ISRAEL MINISTRY OF FOREIGN AFFAIRS

MEMORANDUM REGARDING MORDECHAI VANUNU - 22-Sep-93

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STATE OF ISRAEL
MINISTRY OF JUSTICE
Department of Human Rights and International Relations

September 22, 1993

I. The Factual Background

Mordechai Vanunu worked for the Atomic Research Reactor in Dimona. During the course of his work, he surreptitiously collected information, photographs and materials that, under Israeli law, were secret. He smuggled the information abroad and agreed to sell it for publication in the London Sunday Times, where it appeared on 5 October, 1986. Anyone who reads the articles in the Sunday Times will see that Vanunu provided information, which he claimed to be true, concerning the security arrangements for the reactor, procedures for hiring personnel, the routes that employees take to work every morning, and the exact place where workers are picked up by buses. In furnishing this information to the newspaper, he could not have been unaware of the fact that every intelligence service, in particular those of countries that maintain a state of war with Israel, would glean from it facts and knowledge which could be used to the detriment of Israel.

The details he chose to reveal had the effect of setting up the reactor and its workers for military or terrorist attack. Following the Sunday Times publication of Vanunu's article, on 7 March, 1988, a group of PLO terrorists hijacked a bus transporting workers to the reactor. Three of these workers (Miriam Ben-Yair, Rina Shiratzki and Victor Ram) were killed. Eight other women employees of the reactor were wounded in the hijacking. It is logical to conclude that the terrorists who committed this murderous attack were aided by information revealed by Vanunu.

Vanunu claims he acted solely in opposition to the development of nuclear weapons in the world, and in Israel in particular. However, the details about security and personnel which Vanunu revealed had no connection whatsoever to his alleged anti-nuclear objectives.

II. Details of the Case

Vanunu was charged with the following offences under Section 113 (b) and (c) of the Israel Penal Law (1977):

(b) A person who delivers any secret information without being authorized to do so and with the intent to impair the security of the State is liable to imprisonment for life.

(c) A person who obtains, collects, prepares, records, or holds possession of secret information without being authorized to do so is liable to imprisonment for a term of seven years; if he thereby intends to impair the security of the state, he is liable to imprisonment for fifteen years.

In addition, he was charged under Section 99(a) of the Israel Penal Law, which states: (a) A person who, with intent to assist an enemy in war against Israel, commits an act calculated to assist him is liable to the death penalty or to imprisonment for life.

Significantly, Section 96 of the Penal Law forbids imposition of the death penalty unless the offence was committed in a period of armed hostility. Despite the numerous Arab states and terror organizations which openly assert that they are in a state of war with Israel, the prosecution did not seek the death penalty against Vanunu.

It should be emphasized that Vanunu was not tried for his anti-nuclear views or actions, but for violating the above-mentioned sections of the Penal Law. Every modem nation has similar laws which prohibit the gathering and publication of information classified as secret.

Vanunu's trial opened before the Jerusalem District Court in December 1986 and concluded in March 1988. During all of the proceedings, Vanunu was represented by defense counsel of his choice and of the highest caliber.

The case was heard by a panel of three judges. The bench gave consideration to all of the arguments raised on Vanunu's behalf. The District Court specifically considered the question of Vanunu's motivation for his acts: Were his actions motivated solely by ideology - namely, his opposition to nuclear weapons - or was there a financial motive? The Court weighed this issue despite the fact that, under Section 16 of the Penal Law, "...the motive by which a person is induced to commit an offence... is immaterial as regards criminal responsibility."

The District Court also addressed Vanunu's allegation that the information he revealed was not new and had previously been published, for example, in reports which had been submitted from time to time to the Security Council of the United Nations. The District Court found that the highly detailed information provided by Vanunu to the Sunday Times was, for the most part, secret information previously unpublished and rejected his claim.

In accordance with the law of the State of Israel, the Minister of Defence signed a certificate according to which no evidence would be brought to the District Court about whether the information revealed by Vanunu was correct or not. Vanunu's counsel made use of his right under law to apply to the Supreme Court to cancel this certificate in order to enable him to bring evidence on this issue as well as others. In August 1987, the Supreme Court rejected most aspects of this petition (43 P.D.III 534 (1988)). In any event, the

veracity of the information he provided to the Sunday Times was not relevant, as Section 91 of the Penal Law prohibits the delivery of any kind of information pertaining to security, even where the information delivered is incorrect.

Vanunu was found guilty of each of the charges mentioned above and was sentenced to 18 years' imprisonment. Subsequently, he appealed to the Supreme Court. His appeal was heard in May 1989 before a panel of three judges headed by the President of the Supreme Court. The Supreme Court of Israel upheld Vanunu's conviction and the 18 year sentence imposed upon him by the District Court. The Supreme Court held in its decision that his actions were committed with full knowledge that they would aid the enemy and prejudice the security of the State. A petition for Vanunu's pardon was rejected by the President of Israel following a thorough reexamination of the case. This decision, however, does not prevent Vanunu or anyone acting on his behalf from submitting a new petition in the future.

III. Conditions of Vanunu's Confinement

As with all persons accused or convicted of a crime, Vanunu's conditions of detention and imprisonment are determined by the Prisons Ordinance (New Version) 1971, as amended, and the relevant regulations. The Ordinance gives the Commissioner of Prisons some discretion to determine the conditions of confinement. Where a prisoner believes this discretion has been abused and, consequently, he has been caused harm, he may petition to the District Court by a special procedure and may himself appear before the District Court to state his complaint.

In the case of Vanunu, the Commissioner of Prisons decided that the prisoner should remain in solitary confinement, at least at present, in order to prevent him from continuing to reveal secret information, and to prevent other inmates from harming him in light of the type of crimes he had committed.

It should be emphasized that Vanunu has clearly declared his intention to make public additional secret information in his possession the moment he has the opportunity to do so.

In July 1991, Vanunu petitioned the Jerusalem District Court to order the discontinuance of his solitary confinement. In rejecting this petition, the Court found that in light of all the special circumstances of the case, the Commissioner of Prisons had acted in full accordance with the appropriate law and regulations.

In April 1993, Vanunu again petitioned the District Court that he no longer be kept in solitary confinement. The Court ruled against him.

As regards the conditions of Vanunu's detention, it should be noted that his cell is larger than the standard size in Israeli prisons and has its own adjoining lavatory and shower. Vanunu has a radio, and a walkman tape player with many cassettes. He also has a television and a video. Vanunu is allowed to receive, without any limitation as to subject matter, as many books and newspapers as he wishes. He spends time outdoors daily, his lawyer may visit him in private at any time, and his family is permitted to visit him once every two weeks. He is also permitted visits by a member of the clergy. In light of these facts, any allegations regarding inadequate conditions at the prison are not justified.

Some letters have urged the Minister of Justice to intervene to change the conditions of Vanunu's imprisonment. It should be noted that the conditions of his detainment are under the jurisdiction of the Minister of Police, not the Minister of Justice. Despite this fact, on July 13, 1993, the Minister of Justice, Professor David Libai, personally visited Vanunu in his cell and found the conditions of his imprisonment to be satisfactory. Furthermore, during his conversation with the Minister, Vanunu made no complaints about his conditions of detention.

IV. International Law

The international community has developed several instruments which provide guidelines for the treatment of persons subjected to detention or imprisonment. The conditions under which Vanunu is detained are not inconsistent with these instruments.

1. International Covenant on Civil and Political Rights

Although Israel has signed and ratified the International Covenant on Civil and Political Rights ("ICCPR"), it has not been enacted by the Knesset into municipal legislation. For this reason, Vanunu, as a private individual, would have no standing to rely on the ICCPR in the domestic courts of Israel.(1) It should be noted that Israel, like Britain(2), follows the rule that constitutive treaties are not automatically incorporated into municipal law even thought they bind the state on the international plane.(3)

Furthermore, the ICCPR does not forbid solitary confinement. Indeed, this procedure is not even mentioned in the Covenant Article 7, which addresses related issues, states only:

"No one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment. In particular, no one shall be subjected without his own free consent to medical or scientific experimentation."

Nor do the cases which have been determined by the UN Human Rights Committee forbid the use of solitary confinement per se. Indeed, the cases involving solitary confinement that interpret Article 7 of the ICCPR have involved actual torture and/or sensory deprivation. The Committee did express the view that a violation had occurred in Antonaccio v. Uruguay(4), which involved a prisoner who was tortured for three months while being held in an underground cell under solitary confinement and denied medical treatment. This set of conditions differs markedly from those which Vanunu is subject to.

Presently, solitary confinement is widely used in the prisons of democratic states for reasons including protecting a prisoner's personal safety, preventing a prisoner from revealing sensitive information, and protecting the prison population from a dangerous prisoner.

2. European Convention on Human Rights

The European Convention on Human Rights ("ECHR"), which for reasons of geography is not binding on Israel, is nevertheless worthy of examination as one of the leading contemporary instruments designed to protect human rights. It states in Article 3:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

No reference is made to solitary confinement in this or any other provision of the ECHR. The European Commission on Human Rights has not, in interpreting Article 3 of the Convention, ruled that solitary confinement is per se inhuman or degrading treatment where such is appropriate or necessary.(5)

The European Commission on Human Rights has taken the position that this treatment is in principle undesirable, but stated that the surrounding circumstances including the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned must be taken into consideration. Consideration was also given to the opportunities for human contact provided to detained persons. In the Krocher case, prison conditions included isolation, constant artificial lighting, permanent surveillance by closed-circuit television, denial of access to newspapers and radio and the lack of physical exercise, conditions which do not exist in Vanunu's case. The European Commission questioned the need for such measures, but concluded that they could not be construed as inhuman or degrading treatment. The Commission reached this conclusion after it had been shown that these conditions were necessary to ensure security inside and outside the prison because the applicants were considered dangerous and alleged to be terrorists. The Commission has also required applicants of this kind to submit medical evidence to show that the prison conditions had adverse effects on their mental or physical health.(6) This medical evidence must show a direct relationship between the prison conditions complained of and the deteriorating health of the applicant(7) to the extent that the prison conditions could "destroy the personality and cause severe mental or physical suffering."(8) Vanunu has not submitted such evidence.

3. UN Standard Minimum Rules for the Treatment of Prisoners

It is worth noting that the UN Economic and Social Committee's Standard Minimum Rules for the Treatment of Prisoners ("The Minimum Rules") do not address the issue of solitary confinement despite the fact that they set very high standards for accommodation of prisoners in Sections 9 - 14. The Minimum Rules provide standards for the communication of prisoners with the outside world. These standards include communication with family, reputable friends and diplomatic representatives, as well as access to a library. Vanunu's detention conditions meet or exceed these Minimum Rules.

V. Comparative Law: Solitary Confinement in the United States

The Eighth Amendment to the United States Constitution bans the use of "cruel and unusual punishment". The interpretation thereof has been addressed in recent decades both in the U.S. Supreme Court and in U.S. Circuit Courts of Appeal. While the constitutionality of solitary confinement per se has been considered in judicial decisions, it usually has been considered in the context of discipline because, generally, solitary confinement has been used as a disciplinary measure for infractions of prison rules.

In the landmark case of Sostre v. McGinnis, 442 F2d 178 (2d. Cir. 1971), the history of the application of the Eighth Amendment in relation to solitary confinement was canvassed. In summary, the Federal Court of Appeals for the Second Circuit stated that the courts:

"have in the past declined to find an Eighth Amendment violation unless the punishment can properly be termed 'barbarous' or 'shocking to the conscience.'" (p. 190).

And more pointedly, the Court stated that:

"It is undisputed on this appeal that segregated confinement does not itself violate the Constitution." (p. 192).

When considering a situation as potentially violative as the ban on "cruel and unusual punishment", the courts assess the totality of a prisoner's situation. This principle has been followed in Jackson v. Meachum, 699 F2d 578 (1st Cir. 1983). In Jackson, the Court held:

"... extended, indefinite segregated confinement in a facility that provides satisfactory shelter, clothing, food, exercise, sanitation, lighting, heat, bedding, medical and psychiatric attention, and personal safety, but virtually no communication or association with fellow inmates, which confinement results in some degree of depression, [does not constitute]... cruel and unusual treatment, violative of the 8th and 14th amendments..." (p. 581).

Accordingly, the length of time a prisoner is to spend in isolation is only one consideration among many.(9) A prisoner's conditions must be considered as a whole. The imprisonment conditions of Vanunu are generally very good. However, he is denied contact with other prisoners in the interest of national security, as well as the personal safety of Israeli citizens. Vanunu's solitary confinement must be viewed in this context. Moreover, according to the U.S. Supreme Court in Rhodes v. Chapman, 452 US 337 (1981), the conditions of confinement must be proportionate to the crime committed. Treason is one of the most extreme crimes possible and in many countries is punishable by death.

With respect to prison conditions, the Court in Rhodes went on to state the following:

"To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." (Id., p. 337).

In the past, Vanunu has revealed information that endangered the lives of Israeli citizens. There is a very high risk that he would do so again if given the opportunity. Accordingly, under the circumstances Vanunu's solitary confinement is reasonable and in no way inconsistent with international standards of imprisonment.

Notes

1 Guardian for Absentee Property v. Samra, High Court Decisions vol. 26 (in Hebrew) Civil Appeals 25/55, 145/55, 148/55, pp. 211, 213.

2 Mortensen v. Peters (1906) 8 S.C., 5th Series, 99, 14 Scot. L.T. 227; Chung Chi Cheuna v. King (1939), A.C. 160 at 167-168.

3 N. Feinberg, "Declaratory and Constitutive Treaties in International Law", (1967/1968) 24 HaPraklit 433. The United States rule, by contrast, automatically makes a validly concluded international treaty part of municipal law.

4 Doc, A/37/40, 114.

5 Krocher and Moller v. Switzerland, D& R 34 (1983), pp. 24, 53.

6 Appl. 8116/77 X v. United Kingdom, not published; Appl. 8601/79 X v. Switzerland, not published referred to in Theory and Practice of the European Convention on Human Rights, P. Van Dijk, G.J.H. Van Hoof (1990), p. 233 n. 103.

7 Appls. 7572/76 7586/76, 7587/76, Ensslin. Baader and Raspe v. Federal Republic of Germany, Yearbook XXI (1978) p. 418 at p. 454.

8 Appl. 8158/78 X v. United Kingdom, D&R 21 (1981), p. 99 and Report of December 16, 1982, Krocher and Moller, supra, note 6, at p. 56.

9 Hutto v. Finney, 437 US 678 (1978), p. 687.