

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
www.lrwc.org; lrwc@portal.ca; Tel: +1 604 738 0338; Fax: +1 604 736 1175

3220 West 13th Avenue, Vancouver, B.C. CANADA V6K 2V5

Wednesday, October 11, 2017

Prime Minister

Benjamin Netanyahu

Prime Minister's Office
3 Kaplan St. Hakiryia
Jerusalem 91950
Israel
Tel: 972-2-6705555
Fax: 972-2-5664838
pm_eng@pmo.gov.il

Director General, Ministry of Health

Moshe Bar Siman Tov

39 Yirmiyahu St.
PO Box 1176
Jerusalem 9101002
Israel
Tel: 972-2-5080000
Fax: 972-2-5655966
mankal@moh.health.gov.il

Minister of Public Security

Gilad Erdan

The Ministry of Public Security
Rehov Clermont Ganneau, Building C
Sheikh Jerach Government Complex
Sheikh Jerach, Jerusalem
PO Box 18182
Jerusalem 91181, Israel
Tel: 972-2-6408189
Fax: 972-2-6753982
gerdan@knesset.gov.il, sar@mops.gov.il

Military Judge Advocate General

Brigadier General Sharon Afek

Mag@idf.gov.il

Dear Prime Minister Netanyahu, Minister of Public Security Gilad Erdan, Director General, Ministry of Health Moshe Bar Siman Tov, and Military Judge Advocate General Brigadier General Sharon Afek;

Re: Release of human rights lawyer Muhammed Allan

Lawyers' Rights Watch Canada (LRWC) is a committee of Canadian lawyers and other human rights defenders who promote human rights and the rule of law through advocacy, education and research. LRWC is an NGO in Special Consultative Status with the Economic and Social Council (ECOSOC) of the United Nations (UN).

Introduction

LRWC continues to be gravely concerned about the treatment of Palestinian lawyer Muhammed Allan, that contravenes Israel's international law obligations. There is international consensus that trials of civilians by military tribunals contravene the non-derogable right to a fair trial by a competent,

LRWC requests end to use of military court to try civilian lawyer Muhammed Allan

independent and impartial court to the extent that they violate rights guaranteed by *Universal Declaration of Human Rights* (UDHR)¹ and the United Nations (UN) *International Covenant on Civil and Political Rights* (ICCPR),² which Israel ratified on 3 October 1991.

Mr. Allan was seized from his family home during a pre-dawn raid by Israeli occupation forces on 8 June 2017, placed under administrative detention, and then participated in approximately 34 days of a hunger strike to protest his arrest and administrative detention. He is now facing charges of incitement before an Israeli military court. Mr. Allan was previously held in a year-long administrative detention, and only released in November 2015 after carrying out a gruelling 66-day hunger strike.

LRWC urges the government of Israel to respect its international legal obligations, to end the use of military courts to try Palestinian civilians such as Mr. Allan, and to release him immediately. In the event he is subsequently properly charged, Israel must, in accordance with law, ensure his right to be tried by a civilian Israeli court using established international legal procedures.

Background Facts

As set out in LRWC's 11 July 2017 letter, Mr. Allan was arrested by Israeli forces on 8 June 2017, without charge. To protest his arrest and administrative detention, Mr. Allan began a hunger strike the same day as his arrest. This follows a previous administrative detention of one year, from which he was released in November 2015 following a 66-day hunger strike.

On 2 July 2017, the Israeli military court indicated it would charge Mr. Allan with "incitement" on social media for posting about politics and for participating in demonstrations to support Palestinian prisoners and demand their freedom.³

On 11 July Mr. Allan ended his hunger strike, after approximately day 34; local reports said Mr. Allan ended the hunger strike after he reached a deal with the Israel Prison Service to end his strike, however details of the agreement have not been released.⁴ Reports from Mr. Allan's lawyer indicate he is now being held in Megiddo prison. He is accused of inciting violence against Israel by using Facebook posts and the trial is set before the Israeli military court.

Main Concerns

LRWC expresses concern over the separate sets of laws for Palestinians and Israelis, particularly the use of military courts, to deal with all criminal and security violations involving Palestinians, as these violations are defined by Israel in its military orders. Only very exceptional, usually symbolic cases are heard by Israeli civilian courts. Virtually all – over 99 percent - of cases heard by the military courts in the territories end in a conviction, according to data in the military courts' annual report.⁵ Many of the orders enforced through the military courts also criminalize a wide array of other types of activities, including

¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Articles 7-11, available at: <http://www.refworld.org/docid/3ae6b3712c.html>.

² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

³ Samidoun – Palestinian Prisoner Solidarity Network, "Muhammed Allan on 30th day of hunger strike for freedom," 7 July 2017, online: <http://samidoun.net/2017/07/muhammad-allan-on-30th-day-of-hunger-strike-for-freedom/>.

⁴ Ma'an News Agency, "On 34th day, Muhammad Allan ends hunger strike in Israeli prison," 12 July 2017, online: <http://www.maannews.com/Content.aspx?id=778030>.

⁵ Haaretz, "Nearly 100% of all Military Court Cases in West Bank End in Conviction, Haaretz Learns," 12 November 2011, online: <https://www.haaretz.com/nearly-100-of-all-military-court-cases-in-west-bank-end-in-conviction-haaretz-learns-1.398369>. See also: Addameer Prisoner Support and Human Rights Association, "Presumed Guilty: Failures of the Israeli Military Court System: An International Law Perspective," November 2009, online: <http://www.addameer.org/files/Reports/addameer-report-presumed-guiltynove2009.pdf>.

forms of political and cultural expression, association, assembly, movement and nonviolent protest – anything deemed to threaten Israeli security or adversely affect the maintenance of order and control of the territories.⁶ As the occupying power, Israel has the legal obligation to ensure respect for and protection of the rights of Palestinians within its control.⁷

Use of Military Courts to Try Civilians: Violations of International Human Rights Law

Military courts are sometimes used to prosecute or determine the rights of civilians for the purpose of asserting executive control over independent judicial decision-making and allowing for procedures that deviate from standards applied by regular civilian courts. Exceptional circumstances are often cited as justification. There is international consensus that trials of civilians by military tribunals contravene the non-derogable right to a fair trial by a competent, independent and impartial court to the extent that they violate rights guaranteed by the UDHR⁸ and the ICCPR.⁹

More fundamentally, military courts must not be used to undermine an independent judiciary. Military courts are a division of the armed services and thus part of the executive branch of government and are not part of the independent judicial branch of government. Without access to competent, independent and impartial tribunals, there is no means of enforcing state duties to ensure internationally protected rights in accordance with treaty obligations, and no meaningful access to remedies for violations. As the *Basic Principles on the Independence of the Judiciary*, endorsed in 1985 by the General Assembly,¹⁰ state:

Everyone has 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 (para. 5).

Military tribunals have been criticized for failing to adhere to fair trial standards set out in ICCPR Article 14. The main concerns include:

- lack of independence, arising from the fact that military tribunals are formed and governed by military bodies within the executive branch of government and are not part of the independent judicial branch;
- the use of military tribunals to enable exceptional procedures that do not comply with normal standards of justice;
- lack of actual or perceived impartiality associated with lack of independence;
- lack of adherence to due process safeguards;
- lack of proper authority in constitutions or laws;
- removal of access to properly constituted, “competent, independent and impartial” civilian courts “established by law” (ICCPR Article 14);
- failure of military tribunals to ensure that hearings are held in public in open court;

⁶ Addameer, “The Israeli Military Court System, 12 July 2017, online:

http://www.addameer.org/israeli_military_judicial_system/military_courts. See also: Lisa Hajjar (2005), *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza*, London, The University of California Press, p. 3.

⁷ Fourth Geneva Convention Art.47.

⁸ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Articles 7-11, available at: <http://www.refworld.org/docid/3ae6b3712c.html>.

⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

¹⁰ *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, Principle 5, para 21, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

- failure of military tribunals to respect the presumption of innocence; and
- failure of military tribunals to fully ensure rights related to the ability of the defendant to prepare and present a full defense.

In 1984, the UN Human Rights Committee (HR Committee) affirmed in its General Comment 13 that military tribunals are prohibited from trying civilians except in extraordinary, objectively determined and narrowly defined circumstances such as cases where fair, independent and impartial civilian courts are unavailable.¹¹ The HR Committee noted:

the existence, in many countries, of military or special tribunals which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. 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. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Art 14.¹²

The HR Committee stated in its 2007 General Comment No. 32 that ICCPR Article 14 applies to “all courts and tribunals within the scope of that article, whether ordinary or specialized, civilian or military.”¹³ The HR Committee commented that whenever a State tries a civilian before a military or another special tribunal, it must offer the due process standards under Art 14 of the ICCPR. States are also required to provide objective reasons for trying civilians in a military court and why ordinary courts cannot be used.¹⁴

Judges should always be independent and impartial. In contrast, two of the core values of a military officer are obedience and loyalty to her or his supervisors. Under international law, military tribunals can only be competent to try military personnel for military offences.¹⁵ Military courts should not try military officers if civilians have also been indicted in the case and if civilians are among the victims. All sentences issued by military courts should be reviewed by a civil court, even if they have not been appealed. Military courts should never be competent to impose the death penalty.¹⁶

LRWC calls on the government of Israel to:

- 1) Comply with Art 14 of the ICCPR and the UDHR and immediately end the use of military courts to try Palestinian civilians in the occupied Palestinian territories, such as Mr. Allan;
- 2) Release Mr. Allan immediately;
- 3) If Mr. Allan is subsequently properly charged with an offence that meets international standards that prohibit prosecution for offences that lack the clarity necessary to enable pre-knowledge, defense and objective determination at trial, to ensure a fair trial by a civilian court acting in compliance with the ICCPR; and

¹¹ UN Human Rights Committee (HR Committee), *CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, paragraph 4 [CCPR General Comment No. 13], available at: <http://www.refworld.org/docid/453883f90.html>.

¹² *Ibid*, para 4.

¹³ HR Committee, *General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32 [General Comment No. 32], paragraph 22, available at: <http://www.refworld.org/docid/478b2b2f2.html>.

¹⁴ *Ibid*.

¹⁵ *Ibid*, para. 85.

¹⁶ *Ibid*, para. 86.

- 4) End the use of administrative detention, a practice which contravenes rights to the presumption of innocence and pre-trial release.

Sincerely,



Renée Mulligan, LRWC Director

Copied to:

UN Special Rapporteur on the situation of human rights in the Palestinian Territories Occupied since 1967

Mr. S. Michael Lynk
mslynk@uwo.ca

UN Special Rapporteur on the Independence of Judges and Lawyers

Diego García-Saván
SRindependenceJL@ohchr.org

UN Special Rapporteur on the situation of human rights defenders

Michel Forst
defenders@ohchr.org, urgent-action@ohchr.org

UN Special Rapporteur on Freedom of Expression

David Kaye
freedex@ohchr.org

Canadian Ambassador to Israel

Her Excellency Deborah Lyons
The Embassy of Canada
PO Box 9442
Tel-Aviv, 6706038, Israel
taviv@international.gc.ca

Canadian Ambassador and Permanent Representative to the United Nations

Her Excellency Rosemary McCarney
5 Avenue de L'Ariana
1202 Geneva, Switzerland
genev-gr@international.gc.ca

Israeli Ambassador to Canada

His Excellency Nimrod Barkan
info@ottawa.mfa.gov.il