegal and his subsequent unlawful refoulement to Libya from there. The United States is therefore jointly responsible for the violations in both Senegal and Libya.

39. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

Disposition

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

The deprivation of liberty of Salem Ghereby, being in contravention of articles 2, 7, 9 and 10 of the Universal Declaration of Human Rights and articles 9, 10, 13 and 14

⁴ See opinions No. 3/2016 and No. 4/2016.

⁵ Article 14 of the Covenant; article 10 of the Universal Declaration of Human Rights; and principle 9 and guideline 8 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

⁶ For a detailed analysis, see the commentary of the International Law Commission on articles 16 and 17 of the draft articles on responsibility of States for internationally wrongful acts (A/56/10, pp. 155–165).

⁷ See opinions No. 18/2019 and No. 39/2018. See also OHCHR and UNSMIL, “Abuse behind bars: arbitrary and unlawful detention in Libya”, April 2018, p. 18. Available from www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf.

of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

41. The Working Group requests the Governments of Libya, Senegal and the United States to take the steps necessary to remedy the situation of Mr. Gheryby without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

42. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Gheryby immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law, bearing in mind the joint responsibility of all three Governments.

43. The Working Group urges all three Governments to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Gheryby and to take appropriate measures against those responsible for the violation of his rights.

44. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

45. The Working Group requests the Governments of Libya, Senegal and the United States to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

46. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Governments of Libya, Senegal and the United States to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Gheryby has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Gheryby;
- (c) Whether an investigation has been conducted into the violation of Mr. Gheryby's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Libya, Senegal and the United States with their international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

47. The Governments of Libya, Senegal and the United States are invited to inform the Working Group of any difficulties they 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.

48. The Working Group requests the source and the Governments of Libya, Senegal and the United States to provide the above-mentioned information within six months of the date of 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.

49. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has 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.⁸

[Adopted on 22 November 2019]

⁸ See Human Rights Council resolution 42/22, paras. 3 and 7.