

NATIONS UNIES
HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME

UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

Mandates of the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

REFERENCE: UA Terrorism (2005-4) G/SO 214 (53-24) G/SO 214 (3-3-16)
EGY 12/2012

11 September 2012

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment pursuant to Human Rights Council resolutions 17/2, 15/15, and 16/23.

In this connection, we would like to draw the attention of your Excellency's Government to information we have received regarding the situation of Mr. **Mohamed Gayez Sabbah**, Mr. **Ossama Mohamed Abdel-Ghani Al-Nakhlawi** and Mr. **Younis Mohamed Abu-Gareer**, who were detained on terrorism charges and tried by Egyptian state security courts in 2006. Their cases have been considered by the African Commission on Human and Peoples' Rights in 2011.

According to the information received:

On 30 November 2006, Mr. Mohamed Gayez Sabbah, Mr. Ossama Mohamed Abdel-Ghani Al-Nakhlawi and Mr. Younis Mohamed Abu-Gareer, who were detained on terrorism charges, were tried and sentenced to death by hanging by Egyptian state security courts. It is reported that before the trial the three men were denied access to a lawyer or the opportunity to be brought before a court. It is reported that they were held incommunicado and that they have been subjected to extensive mistreatment and torture, which included electrical shocks, beatings, hanging from their hands and legs and prolonged sensory deprivation, after which they allegedly were forced to 'confess' to involvement in bombings which took place on 6 October 2004 and 23 July 2005 on the Sinai Peninsula in Egypt.

It is reported that in 2011 the three men successfully claimed before the African Commission on Human and Peoples' Rights (Communication 334/06 - Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt) that Egypt

had violated their rights under the African Charter. In its decision, made public in February 2012, the African Commission condemned the trials, conviction and death sentences imposed on the three men by the state security courts as having violated their basic rights, including on the basis of the failure to ensure that evidence obtained through torture was not admitted in the state security courts and a failure to ensure the independence of these courts.

It is reported that in a welcome response, your Excellency's Government lifted the death sentences and indicated that it would submit the case for retrial. However, it is furthermore reported that their cases will be resubmitted for retrial to a different panel of the same state security court, although the African Commission on Human and Peoples' Rights found that the state security courts have failed to ensure that evidence obtained through torture was not admitted. The hearings will allegedly continue on 12 September 2012.

In addition, it is reported that the state of emergency in Egypt came to an end on 31 May 2012. In this context it is reported that a petition to the Supreme Constitutional Court has been submitted on 13 June 2012 (Case no. 94/34), challenging the constitutionality of the provision of the Emergency Law enabling the State to continue trials before state security courts.

While we do not wish to prejudge the accuracy of these allegations, we would like to appeal to your Excellency's Government to seek clarification of the circumstances regarding the case of Mr. Mohamed Gayez Sabbah, Mr. Ossama Mohamed Abdel-Ghani Al-Nakhlawi and Mr. Younis Mohamed Abu-Gareer. We would like to stress that each Government has the obligation to protect the right to physical and mental integrity of all persons. This right is set forth inter alia in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

In this context, we would like to draw the attention of your Excellency's Government to paragraph 1 of Human Rights Council Resolution 16/23 which "Condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all States to implement fully the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment."

We would also like to draw the attention of your Excellency's Government to article 2(2) of the CAT, which provides that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. In this regard, we note that paragraph 2 of Resolution 16/23 of the Human Rights Council, which "Condemns in particular any action or attempt by States or public officials to legalize, authorize or acquiesce to torture and other cruel, inhuman or degrading treatment or punishment under

any circumstances, including on grounds of national security or through judicial decisions, and urges States to ensure accountability for all such acts.”

Furthermore, we would like to draw the attention of your Excellency’s Government to article 15 of the CAT, which provides that, “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” We also recall that paragraph 7c of Human Rights Council Resolution 16/23 urges States “To ensure that no statement established to have been made as a result of torture is invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made, and calls upon States to consider extending that prohibition to statements made as a result of cruel, inhuman or degrading treatment or punishment, recognizing that adequate corroboration of statements, including confessions, used as evidence in any proceedings constitutes one safeguard for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.”

We would also like to draw your attention to the right to a fair trial as one of the fundamental guarantees of human rights and the rules of law embodied in article 14 of the International Covenant on Civil and Political Rights. In his report on the protection of human rights and fundamental freedoms while countering terrorism (A/63/223, para. 31), the Special Rapporteur on the promotion and protection of human rights while countering terrorism notes that article 14(3)(g) of the International Covenant on Civil and Political Rights is also invoked where “methods violating the provisions of article 7 (torture and any other inhumane treatment) are used in order to compel a person to confess or testify.” In that report, the Special Rapporteur further stresses that the practical implementation of article 14(3)(g) of the Covenant is dependent on safeguards and procedural rules that ban in law and practice statements made involuntarily (A/63/223, para. 32).

Furthermore, we would like to draw the attention of your Excellency’s Government to article 14(3)(b) of the International Covenant on Civil and Political Rights which proves that an accused must “have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”. The right to representation involves the right to be represented by legal counsel of choice and the right to self-representation. In that context, the Special Rapporteur on the promotion and protection of human rights while countering terrorism notes in his report (A/63/223, para. 45(g)) that “[a]ny delay or exclusion of legal representation on security grounds must not be permanent, must not prejudice the ability of the person to answer the case”.

We would also like to draw the attention of your Excellency’s Government to article 13 of the CAT, which requires that “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

In this context, we would also like to draw the attention of your Excellency's Government to article 12 of the CAT, which requires the competent authorities to undertake a prompt and impartial investigation wherever there are reasonable grounds to believe that torture has been committed, and article 7 of the CAT, which requires State parties to prosecute suspected perpetrators of torture. We would also like to draw your Excellency's Government's attention to paragraph 7b of Human Rights Council Resolution 16/23, which urges States "(t)o take persistent, determined and effective measures to have all allegations of torture or other cruel, inhuman or degrading treatment or punishment investigated promptly, effectively and impartially by an independent, competent domestic authority, as well as whenever there is reasonable ground to believe that such an act has been committed; to hold persons who encourage, order, tolerate or perpetrate such acts responsible, to have them brought to justice and punished in a manner commensurate with the gravity of the offence, including the officials in charge of the place of detention where the prohibited act is found to have been committed; and to take note, in this respect, of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the updated set of principles for the protection of human rights through action to combat impunity as a useful tool in efforts to prevent and combat torture" and "(t)o ensure that victims of torture or other cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and receive appropriate social, psychological, medical and other relevant specialized rehabilitation, and urges States to establish, maintain, facilitate or support rehabilitation centres or facilities where victims of torture can receive such treatment and where effective measures for ensuring the safety of their staff and patients are taken."

Furthermore, we would like to draw the attention of your Excellency's Government to article 14(5) of the International Covenant on Civil and Political Rights which states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". In this context, the Special Rapporteur on the promotion and protection of human rights while countering terrorism called in his report (A/63/223, para. 24) for caution in allocating terrorism cases to military, special or specialized courts, as this potentially raises issues under article 14 of the International Covenant on Civil and Political Rights. He notes as an additional factor speaking against such solutions that rulings of special or specialized courts may often not be subject full review for the conviction and sentence, in respect of issues of law and fact, as required by the Covenant in article 14(5).

We would like to draw the attention of your Excellency's Government to article 14 of the CAT, which provides that victims of torture should have the right to redress and adequate compensation. In this regard, we would also like to remind you that paragraph 7e of Human Rights Council Resolution 16/23, which urges States "(t)o ensure that victims of torture or other cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and receive appropriate social, psychological, medical and other relevant specialized rehabilitation, and urges States to establish, maintain, facilitate or support rehabilitation centres or facilities where victims

of torture can receive such treatment and where effective measures for ensuring the safety of their staff and patients are taken.”

In this connection, we would like to refer your Excellency's Government to article 14(1) of the International Covenant on Civil and Political Rights, which states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

We would also like to refer your Excellency's Government to the Bangalore Principles of Judicial Conduct, adopted in The Hague in 2002 (E/CN.4/2003/65), and in particular principle 5, which states: “Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.”

Furthermore, we would like to refer your Excellency's Government to General Comment No. 32 of the Human Rights Committee, in which the Committee stated: “The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. [...] While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.”

Principle 5 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, also states: “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of

the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency’s Government to safeguard the rights of the above-mentioned person in compliance with the above international instruments.

Moreover, it is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters, when relevant to the case under consideration:

1. Are the facts alleged in the summary of the cases accurate?
2. Please provide the details, and where available the results, of any investigation, medical examinations, and judicial or other inquiries carried out in relation to this case. If no inquiries have taken place, or if they have been inconclusive, please explain why.
3. Please explain the reasons why the retrial of the three cases have been resubmitted to a state security court despite the findings of the African Commission on Human and People’s Rights, including the finding of the failure of the state security court to ensure that evidence obtained through torture was not admitted.
4. Please explain what measures will be taken to ensure that any statement which is established to have been made as a result of torture will not be invoked as evidence in any proceedings in accordance with article 15 of the Convention against Torture.

We undertake to ensure that your Excellency’s Government’s response to each of these questions is accurately reflected in the report we will submit to the Human Rights Council for its consideration.

While waiting for your response, we urge your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of the above mentioned persons are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured. We also request that your Excellency’s Government adopt effective measures to prevent the recurrence of these acts.

Please accept, Excellency, the assurances of our highest consideration.

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers

Ben Emmerson
Special Rapporteur on the promotion and protection of human rights and
fundamental freedoms while countering terrorism

Juan E. Méndez
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment