

# Advance Edited Version

Distr.  
GENERAL

A/HRC/13/30/Add.1  
2 March 2010

ENGLISH/FRENCH/SPANISH

HUMAN RIGHTS COUNCIL

Thirteenth session

Agenda item 3

## **PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT**

### **Opinions adopted by the Working Group on Arbitrary Detention<sup>\*</sup>**

The present document contains the opinions adopted by the Working Group on Arbitrary Detention at its fifty-fourth, fifty-fifth and fifty-sixth sessions, held in May, September and November 2009, respectively. A table listing all the Opinions adopted by the Working Group and statistical data concerning these opinions are included in the main part of this report.

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<sup>\*</sup> Late submission.

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**AVIS n° 17/2008 (LIBAN)**

**Communication adressée au Gouvernement le 9 octobre 2007.**

**Concernant M. Assem Kakoun.**

**L'État est partie au Pacte international relatif aux droits civils et politiques.**

1. Le Groupe de travail sur la détention arbitraire a été créé par la résolution 1991/42 de la Commission des droits de l'homme, laquelle a précisé et prolongé son mandat par la résolution 1997/50. Le Conseil des droits de l'homme a assumé le mandat du Groupe de travail par sa décision 2006/102 et l'a renouvelé pour trois ans par sa résolution 6/4 de 28 septembre 2007. Agissant conformément à ses méthodes de travail, le Groupe de travail a transmis au Gouvernement la communication susmentionnée.

2. Le Groupe de travail remercie le Gouvernement de lui avoir communiqué les renseignements demandés.

3. Le Groupe de travail considère comme arbitraire la privation de liberté dans les cas énumérés ci-après :

- I. Lorsqu'il est manifestement impossible d'invoquer une base légale quelconque qui la justifie (comme le maintien en détention d'une personne au-delà de l'exécution de la peine ou malgré une loi d'amnistie qui lui serait applicable) (catégorie I);
- II. Lorsque la privation de liberté résulte de l'exercice de droits ou de libertés proclamés dans les articles 7, 13, 14, 18, 19, 20 et 21 de la Déclaration universelle des droits de l'homme et, en outre, en ce qui concerne les États parties, dans les articles 12, 18, 19, 21, 22, 25, 26 et 27 du Pacte international relatif aux droits civils et politiques (catégorie II);

III. Lorsque l'inobservation, totale ou partielle, des normes internationales relatives au droit à un procès équitable, établies dans la Déclaration universelle des droits de l'homme et dans les instruments internationaux pertinents acceptés par les États concernés, est d'une gravité telle qu'elle confère à la privation de liberté un caractère arbitraire (catégorie III).

4. Selon la communication adressée au Groupe de travail le 31 juillet 2007 et les précisions et informations complémentaires reçues ultérieurement, Assem Kakoun a été arrêté le 6 janvier 1990 à Hammana, au domicile de Rustom Ghazalé, un responsable des services de renseignement syriens au Liban, pour qui il travaillait. L'arrestation a été effectuée par les services de sécurité syriens au Liban, sans présentation d'un mandat d'arrêt. M. Kakoun a été emmené dans l'un des centres de la sécurité syrienne situé à Anjar, dans la Bekaa libanaise, puis transféré deux semaines plus tard à Damas, dans un établissement administré par des services syriens, où il est resté détenu pendant 11 mois, toujours au secret. Il aurait été torturé dans tous les lieux où il a été détenu. Le 20 novembre 1990, les autorités syriennes l'ont remis à la police judiciaire libanaise et c'est seulement le 14 décembre 1990 qu'un mandat de détention a été décerné contre lui. Pendant plus de sept mois, il a été transféré d'un lieu de détention à un autre jusqu'à son arrivée à la prison centrale de Roumieh, où il se trouve, ou du moins où il se trouvait à la date de la communication.

5. M. Kakoun a comparu devant un tribunal libanais de Beyrouth pour un assassinat survenu le 25 novembre 1989, mais ni la source ni le Gouvernement n'indiquent le nom de la victime ni aucune autre circonstance, le Gouvernement se bornant à signaler que les faits se seraient produits à Tabir. Selon la source, M. Kakoun a été accusé du crime présumé en raison d'un conflit entre M. Ghazalé et lui, et il n'a jamais reconnu en être l'auteur, sauf sous la torture.

6. Il est précisé que les tortures infligées ont laissé à M. Kakoun de graves séquelles physiques (incapacité fonctionnelle d'une main et traces sur le corps) et psychologiques. Il aurait été soumis à des tortures dans tous les centres de détention secrets où il a été détenu, tant au Liban (Bekaa) qu'en République arabe syrienne.

7. La source ajoute que le procès de M. Kakoun a été entaché d'irrégularités, comme il est exposé ci-après :

a) M. Kakoun est resté au secret pendant les 15 premiers jours qui ont suivi son arrestation au Liban, durant les 10 mois suivants, où il se trouvait en République arabe syrienne, puis durant 8 mois encore au Liban, jusqu'à l'ouverture de la procédure, le 14 décembre 1990, où sa détention a été reconnue pour la première fois;

b) Lors des interrogatoires extrajudiciaires en République arabe syrienne et de ses interrogatoires devant le juge d'instruction à la prison de Barbar el Khazem (Verdun), au Liban, M. Kakoun a demandé un avocat, refusant de faire des déclarations devant le juge. En conséquence, son audition a été suspendue et il n'a été entendu que le 4 janvier 1991, mais encore sans la présence d'un avocat. Au procès proprement dit, M. Kakoun a déclaré qu'il avait fait ses aveux sous la torture. Selon la source, le tribunal indique dans sa décision qu'il a acquis la conviction de la culpabilité de l'accusé précisément sur la base des aveux. Le tribunal a rejeté l'allégation de torture au motif que son bien-fondé n'avait pas été établi;

c) M. Kakoun n'a pas bénéficié du droit d'appel. Il a certes formé un recours, mais celui-ci n'a pas été examiné par le tribunal, qui l'a déclaré irrecevable, alors que les conditions de recevabilité étaient pourtant remplies, confirmant la peine de réclusion à perpétuité prononcée en première instance.

8. Dans sa réponse, le Gouvernement indique qu'Assem Kakoun a été condamné à mort le 10 février 1993 pour la Cour d'assises de Beyrouth à l'issue du procès engagé contre lui, en vertu de l'article 549 (p) et de l'article 72 (port d'armes) mais que la peine a été commuée en travaux forcés à perpétuité, sur le fondement de la loi d'amnistie n° 84/91.

9. Certes, le Groupe de travail n'a pas à se prononcer sur le bien-fondé des accusations qui ont motivé la déclaration de culpabilité et la peine de l'intéressé dans l'affaire d'assassinat ou de port d'armes. Il se prononcera donc uniquement sur le caractère arbitraire ou non de la privation de liberté d'Assem Kakoun – laquelle dure déjà depuis 18 ans.

10. Conformément aux articles 8, 9, 10 et 11 de la Déclaration universelle des droits de l'homme et à l'article 9 du Pacte international relatif aux droits civils et politiques, toute personne a droit à un recours effectif devant les juridictions nationales compétentes contre les actes violant les droits fondamentaux qui lui sont reconnus; a droit à ce que sa cause soit entendue équitablement et publiquement par un tribunal indépendant et impartial, et est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie; ne peut être privée de sa liberté, si ce n'est que conformément à la procédure prévue par la loi; doit être traduite dans le plus court délai devant l'autorité judiciaire compétente; doit être jugée dans un délai raisonnable; enfin, la détention provisoire ne doit pas être de règle et ne peut être autorisée que pour assurer la comparution de l'intéressé au procès et l'exécution du jugement.

11. Les faits exposés par la source n'ont pas été contestés par le Gouvernement dans sa réponse, ce qui permet de conclure à leur véracité.

12. Par ailleurs, Assem Kakoun a fait valoir qu'il avait été soumis à la torture dans les lieux où il a été détenu et a ajouté qu'il avait avoué être l'auteur de l'assassinat dont il était accusé sous la torture. S'il a effectivement dénoncé les mauvais traitements, l'État aurait dû procéder à des investigations, conformément à l'article 13 de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants. Dans sa réponse, le Gouvernement ne précise pas qu'il a agi conformément à cette disposition et le Groupe de travail doit dès lors présumer qu'il n'a pas ordonné d'enquête ce qui, à tout le moins, autorise raisonnablement à supposer que M. Kakoun a pu subir des actes de torture et que ses aveux ont pu en être la conséquence, auquel cas, en vertu de l'article 15 de la Convention contre la torture, ces aveux ne pouvaient pas être invoqués comme un élément de preuve, alors qu'ils l'ont été.

13. Étant donné que toutes les règles de la Déclaration universelle des droits de l'homme et des autres instruments cités ont été violées, il est légitime de conclure que

la détention de M. Kakoun est arbitraire et relève de la catégorie III des critères applicables à l'examen des cas soumis au Groupe de travail.

14. En conséquence, le Groupe de travail demande au Gouvernement de remédier à la situation d'Assem Kakoun, conformément aux dispositions invoquées dans le présent avis. Le Groupe de travail estime que, dans les circonstances de l'affaire et compte tenu de la durée de la détention, la solution adéquate serait la libération immédiate de l'intéressé.

Adopté le 9 septembre 2008

**OPINION No. 18/2008 (EGYPT)**

**Communication addressed to the Government on 19 October 2007.**

**Concerning Mr. Djema'a al Seyed Suleymane Ramadhan.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group acknowledges the cooperation received from the Government which submitted information on the allegations presented by the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The case summarized below was reported to the Working Group as follows: Mr. Ramadhan, born on 5 November 1960, was arrested in the evening of 11 May 1994 at his home in Helouane by State Security Services agents who did not show any arrest warrant nor did give any reason for his arrest. He was transferred to numerous detention centres. During the first year, he was kept in incommunicado detention. It was alleged that Mr. Ramadhan was tortured.

5. Some months after Mr. Ramadhan's arrest, his detention was legalized by an administrative decision from the Minister of the Interior issued according to article 3 of Law No. 162 of 1958 on the state of emergency.

6. In September 1997, according to the 1966 Code of Military Justice, and in spite of the fact that he was a civilian, Mr. Ramadhan was brought before the Supreme Military Tribunal of Heikstep, Cairo; which sentenced him to life imprisonment. The Court is composed of military officials in function and answer to the military hierarchy; and according to the source, they would lack the necessary legal training. Egyptian law does not contemplate judicial appeal to a higher court, neither civilian nor military.

7. The source concludes that Egyptian military tribunals cannot assure that civilians charged with criminal offenses have the right to a fair trial, as stipulated in article 14 of the International Covenant on Civil and Political Rights, to which the Arab Republic of Egypt is a State party. Their judgments are final and cannot be appealed to a higher court, thus denying defendants due-process rights. The source claims that Mr. Ramadhan was not given access to a lawyer with sufficient time to prepare his defence. According to the source, Mr. Ramadhan's health condition is seriously deteriorating and he is now hospitalized in Qasr Al Aïn Hospital.

8. In its reply, the Government reported that Mr. Ramadhan is a prominent member of a proscribed terrorist organization that uses armed violence as a means of wreaking havoc and sowing terror among the population, with the aim of disrupting domestic law and public order. In particular, in the Military Offences case 56/1997, the military court charged him with being responsible for setting off explosions in banks. The Government does not give precise dates, circumstances, victims or other relevant elements and does not give further details as to which proscribed terrorist organization Mr. Ramadhan was allegedly linked to, or what incidents of armed violence he had been involved in. The Government further reported that the military court sentenced Mr. Ramadhan on 15 September 1997 to life imprisonment and he is still serving his sentence.

9. The Government maintains that the criterion for determining whether a trial is fair does not have to do with the nature of the court, but rather with the extent to which guarantees are provided in its proceedings. The Government further adds that the Egyptian military courts comply with the provisions of the International Covenant on Civil and Political Rights on exceptional measures when a state of emergency has been declared; apply the ordinary criminal law and afford defendants appearing before them the same procedural guarantees as those available in the ordinary courts under the Criminal Procedure Code.

10. The Working Group transmitted the response by the Government to the source, which did not provide its comments.

11. The Working Group notes that, in a case very similar to the present one, the Group, in its Opinion No. 3/2007 (A/HRC/7/4/Add.1, page 59), declared the detention of Mr. Ahmed Ali Mohamed Moutawala and 44 other persons to be arbitrary. The Working Group wishes to reiterate the foundations of that Opinion.

12. Further to the arguments contained in the mentioned Opinion No. 3/2007, the Working Group wishes to add the information that follows below.

13. Contrary to what the Government maintains, the nature of a court or tribunal is a fundamental element for considering guarantees of impartiality and independence which are referred to in article 10 of the Universal Declaration of the Human Rights and article 14 of the International Covenant on Civil and Political Rights. The universal experience is that the so-called military courts are composed by, first of all, military judges. If the essential quality for a judge to exercise his/her functions is one of independence, in a military person the main value is by definition one of dependence, even of obedience. In the case of Egypt, the military jurisdiction is dependent on the Ministry of Defence. Military judges are military officers appointed by the Ministry of Defence for a two-year term, which can be renewed for an additional two-year term at the discretion of the Ministry. In addition, the referral of cases to courts by the executive branch of the Government creates a strong link between military courts and the executive.

14. The Government notes that the Military Judgements Act has been recently amended to ensure the impartiality and independence of their members by granting them judicial immunity and strengthening the guarantees for persons tried by those courts. The Working Group feels that the Government thereby confirms that, before this amendment, there were even less guarantees than now, and Mr. Ramadhan was indeed tried within the old norms. The amendment also provides for the establishment of a military appeals court, corresponding to a Court of Cassation. Mr. Ramadhan did not have the opportunity to lodge an appeal before a higher court.

15. The Working Group further notes that in Egypt military courts are composed of three military officers (and five in certain cases) plus a representative of the military public prosecution. Part of the Organic Law No. 25 of 1966, concerning military jurisdiction, requires military officers exercising the function of judge to have a knowledge of law. However, this requirement only applies to the Director of this jurisdiction and the Military Attorney General. The legal experience of some judges and prosecutors is generally limited, and confined to infractions committed by the military against military law and codes, but not to the assessment of crimes and own responsibilities of civilians.

16. The integration of a representative of the Public Prosecution as a magistrate in the military court aggravates the dependency - or lack of independence – of that court, because the public prosecution or Office is, by its own function, one of the parts – the accusatory - in the judicial proceedings.

17. In 2002, the Human Rights Committee, while analysing the fulfilment on the part of the Arab Republic of Egypt of its obligations under the International Covenant on Civil and Political Rights, noted “with alarm that military courts and State security courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those courts’ independence and their decisions are not subject to appeal before a higher court (article 14 of the Covenant)”. (CCPR/CO/76/EGY, para. 16). The Committee also considered that the Egyptian laws that penalize terrorism - that seemed to have applied to Mr. Ramadhan - contain a “very broad and general definition” of this scourge, which causes serious legal consequences.

18. Furthermore, the Committee against Torture, in its Final Observations, expressed “particular concern at the widespread evidence of torture and ill-treatment in administrative premises under the control of the State Security Investigation Department, the infliction of which is reported to be facilitated by the lack of any mandatory inspection by an independent body of such premises” (CAT/C/CR/29/4, para.5). Mr. Ramadhan was precisely held in these premises.

19. In addition, the declaration of a state of emergency by the Government does not comply with the requirement of the International Covenant on Civil and Political Rights for that declaration to be legitimate. The Covenant prescribes that an exceptional situation of “public emergency” must exist which “threatens the life of the nation”. In such cases, there can be such measures derogating from some but not all obligations of the Covenant, provided that such measures are not inconsistent with other obligations of the State under international law and do not involve discrimination. All suspension of the conventional obligations must be limited “to the extent strictly requested by the exigencies of the situation”.

20. The declaration of the state of emergency was made by Decree No. 560 of the provisional President (the President of the People’s Assembly) on 6 October 1981, the same day of the assassination of the President of the Republic, Anwar Sadat. Since that day, it has been renewed periodically, without a single day not governed by the state of emergency. The latest prorogation, for another two-year-period, was made on 26 May 2008.

21. Although it was certainly possible to consider on 6 October 1981 that Egypt was affected by a situation of public emergency which could threaten the life of the nation, this argument seems to be less valid today. The state of emergency is clearly affecting the rights of persons whom objectively did not have links to that crime. The long duration of the state of emergency has also been condemned by the Committee against Torture (“The fact that a state of emergency has been in force since 1981, hindering the full consolidation of the rule of law in Egypt”); as well as by the Committee on Economic, Social and Cultural Rights (“the state of emergency that has been in place in Egypt since 1981 limits the scope of implementation of constitutional guarantees for economic, social and cultural rights” (E/C.12/1/Add.44, para. 10).

22. The Working Group further considers that Mr. Ramadhan had the right to have his case discussed fairly and justly before a neutral and independent court. He had also the right, according to article 14, paragraph 5, of the International Covenant on Civil and Political Rights, to have his conviction and sentence revised by a higher tribunal. This was not the case.

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

The deprivation of liberty of Mr. Djema'a Al Seyed Suleymane Ramadhan since 11 May 1994 is arbitrary, being in contravention of articles 5, 8, 9, 10 and 11 of the Universal Declaration on Human Rights, and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls under category III of the categories applicable to the consideration of cases submitted to the Working Group.

24. Consequent upon the Opinion rendered, the Working Group requests the Government to remedy the situation of Mr. Ramadhan and to provide him with the medical care and assistance he requests, and to bring his situation into conformity with the provisions of the International Covenant on Civil and Political Rights. The Working Group believes that in view of the prolonged period of time already spent deprived of liberty, the adequate remedy would be his immediate release.

Adopted on 9 September 2008

**OPINION No. 19/2008 (UNITED KINGDOM OF GREAT BRITAIN  
AND NORTHERN IRELAND)**

**Communication addressed to the Government on 14 January 2008.**

**Concerning Mr. Michel Moungar.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided the requested information.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The case summarized below was reported to the Working Group as follows: Mr. Michel Moungar, born 22 October 1973 in Chad, and a former member of the Movement for Democracy and Justice in Chad (MDJC), entered the United Kingdom on 2 January 2003 and applied for asylum. He was granted refugee status in the United Kingdom on 6 October 2005 in accordance with the 1951 United Nations Convention Relating to the Status of Refugees.
5. Mr. Moungar was arrested on 3 November 2006 and charged with deception. He was sentenced to one year of imprisonment and finished his term on 7 May 2007. Since then he has been detained at the Lindholme Immigration Removal Centre in Doncaster to effect his deportation from the United Kingdom. At the same time the authorities are seeking to revoke his refugee status.
6. His application for release from administrative detention on bail, dated 17 May 2007, was refused on 1 June 2007. On 3 July 2007 Mr. Moungar challenged the decision to deport him, which was dismissed on 16 July 2007.
7. Since Mr. Moungar fears that he would be detained and possibly killed should he be returned to Chad for reasons of his known political activities against the ruling Government of Chad, the Home Office of the United Kingdom decided to remove him to Cameroon, although he is not a Cameroonian national.

8. The source alleges that the prolonged administrative detention of Mr. Moungar of more than eight months is arbitrary, because it is not necessary under all circumstances.

9. In its reply the Government reported that Michel Moungar is not this person's true name. On 10 April 2007, the Cameroonian authorities confirmed his true identity as Mr. Adabert Blaise Emani, who was born on 22 October 1968 (and not on 22 October 1973) and who is a citizen of Cameroon.

10. Mr Moungar/Emani claimed to have arrived in the United Kingdom on 2 January 2003, by air, accompanied by a paid facilitator. There was no evidence for this. He claimed asylum on 21 February 2003 in the identity of Michel Moungar. His application was refused on 9 May 2005 and, on 11 May 2005, he was notified of his status and liability to removal from the United Kingdom as an illegal entrant.

11. On 2 June 2005, Michel Moungar/Adabert Emani appealed against the refusal of his asylum application. On 22 September 2005 his appeal was allowed and on 6 October 2005 he was recognized as a refugee under the terms of the 1951 United Nations Convention relating to the Status of Refugees. On 7 November 2005, he was issued with a titre de voyage.

12. On 3 November 2006, the person calling himself Michel Moungar was arrested by officers of the Department of Works and Pensions on suspicion of possession and use of a forged French passport. The Government adds that when his home was searched, a significant number of forged documents in the Michel Moungar identity were seized. Also seized was a genuine passport issued by the Republic of Cameroon in the name of Adabert Blaise Emani, born on 22 October 1968, and a genuine Cameroonian driving licence in the same name. Also found was a Halifax Bank card in the name of Mr. A. B. Emani.

13. According to the Government, Mr. Adabert Blaise Emani first attempted to seek asylum in the United Kingdom on 4 July 2001, when he was refused entry to this country at Coquelles, having presented a forged French passport in the name of Nayl Richard. The genuine Cameroonian passport found after his arrest on 3 November 2006 bore a French "Schengen" visa

issued at Douala, Cameroon, on 16 June 2001. There were endorsements showing that Mr. Emani had embarked at Douala airport on 26 June 2001 and had entered France at Roissy-Charles de Gaulle Airport the following day, a week before he was refused entry to the United Kingdom. On 4 July 2001, Mr. Emani was arrested by the French police, who took his photograph and fingerprints. This photograph and fingerprints taken in France subsequently proved to be a match with the photograph and fingerprints of the person calling himself Michel Mounkar in the United Kingdom.

14. Mr. Mounkar/Emani was convicted on 13 February 2007 at Manchester Crown Court for possession and use of a false instrument. He was sentenced to 12 months imprisonment and was recommended by the Court for deportation. He did not appeal against his conviction or sentence. The Cameroonian passport in the identity of Adabert Blaise Emani was referred to the passport authorities in Cameroon who confirmed that the passport was genuine and was issued to Mr. Adabert Blaise Emani, born in Bafang on 22 October 1968. On 10 April 2007, Mr Emani was asked to provide any reasons why he believed he should not be deported from the United Kingdom. He made no reply.

15. On 1 May 2007, he was informed that it had been decided to cancel his refugee status and to make a deportation order against him. That decision attracted a right of appeal. Mr. Emani lodged his appeal on 4 May 2007 in the identity of Michel Mounkar. His grounds for appeal were that he would face treatment contrary to articles 2, 3 and 8 of the European Convention on Human Rights if he were to be returned to Chad. On 7 May 2007, Mr. Mounkar/Emani completed his custodial sentence and he was subsequently detained under the provisions of paragraph 2 of Schedule 3 of the Immigration Act 1971. Mr. Mounkar/Emani's appeal was heard on 3 July 2007. He was present and was able to give evidence to the Immigration Judge.

16. In his determination issued on 16 July 2007, the Immigration Judge commented: "The Appellant is a thoroughly dishonest witness who is completely lacking in credibility". He found that: "In reaching our findings that the passport belongs to the Appellant we have also had regard to the fact that a Cameroonian driving licence was also recovered from the Appellant's home which is also in the same name as Adabert Blaise Emani. Consistent with our findings that the

Appellant has lied concerning his Chadian identity and that he has fabricated a false asylum claim on the basis of persecution in Chad, and taking account of our positive findings that both the Cameroonian passport and the driving licence belong to the Appellant, then we are satisfied on the balance of probabilities that the Appellant's true identity is Adabert Blaise Emani and that he is a citizen of Cameroon and that he is not Michel Mounkar from Chad."

17. Having found that Mr. Emani's deportation to Cameroon would not be in breach of the United Kingdom's obligations under the Refugee Convention or the ECHR, the Immigration Judge concluded: "We bear in mind the fact that the sentencing Judge recommended deportation and that the offence of which the Appellant was convicted was one of using a false French passport, an offence which we find goes to the heart of immigration control. We also take into account our findings that the Appellant deceived the Respondent into granting him asylum by falsely claiming that he was a national of Chad who had suffered persecution there. We find that public policy demands that those who abuse the asylum system in such a way ought not to be allowed to benefit from that deception by being allowed to remain in the United Kingdom, save perhaps in the most exceptional circumstances, and clearly this case does not fall within that category".

18. On 14 August 2007, Mr. Mounkar/Emani's application for a review of the decision to dismiss his appeal was refused by a Senior Immigration Judge. Mr Mounkar/Emani now claimed to be from Darfur in Sudan. On 15 August 2007, he made a further application to the High Court for a review of the decision to dismiss his appeal, which was rejected on 22 November 2007 thereby exhausting all available avenues of appeal. On 21 January 2008, a Deportation Order was signed against Adabert Blaise Emani, authorizing his continued detention until his removal from United Kingdom territory. He was later deported to Cameroon.

19. The Government lastly states that Mr. Emani's continued detention was reviewed on a regular basis. Paragraph 2 of Schedule 3 of the immigration Act 1971 provides that a person who has been recommended for deportation by a Court may be detained pending the making of a deportation order. Mr. Emani's continued detention was lawful and fully justified by the Court's recommendation that he be deported; his very poor immigration history; the degree of deception

he practised; and the likelihood that he would not comply with any conditions attached to his release.

20. The response from the Government was submitted to the source, which did not provide the Working Group with its observations or comments.

21. The Working Group considers that Mr. Michel Moungar/Adabert Blaise Emani was deported to Cameroon under the authority of a deportation order issued by a competent administrative immigration authority, a decision which was revised by competent judicial authorities, the Immigration Judge and the High Court.

22. However, the Working Group also notes that this person has been under criminal detention between 3 November 2006 and 7 May 2007 for possession and use of a false instrument and under administrative detention since then and until his deportation. His applications to be released on bail were refused on 1 June and 8 November 2007. This period of administrative detention seems to be of an unwarranted and unnecessary duration for the execution of a deportation order. The Working Group considers that the right not to be deprived of liberty is one of the fundamental human rights and that the principles of no undue delay and reasonable time are principles consecrated in articles 9 and 14 of the International Covenant on Civil and Political Rights (see, in this regard, the Working Group's Opinion No. 45/2006 (United Kingdom of Great Britain and Northern Ireland) (A/HRC/7/4/Add.1, p. 40)).

23. Considering that Mr. Michel Moungar/Adabert Blaise Emani was deported from the United Kingdom, the Working Group, according to paragraph 17 (a) of its methods of work, decided to file the case.

Adopted on 10 September 2008

**OPINION No. 20/2008 (EGYPT)**

**Communication addressed to the Government on 24 October 2007.**

**Concerning Mr. Islam Subhy Abd al-Latif Atiyah al-Maziny.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided the requested information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The case summarized below was reported to the Working Group as follows: Dr. Islam Subhy Abd al-Latif Atiyah al-Maziny, born on 21 October 1971, is a well known physician and a prestigious writer, resident at Al Gharbiyah. He is not a member of any political association. He has published, among other books, a family medical guide entitled *Before You Go to the Doctor*; *The Diary of the Unfortunate Doctor between Addicts*; *When Men Stagger*; *The Wonder of Muslim Doctors* and an Islamic medical history encyclopaedia; *Cataract and Glaucoma*; *Our Sexual Troubles before and after Marriage* and *Social and Medical Study about Addiction: My Enemy Inside my Cage*.
5. It was reported that Dr. Al-Maziny was requested to travel to Saudi Arabia in order to temporarily work in a medical centre. After obtaining a work permit from the relevant authorities, he went to the security headquarters of Tanta, in Egypt, on 7 April 2007, and was arrested. He was informed by the security chief that the purpose of his arrest was to facilitate an investigation. He was held in incommunicado detention in an exiguous, unhygienic and unsanitary cell for 50 days. Guards often prevented him from going to the bathroom. According to the source, Dr. Al-Maziny was ill-treated while in detention. He was not interrogated about a precise fact or accused of having committed a concrete offence.

6. On 27 May 2007, Dr. Al-Maziny was transferred to Wady Natroune Prison. It is believed that an administrative decision for his detention was issued by the Minister of the Interior, although Dr. Al-Maziny has never received a formal notification of this order nor any detention warrant. On 7 July 2007, a civil court ordered his immediate release. The court considered that there was no evidence against the detainee and that his detention was not justified, particularly considering his good standing and reputable position in the Egyptian society.

7. However, Dr. Al-Maziny was re-arrested when he was leaving the prison by State Security Services agents who brought him to their headquarters in Tanta, and where he was again put in incommunicado detention. According to the source, this re-arrest shows contempt for the rule of law and disrespect for the civil court decision. On 16 July 2007, Dr. Al-Maziny was again transferred to Wady Natroune Prison.

8. In July 2007, the Head of the Health Unit of the Prison ordered the immediate transfer of Dr. Al-Maziny to the hospital, given that he considered that Dr. Al-Maziny's state of health had seriously deteriorated while in prison. Dr. Al-Maziny is currently suffering from several illnesses, among them, of an anastomotic ulcer with a gastritis presenting a hemorrhagic risk; disc pathology with compression of the vertebrae; urethral calculus and a retinal ischemia. The penitentiary administration did not accept his transfer to the hospital, instead aggravating Dr. Al-Maziny's already extremely difficult conditions of detention.

9. The source reports that Dr. Al-Maziny is being kept in detention in virtue of article 3 of Emergency Act No. 162 of 1958. This law of exception allows the Minister of Internal Affairs to administratively detain any individual without charge or judicial order; with the security services entitled to appreciate the "suspect" nature of any individual, and the potential "threat" the person represents to "public order". The security services are not obligated to sustain or defend their considerations or fears about an individual. Dr. Al-Maziny has never received a notification about his detention, its possible length or about the reasons to be deprived of his liberty. He has not been charged nor accused of having committed any offence. No trial has been scheduled.

10. The source adds that contrary to the disposition contained in article 9, paragraph 4, of the International Covenant on Civil and Political Rights, Dr. Al-Maziny does not have at his disposal any effective resource to challenge the lawfulness of his detention. He is being kept in detention in spite of a specific judicial decision ordering his release. He has not been charged, accused nor tried and does not know for what fact he is now being considered responsible.

11. According to the Government, Dr. Islam Subhi Abd al-Latif Al-Maziny was an active member of an extremist movement. The Minister for Internal Affairs therefore ordered his detention under the Emergency Act No. 162 of 1958, as amended, in order to put a stop to his activities. He received the necessary treatment at his place of detention and his condition at the time was stable. The above-mentioned citizen was released on 19 December 2007.

12. The Government states that the concept of exceptional circumstances is a fundamental element of all national legal systems. It allows the national authorities to take certain emergency measures to deal with threats to social stability and security. Provisions to this effect are contained in article 4 of the International Covenant on Civil and Political Rights, article 15 of the European Convention [on Human Rights] and article 26 of the American Convention [on Human Rights]. Egypt has followed the approach of the previous law regulating the state of emergency since 1962. That law was amended to bring it into line with international standards and Egypt's legal obligations in this regard.

13. As stated above, Dr. Al-Maziny was detained in accordance with the Emergency Act, which allows administrative detention for a period limited by law. As is well known, the state of emergency is about to be lifted and, as a consequence, the Emergency Act will no longer be applied once the Counter-terrorism Act has been enacted.

14. The Government concludes that the detention of Dr. Al-Maziny was not arbitrary, but was based on objective grounds related to his activities, and was imposed lawfully and in accordance with the legislation in force in this country, taking into account the terms of article 4 of the International Covenant on Civil and Political Rights concerning states of emergency.

15. The source confirmed that Dr. Al-Maziny, whose health has severely degraded during his detention, was indeed released on 19 December 2007. He was thus detained for more than eight months, without any legal basis and only upon a simple decision by the Minister of Internal Affairs, a fact uncontested by the Government in its response. The Government persists in justifying arbitrary detentions and detentions of lengthy duration by virtue of the Emergency Act of 1958, a law in effect for more than 50 years, while invoking article 4 of the Covenant, an international instrument designed to protect human rights and not to justify violation of such rights by States.

16. Furthermore, according to the source, the Government neither elaborates on nor contests the allegations made, in particular, that:

(a) Dr. Al-Maziny was indeed arrested on 7 April 2007 at his place of residence by agents of the State Security Services, without any warrant and detained in secret during 50 days without any possibility of contact with outside world;

(b) He was never notified of any legal charges, nor brought before to any court or any other judicial authority;

(c) He was arrested and detained during this whole period, as a “preventative measure”, only in light of his presumed “affiliation to an extremist movement”, this being understood as because of his political opinions; while no material fact was ascertained against him;

(d) In spite of a judicial decision ordering his release on 7 July 2007, he was maintained in detention in absence of any legal proceeding, therefore rendering any appeals or recourse to justice concerning the lawfulness of his detention completely unproductive and ineffective.

17. In accordance with the Working Group’s methods of work, if the person has been released, for whatever reason, following the reference of the case to the Working Group, the case

should in principle be filed. The Working Group, however, reserves the right to render an Opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned.

18. The legal basis for the deprivation of liberty of Dr. Al-Maziny follows from the state of emergency declared on 6 October 1981 according to the Emergency Act No. 162 of 1958, by the Arab Republic of Egypt, and which has been maintained in effect without interruption for more than 26 years. The state of emergency gives the Ministry of the Interior extensive powers to suspend basic rights, such as detaining persons indefinitely without charge or trial. The length of this state of emergency has been a constant concern of the human rights community, including the Working Group.

19. Indeed, the Working Group considers that, contrary to the Government's argument, the state of emergency as declared by the executive branch of Egypt, does not conform to the requirements of the International Covenant on Civil and Political Rights, because its article 4 prescribes that an exceptional "time of public emergency" should exist, which would "threaten the life of the nation". Not all the obligations contracted by virtue of the Covenant can be suspended, and only as long as this suspension is not incompatible with the other obligations imposed by international law, and does not involve any causal relation to prohibited discrimination. All temporal derogation of obligations in the Covenant must be strictly limited the exigencies of the invoked situation.

20. The declaration of the state of emergency was made on 6 October 1981 according to the Emergency Act No. 162 passed in 1958 under the Government of Gamal Abdul Nasser, by Decree of the interim President, Dr. Soufy Abu Talib, then President of the People's Assembly, the same day of the assassination of the former President of the Republic, Anwar Sadat. From that day on, the state of emergency has been periodically renewed, and on 26 May 2008, it was extended for a further two-year period, prevailing therefore until 31 May 2010. The state of emergency has allowed the Government to detain prisoners indefinitely and without charge.

21. Although undoubtedly the assassination of President Sadat in 1981 and its eventual consequences could have been considered a “danger for the life of the nation”, clearly the argument seems invalid today, as to affect rights of people who objectively are not linked to this situation. State of emergency is associated with times of international or internal war, disturbances or natural disasters which endanger security or public order. This long duration of the state of emergency has also been denounced in a report of the Committee against Torture (“The fact that a state of emergency has been in force since 1981”, hindered “the full consolidation of the rule of law in Egypt”, the Committee noted in its report CAT/C/CR/29/4, para. 5 (a)), as well as by the Committee on Economic, Social and Cultural Rights (“the state of emergency that has been in place in Egypt since 1981 limits the scope of implementation of constitutional guarantees for economic, social and cultural rights”, noted the Committee in its report E/C.12/1/Add.44, paragraph 10). In November 2002, the Human Rights Committee recommended that Egypt lift its permanent state of emergency.

22. It must be considered that although one court, acting in accordance with strict legal criterion, had ordered for the release of Dr. Al-Maziny, on 7 July 2007, the Government, unbeknownst to the judicial mandate, ordered his re-arrest and secret detention, without formulating charges against him.

23. In light of the above, although Dr. Al-Maziny enjoyed a right to appeal to contest his detention, this was not effective in absolute terms, as required by article 8 of the Universal Declaration of Human Rights.

24. The Working Group lacks precedents and enough background information to pronounce itself on the detention of Dr. Al-Maziny as being motivated by the legitimate exercise of some of the rights mentioned in category II of its methods of work (see above para. 3.)

25. In the light of the foregoing, the Working Group renders the following Opinion:

(a) The deprivation of liberty of Dr. Al-Maziny during the period of 7 April 2007 to 7 July 2007 (the date on which the court ordered his release), was arbitrary; according

to articles 9 and 10 of the Universal Declaration of Human Rights and article 9, paragraphs 1, 2, 3 and 4, and article 14, paragraphs 1, 2 and 3, of the International Covenant on Civil and Political Rights, and falling within categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group:

(b) The detention of Dr. Al-Maziny during the period of 8 July 2007 to 19 December 2007 (day of his release), was arbitrary, according to applicable category I, for the inexistence of any valid legal basis to justify his deprivation of liberty.

26. Consequent upon the Opinion rendered, the Working Group calls on the Government to ensure that everyone has the right to liberty and security of person and requests it to arrange for effective right to compensation for Dr. Al-Maziny, in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights, and to inform the Working Group therewith.

Adopted on 10 September 2008

### **OPINION No. 21/2008 (CHINA)**

**Communication addressed to the Government on 17 July 2007.**

**Concerning Pastor Gong Shengliang.**

**The State has signed but not ratified the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided the requested information.

3. (Same text as paragraph 1 of Opinion No. 17/2008.)

4. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Pastor Gong Shengliang (Gong Dali) is a Christian Pastor from Hubei province who founded the South China Church in 1988. The South China Church exists independently of the only State-sanctioned Protestant Church in China, the Three Self Patriotic Movement. The Church does not register with the Religious Affairs Bureau. Under Pastor Gong's leadership, the Church rapidly grew into one of China's largest Christian Protestant Churches. Over 2,000 members of the Church were imprisoned between 1986 and 2001. In 2000, the Central General Office of the Communist Party and General Office of the State Council designated Pastor Gong's Church as a "cult organization" and intensified its efforts to dismantle the Church. A Cult Notice stated that Pastor Gong and the Church threatened society and instructed security departments throughout the country "to apprehend Gong and key members [of the Church] without delay".

5. On 8 August 2001, Hubei Police arrested Pastor Gong at the home of a Church member. Police also arrested 16 other members of the South China Church between May and October 2001 who were later indicted and tried along with Pastor Gong. After their arrests, police did not allow arrested Church members to contact their family members and did not notify family members of the locations where Church members were detained. The police did not allow Church members to contact lawyers.

6. Twenty-one (21) members of the South China Church have detailed in sworn statements submitted to the Working Group that Hubei Police tortured them into making false statements about Pastor Gong either before or during Pastor Gong's trials. They identified the following government facilities as locations where police tortured them: Zhongxiang Public Security Bureau, Jingmen Detention Centre, Zhongxiang Police Training Centre, Jingmen Police Training School, and Shayang Detention Centre. They also identified by name officers of the Zhongxiang Religious Affairs Bureau, Zhongxiang Public Security Bureau, Shayang Public Security Bureau, and Chengzhong Police Station as responsible for supervising and carrying out the torture. All 10 women whom the Government accused Pastor Gong of raping (their names are on record with

the Working Group) recanted their statements and said that they were tortured into making the accusations.

7. According to the source, Pastor Gong himself was tortured and forced to sign a false confession of guilt. After his arrest on 8 August 2001, Pastor Gong's family was not notified of his whereabouts until 10 December 2001. During these four months of incommunicado detention, police repeatedly interrogated Pastor Gong under situations of mental, psychological and physical duress. Under the pressure of threats, Pastor Gong signed a statement admitting to the rape and assault charges. On 5 December 2001, after nearly four months of incommunicado detention, the Procuratorate charged Pastor Gong with an indictment including charges of organizing a cult, rape, and intentional assault. It was reported that under article 300 of the Criminal Law of the People's Republic of China (the "Anti-Cult Law"), evidence that a leader has had "illicit sexual relations with women" may be used to substantiate the charge that the organization is a cult.

8. On 19 December 2001, the Intermediate Court began secret proceedings against Pastor Gong and the other 16 defendants. Family members of the defendants were not permitted to enter the court. Pastor Gong was in a visibly weakened state on the first day of the trial. On the second day of the court hearing, Pastor Gong was unable to stand. He spoke to the judge and then fainted before the judge could respond. The Intermediate Court permitted the alleged victims of assault to give testimony without identifying themselves. The alleged victims were unable to identify any of the defendants as their attackers. The Intermediate Court did not permit Pastor Gong's lawyers to cross-examine any of the alleged victims. At least six of the defendants stated in court that they had been tortured during interrogation and under this duress made false accusations against Pastor Gong which they wanted to retract. However, the Intermediate Court denied all requests to recant the false accusations. All defendants submitted a written statement to the Intermediate Court explaining that their confessions were false and had been extracted through torture. Pastor Gong himself submitted a written statement stating that he was coerced into making a false confession of guilt. The Intermediate Court did not offer any response to the document. Neither did the Intermediate Court investigate allegations of torture.

9. The indictment named more than 20 criminal charges against Pastor Gong and the other 16 defendants and listed 13 separate villages in 10 townships and eight cities as locations of the alleged activities. The charges covered activities spanning more than six years, involved 30 alleged victims and 31 alleged witnesses. Yet after only three days of proceedings, the Intermediate Court found Pastor Gong guilty of intentional assault, rape, “organizing and utilizing a cult organization to undermine law enforcement,” and intentionally destroying property. The Intermediate Court sentenced Pastor Gong to death. Prison guards then forced Pastor Gong and the other defendants to sign the record of the trial without allowing them to read it.

10. Upon appeal by the defendants, the Court of Appeals conceded that “the facts affirmed by the Intermediate Court are not clear and the evidence supporting the judgment is not sufficient”. It ordered a retrial. On 9 October 2002, the second trial of Pastor Gong and the other 16 defendants began. Pastor Gong’s lawyers were denied access to the record of the first trial. The day before the trial began, on 8 October 2002, the Court of Appeals and the Intermediate Court required the attendance of Pastor Gong’s attorneys at a private lunch meeting. At the meeting, officers of the Intermediate Court told Pastor Gong’s attorneys that the case was politically significant and that they must keep State secrets and cooperate with the Intermediate Court in order to bring the trial to a swift conclusion. The second trial again took place in secret. Rather than hearing live testimony about the charges of rape and assault, the Intermediate Court directed the Procuratorate to present only summaries of witness and victim statements. The Intermediate Court rejected the request by the defence attorneys for a complete presentation of evidence. With regard to the rape charges, the Procuratorate disclosed only the last names of the four alleged victims, none of whom testified at the trial. Moreover, the statements from the victims were never shown to Pastor Gong or his attorneys. Pastor Gong’s lawyers thus could not determine the identities of the alleged victims much less examine the witnesses against him or defend him against the charges.

11. The judgment of the Intermediate Court at the Second Trial expressly relied on evidence obtained through torture to convict Pastor Gong of rape. It also cites Pastor Gong’s confession to the Police, which was similarly made under the duress of torture. After only a day and a half of

proceedings, the Intermediate Court convicted Pastor Gong of rape and intentional injury. This time it sentenced him to life imprisonment.

12. The source alleges that the Government violated Pastor Gong's right to a fair trial when it relied upon confessions obtained through torture of South China Church members, and by denying fundamental due process guarantees. Both Pastor Gong and the Church members who were co-defendants in his trials raised allegations of torture to the Procuratorate before trial. They also strenuously urged the judges during Pastor Gong's first and second trials to examine their claims of torture. Criminal Procedure Law article 18 requires the Procuratorate to investigate allegations of torture, but the Procuratorate did not undertake any investigations. The Intermediate Court in the first trial also ignored Church members' objections to the introduction of statements obtained through torture. In the second trial, the Intermediate Court similarly ignored objections to the use of evidence obtained through torture. It convicted Pastor Gong based upon the summarized evidence from the first trial, including the coerced confessions of Li Ying, Sun Minghua and Pastor Gong. According to the source, Pastor Gong's conviction and sentence to imprisonment are arbitrary because they are based on evidence obtained through torture.

13. The source asserts that the Government additionally violated Pastor Gong's right to a fair trial by denying him fundamental guarantees of due process, including right to adequate time and facilities to defend charges; right to a public trial; right to be informed of charges; right to cross-examine witnesses; and the right to examine witnesses on the his behalf. The Intermediate Court's decision to hold its proceedings in secret violated Pastor Gong's right to a public trial, thereby rendering his detention arbitrary. The Intermediate Court closed both of Pastor Gong's trials to the public. Close family members of Pastor Gong and Church members were forced to wait outside the courthouse. The Intermediate Court was seeking to justify a secret trial because the charges involved rape. However, it did not even examine the rape charges during the proceedings, call any of the alleged victims to testify, or disclose the full names of the alleged rape victims, even to Pastor Gong. Thus the privacy of the alleged victims was never at risk and was a pretext for violating the important safeguard of justice that a public trial provides. Nor

does the record provide any basis for other “exceptional circumstance” (such as national security) that could justify holding a secret trial.

14. With regard to the right to adequate time and facilities to prepare his defence, the source notes that the charges against Pastor Gong were extremely complex. The indictment named more than 20 criminal charges against Pastor Gong and the other 16 Church defendants and listed 13 separate villages in 10 townships and eight cities as locations of the alleged activities. The charges covered activities spanning more than six years. The charges involved 30 alleged victims and 31 alleged witnesses. However, in both trials the Intermediate Court denied Pastor Gong and the other Church members’ sufficient time to prepare to defend. Prior to the second trial, Pastor Gong’s attorneys explicitly requested an extension of time on the ground that the four days provided were grossly inadequate. However, the Intermediate Court denied their request. In addition, Pastor Gong was denied access to any legal assistance for the four months he was detained incommunicado prior to the December 2001 indictment. Moreover, the Intermediate Court denied Pastor Gong’s attorneys access to the record of the first trial and their request for evidence from the first trial, even though the Intermediate Court then relied on evidence from the first trial to convict him at the second trial. The Intermediate Court denied Pastor Gong access to the record and verdict of the first trial. Thus, the Intermediate Court made it impossible for Pastor Gong’s attorneys to determine whether the Procuratorate had remedied any of the evidentiary deficiencies in the first trial.

15. The source maintains that the Government violated Pastor Gong’s right to be informed of the charges against him. At the second trial the Procuratorate and Court refused to inform Pastor Gong of the identity of the individuals whom he supposedly raped. In addition, the Government did not inform Pastor Gong that he would be tried on the charge of organizing a criminal gang until the Procuratorate raised it during the second trial. Defence attorneys protested that the charge was not in the indictment. The Intermediate Court overruled their objections, allowed the Procuratorate to proceed, and forced the defence to rebut their charges without allowing them any additional time to prepare. The Intermediate Court concluded the trial without any further elaboration of the new charge. The Government also denied Pastor Gong due process by denying Pastor Gong’s attorneys the opportunity to cross-examine any of the Procuratorate’s witnesses.

Not only the Intermediate Court refused to allow Pastor Gong to cross-examine any of the four alleged rape victims, but the Intermediate Court refused even to disclose their identities. The defendant had no way at all to know . . . whom he had allegedly raped, nor what her name was. In addition, the Government denied Pastor Gong due process by prohibiting him to call or examine witnesses in his defence.

16. According to the source, the Government has imprisoned Pastor Gong as punishment for his religious beliefs in violation of art. 18 of the Universal Declaration of Human Rights and the Constitution of the People's Republic of China, which protects the individual's right to "believe in any religion," and provides that no citizen will be discriminated against by the State because of their religious belief. The Intermediate Court in the first trial relied upon evidence that Church members were "sent to various places to engage in missionary work and to increase its converts" to find Pastor Gong guilty of organizing a cult. Further, the Government has misinterpreted several Christian teachings to signify a political challenge to the Socialist regime. The Cult Notice characterized the Church's collection of voluntary offerings as an illegal practice of "coercing and deceiving." The source asserts that the Government never produced any evidence that Church members were misled as to what their tithes would be used for, that the tithes were used for anything other than legitimate Church activities, or that the Church's accounting practices were fraudulent. However, the Intermediate Court relied on the Cult Notice's characterization of tithing as a cult activity to convict Pastor Gong of organizing a cult.

17. In its response, the Government reported that on 7 December 2001, the People's Procurator's Office of Jingmen city in Hubei province instituted criminal proceedings with the Jingmen Municipal People's Intermediate Court against Gong Dali, also known as Gong Shengliang, male, born May 1952, farmer from Xuzhai village in Zaoyang municipality, Hubei province, and other persons for assault and rape and other offences. Because of the need to protect the privacy of the victims in this case, the Jingmen Municipal People's Intermediate Court, acting in accordance with the law, did not conduct the proceedings in open court and, on 25 December 2001, handed down its judgement at first instance. Following their sentencing at first instance, Gong and the other defendants refused to accept the court's judgement and lodged an appeal. Following its consideration of the case, the Hubei Provincial People's High Court

ruled that some of the facts adduced in evidence in the proceedings at first instance had not been clear and, on 23 September 2002, it dismissed the judgement handed down at first instance and sent the case back for retrial.

18. On 9 and 10 October 2002, the Jingmen People's Intermediate Court, in accordance with the law, retried the case in closed court and determined the following facts in the case: over the period from November 1999 to May 2001, Gong and his co-defendants, acting under Gong's leadership, had thrown sulphuric acid into their victims' faces to disfigure them, wearing masks had broken into locked premises, beating their victims ferociously with metal bars, even knocking down walls to enter buildings and to carry out their beatings, as a retaliation against villagers who opposed their unlawful activities, causing intentional harm to 16 persons, 4 of them seriously, 10 with lesser injuries and 2 with slight injuries, with the use of utmost cruelty and in the most reprehensible fashion. In addition, with the use of force, deceit and other ploys, Gong had, in the towns of Zhongxiang, Zaoyang and Shiyan in Hubei province, in other people's homes and on the Huangzhuang sector of the Han river flood control barrier in the town of Zhongxiang, repeatedly carried out acts of indecent assault and rape against the young women Wang [name withheld], Li [name withheld], Yang [name withheld], Zhang [name withheld] and others.

19. Following the trial, the Jingmen Municipal People's Intermediate Court made public its judgement in the same court, sentencing Gong, in accordance with the provisions of articles 234, paragraphs 1 and 2, and 236, paragraph 3 (b), of the Chinese Criminal Code, for the offence of causing intentional bodily harm, to life imprisonment, stripping him of his political rights in perpetuity; for the offence of rape, to 10-years' fixed-term imprisonment; with the final consolidated sentence of life imprisonment, and deprivation of his political rights in perpetuity. For the offence of causing intentional bodily harm, Gong's co-defendants received fixed-term prison sentences ranging from 2 to 15 years. A further four defendants were discharged. The other counts in the indictments brought by the procuratorial authorities against Gong and the other defendants were dismissed, as the facts in the indictment were not clear, evidence was lacking and there was no determination of the offence.

20. Following the proceedings at first instance, Gong and his co-defendants lodged an appeal. The Hubei Provincial People's High court heard the case at second instance and, on 22 November 2002, ruled that the appeal should be dismissed and the original judgement should stand. Gong is currently serving his sentence in the Hongshan prison in Wuhan city, Hubei province. Prior to his admission to prison, Gong was found to be suffering from stomach ulcers and, according to his own statement, had already undergone more than 20 medical interventions and surgical procedures, the scars from which were visible on his abdomen, and for many years had been on continuous medication. Upon admission to prison, following a course of medication and treatment, his physical condition has returned to normal.

21. Concerning the allegation that Gong and the other defendants, during the pretrial investigation stage, were tortured, and that their confessions and the evidence against them were obtained by coercion and were false and that the courts failed to ensure due process, the Government stated that on no occasion during the proceedings at both first and second instance did either Gong and his co-defendants, or their defence counsel, lodge any complaint regarding the use of torture during the investigation stage. The Jingmen Municipal People's Intermediate Court and the Hubei Provincial People's High Court determined that the actions by Gong and the other defendants had constituted the offence of causing intentional bodily harm; that an appeals procedure had been available to them and, following due authentication during the court proceedings, confirmed that the evidence demonstrated the following:

- (a) The statements by the victims and the relevant oral testimony and written testimony provided by the witnesses demonstrated the causes of their injuries and the facts that had been adduced;
- (b) The scene-of-the-crime report and photographs were recognized by the defendants concerned who confirmed the place where the offences had been committed;
- (c) The forensic investigation report and photographs of the victims demonstrated where the injuries had been sustained on their bodies and the degree of those injuries;

(d) Of these victims, four had sustained injuries categorized as serious; the injuries sustained by the other 12 victims ranged in severity from moderate to slight. After the above-mentioned photographs of the victims were identified by the relevant defendants, it was confirmed that they had inflicted the injuries on the victims;

(e) The report of the material evidence recovered from the scene, the report of the weapons recovered at the scene and the photographs of the places where these weapons were concealed demonstrated that the implements recovered from the scene of the crime by the investigative officials were the implements used in committing the offence, which had been concealed by the defendants after commission of the offences and which had been recovered after they had been shown by the defendants the places where they had concealed them, recovering iron bars, steel pipes, claw hammers and other implements used in committing the offences, and following admissions by the defendants it was duly confirmed that these were used in the commission of the offences.

22. The Jingmen Municipal People's Intermediate Court and the Hubei Provincial High Court found that Gong was culpable of the offence of rape; that appeals procedures had been available to him; that in the light of its cross-examination of the witnesses in the trial, provided attestation of the following confirmed evidence:

(a) The statements of five victims confirm that Gong had separately in the towns of Zhongxiang, Zaoyang and Shiyan, in other people's homes, and on the Huangzhuang sector of the Han river flood control barrier in the town of Zhongxiang, with the use of force, deceit and other ploys against the victims, obtained illicit sexual relations with them;

(b) In the offices of the public security authorities Gong had admitted the offence of having obtained illicit sexual relations with many young girls confirmed, at the same time, by the statements made in the public security offices by his co-defendant Li Rong and the associated written testimony.

23. The above evidence is clear and ample, and adequately demonstrates that Gong was guilty of the offences of causing intentional bodily harm and rape. This is manifestly not a case of false accusation.

24. Concerning the allegation that the Court's decision to hold both trials in closed session was based on the false pretext of protecting the victims' privacy and was actually designed to breach Gong and his co-defendants' right to a fair trial, the Government reported that, in accordance with the stipulations of article 152 of the Chinese Code of Criminal Procedure, cases involving the privacy of individuals shall not be heard in public. The charges brought by the prosecution against Gong for the offence of rape involved the privacy of certain individuals, and the decision by the People's Court not to hear the case in public was entirely consistent with the law.

25. With respect to the allegation that the Court did not provide the defendant and his lawyers with sufficient time or the wherewithal to conduct a defence, thus breaching his legal right to defence, the Government stated that, in accordance with the stipulations of the relevant articles of the Code of Criminal Procedure, in this case during the trial and sentencing stages, the defendants and their legal counsel all fully exercised their right to defence.

26. With regard to the allegation that, in its ruling against Gong that he organized and used a cult to break the law etc., the Court violated his civil right to freedom of religion and belief, the Government pointed out that the procuratorial authorities brought charges against Gong and the other defendants for other offences; following the trial proceedings it was determined that the facts had not been clear, the evidence was lacking and the offence had not been properly determined.

27. Lastly, the Government expressed the view that the criminal judgement handed down by the People's Court against Gong and the other defendants has already become enforceable and, in accordance with the law, they have already been delivered to their custodial facilities to serve their sentences.

28. The Working Group notes the discrepancies between the allegations from the source and the Government's response. Although the source admits that Pastor Gong Shengliang was condemned for the crimes of assault, rape and intentional bodily harm, it denies that Pastor Gong was responsible for committing such crimes. According to the source, Pastor Gong recognized committing those crimes solely because he was subjected to torture during his detention before the trial.

29. The Working Group observes that the Government has replied providing specific and concrete information on the trial and the evidences submitted against the above-mentioned person. In its response, the Government clearly denies that Pastor Gong has been subjected to torture or ill-treatment, and adds that, on no occasion during the judicial proceedings at both first and second instance, did either Pastor Gong Shengliang and his co-defendants, or their defence counsels, lodge any complaint regarding the use of torture or ill-treatment during the investigation stage.

30. The source was provided with a copy of the Government's response on 9 October 2007. The Working Group reminded the source on 25 July 2008 of the convenience of submitting its comments or observations to the Government's reply. However, and up to date, the source has not replied.

31. Considering the serious difference between the allegations submitted by the source and the Government's response, the Working Group considers it does not have sufficient elements to issue an Opinion. Therefore, and according to paragraph 17 (d) of the Working Group's methods of work, the Working Group decides to file the case.

Adopted on 10 September 2008

**OPINION No. 22/2008 (SAUDI ARABIA)**

**Communications addressed to the Government on 6 November 2006 and 29 May 2007.**

**Concerning Mr. Suleyman b. Nasser b. Abdullah Al-Alouane.**

**The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group welcomes the cooperation of the Government, which provided the Working Group with information concerning the case. The replies of the Government were brought to the attention of the source, which made observations on them. As the first comments by the source to the first Government's reply did contain new allegations, the Working Group decided, at its forty-eighth session, to transmit them to the Government, which submitted its comments or observations. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The case summarized below was reported to the Working Group as follows: Mr. Suleyman b. Nasser b. Abdullah Al-Alouane, born in 1969 at Al Burayda, Al Qasim, married and father of three children, addressed at Haï Mechaal, Al Burayda, a teacher by profession, was arrested on 28 April 2004 at his place of work by General Information Services agents, without any judicial warrant or charges laid against him.
5. On the same day, his home was searched without a legal warrant. Mr. Al-Alouane was taken to a detention centre depending of the Ministry of the Interior, where he was allegedly tortured. He was accused of having repeatedly criticized the Government of the United States of America for its policies concerning the Arab world and particularly the 2003 invasion of Iraq. Mr. Al-Alouane was subsequently transferred to El Hayr prison in the south of Riyadh, where he has been kept in detention during more than four years. He has been placed in complete isolation

during long periods. No charges have, up to the date of submission of the case, been laid against Mr. Al-Alouane and no trial date has been set. He has furthermore been refused access to legal counsel.

6. The source further reports that Mr. Al-Alouane had previously been banned from exercising his profession as a teacher, but this ban was lifted in 2003. Due to the expression of his political views, Mr. Al-Alouane was accused by public officers of expressing opinions contrary to the national interest and of sowing discord in the society. He continues to be kept in incommunicado detention, has been subject to ill-treatment and has not been brought before a judge.

5. The source considers that the detention of Mr. Al-Alouane is contrary not only to the principles enunciated in the Universal Declaration of Human Rights but also to articles 2 and 4 of Royal Decree No. M-39 concerning the regulation of the penal procedure and the rights of detainees to legal counsel. No legal norm was invoked to justify the arrest and detention of Mr. Al-Alouane. The source concludes that his detention is an outcome resulting from the exercise of his right to freely express his political opinions.

6. The Government, in its reply to the allegations of the source, confirmed that Mr. Al-Alouane was detained on 29 April 2004 and informed that his detention took place in the framework of a matter involving terrorism. The arresting authorities treated him in accordance with the judicial regulations in force in the Kingdom and he enjoyed all the rights guaranteed to defendants in the said regulations. His relatives have been permitted to pay him 37 visits, the last of which took place on 10 January 2007. His family was granted financial assistance. Arrangements were made for Mr. Al-Alouane to avail himself of the services of a defence lawyer during the stages of investigation and trial. He also was permitted to contact officials in order to transmit his complaints.

7. In its comments to the Government's reply, the source denies that Mr. Al-Alouane was allowed to consult with a defense lawyer. It also points out that the Government has not disputed its allegation that Mr. Al-Alouane was arrested without a legal order to that effect; that he was

not informed of the charges brought against him; that he did not have the possibility to effectively challenge the lawfulness of his detention; and that, in spite of the more than four years already spent in detention, he has not been put to any kind of trial.

8. During its forty-eighth session, the Working Group decided to request the Government clarifications concerning the information which it had submitted. By letter dated 29 May 2007, it requested the Government to be informed about the following: (a) When Mr. Alouane's trial took place; (b) before which court; (c) who was his defence lawyer and (d) on how many occasions Mr. Al-Alouane was able to meet with him. The Working Group also requested a copy of the final judgement or sentence.

9. The Government responded that Mr. Al-Alouane was detained on charges of transmitting funds outside the Kingdom to organizations and groups engaged in acts of terrorism; issuing interpretations of Islamic law (Fatwas), and delivering unauthorized sermons and lectures of an inflammatory nature to terrorist groups. His case is still being investigated due to its connection with terrorist cells, some of which are operating outside the Kingdom and in view of new evidence of his involvement in a number of crimes and his association with other suspects. The Government added that Mr. Al-Alouane's case was brought before the competent court, which has issued judicial orders for the prolongation of his detention so that the investigation procedures could be completed.

10. The source considers that the Government limits itself to declare that Mr. Al-Alouane is under investigation for terrorism but it has not specified the nature of the concrete acts; Mr. Al-Alouane's involvement on them; the charges brought against him or the specific articles of the Penal Code allegedly infringed. According to the source, Mr. Al-Alouane is well-known in his country for having taken public positions concerning the invasion of Iraq; the political situation in Saudi Arabia and in the Arab region. His right to a legal recourse against his detention has not been recognized in violation of the Universal Declaration of Human Rights, the Constitution of the Kingdom and Saudi Arabia's domestic law.

11. On the basis of these elements, the Working Group considers that it is in a position to issue an Opinion. The Working Group deems that, in relation to the concrete allegations from the source, the Government has not provided specific responses. It has not been provided concrete responses to the Working Group's questions contained in its communication dated 29 May 2007. It seems that the Government is itself satisfied of providing the Working Group with generalities and not concrete information. The Government does not refute the reasons by which the source considers Mr. Al-Alouane's detention as arbitrary.

12. The Working Group notes that, on the contrary, the Government recognizes, implicitly or explicitly, in their responses, the following allegations from the source:

(a) That Mr. Al-Alouane was in effect arrested on 29 April 2004 and that he has been detained since then;

(b) Mr. Al-Alouane's arrest was carried out without a previous mandate; without an arrest warrant; and that precise charges were not articulated nor brought against him;

(c) The only fact to affirm in a general way that this person is implied in financing or publicizing terrorist activities, without specifying his participation in those activities, or the nature of them, is not enough to establish a legal basis for his detention;

(d) This person has not been informed of the exact and precise facts which are reproached to him and, in this way; he is not able to adequately prepare his defense;

(e) Even if the Government has informed that Mr. Al-Alouane is able to complaint before the authorities, it has not specified if he is able to contest the lawfulness of his detention, and, in this last case, in what way;

(f) The Government has implicitly recognized that Mr. Al-Alouane is not authorized to obtain legal counsel or to have the services of a lawyer who help him to prepare his defense;

(g) The Government has recognized that Mr. Al-Alouane is in detention since 29 April 2004. However, it has not provided any information concerning the advancement of the legal procedure, the stage of the process or any date on which his trial should start;

(h) The Government informs that Mr. Al-Alouane “issued interpretations of Islamic law (Fatwas) and delivered unauthorized sermons and lectures of an inflammatory nature to terrorist groups”. This seems confirm the allegations from the source concerning Mr. Al-Alouane’s opinions and views as the main reasons for his detention.

13. The Working Group wishes at this stage to underline that the Government has the obligation to respect the rights to the exercise of the freedoms of opinion and expression of all its nationals and persons living under its jurisdiction, according to the Universal Declaration of Human Rights, to the Constitution of the Kingdom and to Saudi Arabia legal norms. It has also the obligation to respect the due process of law, to bring charges against those detained and to bring them before an impartial and independent tribunal.

14. In the light of the allegations submitted, the information transmitted by the Government on the case and the source’s observations on it, the Working Group observes that Mr. Al-Alouane was not shown an arrest warrant; was not informed about the reasons for his arrest; was not informed about the precise charges laid against him; was not allowed to consult or to appoint a defense lawyer; could not effectively contest or appeal his detention; and continues to be deprived of his liberty without having been formally charged or tried. The Government’s sweeping assertion that Mr. Al-Alouane has been detained in relation to a matter involving terrorism; that he enjoyed all the rights and guarantees to which he is entitled as a criminal defendant, and that arrangements were made to avail himself of the services of a defense lawyer, lacks the necessary precision and details to be significantly considered and remains thus unsubstantiated. In addition, the Working Group notes that the Government has not responded to the concrete questions formulated by the Working Group in its communication dated 29 May 2007.

15. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Mr. Suleyman b. Nasser b. Abdullah Al-Alouane is arbitrary, being in contravention of articles 9, 10 and 19 of the Universal Declaration of Human Rights, and falls within categories I, II and III of the categories applicable to the consideration of cases submitted to the Working Group.

16. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights.

17. The Working Group also recommends the Government to consider the possibility of becoming a party to the International Covenant on Civil and Political Rights.

Adopted on 10 September 2008

**OPINION No. 23/2008 (SYRIAN ARAB REPUBLIC)**

**Communication addressed to the Government on 4 February 2008.**

**Concerning Mr. Nezar Rastanawi.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)

2. In light of the allegations made, the Working Group regrets that the Government of the Syrian Arab Republic has not provided it with a response.

3. (Same text as paragraph 3 of Opinion No. 17/2008.)

3. The case summarized below was reported to the Working Group as follows: Mr. Nezar Rastanawi is a citizen of the Syrian Arab Republic of 46 years of age, usually residing in Hama-Murek. He is a civil engineer and a founding member of the Arab Organization for Human Rights-Syria (AOHR-S).

4. Mr. Rastanawi was arrested on 18 April 2005 while returning to his home in the village of Mowrek in the Province of Hama and held incommunicado and without charge at an unknown location for more than two weeks before the Military Security informed his family that he was in their custody. In July 2005, Mr. Nezar Rastanawi was transferred to Sednaya Prison on the outskirts of Damascus, and was then referred to Supreme State Security Court (SSSC). He continued to be held incommunicado until August 2005, when he was permitted monthly visits from his wife. However, up until November 2005 the charges against him were unknown and he was denied access to lawyers. The Military Security refused Mr. Rastanawi's application to appoint a panel of defence lawyers for his first expected trial before SSSC on 24 November 2005. During this period Mr. Rastanawi was allegedly ill-treated.

5. On 19 November 2006, Mr. Nezar Rastanawi was sentenced to four years' imprisonment by the Damascus Supreme State Security Court (SSSC) for "spreading false news" and "insulting the President of the Republic". The charges and sentencing appeared to be based on his work in promoting human rights. Mr. Nezar Rastanawi continues to be held at Sednaya Prison and receives visits from his wife.

6. The source alleges that the arrest and imprisonment of Mr. Nezar Rastanawi is solely connected to his peaceful and legitimate human rights work. Consequently, his detention is arbitrary because it is a reprisal for Nezar Rastanawi's exercising his right to freedom of opinion and expression, guaranteed in article 19 of the Universal Declaration of Human Rights and in article 19 of the International Covenant on Civil and Political Rights, to which the Syrian Arab Republic is a Party.

7. The source further argues that the proceedings against Mr. Rastanawi before the SSSC failed to meet international standards of fair trial, because he was arrested without a judicial warrant of arrest or other document justifying his detention; he was denied access to his lawyer; he was not notified about the charges against him; was deprived of any possibility to adequately prepare his defense, and could not appeal his sentence. Furthermore, judges from the SCCC enjoy a too wide discretion when sentencing the accused.

8. The Working Group notes that Mr. Nezar Rastanawi was already the subject matter of Opinion No. 35/2006 (Syrian Arab Republic) (A/HRC/7/4/Add.1, p. 9), adopted by the Working Group on 16 November 2006, in which it decided to file the case in accordance with paragraph 17 (a) of its methods of work. The Working Group had received information about the release of Mr. Rastanawi, which was not contradicted by the source at that time.

9. The Working Group believes that it is in a position to render a new Opinion on the facts and circumstances of the case, in the light of the allegations made, notwithstanding that the Government has failed to offer its version of the facts and to give explanations on the circumstances of the case.

10. As stated in paragraph 8 above, the present case is not entirely new to the Working Group as it was seized of it approximately two years ago. The Working Group is of the view that the earlier communication of the Syrian Arab Republic indicates that the Government concedes that Mr. Rastanawi was indeed arrested and detained at that time. The Government did not provide grounds for the detention of this person. The information concerning Mr. Rastanawi's release was challenged by the source through a later communication to which the Government has not responded.

11. The Working Group notes that it does not appear any legal basis justifying Mr. Rastanawi's deprivation of his liberty. According to the source, he is a well respected professional and human rights activist exercising his right to freedom of expression and assembly. His continued detention without a fair trial before an independent tribunal as well as his conditions of detention, violate international human rights standards on the subject.

12. Consequently, the Working Group renders the following Opinion:

The detention of Mr. Rastanawi is arbitrary, falling under categories I, II and III of the categories applied by the Working Group.

13. The Working Group requests the Government of the Syrian Arab Republic to take the necessary steps to remedy his situation and to bring it in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

14. The Working Group would also like to bring to the attention of the Government of the Syrian Arab Republic the fact that it has on previous occasions considered cases involving allegations of arbitrary deprivation of liberty and unfair trials before the SSSC (see, for instance, Opinions Nos. 8/2007 (A/HRC/7/4/Add.1, page 74); 21/2006; 16/2006; 15/2006 (A/HRC/4/40/Add.1, pages 74, 76, and 90); 10/2005; 7/2005; 4/2005; 1/2005; E/CN.4/2006/7/Add.1, pages 20, 22, 30, and 39); 6/2004 (E/CN.4/2005/6/Add.1, page 39), a special court which is trying those accused of offences against State security. A number of cases sent for the Working Group's consideration have some unfortunate similarities relating to the terms and conditions of arrest and detention; access to a fair trial including lawyers as well as vagueness and lack of specific evidence-based charges brought against detainees. Defendants before the SSSC are often accused and convicted of vague, widely-interpreted and unsubstantiated security offences.

14. The Working Group has received several allegations concerning proceedings before the SSSC: Defendants are not present during the preliminary phase of the trial, during which the prosecutor presents evidence; confessions are admissible as evidence even when they are alleged to have been extracted under torture; allegations of torture are not investigated by the court; trials usually remained closed to the public as well as to the defendants' relatives; defendants have restricted access to lawyers; judges have wide discretion in sentencing and convicted prisoners cannot appeal their sentences.

15. Created in 1968 under the 46-year-old state of emergency, the SSSC does not observe international nor even constitutional provisions safeguarding defendants' rights. Defendants have no legal redress for arrest or detention. Proceedings before the SSSC fail to meet international standards for fair trial.

16. If agreed, the Working Group would be honored to assist the Government in studying the relevant laws regulating the SSSC and, in general, the laws governing deprivation of liberty. The Working Group offers its cooperation in contributing to bring these laws in line with the standards and principles set out in the international human rights instruments.

Adopted on 12 September 2008

**OPINION No. 24/2008 (SYRIAN ARAB REPUBLIC)**

**Communication addressed to the Government on 4 June 2007.**

**Concerning Dr. Mohamad Kamal Al-Labouani.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments.

5. The case summarized below was reported to the Working Group as follows: Dr. Mohamad Kamal Al-Labouani is a Syrian citizen born in 1957, resident in Zabadani, and a medical doctor by profession. He is also a writer, artist, and the founder of the Liberal Democratic Union in Syria.

6. According to the information received, Security police agents arrested Dr. Al-Labouani at Damascus International Airport on 8 November 2005 as he was re-entering his country after travelling to Europe and the United States of America. In the course of his trip which had begun in August 2005, Dr. Al-Labouani had met with human rights organizations and Government officials, lobbying for democratic reform in Syria and had given interviews to the media. In the course of TV interviews in the United States, Dr. Al-Labouani reportedly criticized the Government of the Syrian Arab Republic and called for the gradual and peaceful introduction of democracy. He also stated that he firmly opposed intervention in Syrian affairs by the United States or other foreign Governments.

7. The security police arresting him on 8 November 2005 did not show an arrest warrant or other document justifying the arrest. Dr. Al-Labouani was taken to the headquarters of the political security police in Damascus, interrogated and taken into detention. Three days later an arrest warrant was issued, but it was not signed and did not indicate the reasons for his arrest.

8. On 12 November 2005, Dr. Al-Labouani was brought before a criminal court in Damascus. He was charged with “undermining patriotic sentiment”, “weakening national morale”, “insulting the dignity of the State” and “inciting sectarian hatred” under articles 285, 286, 287, 307 and 308 of the Syrian Penal Code. Thereafter, Dr. Al-Labouani was taken to Adra Prison in Damascus.

9. Five months later, the prosecution added charges of “scheming with a foreign country or communicating with one with the aim of causing it to attack Syria” (article 264 of the Penal Code). These charges, which carry a significantly heavier penalty (up to life imprisonment) than those previously brought against him, were added as a result of a letter from the Director of the National Security Bureau to the Minister of Justice, who in turn sent a comment about this letter to the First Attorney General for Damascus, asking to have the additional charges included. Dr. Al-Labouani has never been interrogated in relation to the new charges.

10. Lawyers representing Dr. Al-Labouani at the trial were not allowed any private contact with their client. The lead defense counsel, Mr. Anwar al-Bunni, was arrested on 17 May 2006 and charged with “spreading false information harmful to the State” in connection with a petition calling for the normalization of relations between the Syrian Arab Republic and Lebanon. On 24 April 2007, the Damascus Criminal Court sentenced Mr. al-Bunni to five years in jail.

11. At the trial, the prosecution did not produce any evidence that Dr. Al-Labouani had at any time or in any way incited foreign intervention in Syria. The defense presented as evidence recordings of the two TV programmes shown in the United States in which Dr. Al-Labouani repeatedly argued against any kind of military or economic pressure against Syria and insisted that foreign Governments should only exercise political pressure on the Syrian Government to give the Syrian people the opportunity to introduce democracy in their country themselves and at their own pace. The defense also produced letters from British and other European members of Parliaments stating that Dr. Al-Labouani had always expressed the view that any form of intervention in Syria would be wrong.

12. On 10 May 2007, the Damascus Criminal Court found Dr. Al-Labouani guilty of the new charges of “scheming with a foreign country, or communicating with one with the aim of causing it to attack Syria” under article 264 of the Penal Code and sentenced him to 12 years of imprisonment. He is currently serving the sentence.

13. The source alleges that Dr. al-Labouani is detained solely for having called for peaceful democratic reform in Syria. As the registration of his television interviews and all other

statements that he has made show, he has never called for the violent overthrow of the Government. His defense has amply documented this during the trial, while the prosecution was not able to adduce any evidence in support of the charges of “scheming with a foreign country, or communicating with one with the aim of causing it to attack Syria”, nor in support of any other charges laid against him.

14. The source also argues that Dr. Al-Labouani clearly did not receive a fair trial. The Government particularly interfered with his right to “have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing” (art. 14, para. 3) (b), of the International Covenant on Civil and Political Rights), by not allowing him to meet in private with his lawyers and by imprisoning Lawyer Al-Bunni, the leader of his defense team. The source concludes that the detention of Dr. Al-Labouani is arbitrary.

15. In its reply, the Government points out that Mr. Kamal Al-Labouani set up an illegal political organization without permission from the relevant authorities. This is punishable under Syrian law in accordance with article 288 of the Criminal Code. He established personal links with official agencies abroad and secretly received material assistance from foreign organizations hostile to the Syrian Arab Republic. This is punishable under Syrian law in accordance with article 264 of the Criminal Code.

16. The Government reports that Dr. Al-Labouani published spurious information on a website likely to damage, locally and internationally, the reputation of the State. This is punishable under Syrian law in accordance with articles 286 and 287 of the Criminal Code. The Office of the Public Prosecutor in Damascus initiated criminal proceedings against him for the crimes of damaging the reputation of the State and weakening national morale and unity. Dr. Al-Labouani was interrogated on 12 November 2005 with his legal representatives present. A decision was taken to issue a detention order and to remand him in Damascus Central Prison for the offences with which he was charged.

17. The Government concludes by highlighting that Dr. Al-Labouani has not been detained arbitrarily and that the reasons for his detention are not related to his peaceful calls for

democratic reform in Syria. As a Syrian citizen, he is protected by Syrian law from torture or any ill-treatment. He is allowed regular visits from his lawyers and members of his family.

18. In its observations to the Government's response, the source points out the following:

(a) The new, more serious charges against Dr. Al-Labouani, for which he was at the end condemned, were added by the prosecution five months after the beginning of the judicial process due to pressures from the Director of the National Security Bureau and from the Ministry of Justice. The charges brought against Dr. Al-Labouani at the beginning of the procedure, as those related in article 287 of the Criminal Code, carry a maximum sentence of six months;

(b) The source adds that Dr. Al-Labouani, contrary to the information provided by the Government, has never been charged under article 288 of the Criminal Code related to the formation of an illegal organization;

(c) Dr. Al-Labouani does not deny that he met with non-governmental organizations and Government officers abroad, but the nature of these contacts has been grossly misrepresented by the prosecution, with no evidence to support their contentions;

(d) The charge that Dr. Al-Labouani secretly received funding from foreign organizations that oppose to the Syrian Arab Republic has never been brought against him;

(e) No mention of the Internet was made at the trial. Only two TV broadcasts were cited;

(f) No evidence was brought by the prosecution to support the accusation of inciting a foreign country to intervene in Syria;

(g) The source considers that Dr. Al-Labouani was arrested because the security services believed that he had some important information about the investigation into the death of Rafik Hariri in Lebanon;

(e) Contrary to the information provided by the Government, Dr. Al-Labouani is not adequately protected from torture or ill-treatment while in prison. He has had his head forcibly shaved by prison guards and has been attacked by fellow inmates. At least in two occasions he has been put into a rat- and vermin-infested underground cell with no light, no washing materials and inadequate food, clothing, bedding and toilet facilities.

19. The Working Group had previously considered a communication introduced on behalf of Dr. Al-Labouani (see Opinion No. 11/2002<sup>1</sup>). He was a member of the Civil Society Forum formed by Riad Seif. He was arrested in September 2001 and tried before the Supreme State Security Court (SSSC) on charges including “inciting armed revolt”. He was found guilty and sentenced on 28 August 2002. In its Opinion 11/2002, the Working Group “note[d] that these persons [a group including Dr. al-Labouani] were detained for having taken part in various forums in support of a group holding meetings and encouraging wider political participation, and that they carried out their activities peacefully, which was not denied by the Government, in exercise of their rights to freedom of assembly, expression and opinion, as guaranteed by international law” (at para. 25(c)). Dr. al-Labouani was released on 9 September 2004.

20. The Working Group has accorded due consideration to the allegations submitted to it by the source, to the response of the Government, and to the comments received on that response from the source.

21. The Government informed that Dr. Al-Labouani was not detained or sentenced for his peaceful calls for democratic reform in Syria but for activities that were of a far serious nature, i.e., for damaging the reputation of the State; weakening national morale and unity and scheming with a foreign country, or communicating with one with the aim of causing it to attack the country. Yet all instances provided appear vague, broad and ambiguous and lending themselves to the expression of views or the peaceful exercise of political activities including publishing information on the Internet; establishing personal links with persons abroad; forming a political organization without permission, and the like.

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<sup>1</sup> E/CN.4/2003/8/Add. 1, pp. 86-90.

22. The Working Group considers that it should be taken into consideration the broad lack of proportionality between the power and impact of the work and activities carried out by a single individual, who should attend daily his persona professional, artistic, social and political activities, and the power and impact of an entire State machinery, with its Executive, Legislative and Judicial organs and its armed forces, police and security agents. The Working Group considers that the acts and omissions imputed to Dr. Al-Labouani may not justifiably attract the long and arduous term of detention imposed on him by the judicial system of his country.

23. The most serious charges, for which he was at end sentenced to 12 years imprisonment, i.e. “scheming with a foreign country, or communicating with one with the aim of causing it to attack Syria”, referred in article 264 of the Criminal Code, were added five months later to beginning to the judicial procedure. Dr. Al-Labouani was not interrogated with regard to them and was not given the possibility to defend himself of these accusations. This is clearly not compatible with universally acceptable norms of due process and rule of law.

24. In its Opinion No.11/2002 (Syrian Arab Republic)<sup>2</sup> the Working Group found already that a previous detention of Dr. Al-Labouani, and of the other eight persons, was arbitrary because they had been detained “for having taken part in various forums in support of a group holding meetings and encouraging wider political participation, having carried out their activities peacefully, in exercise of their rights to freedom of assembly, expression and opinion, as guaranteed by international law.”<sup>3</sup>

25. The Working Group considers that Dr. Al-Labouani has now been condemned for acts of a basically similar nature to those for which he was detained and condemned in the past. The difference is that he has been now condemned for activities carried out abroad and that the Government has added charges of a more serious nature. The main fact imputed to Dr. Al-Labouani continues to be his calls for democratic reform, be in the Syrian Arab Republic or abroad.

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<sup>2</sup> E/CN.4/2003/8/Add.1, pp.86-90.

<sup>3</sup> Ibid p. 90.

26. The Working Group also notes that the peaceful character of the activities carried out by Dr. Al-Labouani, both in the Syrian Arab Republic as abroad, has not been put in question in the response from the Government. The response solely refers to the establishment of an illegal political organization; to the publication of spurious information on a website and to the establishment of personal links with official agencies abroad.

27. The circumstances of Dr. Al-Labouani's arrest and detention, without the exhibition of an arrest warrant; the fact that his lawyers were not permitted to contact him before the trial and the minimal access to defense lawyers granted to Dr. Al-Labouani during his trial; the facts that he was not interrogated on the new serious charges brought against him at the end of the trial; the fact that he was not permitted to present witnesses on his behalf and the fact that the Court did not consider the evidence submitted by the defense; are serious violations of the due process and represent a flagrant case of denial of a fair trial.

28. Dr. Al-Labouani public insistence in rejecting an eventual interference from foreign Powers in Syrian affairs, as evidenced in the TV programmes and other evidence shown during the trial, were clear signs of his loyalty to his country and his nationalist position vis-à-vis the possibility of any foreign interference. The Government's affirmation that he was damaging the reputation of the State and weakening national morale and unity does not match with Dr. Al-Labouani attitude in his country and abroad.

29. Consequently, the Working Group considers that Dr. Al-Labouani has been condemned for the peaceful expression of his political views and for having carried out political activities; a right protected by article 19 of the Universal Declaration on Human Rights and article 19 of the International Covenant on Civil and Political Rights, from which the Syrian Arab Republic is a Party. His judicial process seems having been grossly unfair and fundamental exigencies of due process of law were not respected.

30. The Working Group therefore is of the view that

the deprivation of liberty suffered by Dr. Al-Labouani is arbitrary and contrary to articles 9, 10, 18 and 19 of the Universal Declaration of Human Rights and articles 9, 14, 18 and 19 of the International Covenant on Civil and Political Rights, falling under categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

31. Consequently, the Working Group requests the Government of the Syrian Arab Republic to take all necessary steps to redress the situation of Dr. Al-Labouani providing him access to a fair trial before an independent and impartial tribunal, according to the standards of the due process of law and the principles and norms set forth in the International Covenant on Civil and Political Rights and its obligations under international human rights law.

32. The Working Group further requests the Government to consider the procedural principles, laws and norms relating to the due process of law and fair trial in the Syrian Arab Republic in order to make them compatible with the international human rights principles and standards.

Adopted on 12 September 2008

**OPINION N.º 25/2008 (MEXICO)**

**Comunicación dirigida al Gobierno el 30 de mayo de 2007.**

**Relativa al Sr. Olivier Acuña Barba.**

**El Estado es parte en el Pacto Internacional de Derechos Civiles y Políticos.**

1. (Texto del párrafo 1 de la Opinión N.º 17/2008.)
2. El Grupo de Trabajo expresa su apreciación al Gobierno por haber proporcionado oportunamente la información solicitada.
3. (Texto del párrafo 3 de la Opinión N.º 17/2008.)
4. Habida cuenta de las alegaciones formuladas, el Grupo de Trabajo acoge con satisfacción la cooperación recibida del Gobierno. El Grupo de Trabajo ha transmitido la respuesta del Gobierno a la fuente de la comunicación y ha recibido sus comentarios. El Grupo de Trabajo estima que está en condiciones de emitir una Opinión acerca de los hechos y circunstancias del caso considerado, teniendo en cuenta las alegaciones formuladas, la respuesta del Gobierno sobre ellas y los comentarios de la fuente.
5. Según las informaciones recibidas, el Sr. Olivier Acuña Barba, ciudadano mexicano, periodista de investigación; director de la publicación “Sinaloa Dos Mil”; reportero de medios

nacionales durante más de 20 años y corresponsal de medios extranjeros, se encuentra detenido en el penal de Culiacán, Estado de Sinaloa. Fue arrestado el 14 de enero de 2006 a las 8.00 horas en su domicilio, en presencia de su esposa e hijos, por agentes de la Unidad Modelo de Investigación Policial de la Policía Ministerial del Estado (PME) de Sinaloa, adscritos al Departamento de Investigaciones; vestidos de civil, quienes no portaban signos distintivos o insignias que les identificasen como agentes policiales. Los agentes se movilizaban en vehículos sin placas ni identificación oficial. Al arrestarle, los agentes no se identificaron ni presentaron orden de arresto alguna.

6. Trasladado a una bodega, fue sometido a torturas durante más de 18 horas con el objeto de que se declarase culpable del homicidio del Sr. Loreto Antonio López Carvajal, alias “El Toñito”, ocurrido el 3 de octubre de 2005. La víctima del homicidio tenía antecedentes penales por robo. Según la fuente, esta confesión buscaba impedirle continuar sus investigaciones periodísticas sobre la corrupción de autoridades estatales y de agentes policiales y evitar que siguiese publicando los resultados de sus investigaciones. El proceso se siguió en el Séptimo Juzgado de Culiacán, Sinaloa.

7. Su esposa e hijos fueron “retenidos” durante más de 24 horas en su domicilio, siendo constantemente vigilados por elementos policiales. Los agentes abandonaron el domicilio ante la intervención del Presidente de la Comisión Estatal de Derechos Humanos. Al partir, se llevaron documentos, notas, equipo periodístico, obras de arte y fotografías de propiedad del Sr. Acuña Barba. Este fue finalmente conducido ante el Agente del Ministerio Público Especializado en el

Delito de Homicidio Doloso. No se le permitió contar con un abogado defensor de su elección, nombrándose a una defensora de oficio adscrita ante dicha agencia.

8. Sostiene la comunicación que el proceso penal por homicidio tuvo como únicos fundamentos la confesión que le fue obtenida mediante tortura y la declaración de un único testigo de cargo, el Sr. Christian Ochoa, quien luego de haber exculpado al periodista en un primer testimonio, y luego de haber huido durante varios meses, cedió a las presiones, cambió su versión y declaró en su contra.

9. La comunicación da cuenta de numerosas investigaciones sobre responsabilidades penales, civiles y políticas de autoridades estatales y policiales por hechos criminales (asesinatos, desapariciones forzadas, corrupción, etc.) que dieron origen a una serie de actos de hostigamiento e intimidaciones. La comunicación adjunta antecedentes de numerosos casos que el Sr. Acuña Barba denunció y de sus demandas de protección ante las autoridades estatales, la que nunca le fue otorgada.

10. En un segundo proceso penal abierto en su contra, ante el Juzgado Tercero del mencionado distrito judicial, el Sr. Acuña Barba fue acusado de la comisión de los delitos de amenazas de muerte y de allanamiento de morada.

11. En su respuesta, el Gobierno asume como propio un informe sobre el caso emitido por la Procuraduría General del Estado de Sinaloa, el que a su vez se fundamenta en una investigación de la Comisión Estatal de Derecho Humanos del mismo Estado que, en síntesis, expresa:

- a) Que el Sr. Acuña Barba se encontraba detenido en el Centro de Ejecución de las Consecuencias Jurídicas del Delito de Culiacán por los hechos antes referidos;
- b) Que la aprehensión no se efectuó en su domicilio, ni en presencia de su esposa e hijos, ni por agentes no individualizados, sino en otro lugar, con orden de arresto previa y por agentes legalmente individualizados. Sostiene que el detenido no confesó su responsabilidad en el crimen de López Carvajal, y que fue bien tratado, no habiendo sufrido torturas;
- c) Que no existe relación alguna entre las actividades periodísticas del procesado y su privación de libertad;
- d) Que no hay antecedentes de detención de su esposa e hijos;
- e) Que no hay antecedentes de que funcionarios públicos hayan participado en intimidaciones y hostigamientos en su contra;
- f) Que los dos procesos judiciales incoados en contra del Sr. Acuña Barba no están relacionados con sus denuncias periodísticas;
- g) Que continúan las investigaciones por las denuncias formuladas por hechos de tortura;

h) Que las pruebas contra el Sr. Acuña Barba que constan en el proceso por homicidio del Sr. López Carvajal son las declaraciones de los que sí son autores confesos, Javier Estrada Acosta y Martín Edgar Ochoa, quienes efectivamente acusan al Sr. Acuña;

i) Que la orden de arresto, y luego el auto de formal prisión de 21 de enero de 2006 dictado por las autoridades judiciales a cargo del caso, fueron apeladas y confirmadas por la Sala de Circuito Penal Zona Centro el 30 de septiembre de 2006, y el posterior recurso de amparo del inculpado Acuña Barba fue desestimado por el Juzgado Segundo de Instrucción el 3 de noviembre de 2006. Cerrada la investigación, se dedujo acusación en contra del Sr. Acuña, quien presentó sus descargos el 19 de junio de 2007. La vista de la causa se inició el 31 de julio de 2007.

12. En sus comentarios a la respuesta del Gobierno, la fuente insiste en sus alegaciones contra el Procurador General del Estado y en su versión de los hechos, pero no aporta nuevos elementos de convicción.

13. El Juez Séptimo de Primera Instancia del Ramo Penal del Distrito Judicial de Culiacán, Sinaloa, dictó sentencia de primera instancia en el juicio por homicidio del Sr. López Carvajal el 29 de mayo de 2007. El juez condenó solamente a uno de los inculpados absolviendo a los otros dos, incluyendo al Sr. Acuña Barba. El juez no encontró elementos de convicción de su participación en el crimen. La sentencia ordenó “su inmediata y absoluta libertad “.

14. Conforme a lo previsto en el inciso *a* del párrafo 17 de sus métodos de trabajo, asumidos por la antigua Comisión y por el actual Consejo de Derechos Humanos, el Grupo de Trabajo ordena el archivo de un caso sometido a su opinión cuando la persona es liberada. No obstante, ese mismo instrumento le permite excepcionalmente pronunciarse sobre el carácter arbitrario o no de la privación de libertad que la persona sufrió durante el período previo a su puesta en libertad.

15. En el presente caso no cabe aplicar dicha excepción, toda vez que el Grupo de Trabajo no ha sido concebido como un tribunal de última instancia; que en sus Opiniones no debe evaluar la prueba rendida en un juicio contra un detenido ni pronunciarse sobre su culpabilidad o inocencia. No es ése su mandato y, por lo demás, le sería imposible hacerlo sin un estudio previo y en profundidad del expediente judicial.

16. Así, si la orden de arresto, los autos de formal prisión y de procesamiento, y luego la sentencia definitiva, se ajustan o no a los elementos de convicción que obran en el expediente, no es un análisis que competa al Grupo de Trabajo.

17. Se trata además de procesos judiciales y de una privación de libertad por delitos comunes y no por un delito en el que la acción impugnada sea el ejercicio de uno de los derechos mencionados en la Categoría II de las consideradas por el Grupo de Trabajo (es decir, los proclamados por los artículos 7, 13, 14 y 18 a 21 de la Declaración Universal de Derechos Humanos y los correspondientes 12, 18, 19, 21, 22 y 25 a 27 del Pacto Internacional de Derechos Civiles y Políticos).

18. Tampoco se alegan claras violaciones al debido proceso legal, como podría ser, por ejemplo, la denegación de admitir una prueba ofrecida por el acusado, ni otras infracciones graves que harían que la detención fuese arbitraria conforme a la categoría III del Grupo de Trabajo.

19. Pero ni los delitos que se imputaron al Sr. Acuña Barba son delitos de opinión ni se vulneraron los derechos consagrados en el artículo 14 del Pacto Internacional de Derechos Civiles y Políticos, por lo que el Grupo de Trabajo no tiene elementos para considerar que la detención del Sr. Acuña fue arbitraria. El fundamento principal de la alegación de la fuente es el trabajo periodístico de esta persona y sus denuncias anteriores sobre casos de corrupción. Pero el Grupo de Trabajo no tiene elementos para inferir que su detención y posterior enjuiciamiento penal por delitos de carácter común fueron en represalia por sus actividades profesionales o sus escritos.

20. Tampoco compete al Grupo de Trabajo pronunciarse sobre la realidad o no o la efectividad o no de las torturas que la fuente alega que esta persona sufrió, materia que es propia de otro de los procedimientos públicos creados por la antigua Comisión de Derechos Humanos y el Consejo Económico y Social desde 1967 y asumido por el actual Consejo de Derechos Humanos. Ni puede tampoco pronunciarse el Grupo de Trabajo sobre la alegada detención por 24 horas de su esposa e hijos —que la comunicación llama “retención”—, hecho negado por el Gobierno, y sobre el que no se ha aportado evidencia alguna.

21. En estas condiciones y por lo expuesto, el Grupo de Trabajo, de conformidad con el inciso *a* del párrafo 17 de sus métodos de trabajo, decide archivar y dar por terminada su consideración del presente caso.

Adoptada el 10 de septiembre de 2008

**OPINION No. 26/2008 (MYANMAR)**

**Communication addressed to the Government on 16 August 2007.**

**Concerning Messrs. Hkun Htun Oo; Sai Nyunt Lwin; Sai Hla Aung; Htun Nyo; Sai Myo Win Htun; Nyi Nyi Moe; and Hso Ten.**

**The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. In light of the allegations made, the Working Group regrets that the Government of Myanmar has not provided it with observations on the allegations of the source despite several invitations to do so. The Working Group considers that it is nonetheless in a position to render an Opinion on the case.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The case summarized below was reported to the Working Group on Arbitrary Detention as follows:

(a) U Hkun Htun Oo, son of Sao Kyar Zone, aged 63, usually residing at 25/Pyi Road (Mile 9), Ward 5, Mayangone Township, Yangon;

(b) U Sai Nyunt Lwin, son of U Ba Khin, aged 52, usually residing at 157 Pyi Road (Mile 9), Ward 5, Mayangone Township, Yangon;

(c) U Sai Hla Aung, son of U Kaung Mu, aged 61, usually residing at 175 Hkwanyo Road, Pyidawthar Section, Taunggyi, Shan State;

(d) U Htun Nyo, son of U Ba Myaing, aged 57, usually residing at 56 Konemyinthayar Road, Kanthar Ward, Taunggyi, Shan State;

(e) U Sai Myo Win Htun, son of U Ba Myint, aged 42, usually residing at Yatanathiri Ward, Taunggyi, Shan State;

(f) U Nyi Nyi Moe, son of U Tin Ngwei, aged 36, usually residing at J/237 Thisa Road, Nyaungshei Section, Taunggyi, Shan State; and

(g) Hso Ten, son of U Htun Sein, aged 69, usually residing at 3, Ward 1, Myawaddi Road, Lashio, Shan State; all of whom are Myanmar citizens belonging to the Shan ethnicity, were arrested on 8, 9 and 10 February 2005, respectively, for attempting to form a committee called the “Shan State Academics Consultative Council”. All but Hso Ten were arrested without a warrant under orders from the State Peace and Development Council (SPDC) by Special Branch officers from the Myanmar Police Force. Hso Ten was arrested without a warrant by Eastern Command Personnel of the Myanmar Armed Forces. Sai Hla Aung was arrested in the Taunggu Township while travelling to Yangon by train. Hkun Htun Oo and Sai Nyunt Lwin were arrested at their homes. The places of arrest of the other persons concerned are not known.

5. Hso Ten is the President of the “Shan State Peace Council” and Head of the “Shan State Army” (SSA), an ethnic armed group which has entered into a ceasefire agreement with the

SPDC. Hkun Htun Oo is the chairman of the Shan National League for Democracy (SNLD), a registered political party in Myanmar, and an elected representative of the Thee Baw constituency No. 1. At the time of the establishment of the “Committee Representing People’s Parliament” (CRPP), he was the representative for the Shan. He also led the “United Nationalities Alliance” (UNA). Sai Nyunt Lwin is the General Secretary of the SNLD, and Sai Hla Aung one of its members. Nyi Nyi Moe, Sai Myo Win Htun, and Htun Nyo are members of a civil society organization called “Shan Youth New Generation” (SYNG).

6. On 17 February 2005, all individuals concerned were transferred to Central Insein Prison, Yangon, where they were held until 2 November 2005 under the authority of the Department of Correctional Services of the Ministry of Home Affairs. On 18 February 2005 the Supreme Court of Myanmar, by Order No. 37/05, transferred their case to a Special Tribunal convened under the authority of the Northern Yangon District Court and presided by Assistant Divisional Judges U Mya Thein (Chairman) and U Khin Maung Kyi. On the next day, the Ministry of Home Affairs issued an arrest warrant for all of them.

7. All individuals were accused by the Government of the Union of Myanmar of conspiring to secede from the Union following a meeting convened to form the “Shan State Academics Consultative Council”. On 21 February 2005, Police Lt.-Col. Khin Htay, Police Captain Aung Myint Than and Police Lieutenant Myint Aung from the Special Branch of the Myanmar People’s Police Force filed a complaint and they were indicted on a number of charges based on the following allegations:

At General Hso Ten’s invitation, from 4-5 November 2004, Hkun Htun Oo and Sai Nyunt Lwin attended the meeting of the 15th Peace Day Anniversary organised by the SSA in the Sein Kyawt village, Thee Baw District, Northern Shan State. In this meeting, all of them agreed to form the ‘Shan State Academics Consultative Council’. Hkun Htun Oo gave his suggestions and discussed the forming of this council in the meeting. Sai Nyunt Lwin read out the Shan State Nationalities’ Peace Letter. Than Myint also attended the meeting. General Hso Ten gave an opening speech at the meeting.

The second meeting was held at General Hso Ten's house in Lashio on 22 December 2004. The third meeting was held at an SSA office in Taunggyi on 7 February 2005, which was Shan State Day. In this meeting, a Shan State Academics Consultative Council statement, the Shan State New Generation statement, and a student youth's statement were distributed.

Hkun Htun Oo and Sai Nyunt Lwin were not present at this third meeting.

8. On 15 March 2005, the SPDC held a press conference explaining the reasons for the arrests carried out. Hkun Htun Oo, Sai Nyunt Lwin, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, Nyi Nyi Moe, and Hso Ten were charged for high treason pursuant to Section 121, para. 1, of the Penal Code of Myanmar (criminal case No. 233/05), for sedition pursuant to Section 124, lit a), of the Penal Code (criminal cases No. 234/05 and 239/05), and for subversion pursuant to Section 4 of the 1996 Law Protecting the Peaceful and Systematic Transfer of the Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Oppositions (the "Anti-Subversion Law") (criminal case No. 235/05/declaration 5/96). They were further charged pursuant to Section 6 of the 1988 Law Relating to Forming of Organisations (criminal case No. 236/05) and the 1962 Printer and Publisher Registration Act (criminal case No. 237/05). Hso Ten was further convicted in two cases related to a separate incident pursuant to the provisions of the Public Property Protection Act (criminal case No. 294/05) for illegal logging and under the Control of Import and Export Temporary Act (criminal case No. 293/05) for illegal exporting of timber.

9. The preliminary hearings before the Tribunal commenced on 27 April 2005 pursuant to Section 337 of the Criminal Procedure Code and concluded on 26 May 2005. The full trial began on 2 June 2005 on the premises of Central Insein Prison. All defendants pleaded not guilty on 6 June 2005. Only six of the 18 witnesses for the defence could be examined as the others had absconded or were otherwise not reachable. Two witnesses who had appeared for the prosecution also could not be summoned for cross-examination. On 2 November 2005, all were sentenced to "transportation for life" terms by the Northern Yangon District Court, which mean a life sentence in a penal colony involving hard labour. Hkun Htun Oo was sentenced to 93 years of

imprisonment to be served at Putao Prison, Kachin State (prisoner No. 0136/C); Sai Nyunt Lwin to 85 years at Kale Prison, Sagaing Division (prisoner No. 7222/C); and Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, and Nyi Nyi Moe to 79 years, at Kyauk Hpyu Prison (Rakhine State), Buthihtaung Prison (Rakhine State), Myingyan Prison (Mandalay Division), and Pakukku Prison (Magwe Division), respectively. Hso Ten was sentenced to 106 years of imprisonment at Khanti Prison (Shan State). One of their co-defendants, U Myint Than (also known as Eh Phyu), who was also arrested on 9 February 2005 and sentenced to 79 years of imprisonment by the Northern Yangon District Court, died in detention at Than Dwe Prison. Another co-defendant, U Sao Tha Ut, member of the SNLD, also received a heavy prison sentence, but was released after the trial after appearing as a witness for the State pursuant to section 337 of the Criminal Procedure Code. An appeal to the Special Appellate Bench of the Supreme Court in Yangon is pending. It was said that this appeal is the last course of redress under the conventions of the Myanmar legal system.

10. The defendants Hkun Htun Oo, Sai Nyunt Lwin, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, Nyi Nyi Moe and Hso Ten were convicted in criminal case No. 233/05 for high treason pursuant to Section 121 of the Penal Code, which provides: “Whoever (a) wages war against the Union of Myanmar or any constituent units thereof, (b) or assists any State or person, (c) or incites or conspires with any person within or without the Union to wage war against the Union or any constituent unit thereof, (d) or attempts or otherwise prepares by force of arms or other violent means to overthrow the organs of the Union or of its constituent units established by the Constitution, or takes part or is concerned in or incites or conspires with any person within or without the Union to make or to take part or be concerned in any such attempt shall be guilty of the offence of High Treason”. The Tribunal found all defendants guilty of high treason. According to the findings of the Northern Yangon District Court, Hkun Htun Oo, as chairman of the “Shan State Academics Consultative Council”, gave an opening speech at the Council’s first day of the first meeting on 4 November 2004. Defendant Sai Nyunt Lwin attended that meeting and read out a statement of the “Coalition of Shan Ethnic People”. Hso Ten was the chairman at the second day of the first meeting. The second meeting of the Council was held at his house in Lashio Township and the third meeting was held at a Shan State Army office in Taung Gyi Township with the permission of Hso Ten. According to the Tribunal, based on this evidence,

Hso Ten was alleged to be the person leading the meetings of the “Shan State Academics Consultative Council”. The Tribunal was further satisfied that the conduct of the accused was aimed at transforming the “Shan State Academics Consultative Council” into an organization on the national level in order to achieve autonomy and self-determination for a Shan State, thereby exercising the right to equality and the right to secession. The Tribunal concluded that it was the intention of the Council to undermine the Union of Myanmar after having achieved these goals.

11. All persons concerned were also found guilty in criminal case No. 234/05 pursuant to Section 124, lit (a), of the Penal Code for the crime of sedition: “Whoever by words, either spoken and written, or by signs, or by visible representation, or otherwise, bring or attempts to bring into hatred and contempt, or excites or attempts to excite disaffection towards [the Government established by law for the Union or for the constituent units thereof,] shall be punished with transportation for life or a shorter term, to which a fine may be added, or with imprisonment which may extend to three years, to which a fine may be added, or with a fine.” The Tribunal based its convictions on oral and written statements made during the first meeting of the “Shan State Academics Consultative Council”, in which, *inter alia*, the current political situation of Myanmar “characterized by the power struggle between the military Government that currently rules the country and political parties that won the 1990 election” is described as having “caused the country’s troubles and the people’s impoverishment to become greater and greater”. The written statement distributed at the meeting further read: “The conditions over the last 16 years have become worse and worse, day by day”, and “even though the current situation is not slavery, we could say the impoverished lives of the Burmese people are not much different from the lives of slaves”.

12. Criminal case 239/05 concerning Sai Nyunt Lwin was based on a document entitled “Future Burma” by the United Nationalities Alliance (UNA) and discovered on a computer found in his home, which resulted in another sentence of life imprisonment under Section 124, lit (a), of the Penal Code. The Court described the document’s content as follows:

“(1) The performances of government, whether positive or negative, have a direct effect on the lives of the people in that country. Bad governments govern the country badly and

do not provide for the needs of the people. Therefore, the people have a duty to elect a good government, which will promote our dignity and life ...

(2) The State Law and Order Restoration Council (SLORC) has reneged the promise that it made before the 1990 election. Moreover, it has been disturbing and controlling the process of drawing up a draft constitution. They held a sham National Convention from 9 January 1993 to 25 January 1996 at Kyatkasun Field with six goals, including one that the 'The military is to play a leading role in the national politics of Burma' ...

(3) The SLORC completely controls and dominates the Solidarity and Development Association and ordered it to campaign for its one-sided 104 fundamental policies to be introduced at the National Convention. ... Such campaigning is very dangerous for the ethnic armed cease-fire groups...

(4) The SPDC is attempting to draft a constitution with 104 fundamental policies that enable the military to continue to administer the government and secure the longevity of the current regime. If this constitution is approved and enacted, Burma will be the country with the worst constitution in the world ...

(5) Contrary to the SPDC's announcement, the Union of Burma that would be formed by the constitution that the SPDC has proposed would be a military state that would be unable to bring about the emergence of a modern developed country.

(6) Because there are seven states and seven divisions in the Union of Burma, a one-party system inadequately represents all the people of Burma, and as a result there is a lack of equality for ethnic groups and a genuine democratic system cannot emerge.

(7) Since 1948, the Burmese population has been experiencing a political crisis due to the weaknesses and shortcomings of the 1947 Constitution. Because of those weaknesses, Burma's independence was accompanied by ethnic conflicts, ideological wars, the

seizing of power by the military and extreme problems of all types for the people of Burma.

(8) The statement made at the Sixth Anniversary of the Chamber of Nationalities declared that the current political, economic, educational, and social conditions in Burma have deteriorated and national unity is shattered. Under such conditions, there is great concern that a general crisis will inevitably occur in future Burma.

(9) There should be a Federal Republic of Burma governed by a genuine democracy which protects human rights, guarantees ethnic equality and self-determination for every ethnic group; and only then, it would ensure that the country will not be ruled by any dictators again”.

13. Khun Htun Oo, Sai Nyunt Lwin, Nyi Nyi Moe, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun and Hso Ten were further sentenced to five years’ imprisonment and hard labour pursuant to Section 6 of the 1988 Law Relating to Forming of Organizations (criminal case No. 236/05). Section 6 of this Law provides: “Any person found guilty of committing an offence under Section 3, Subsection (c), or Section 5 shall be punished with imprisonment for a term that may extend to five years.” Section 3, lit (c), of the said Law reads: “Organisations that are not permitted shall not form or continue to exist and pursue activities.” Section 5 stipulates: “The following organisations shall not be formed, and if already formed shall not function and shall not continue to exist: ... (c) Organisations that attempt, instigate, incite, abet or commit acts that may affect or disrupt the regularity of state machinery.” The Tribunal, inter alia, found the defendants guilty of having discussed topics at the third meeting of the “Shan State Academics Consultative Council” and of having issued statements thereafter that disparaged the proper functioning of the State and appeared to have as their purpose the hindrance of the Government from running the State. It had been established for the Northern Yangon District Court that the Council led by the defendants was an association that the State had prohibited and that no activities shall be carried out in accordance with Section 5, lit c) of the Law Relating to Forming of Organisations. According to the Tribunal, the Council had been established and its foundation violated this provision.

14. In two separate cases (criminal cases Nos. 294/05 and 293/05) Hso Ten was sentenced to life imprisonment under Sections 2 and 3 of the 1963 Act for Protection of Property Relevant to the Public, and Section 5.5, paras. 1) - 3) of the Control of Imports and Exports (Temporary) Act of 1947. According to the Tribunal, Hso Ten was guilty under these provisions for his involvement in the illegal logging and exportation of teak to China. Section 2 of the Public Property Protection Act provides: “Property relevant to the public is money or stored good, or utensil or other property owned or transferred to use or kept by: (a) army; (b) revolutionary government or local government authority or Board, corporation, bank, other organisation formed in accordance with an existing law; (c) a cooperative; or (d) the following organisation announced by the revolutionary government in its Gazette: 1. an organisation registered in accordance with the Registration Act for Associations; 2. an organisation registered in accordance with Section 26 of the Burma Company Act; 3. a trustee; 4. other organisations.” Section 3 of this Act stipulates: “Any person who commits theft, or misappropriation, or cheating in regard to property relevant to the public shall be punished with life imprisonment, or a minimum term of ten years of imprisonment; in addition, he or she shall be fined.” The Control of Imports and Exports (Temporary) Act makes certain violations of customs, import and export regulations a criminal offence.

15. In a final case (criminal case No. 237/05) Htun Nyo, Sai Hla Aung, Nyi Nyi Moe, Sai Myo Win Htun and Hso Ten were sentenced for illegal publishing in violation of Sections 6, 17, 18 and 20 of the Printer and Publisher Registration of 1962. According to the source, section 6 of this Act provides: “1) Any person who is a printer or publisher must make confession with his signature according to Section 3 and register it to the registration officer with the application form and within the time limitation. 2) No one is allowed to engage in the enterprise of printing or publishing except with the registration testimony card and rules in this card or under the requirements of the law”. Section 17 of the said Act stipulates: “Anyone who engages in the enterprise of printing or publishing without any registration under Section 6 will be punished with one year to seven years of imprisonment or fined 3000 to 30000 Kyat, or both punishments will be given”. Section 18 provides: “Anyone who mentions a fact which is false and which he knows or believes to be false will be punished with six months to five years of imprisonment or

fined 2,000 to 20,000 Kyat, or both punishments will be given”. Finally, Section 20 reads as follows: “Anyone who opposes or fails to obey the procedure of this law and order of any authority under this law will be punished with one year to a maximum of seven years of imprisonment or fined 3,000 to 30,000 Kyat, or both punishments will be given”. The Tribunal convicted the defendants since the three statements published at the third meeting of the “Shan State Academics Consultative Council” and on the 58th Anniversary of “Shan State Day”, respectively, had not been registered according to Section 6, paragraphs 1 and 2 of the Printers and Publishers Registration Act. Accordingly, they were liable to punishment provided for in Section 17 of the Act. Moreover, they failed to follow the procedure of Section 18, and were thus liable to punishment pursuant to Section 20 of the Act.

16. The source alleges a number of procedural flaws attached to the trial. More specifically, it points out that no warrants were produced at the time of the arrests of any of the accused. The Ministry of Home Affairs issued authority for the warrants on 19 February 2005, around 10 days after the arrests had been carried out and the persons concerned had been detained. The source further alleges that three Supreme Court lawyers were granted power of attorney by the families of the detainees to represent their cases. However, they were denied access to the accused and to the Tribunal despite repeated requests. The case was heard by a tribunal outside the scope of jurisdiction *ratione loci* in violation of sections 177, 178 and 526 of the Criminal Procedure Code, which requires authorization by the national President or Chief Justice for transferral of a case outside the area of the usual jurisdiction. In the absence of such authorisation the trial should have been conducted in Shan State where the alleged offences were committed.

17. Furthermore, the trial was conducted apparently without authorization by a two-judge tribunal on prison rather than on court premises as required by Supreme Court Directive Nos. 7/56 and 3/69. The defendants were also denied their right to cross-examine witnesses as stipulated in section 256 of the Criminal Procedure Code. Two key witnesses for the convictions of all respondents could not be recalled and the Tribunal did not follow the procedure for non-recall as laid down in Supreme Court Directive No. 3/66. Witnesses for the defence of Hso Ten on charges of illegal timber trading were not provided enough time to appear and depose. A summons was issued on 26 July 2005. However, only two days later the Tribunal announced that

those who had not appeared in court by that time would not be heard. As witnesses were expected to travel from the far Northeast regions of the country the amount of time given was not reasonable. A request by the defence for the names of the witnesses due to appear be given to the state airline in order to facilitate and expedite their travel from Lashio to Yangon was also denied. For these reasons, only one witness was heard for the defendant. Finally, in violation of the law on evidence as regulated in section 614 of the Court Manual, photocopies of original documents were used throughout the trial instead of the actual documents themselves

18. The source also alleges that the convicted have not committed any crime pursuant to the domestic laws of Myanmar. As regards criminal case No. 233/05, the source argues that there were not enough elements to warrant the conviction pursuant to section 121 of the Penal Code for high treason. There was no evidence presented before the Tribunal about waging war against Myanmar or any other evidence related to the elements as stipulated in section 121 of the Penal Code. The actions of the defendants described in the judgment were merely related to their involvement in a political movement. The source further alleges that the Government has not been established by a constitution as required by section 121 of the Penal Code, because Myanmar has been without a constitution since 1990. Thus, the defendants could not be convicted of high treason from the outset. Finally, the source points out that the persons concerned attempted only to establish a genuine Union for the country.

19. Regarding case No. 234/05 the source argues that no conviction for sedition pursuant to section 124, lit (a), of the Penal Code was possible since the provision refers to a “Government established by law”. Furthermore, it is alleged that the defendants were merely exercising their right to freedom of expression. With respect to case No. 239/05 concerning Sai Nyunt Lwin the source alleges that his prosecution is not in line with section 124, lit (a), of the Penal Code, since the conviction was based on the contents of a computer found in Sai Nyunt Lwin’s house with documents proposing the establishment of a federal union of Myanmar, none of which had at any time been publicized or otherwise used for this purpose. Furthermore, the 1973 Act for Defining Terms provides in section 22 that when an act or omission is an offence according to two or more laws, the perpetrator shall be punished according to only one of them. Sai Nyunt Lwin, however, was punished for the same action under cases No. 233/05, 234/05, 235/05,

236/05 and 239/05 and received a total of 85 years of imprisonment. This sentencing is also in variance of section 403 of the Criminal Procedure Code and section 71 of the Penal Code. The latter provides: “Where anything which is an offence is made up of parts, any of which part is itself an offence, the offender shall not be punished with the punishment of more than one of such offences”. Furthermore, to reach multiple convictions for one single illegal act amounts to a violation of the principles established in the 2000 Judiciary Law and the fundamental legal principle of no double jeopardy. Finally, Sai Nyunt Lwin was acting in good faith without criminal intent and lawfully exercising his right to freedom of expression.

20. The conviction for subversion (criminal case No. 235/05) relates to a meeting on 7 February 2005 which Hkun Htun Oo and Sai Nyunt Lwin did not attend. This claim of non-attendance was not countered by the prosecution nor was evidence produced to suggest otherwise, although it is required by section 3 of the Anti-Subversion Law that the accused as an individual rather than as a member of an organization must have committed or abetted the act of subversion.

21. The source further argues that a conviction in criminal case No. 236/05 pursuant to the 1988 Law Relating to Forming of Organizations was legally not possible, since, amongst other things, the defendants had not yet fully established the “Shan State Academics Consultative Council” at the time related to the charges put against them, and could not, therefore, have applied for registration. Furthermore, the statements made at the incriminated meeting were made within the limitations of their right to freedom of speech.

22. As regards the separate cases concerning Hso Ten (criminal case No. 294/05 and 293/05) the source argues that he could not have violated the pertinent provisions of the Public Property Protection Act, since the disputed teak does not qualify as public property within the meaning of section 2 of the Act and the charges were related to a licensed business. Moreover, he could not have been charged and convicted for the same action under different criminal laws, namely the Public Property Protection Act on the one hand and the Control of Imports and Exports (Temporary) Act on the other (criminal case No. 293/05). Such conduct is not in line with the rule of law and is further damaging to the fair application of justice. The Tribunal used exactly

the same evidence, testimonies and trial proceedings for both convictions although the legal procedure requires that the court ensures that each witness testifies only on one charge at a time and that documentation be kept for each (Court Manual, section 614). Other procedural flaws concerned the fact that the approval for his arrest under the Public Property Protection Act was not issued by the Ministry of Home Affairs until 1 July 2005, which is almost five months after the accused had already been detained.

23. With respect to criminal case No. 237/05, which led to the conviction of Htun Nyo, Sai Hla Aung, Nyi Nyi Moe, Sai Myo Win Htun, and Hso Ten, for violations of the Printers and Publishers Registration Act of 1962, the source alleges that there was no evidence presented to the Tribunal that registration of distribution of the statement was required under section 3 of the Act because its distribution was limited. They were not criminally liable under this Act since they had not printed or published any documents.

24. The source explains that the arrests and convictions of the individuals concerned followed a process of convergence between the Government and various ethnic groups in the country that came to a hold around the years 2003 and 2004. Hkun Htun Oo had been well known for some years for his efforts to broker an agreement between the Government and its armed opponents. During this period the UNA, led by Hkun Htun Oo, refused to participate in the National Convention for the making of a new constitution. Also, the Secretary of the SNLD, Sai Nyunt Lwin, declared that his organisation would not participate in the National Convention unless the 104 basic principles that would empower the armed forces of Myanmar to control the Government are amended. During that time the SPDC banned a publication entitled “Sum Bai Bulletin”, which had been edited by Sai Nyunt Lwin. Similarly, on 11 April 2004, the “Restoration Council for the Shan State”, which is a political wing of the “Shan State Army”, issued a statement equally criticizing the 104 principles. On 6 May 2004, Hkun Htun Oo publicly stated that the SNLD took the same political stance as the “National League for Democracy” and that the SPDC’s 104 principles could not be accepted. It was said that the roots of the conflict between the current Government and the ethnic groups concerned goes back to the moment when Myanmar gained independence in 1947. It was the time when the Shan leaders objected against

and litigated for amendments to the 1947 Constitution and were, in turn, accused by the military of conspiring to secede from the Union, the source argues.

25. The Working Group, in its consideration of the detailed and credible information before it, and regretting the lack of response from the Government of Myanmar thereto, believes that a number of human rights lapses, amounting to arbitrary detention, may be gleaned from the situation of the seven prisoners as presented by the source.

26. Hkun Htun Oo, Sai Nyunt Lwin, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, Nyi Nyi Moe and Hso Ten were all arrested in early February 2005 at the orders of varying Government authorities of Myanmar without a warrant. Arrest warrants were only issued against them on 19 February 2005 by the Ministry of Home Affairs.

27. Irregularities of the trial impairing upon the defendants' entitlement, in full equality, to a fair and public hearing by an independent and impartial tribunal at which they enjoy all the guarantees necessary for their defence, as stipulated by articles 10 and 11 of the Universal Declaration of Human Rights, include the following: The decision of the Supreme Court of Myanmar to transfer their cases to a specially established Tribunal puts into question the impartiality and the fairness of the proceedings. The Working Group cannot consider whether the convening of this court outside of its jurisdiction *ratione loci* followed the proper domestic procedure as stipulated in the Criminal Procedure Code of Myanmar, which was disputed by the source. However, the Working Group is competent to consider that, when a trial is conducted in an area far from the places where the offences had allegedly been committed, and key witnesses called by the defence counsels could not be heard due to the short notice of the summons issued by the Special Tribunal and other witnesses could not be cross-examined, their right to defence was not properly observed.

28. Serious doubts over the fairness of the trial of the defendants are further cast by the allegations that the freely chosen defence lawyers were denied access to the accused and to the Special Tribunal. The fact that the trial was conducted on prison rather than court premises also puts into question whether the publicity requirement of articles 10 and 11, paragraph 1, of the

Universal Declaration of Human Rights was complied with. Moreover, Government authorities made the charges against the accused public at a press conference on 15 March 2005, which touches upon the right to be presumed innocent until proven guilty. It would also appear to the Working Group that the principle of *ne bis in idem* has not been adhered to with respect to Sai Nyunt Lwin as he was sentenced for the same actions on multiple charges in criminal cases Nos. 233/05, 234/05, 235/05, 236/05 and 239/05.

29. The Working Group considers that these violations of the right to fair trial taken together are of such gravity as to confer upon the imprisonment of all seven convicts an arbitrary character, particularly in view of the extremely serious charges, including high treason carrying heavy prison sentences. Whether or not the defects of the unfair trial have been corrected upon appeal, which was pending at the time of submission of the cases by the source, the Working Group cannot assess as it has not enjoyed the benefit of the Government's comments on the allegations transmitted.

30. The Working Group cannot sit in judgement as a "super-cassation court" over decisions taken by domestic criminal courts with respect to questions of guilt or whether factual evidence has been correctly assessed. It can, therefore, not entertain the allegations of the source that Hso Ten did not commit the crimes of illegal logging and exportation of lumber, or whether the actions of the defendants did not fulfil all elements of crime established by different provisions of the criminal laws of Myanmar. Nevertheless, the Working Group can consider whether the provisions making a particular action or omission a crime are in line with applicable international human rights law. It can also examine whether the incriminated actions are protected by a freedom right enumerated above under its Category II applicable to the consideration of cases before it and should therefore not be punishable.

31. The Working Group considers that there are sufficient indications that the list of charges against the accused and resultant actions of the Government of Myanmar represent a reaction to the peaceful exercise of the fundamental human rights to freedom of opinion, expression, association, and to take part in the government of one's country, directly or through freely

chosen representatives, as guaranteed by articles 19, 20 and 21 of the Universal Declaration of Human Rights.

32. It transpires from the information provided by the source that all seven persons concerned were in the process of forming a political organisation with its constituency mainly lying within the Shan ethnic group. However, this process was also undertaken with a desire to motivate democratic movement within the country as a whole with Hkun Htun Oo being the chairman of the Shan branch of the National League for Democracy, the political party of Aung San Suu Kyi, which won the general elections in 1990. Even if the ultimate goal of this political movement was to obtain self-autonomy and self-determination for a “Shan State” within the Union of Myanmar, or to secede from the Union, the Working Group considers that if such goals are pursued in a peaceful manner through democratic means such activities are protected by the rights already mentioned. Nothing in the incriminated statements read out during the three meetings of the “Shan State Academics Consultative Council” or discovered on Sai Nyunt Lwin’s computer would indicate that this was not the case.

33. Further, the fact that the “Shan State Army” entered into a ceasefire agreement with the Government of Myanmar through the State Peace and Development Council, and the context of the constitutional development since the country’s independence in 1947 described above by the source, militates in favour of the understanding that Hso Ten, together with the other members of the group, were pursuing political goals through a political rather than military process. The proximity of the arrest of all seven defendants carried out in February 2005, following three meetings of the political movement in November and December 2004 and February 2005, decisively supports the conclusion that the arrests and trials leading to harsh prison sentences were conducted as a reaction to their political engagements rather than involvement in armed activities, if any.

34. Having established that the activities of the seven defendants fall within the ambit of the right to freedom of opinion, expression, association and participation in one’s country’s Government, the long-term criminal sentences imposed upon them as a reaction thereto are outside acceptable limitations of these fundamental rights. Criminal provisions that make it an

offence to “bring or attempt to bring into hatred and contempt, or excite or attempt to excite disaffection” towards the Government of the day; or to found an organization, and punish its members, only because it may “affect or disrupt the regularity of state machinery”; or to knowingly “mention a fact which is false”; or to establish an enterprise of printing and publishing without prior registration, are too vague, overbroad and over-restrictive in view of the fundamental importance of the free – and peaceful – exchange of (political) ideas for a society as guaranteed by the rights to freedom of speech, association and political activity. The Working Group concludes that the imprisonment of the seven defendants also amounts to arbitrary detention in terms of Category II.

35. In light of the above analysis of the information before it, the Working Group renders the following Opinion:

The deprivation of liberty of Messrs. Hkun Htun Oo, Sai Nyunt Lwin, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, Nyi Nyi Moe and Hso Ten is arbitrary, contravening articles 9, 10, 11, 19, 20 and 21 of the Universal Declaration of Human Rights and falling within Categories II and III of the categories applicable to the consideration of cases submitted to the Working Group on Arbitrary Detention.

36. Consequent upon the Opinion rendered, the Working Group requests the Government of Myanmar to take the necessary steps to remedy the situation of the above-mentioned persons and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights. The Working Group continues to invite the Government of Myanmar to consider ratifying the International Covenant on Civil and Political Rights.

Adopted on 12 September 2009

**OPINION No. 27/2008 (EGYPT)**

**Communication addressed to the Government on 11 October 2007.**

**Concerning Mr. Mohamed Khirat Al-Shatar and 25 other persons.**

**The State is a party in the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.
5. The cases were reported to the Working Group as follows: Mohamed Khirat Saad Al-Shatar; born in Dakahleya on 4 May 1950, a businessman and a member of boards of administration of several banks and financial companies, was arrested on 14 December 2006 at 12 p.m. at his home, located in Madinat an Nasr, Cairo.
6. Ayman Abd El-Ghani Hassanin; born on 1 November 1964, an engineer, was arrested in the above-mentioned date, time and place.
7. Khaled Abdelkader Owda; born on 31 August 1944, a scientist and professor of geology at the University of Assiut; member of the People's Assembly between 2000 and 2005; militant of the National Democratic Party; was arrested on 14 January 2007 at 1.30 p.m. at the University compound, while he was meeting with several foreign university professors.
8. Ahmad Ahmad Nahhas, born on 12 February 1959, an engineer and treasurer of the Engineers' Trade Union of Alexandria, was arrested on 16 January 2007 at 4.30 p.m. at his place of work in Alexandria.

9. Ahmed Ashraf Mohamed Mostafa Abdul Warith, 50, manager of an editorial house, was arrested on 24 December 2007, during the afternoon at his place of work in Al-Sayeda Zeinab.
10. Ahmed Azzedin El-Ghoul, born on 8 October 1954, a journalist with home address in Giza, was arrested at his home on 14 December 2006 at 3 a.m.
11. Amir Mohamed Bassam Al-Naggar, born on 16 February 1964, a professor at the Faculty of Medicine of the University of Cairo, was arrested on 1 January 2007 at 2 a.m. at his home.
12. Esam Abdul Mohsen Afifi, born on 7 December 1956, a professor in Biochemical at the Faculty of Medicine of the University of Al-Azhar, with home address in Giza, was arrested at his home on 14 December 2006 at 2.30 a.m.
13. Essam Abdul Halim Hashish, born on 29 April 1950, a professor of engineering at the University of Cairo, was arrested on 14 January 2007 at 2 a.m. at his home.
14. Farid Aly Galbt, born on 23 March 1954, a law professor at the University of Al Azhar, was arrested on 14 December 2006 at 3 a.m. at his home.
15. Fathy Mohamed Baghdady, born on 27 June 1954, a school director with home address in Nasr-City, Cairo, was arrested at his home on 14 December 2006 at 3 a.m.
16. Gamal Mahmoud Shaaban, born on 6 June 1965, a financial manager with home address in Alexandria, was arrested at his place of work in Alexandria, the Salsapeal Company, on 14 December 2006 at 2 p.m.
17. Ahmad Mahmoud Shousha, born on 23 March 1954, an engineer with home address in Nasr-City, Cairo, was arrested on 24 December 2006 at 2.30 a.m. at his home.

18. Yasser Mohamed Ali, born on 22 March 1955, manager at the Credit United Bank, with home address in Giza, was arrested on 14 December 2006 at 2 a.m. at his home.
19. Mahmoud Abdul Latif Abdul Gawad, born on 28 December 1957, a lawyer with home address in Idku City Behera, was arrested at his home on 17 January 2007 at 1.30 a.m.
20. Hassan Ezzudine Malek; born on 20 August 1958; a Businessman; addressed in Nasr-City, Cairo, was arrested on 24 December 2006 at 2.00 a.m. at his home.
21. Mahmoud Morsi Koura, born on 25 October 1961, an engineer with home address in Ain Shams, Cairo, was arrested at his home on 14 December 2006 at 3 a.m.
22. Mamdouh Ahmed Al-Husseini, born in 1947, an engineer with home address in New Cairo, Al' Tagamue Al-Khamis, was arrested on 14 December 2006 at 1 a.m. at his home.
23. Medhat Ahmad El-Haddad, born on 25 December 1949, President of the Arabian Construction Company (ACC), with home address in Rami, Alexandria, was arrested at his home on 14 January 2007 at 2 a.m.
24. Mohamed Ali Bishr, born on 14 February 1951, an engineering professor at the University of Menoufia with home address in Shebin El-Kom, was arrested on 14 January 2007 at 5 a.m. at his home.
25. Mohamed Mahmoud Hafez, born on 24 August 1971, an ophthalmologist and Director of Hayat Pharmaceutical International Co. laboratories, with home address in Nasr-City, Cairo, was arrested at his home on 24 December 2006 at 2 a.m.
26. Mohamed Mehany Hassan, born on 27 October 1976, a qualified accountant with home address in Flower City, Ezpet Elnkhel, Cairo, was arrested on 14 December 2006 at 4 a.m. at his home.

27. Mohamed Ali Baligh, born on 8 October 1956, a professor of medicine at the Cairo Ophthalmologic Institute with home address in Heliopolis, Cairo, was arrested at his place of work on 23 December 2006 at 10 a.m.

28. Mostafa Salem, born on 2 August 1962, an accountant with home address at Heliopolis, Cairo, was arrested on 14 December 2006 at 3 a.m. at his home.

29. Osama Abdul Muhsin Shirby, born on 1 July 1944, the director of a travel agency with home address in Alexandria, was arrested at his home on 14 January 2007 at 2 a.m.

30. Murad Salah El-Desouky, born on 25 September 1957, a professor of anatomy at the Faculty of Medicine of the University of Cairo with home address in Mit Ghamr, Daqahliya, was arrested on 14 December 2006 at 6 a.m. at 20 Mohamed Hassan Street, Ain Shams, Cairo.

31. According to the information submitted by the source, these 26 persons, all leading members of the opposition organization the Muslim Brotherhood, were arrested at their homes and places of work in simultaneous predawn raids on 14, 23 and 24 December 2006 and on 14, 16 and 17 January 2007 by agents of the State Security forces (Amn Addawia) acting with the support of special units of the Army. Their houses and offices were searched and personal computers, cellular phones, books and documents pertaining to them and to members of their families were confiscated. No arrest or search warrants were shown to them or to their relatives and no reasons were given for their arrests.

32. These 26 persons, together with other 14 more persons, were taken to Al-Mahkoum Prison in Cairo, where they were held in cells of 3 by 8 metres in size. They were denied blankets and medicines, and 17 detainees were forced to sleep on the floor. Their relatives were denied the right to visit them.

33. On 21 January 2007, the detainees were taken to Torah Prison. The Public Prosecutor 'Abd al-Magid Mahmud charged them with membership in a banned organization and provision of arms and military training to university students. He prolonged their imprisonment on three

occasions. On 28 January 2007, the Public Prosecutor ordered the assets of the detainees frozen on the grounds that they had financed a banned organization. Their wives' and children' assets were also frozen.

34. On 29 January 2007, a Judge of the Cairo Criminal Court, after having interrogated the accused, dismissed all charges against them and ordered their immediate release. He considered that there was no evidence against the detainees and that the extension of the detention period was not justified. The Court considered that the detention of these persons was unjustified, particularly considering their good standing and reputable position in the Egyptian society and the fact they did not have any criminal records. In his ruling, the Judge specifically called on the Executive authorities to respect his decision.

35. Despite the court ruling, the Ministry of the Interior issued warrants against these persons and they were all immediately re-arrested by the police. According to the source, these re-arrests showed contempt for the rule of law and disrespect for the court decision.

36. On 4 February 2007, the President of the Republic, acting in his capacity as Supreme Commander of the Armed Forces, ordered that the detainees be tried by the Supreme Military Tribunal of Heikstep, Cairo, according to the Code of Military Justice of 1966 (Law No. 25), which authorizes the President to refer civilians to military trials. The Emergency Laws allows the Government to indefinitely detain people without charge, trial or legal recourse, sometimes for years.

37. The source further adds that military tribunals are known for their quick trials and for not giving the defense enough time to prepare for the case. Egyptian military judges are not obligated to possess a legal license. Military judges, appointed only for a two-year period by the Deputy Head of the Armed Forces, can be dismissed at any time. Among the fair trial guarantees that are being routinely violated when civilians are brought before Egyptian military courts, are the right to a public trial before an independent and impartial court; the right to prompt access to a defense lawyer; the right to prepare an adequate defense and the right to appeal.

38. On 24 April 2007, the Cairo Criminal Court acquitted for the second time 17 of the above-mentioned detainees, in response to an appeal filed by their relatives and overruled the State Prosecutor's decision to freeze the detainees' assets. The authorities did not carry out the acquittal decisions and ordered instead that the military trials begin on 26 April 2007.

39. The first session of the trial was held in absolute secrecy and security. Media access to the trial was severely restricted. Independent international observers were denied access to the court. Defense lawyers were not informed of the date of the beginning of the trial and decided to boycott the court session in protest, compelling the defendants to defend themselves. Defendants were not informed on the charges against them before the beginning of the trial. Later, they were charged by a panel of three military judges with terrorism, money laundering and possession of documents propagating the Muslim Brotherhood's ideas. The State Prosecutor acknowledged that he had not yet received the report on money laundering and that it had not yet been presented by the bank. The source considers that this shows that the defendants were charged, their accounts frozen and their companies shut down, without any valid legal evidence. Sessions of the trial were also held on 3 June, 15 July and 5 August 2007.

40. The source considers that these detentions were part of a crackdown the authorities began in March 2006 against the Muslim Brotherhood, which, although officially banned, constitutes the country's largest opposition group, with 88 out of 454 seats in Parliament. It considers that the crackdown began when the Muslim Brotherhood lent its support to judges campaigning for further independence of the judiciary. Egyptian military tribunals cannot assure that persons charged with criminal offenses have the right to a fair trial, as stipulated in article 14 of the International Covenant on Civil and Political Rights. Its judgments are final and cannot be appealed to a higher court, denying defendants due-process rights. Military courts should not have jurisdiction to try civilians, whatever the charges they face. They can no be considered as independent and impartial tribunals for civilians.

41. The source considers that the above-mentioned persons have been arrested and are being kept in detention solely for exercising their rights to freedoms of assembly, association, opinion

and expression, rights enshrined by articles 18, 19 and 22 of the International Covenant on Civil and Political Rights.

42. As to the facts, the Government reported that on 13 December 2006, the Office of the Public Prosecutor received a police investigation report concerning a number of leaders of the Muslim Brotherhood Society - a proscribed organization - suspected of holding organizational meetings in order to draft a plan targeting students at various universities, in particular at Al-Azhar University. The purpose of the plan was to create havoc, to disrupt studies and incite students to stage demonstrations and sit-ins, damaging public and private property and obstructing the law, with a view to achieving what the proscribed organization refers to as “the empowerment phase prior to the establishment of the Islamic Caliphate”.

43. The investigations yielded the following results:

(a) The leaders responsible for the organizational plan were identified, including Mohamed Khirat Al-Shatar and others. The members of the organizing committee tasked with implementing the plan were also identified. In order to execute the plan, they had established a number of paramilitary groups among the ranks of Al-Azhar University students, who were recruited to the proscribed organization according to the same methods as those used for militias of some religio-political parties in neighbouring States. They were armed with knives and clubs and instructed to stage riots and commit acts of violence in the area around the university, in order to terrorize other students and faculty members. The organizers instructed the students to hold a paramilitary parade on 10 December 2006, at which the participants wore a uniform and black headgear bearing the words “Steadfast Combatants”. Some also wore black face masks in order to evade police surveillance. They demonstrated martial arts using knives and clubs and, when they came out onto the public highway, the demonstrators tried to create an atmosphere of panic and terror;

(b) The accused - university students who are members of the proscribed organization - were picked up at their university residence and at apartments rented for

them by the leaders of the organization as centres for organizational meetings. The accused kept knives and instruments for use as weapons at these residences, in addition to printed materials and documents on the activities of the organization. The investigation also identified the sources of funding for these activities, which are handled by leaders of the proscribed organization through what are known as the “domestic financial committee” and the “external financial committee”. These committees oversee the spending and administration of the organization’s funds and support the above-mentioned operations of the organization by collecting subscriptions from members and receiving voluntary donations under the pretext that they will be used to support the Palestinian cause. They also have contacts with charitable associations and institutions abroad, and receive sums of money from them under the pretext that they will be used for charitable work. They invest the money in commercial ventures, establishing enterprises and economic undertakings registered in the names of members of the proscribed organization, their spouses and relatives; allocating part of the profits for the organization’s activities and investing the remainder in order to leverage its resources and maximize its financial capacities.

44. As soon as it received this report, the Office of the Public Prosecutor issued a warrant for the arrest of the leaders of the proscribed organization and the students of Al-Azhar who were members and for a search of their persons, residences and the head office of a company owned by Mohamed Khirat Al-Shatar. Pursuant to that warrant and subsequent warrants, 32 leaders of the organization and 109 Al-Azhar students who were members were arrested. The following results were achieved:

(a) Sums of money in Egyptian pounds and foreign currency, estimated in the order of millions of Egyptian pounds, were found in the residences of the arrested persons and at the head office of the aforementioned company and trading companies operating on behalf of the organization. In addition, printed and handwritten documents were found, including plans for the coming period based on the aims and principles of the proscribed organization;

(b) The university students were found to have knives (ordinary knives and penknives) and instruments for use as weapons in their clothes cupboards and desk drawers. Several items of black head gear bearing the word “steadfast” were also seized, as were quantities of printed, photocopied and handwritten documents of the organization containing details of the principles and ideas of the Muslim Brotherhood, propaganda for “Jihad” and material calling for the formation of a students’ union under the name Al-Ittihad al-Hurr (The Free Union). Assorted printed materials and statements bearing the name and slogan of the organization were also seized.

45. The Office of the Public Prosecutor examined the documents seized from the accused leaders of the organization and found them to include plans to infiltrate student bodies, with a particular focus on Al-Azhar University, as a priority. There were also studies showing that the approach taken by the proscribed organization was to use force and violence in order to change the current political system in Egypt and that the organization was looking to expand its activities abroad through missionary work and investments in various Islamic and African countries. The printed materials contained information indicating that the organization owns commercial establishments and economic enterprises at home and abroad and wishes to acquire media outlets to serve as its mouthpiece. The documents also included data showing that the organization relies on voluntary donations from individuals and institutions and has opened bank accounts for this purpose.

46. The Office of the Public Prosecutor analysed the organizational documents seized from the university students and established that they consisted of handwritten, printed and photocopied materials, including questionnaires and forms for the evaluation of students recruited to the Muslim Brotherhood. In addition to details about the organization’s methods and plans in the context of Al-Azhar University, there were propaganda posters bearing the name and slogan of the illegal organization and books and studies by its leaders, promoting the ideas, principles and aims of the organization.

47. The Office of the Public Prosecutor searched the student residences for which search warrants had been issued and seized knives and numerous documents similar to those seized

during the execution of the warrant dated 13 December 2006. It established the extent of the control exercised by the accused over the residences, in view of the propaganda posters visible on the walls promoting the organization and the signs, images and drawings with its slogan and propaganda on apartment doors inside the residences. The Office of the Public Prosecutor established that the items seized during the search belonged to the accused, as they were found in their cupboards and desk drawers in their private rooms at these residences.

48. The Office of the Public Prosecutor began its investigations by questioning the prosecution witnesses; namely, the police officers who had served the warrants and had witnessed the discovery of the items seized at the university residences and at the apartments which the leaders of the organization had rented for the students in places under their effective physical control. It also took statements from the Rector of Al-Azhar University and his deputy, both of whom confirmed the findings of the investigation and the events at the university which had led to the arrest of the accused.

49. The Office of the Public Prosecutor questioned the accused in the presence of their defence lawyers and then charged two of their leaders with leading and running a proscribed organization, the object of which is to incite others to flout the provisions of the Constitution and the law; to violate the public rights and freedoms guaranteed by the Constitution and the law and to undermine national unity and social peace, using terrorism in order to achieve those objectives. The leaders were also charged with possession of printed materials and recordings promoting the objectives of the organization, for distribution or for viewing by others, and with laundering the proceeds of the crime of leading the proscribed organization - which uses terrorism to achieve its ends - in order to conceal what they are and where they come from.

50. The Office of the Public Prosecutor charged the university students with being members of the organization while knowing what its objectives are. It also charged them with possession of printed materials promoting those objectives and with possession of knives without a licence or evidence of personal need. These offences are punishable under articles 86, 86 bis and 86 bis (a) of the Criminal Code and articles 1, paragraph 1, 25 bis of Act No. 394 of 1954 on firearms and ammunition, as amended by Act No. 26 of 1987 and Act No. 165 of 1981, as well

as under items 5, 10 and 11 of schedule 1, annexed to the first-mentioned Act and articles 2 and 14 of Act No. 80 of 2006 on money laundering.

51. Having questioned and confronted the accused with the evidence, the Office of the Public Prosecutor decided to remand them in custody for 15 days for the purpose of the investigations. It continued to apply for extensions of the custody orders, within the time limits established by law, as the investigation had not been completed, in order to prevent the accused from absconding and to avoid serious breaches of security and public order.

52. On 29 January 2007, 16 of the leaders of the illegal organization appealed against the custody extension order and, on 31 January 2007, 42 of the university students also appealed against the order before the Cairo Criminal Court, which decided to revoke the order and release all the appellants.

53. In view of the gravity of the criminal activities of the leaders of the illegal organization and of the crimes with which they had been charged in Higher State Security Case No. 963 of 2006, the President of the Republic issued Decree No. 40/2007 of 5 February 2007, in conformity with the Emergency Act in effect in the country to counter the threat of terrorism, particularly article 6 thereof, referring the offences in the case and the accused, Mohamed Khirat Al-Shatar and other leaders of the organization, to a military court.

54. On 11 February 2007, after concluding its investigations into the university students charged in Higher State Security Case No. 148 of 2007, the Office of the Public Prosecutor decided to release those who were still in custody and to refer them to the competent disciplinary board at Al-Azhar University for disciplining for the offences with which they had been charged. It took this decision in order to safeguard their academic future and spare them the serious consequences of a criminal trial and because the Office of the Public Prosecutor is empowered to consider the most appropriate means of instituting criminal proceedings.

55. At the outset, the Government clarifies the legal status of the public emergency provisions and of the military courts in the Egyptian legal system. The Egyptian Constitution

provides for the regulation of any state of emergency in Egypt in article 148, which stipulates that a state of emergency must be declared by the President of the Republic and the declaration must then be submitted to the People's Assembly, within 15 days, for a decision. The same article provides that a state of emergency in all cases shall be for a limited period, which may not be extended unless by approval of the People's Assembly.

56. The International Covenant on Civil and Political Rights, to which Egypt is a Party, provides in article 4 that, in times of public emergency which threaten the life of the nation and the existence of which is officially proclaimed, States parties to the Covenant may take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. It further provides that these measures may not derogate from articles 6, 7, 8 11, 15, 16 and 18 of the Covenant, which deal with the right to life, safeguards against capital punishment and torture, subjection to slavery, servitude, imprisonment for civil debt, the legality of crimes and punishments, recognition as a person before the law, and the freedoms relating to religion and religious beliefs.

57. The nations of the world, with their different legal systems, have adopted various methods for dealing with the emergencies and exceptional circumstances that confront their societies. Some grant exceptional powers through provisions in the relevant laws and leave it to the competent authorities to evaluate the measures that are needed, while others follow the course set by prior legislation in dealing with public emergencies and others still leave the entire matter to the discretion of the authorities concerned. Since 1923, the Egyptian legislator has followed the system of prior legislation for emergencies. Martial Law Act No. 15 of 1923 was followed by Act No. 162 of 1958, as amended by Acts Nos. 60 of 1968, 37 of 1972, 164 of 1981 and 50 of 1982 containing provisions relating on the proclamation of a state of national emergency. The law stipulates: the circumstances under which a state of emergency may be proclaimed; the authority competent to proclaim it; the procedures for extending a state of emergency; the measures that may be adopted; the conditions bringing a complaint relating to the state of emergency; emergency courts and their procedures; and the effects of ending a state of

emergency. The law upholds all the international standards set out in the International Covenant on Civil and Political Rights. The Emergency Act does not stipulate that the Constitution, or the law, or parliamentary life should be suspended. Moreover, the Act does not give free rein to the executive authorities but affords rights and guarantees to persons harmed by the arbitrary use of these rights. In addition, the Code of Military Justice authorizes the President of the Republic to refer any offence punishable under the Criminal Code or any other law to a military court when a state of emergency has been declared.

58. The Government notes that although the African Charter on Human and Peoples' Rights does not regulate states of emergency and exceptional circumstances, article 60 thereof states that the [African] Commission [on Human and Peoples' Rights] is to draw inspiration from international human rights law and the instruments adopted by the United Nations specialized agencies in this field. It is therefore necessary to refer back to the International Covenant on Civil and Political Rights, which regulates this matter, as mentioned above, and contains nothing that would prevent States parties from bringing civilians to trial before military courts. Moreover, General Comment No. 13 of the Human Rights Committee states that while the Covenant does not prevent military courts from trying civilians, it clearly indicates that such trials must be the exception and must afford the guarantees stipulated for in article 14 of the Covenant. The key factor in the referral of civilians to military courts is the availability of fair trial guarantees. The Working Group emphasized precisely this point in its report of 10 January 2008 (A/HRC/7/4).

59. Under the Egyptian legal system, military courts are a permanent, independent judicial authority. Their affairs, levels and scope are regulated by the Code of Military Justice No. 25 of 1966 and the amending laws, the most recent of which is Act No. 16 of 2007. By necessity, the military courts are special courts with criminal jurisdiction, as defined in articles 4, 5 and 6 of the Act, and try offences under ordinary law committed by military personnel and civilians working for the military authorities, in addition to offences committed by civilians on armed forces' premises and military bases.

60. Military judges are specialist judges who must satisfy the criteria set out in the Judicial Authority Act. Military judges enjoy legal immunity, may not be removed from their posts and are subject to no higher authority in the performance of their functions than that of the law. Appeals against military court judgements may be brought before the Supreme Court of Military Appeals on the same grounds as appeals before the Court of Cassation. This ensures that judgements are reviewed by a higher court composed of a rotating panel of five judges. Trials before the court are conducted in accordance with the Code of Criminal Procedures and judgements must be consistent with the Criminal Code. This law was adopted on the basis of specific considerations, determined by the Egyptian legislature, taking into account the military status of those subject to its provisions and the need to protect facilities and installations under its purview in a manner consistent with military requirements. Hence, military courts are not special courts, within the limits of their jurisdiction, but are natural courts that hand down judgements in conformity with the law and conduct proceedings and afford guarantees which meet all the international standards for a fair and equitable trial, whether from the point of view of public hearings, the presence of, and representation by, defence counsel for the accused (legal representatives or court appointees) and the right to appeal against judgements before the Supreme Court.

61. Under the Egyptian legal system, appeals may be made against administrative decisions in general and at all levels by applying to the State Council for an annulment of a decision and compensation. The State Council assures all the international standards for a fair and equitable hearing, in that it is an Egyptian judicial authority that considers cases at two levels of jurisdiction, the higher of which is the Supreme Administrative Court.

62. Orders freezing the assets [of the accused persons], including assets of wives and children, which actually come from the accused in a criminal case (because of the dependency relationship and the need to track down illegal assets) are interim orders issued by the Office of the Public Prosecutor while criminal proceedings are under way and a final decision on them is taken during the criminal proceedings.

63. Military courts provide the guarantees required of judicial systems in accordance with international standards, namely, independence, immunity and two levels of jurisdiction. Thus, the military courts meet the criteria for them to be considered a permanent and independent judicial authority under the Egyptian legal system, and provide guarantees equivalent to those provided by the ordinary courts.

64. The substantive and legal aspects considered above point to the following: The offences with which the complainants were charged and for which they are on trial are offences under public law, to which all persons are subject without distinction or discrimination. The offences consist of grave acts against the security of the community and the rights and freedoms of others and have nothing to do with religious beliefs or freedoms. Moreover, the measures imposed as a result of the continuing state of emergency are not contrary to the international standards set out in the International Covenant on Civil and Political Rights in this regard. Cases referred to military courts are referred to a judicial authority which meets all the international standards for a fair and equitable trial, is regulated by law and conducts proceedings in accordance with the laws in force. Consequently, military courts are not a special judicial authority and these laws do not contain any provisions that are discriminatory or breach the principle of equality before the law.

65. The acts with which the complainants were charged are serious offences under the Criminal Code and other criminal laws. In view of the state of emergency in the country, the grave nature of the criminal activities of the accused of the proscribed organization and the gravity of the crimes with which they were charged in Higher State Security Case No. 963 of 2006, the President of the Republic issued Decree No. 40 of 2007 referring the case and the accused, Mohamed Khirat Al-Shatar and others (leaders of the organization), to the military courts, in accordance with Act No. 25 of 1966, article 6 of which authorizes the President of the Republic to refer to military courts any offence punishable under the Criminal Code or any other law when a state of emergency has been proclaimed.

66. With regard to the decision to release the accused in the appeal by the complainants against the decision of the Office of the Public Prosecutor to remand them in custody, the role of

the court was limited to examining the grounds for extending custody and did not include and examination of the charges against the appellants. The Office of the Public Prosecutor compiled with the decision of the court in the case of the students and, having completed its investigations, decided to discontinue proceedings and refer them for disciplinary measures, instead taking into consideration the students' future.

67. The accused who were referred to the military courts appealed to the State Council Administrative Court against the referral decision, which ordered the suspension of the decision. That decision was in turn appealed before the Supreme Administrative Court, in Appeal No. 12761, judicial year 53. The Court ordered the suspension of the appealed decision on 4 June 2007, and the appeal was examined in hearings before the Supreme Administrative Court. The date of the trial was set for 12 April 2008.

68. The case forming the subject of the communication remains before the military courts. The trial proceedings were held in public, in the presence of the defence counsel of the accused. The case is still at the deliberations stage; the hearings have been completed and the court has reserved the case for judgement, although no judgement has been handed down to date.

69. The forthcoming judgement can be appealed by the Office of the Military Prosecutor or the accused, as the case may be, before the Military High Court, on the same grounds as an appeal before the Court of Cassation. The rules and procedures relating to appeals in criminal cases apply. Therefore, the appeal court has the same powers as the Court of Cassation with regard to the review of the legal arguments and the judgement and the decision to overturn or uphold the judgement, depending on the admissibility of the arguments presented by the two parties in a criminal case (the defendants and the Office of the Public Prosecutor). The chambers of the Supreme Court are composed of five judges other than those who handed down the appealed judgement.

70. The use by the President of the Republic of his right to refer a case to the military courts in the context of the continuing state of emergency, is confined to, and aimed only at, serious terrorist offences, of which there have been few cases.

71. It should be noted that the Government has announced its intention of ending the state of emergency once the text of the draft counter-terrorism law has been finalized. Article 179 of the Constitution provides that the President of the Republic may refer any terrorism offence to any judicial body recognized in the Constitution or the law. This in itself constitutes a basic guarantee of a fair and equitable trial, as the laws governing the various judicial authorities stipulate that trials must be fair and equitable from the point of view of procedures and judgements. Hence, any judicial body selected by the President of the Republic will guarantee a fair and equitable trial as provided for in the Constitution (Chapter IV, on the rule of law) and the various laws.

72. With regard to the substantive issues, it should be clear from the facts set out above, that the allegations in the complaint about discriminatory treatment of the persons concerned are groundless. With regard to the formal issues, Egypt takes the view that consideration of this communication does not come under the purview of the Working Group according to the relevant procedures, since domestic remedies have not been exhausted (the trial is not yet over and the final judgement may be challenged at appeal and then before the Court of Cassation). Moreover, the same communication is currently being considered by the African Commission on Human and Peoples' Rights (communication No. 354/2007), which is a regional recourse mechanism.

73. In its observations on the Government's response, the source states that it reports that 109 university students were arrested while preparing to perpetrate serious acts of extreme violence, described as having a quasi-insurrectionary character, and that the investigation that followed found that the students would actually be responsible as main organizers and financiers. The proceedings against the students by the State Security Prosecutor (Niyabat Amn Addawla Al Ôlya) originated criminal proceedings. Those proceedings were not under the Office of the Public Prosecutor, as the Government pretends.

74. The source recalls that on 11 February 2007, the State Security Prosecutor decided the nullity of the proceedings concerning the arrested 124 (and not 109) students of the University of

Al-Azhar. The Rector of Al-Azhar University, his Deputy and other university authorities who declared as witnesses, exonerated the students of any responsibility in acts of violence or of possession of knives. All the students were also brought before the Disciplinary Committee of the University at the request of the State Security Prosecutor, and this Committee exonerated them.

75. The source adds that the main witness presented by the prosecution was Colonel Atef Al Hussein, who was simultaneously the official in charge of the investigations. Colonel Al Hussein did not provide any evidence on actions or meetings taken by the incriminated persons that could prove the allegations against them. All arrests were ordered by telephone by Colonel Al Hussein and not by regular arrest warrants, which was a violation of both Egyptian and international law.

76. The continued indefinite detention of the above-mentioned persons was decided by a political authority in contradiction with a judicial decision, which was also a violation of article 134 of the Penal Code. This administrative detention order was taken simply for political reasons and was given despite a clear court decision rendered by a competent criminal tribunal ordering the immediate release of those accused.

77. The source concludes by pointing out that the use of military tribunals in Egypt has become selective, and is currently applied solely to the members of the Muslim Brotherhood. These tribunals are not independent, impartial nor competent and fail in guaranteeing due process of law according to international standards.

78. According to the Working Group, the following allegations have not been contradicted by the Government's response:

(a) All 26 persons to whom this Opinion refers were arrested at their homes or places of work in simultaneous predawn raids on 14, 23 and 24 December 2006 and 14, 16 and 17 January 2007 by agents of the State Security forces (Amn Addawia) acting with the support of special units of the Army. Their houses and offices were searched and

personal computers; cellular phones; books and documents pertaining to them and to members of their families were confiscated. No reasons were given to them or their relatives for their arrests;

(b) On 29 January 2007, the Cairo Criminal Court, after having interrogated the accused, dismissed all charges against them and ordered their immediate release. It considered that there was no evidence against the detainees and that the extension of the detention period was not justified;

(c) Despite this Court ruling, the Ministry of the Interior issued arrest warrants against these persons and they were all immediately re-arrested by the Police, and on 4 February 2007, the President of the Republic, acting in his capacity as Supreme Commander of the Armed Forces, ordered that the detainees be tried by the Supreme Military Tribunal of Heikstep, Cairo; trial which took place on 15 April 2008. The principle *non bis in idem*, enshrined by article 14, paragraph 7, of the International Covenant on Civil and Political Rights, was not observed;

(d) The Supreme Military Tribunal of Heikstep acquitted Messrs Khaled Abdelkader Owda; (2) Ahmad Ahmad Nahhas; (3) Ahmed Azzedin El-Ghoul; (4) Amir Mohamed Bassam Al-Naggar; (5) Gamal Mahmoud Shaaban; (6) Yasser Mohamed Ali; (7) Mahmoud Abdul Latif Abdul Gawad; (8) Mahmoud Morsi Koura; (9) Mohamed Mahmoud Hafez; (10) Mohamed Mehany Hassan; (11) Mohammed Ali Baligh; (12) Osama Abdul Muhsin Shirby;

(e) The Military Tribunal also condemned to three to seven years' imprisonment to Messrs. (1) Mohamed Khirat Al-Shatar; (2) Hassan Ezzudine Malek; (3) Ahmed Ashraf Mohamed Mostafa Abdul Warith; (4) Ahmad Mahmoud Shousha; (5) Esam Abdul Mohsen Afifi; (6) Essam Abdul Halim Hashish; (7) Farid Aly Galbt; (8) Fathy Mohamed Baghdady; (9) Mamdouh Ahmed Al-Husseini; (10) Medhat Ahmad El-Haddad; (11) Mohamed Ali Bishr; (12) Mostafa Salem; and (13) Murad Salah El-Desouky, for their membership in a proscribed organization;

(f) The Government justified such intervention with the situation of state of emergency, which provides specific competences to the President of the Republic to refer any offence punishable under the Penal Code or any other law to a military court.

79. The Working Group reiterates its prior considerations on similar cases of detention in Egypt (such as its Opinion No.3/2007 (Egypt)), as well as the views of the Committee against Torture and the Committee on Economic, Social and Cultural Rights, on the situation caused by the declaration of state of emergency in Egypt since 6 October 1981 (see, for instance, CAT/C/CR/29/4, para.5 and E/C.12/1/Add.44, para.10).

80. Considering the above, the Working Group notes that two different periods of time should be differentiated:

(a) On the arrest of Messrs. Khaled Abdelkader Owda; Ahmad Ahmad Nahhas; Ahmed Azzedin El-Ghoul; Amir Mohamed Bassam Al-Naggar; Gamal Mahmoud Shaaban; Yasser Mohamed Ali; Mahmoud Abdul Latif Abdul Gawad; Mahmoud Morsi Koura; Mohamed Mahmoud Hafez; Mohamed Mehany Hassan; Mohammed Ali Baligh; Osama Abdul Muhsin Shirby; and

(b) On the convictions against Messrs. Mohamed Khirat Saad El-Shatar; Hassan Ezzudine Malek; Ahmed Ashraf Mohamed Mostafa Abdul Warith; Ahmad Mahmoud Shousha; Ayman Abd El-Ghani Hassanin; Esam Abdul Mohsen Afifi; Essam Abdul Halim Hashish; Farid Aly Galbt Fathy Mohamed Baghdady; Mamdouh Ahmed Al-Husseini; Medhat Ahmad El-Haddad; Mohamed Ali Bishr; Mostafa Salem and Murad Salah El-Desouky.

81. One period concerns the arrest of all these persons before the judicial decision ordering their immediate release was taken by the Cairo Criminal Court. The other period concerns the re-arrest of all these persons as a consequence of the administrative order of the Executive authorities without taking into account the judicial resolution ordering their release.

82. Articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights establish that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal. This has to be interpreted as meaning that if such independent and impartial judicial authority decides that an order issued by an administrative authority is not appropriate, those arrested should be immediately released. Although the police forces can arrest these persons again under the same charges, the new arrest by administrative authorities will have no legal basis and will imply a non-observance of a judicial decision.

83. The absence of a legal basis for the re-arrest of all these persons is a sufficient element for the Working Group to consider their detention as arbitrary. However, the Working Group notes that, even without such element, these detentions would have been considered as arbitrary due to the fact that all these persons, all of them civilians, were tried before a military court which did not show the necessary qualities of competence, independence and impartiality.

84. Article 14 of the International Covenant on Civil and Political Rights establishes that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The independence, impartiality and objectivity of the tribunal are a fundamental requisite determined by International Law. Egyptian military courts are dependent on the Ministry of Defence. They are composed by judges appointed by the Armed Forces command and can be dismissed at any time. In addition, their members lack the necessary professionalism and legal knowledge.

85. The Working Group considers that, in principle, military tribunals should not try civilians. The Human Rights Committee has also expressed concern that these tribunals as well as State Security Courts show no guarantees of independence. In addition, their decisions are not subject to appeal before a higher court as established by article 14 of the International Covenant on Civil and Political Rights (see CCPR/CO/76/EGY, para.16).

86. In the light of the foregoing, the Working Group renders the following Opinion:

(a) The deprivation of liberty of Messrs. Mohamed Khirat Saad Al-Shatar; Hassan Ezzudine Malek; Ahmed Ashraf Mohamed Mostafa Abdul Warith; Ahmad Mahmoud Shousha; Ayman Abd El-Ghani Hassanin; Esam Abdul Mohsen Afifi; Essam Abdul Halim Hashish; Farid Aly Galbt; Fathy Mohamed Baghdady; Mamdouh Ahmed Al-Husseini; Medhat Ahmad El-Haddad; Mohamed Ali Bishr; Mostafa Salem; and Murad Salah El-Desouky is arbitrary, being in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group;

(b) The Working Group, without prejudging the arbitrary nature of their detention, on the basis of paragraph 17 (a) of its methods of work, decided to file the cases of Messrs. Khaled Abdelkader Owda; (2) Ahmad Ahmad Nahhas; (3) Ahmed Azzedin El-Ghoul; (4) Amir Mohamed Bassam Al-Naggar; (5) Gamal Mahmoud Shaaban; (6) Yasser Mohamed Ali; (7) Mahmoud Abdul Latif Abdul Gawad; (8) Mahmoud Morsi Koura; (9) Mohamed Mahmoud Hafez; (10) Mohamed Mehany Hassan; (11) Mohammed Ali Baligh; (12) Osama Abdul Muhsin Shirby.

87. Consequent upon the Opinion rendered, the Working Group requests the Government of Egypt to take the necessary steps to remedy the situation of the above mentioned persons and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 12 September 2008

**OPINION No. 28/2008 (SYRIAN ARAB REPUBLIC)**

**Communication addressed to the Government on 9 January 2008.**

**Concerning Messrs. Ahmed Omar Einein, Khaled Hammaami, Khaled Jema' 'Abd al-'Aal, Mustafa Qashesha, Muhammad Asa'd, Ahmed Huraania, Hussein Jema' 'Othmaan, Samer Abu al-Kheir, Abd al-Ma'ti Kilani, Muhammad 'Ali Huraania, Muhammad 'Ezz al-Din Dhiyab and Muhammad Kilani.**

**The State has ratified the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 1 of Opinion No. 17/2008.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.
5. The cases were reported by the source as follows: Messrs. Ahmed 'Omar 'Einein, Khaled Hammaami, Khaled Jema' 'Abd al-'Aal, Mustafa Qashesha, Muhammad Asa'd, Ahmed Huraania, Hussein Jema' 'Othmaan, Samer Abu al-Kheir, Abd al-Ma'ti Kilani, Muhammad 'Ali Huraania, Muhammad 'Ezz al-Din Dhiyab and Muhammad Kilani, all of them from al-'Otayba village in the Damascus countryside area, were sentenced on 14 November 2006 after an unfair trial before the Supreme State Security Court (SSSC) to prison terms of between six to nine years.
6. They had been arrested on 23 April 2004. Eleven of them were arrested by officers of Air Force Intelligence, held in *incommunicado* detention at a branch of Air Force Intelligence for several months and later transferred to Sednaya prison, near Damascus.

7. By January 2006, the 11 individuals had been allowed just one visit from family members. The twelfth man, Mr. Mustafa Qashesha, also apprehended on 23 April 2004, was arrested by officers of State Security, held in incommunicado detention at a State Security branch and then transferred to Sednaya prison. Mr. Mustafa Qashesha's access to visits from family members was less restricted than the other 11 individuals.

8. According to the source, the detainees were tortured in detention. Relatives who complained about the alleged torture were themselves consequently detained for one day and then released, and visits were again denied to the 12 above-mentioned persons. No investigation was carried out into the alleged torture suffered by the men in detention.

9. The source adds that these persons were arrested on account of their alleged "Islamic background". On 14 November 2006, they were convicted of being part of "a group established with the aim of changing the economic or social status of the State", according to article 306 of the Penal Code. No evidence was presented to the court to substantiate the charge, thereby undermining the defendants' ability to contest it.

10. The accused were denied the right to appoint lawyers for a number of months, but by January 2006 had had lawyers appointed for them by the court. However, on at least three occasions, the appointed lawyers were not informed of the dates for the hearings and hence the trial sessions were postponed.

11. Mr. Ahmed 'Omar 'Einein was sentenced to nine years' imprisonment. Messrs. Khaled Hammaami, Khaled Jema' 'Abd al-'Aal, Mustafa Qashesha and Muhammad Asa'd were sentenced to seven years' imprisonment. Messrs. Ahmed Huraania, Hussein Jema' 'Othmaan, Samer Abu al-Kheir, 'Abd al-Ma'ti Kilani, Muhammad 'Ali Huraania, Muhammad 'Ezz al-Din Dhiyab and Muhammad Kilani were sentenced to six years' imprisonment.

12. The source also reports that three other men, Messrs. Ziad Kilani, 'Ali 'Othman and Na'em Qasem Marwa, were also arrested on 23 April 2004 in al-'Otayba. They remain detained and on trial before the SSSC and facing the same charge. They were brought to court on 6

January 2008, but their lawyers had been misinformed of the date of the hearing and consequently the hearing was postponed to April 2008.

13. In its response dated 8 April 2008, the Government pointed out that Syrian law does not punish individuals on account of their religious background; and that on the contrary, the Constitution and the legislation in force emphasize freedom in general, and religious freedom in particular, and the law seeks to protect and safeguard these freedoms. Syrian culture is distinguished by religious diversity, peaceful coexistence and tolerance among all religions.

14. The Government adds that the above-mentioned persons belonged to an extremist terrorist organization affiliated to Al-Qaida, which became a focus of attention as a result of the terrorist operations that it carried out in Arab and Western States. The organization is being prosecuted by the Syrian authorities pursuant to the Criminal Code No. 148 of 1949. The name of the organization was given as Al Takfir wa al-Hijrah, which has spread in the Syrian Arab Republic and Jordan and is an affiliate of Al-Qaida. Most of the above-mentioned persons joined this organization through Mr. Mustafa Qashoshah and Mr. Ibrahim Abu al-Khayr. The latter was killed while committing terrorist acts in Jordan. The above-mentioned persons underwent weapons training in preparation for terrorist operations in Arab States as they believe that Arab Governments do not apply Islamic Sharia or allow Jihad against Israel and the United States of America.

15. The Government provides the following information on each of the above-mentioned persons:

(a) Ahmad bin Ali Huraniyah joined the organization through Mustafa Qashoshah, who claimed that its objective was to “fight the infidels at any time, anywhere”. According to his statement, he underwent weapons training “to prepare for fighting in Iraq”;

(b) Husayn Jama` Uthman joined the organization through Mustafa Qashoshah, who claimed that its objective was to “fight the infidels at any time, anywhere”.

According to his statement, he underwent weapons training “to prepare for fighting in Iraq”;

(c) Ahmad Omar Aynayn joined the organization through Ibrahim Abu al-Khayr, who had carried out terrorist acts in Jordan and trained him in the use of weapons “to prepare for fighting in Iraq”;

(d) Mohamed Ahmed As`ad joined the organization through Mustafa Qashoshah and underwent weapons training “to prepare for fighting in Iraq”. He attempted to go to Iraq for the purpose;

(e) Mohamed Ali Huraniyah joined the organization through Ali Uthman and underwent weapons training “to prepare for fighting in Iraq”;

(f) Khalid Jama` Abd al-Al joined the organization through Mustafa Qashoshah and underwent weapons training “to prepare for fighting in Iraq”;

(g) Abd al-Mu`ti al-Kilani joined the organization through Ziyad Kilani and underwent weapons training “to prepare for fighting in Iraq”;

(h) Mohamed Izz al-Din Diyab joined the organization through Mr. Ziyad Kilani and left the organization three months later;

(i) Samir Mustafa Abu al-Khayr joined the terrorist organization through Ziyad Kilani and underwent weapons training “to prepare for fighting in Iraq”;

(j) Khalid Mohamed Hammami joined the terrorist organization through Mustafa Qashoshah and was preparing “for fighting in Iraq”;

(k) Mustafa Qashoshah joined Al-Qaida through Ibrahim Abu al-Khayr; he is convinced that Muslims are oppressed everywhere, that all Arab Governments are

apostate, should be changed and replaced and that a single State should be set up, based on the Islamic caliphate. According to his confession, taking Osama Bin Laden, whom he calls “the first *mujahid*” as a role model, he founded *Al-Takfir wa al-Hijrah* as an Al-Qaida cell.

16. The Government further reports that the members of Al-Takfir wa al-Hijrah subscribe to the following principles: (a) declaring Arab and Muslim Governments guilty of apostasy (*takfir*) because they do not apply Islamic Sharia; (b) accusing Muslim scholars of hypocrisy and duplicity; (c) approving theft of State funds because they are the proceeds of “usury”; (d) forbidding acceptance of employment in State institutions, since the State is apostate; (e) allowing perjury in the service of *takfir* doctrine; (f) approving theft of the property of Muslims who do not support the organization; (g) forbidding prayer in Mosques on account of the presence of apostates; (h) fighting in any State where Muslims are under attack.

17. The above-mentioned persons were detained for belonging to Al-Qaida and carrying out terrorist acts that are punishable under Syrian legislation. The allegations that they were allowed only one family visit in prison and that they were tortured are unfounded; neither the Constitution nor the law, allow physical or mental torture or ill-treatment (Syrian Constitution, art. 28). As regards the appointment of defence lawyers by the court, this was done because the above-mentioned persons refused to retain defence lawyers who apply secular law. The court therefore requested the Bar Association to assign a suitable lawyer to defend them.

18. The Government considers that the allegation that the State Security Court falls short of the international standards of a fair trial is greatly exaggerated: the persons concerned were arrested by the competent authorities and proceedings were instituted against them by the competent public prosecutor’s office. They were tried in public proceedings, in the presence of their lawyers and relatives, members of the public and foreign embassy officials who usually attend hearings of the State Security Court. Their testimony was heard in court and they admitted the charges against them. The Government further pointed out that confessions made before bodies conducting initial inquiries are not accepted by courts as evidence in criminal proceedings. However, it accepted that they are used for information purposes.

19. The Government reported that the court sentenced Mr. Ahmad Bin Omar Aynayn to nine years' hard labour under article 306 of the Criminal Code; Khalid Jama' Abd al-Al, Mohamed Bin Ahmad As'ad and Khalid Mohamed al-Hammami to seven years' hard labour under article 306 of the Criminal Code; Ahmad Bin Ali Huraniyah, Husayn Bin Jama' Uthman, Na'im Bin Kasim Marwah, Mohamed Bin Ali Huraniyah, Abd al-Mu'ti Bin al-Hakim al-Kilani and Mohamed Ahmed al-Kilani to six years' hard labour under article 306 of the Criminal Code; Samir Bin Mustafa Abu al-Khayr to six years' imprisonment under article 147 of the Military Criminal Code, and Mohamed Bin 'Izz al-Din to six years' hard labour under article 306 of the Criminal Code. The period of detention prior to sentencing was deducted from the original sentence in each case.

20. The Government's response was transmitted to the source. The Working Group considers that is in a position to issue an Opinion on the case on the basis of all the information submitted to it.

21. The Working Group notes the information provided by the Government that the above-mentioned 12 persons are members of Al Takfir wa al-Hijra, an organization linked to Al-Qaida; that they were trained in the use of arms in order to carry out terrorist operations, not only in Syria, but also in other Arab States, and that their convictions were not based on their confessions but in the evidence gathered by the public prosecutor's office and the investigations carried out by that body. However, the Government recognizes that the confessions of these persons were used for information purposes, and that these persons admitted the charges brought against them.

22. The Working Group further notes that the Government has not denied that these 12 persons were held during several months in incommunicado detention at a branch of Air Force Intelligence and at a State Security branch; that no investigation has been carried out into the alleged torture suffered by these persons; that the hearings had to be postponed in at least three occasions because the defence lawyers, appointed by the Court, were not informed of the dates of the hearings. The Working Group further notes that no information was provided by the

Government concerning Messrs. Ziad Kilani, ‘Ali ‘Othman and Na’em Qasem Marwa, who were also arrested on 23 April 2004 in apparent connection with the others.

23. The Working Group has already pronounced its views about trials before the SSSC, which the Working Group considers that fall far short of international standards for fair trial. The Working Group believes that procedures before this court violate a number of rights of the accused and obligations on the State, including in particular:

- (a) The right to a fair and public hearing before a competent, independent and impartial tribunal;
- (b) The right to be informed promptly and in detail of the nature and cause of the charges against him;
- (c) The right of everyone to challenge the lawfulness of his detention before an independent and impartial court;
- (d) The right to have adequate time and facilities for the preparation of his defence and to communicate with legal counsel of his own choosing;
- (e) The right to defend himself in person or through legal assistance;
- (f) The right to be tried without undue delay;
- (g) The obligation on the State to investigate allegations of torture and not to use coerced confessions as evidence; and
- (h) The right to have his conviction and sentence being reviewed by a higher tribunal.

24. The Working Group considers that the rights of these 12 persons to a fair trial were violated to such an extent that their detentions become arbitrary. The response from the

Government does not contain clear and persuasive arguments that the rights of the above-mentioned persons to not be arbitrarily deprived of their liberty or persecuted have been respected according to the international legal guaranties.

25. The Working Group believes that given that no evidence seems to have been submitted to an independent and impartial court to substantiate the charges, the allegation that these persons have been detained on account of their alleged “Islamic background” and for their free exercise of their rights to freedom of opinion and expression has not been diluted. Confessions made before bodies conducting initial inquiries, i.e. the Air Force Intelligence and the State Security Office, in whose installations the detainees spent several months in incommunicado detention, were used for information purposes.

26. The Working Group would like to remind the Government of the resolutions and recommendations adopted by the United Nations concerning a global counter-terrorism strategy which include that any measure taken by States to combat terrorism must fully comply with all their obligations under international human rights law and international humanitarian law. Individuals detained under accusations of terrorism or in the framework of the war against terror must enjoy of all the guarantees enshrined in international law, particularly to be tried in conformity with the principles of due process of law under an independent and impartial tribunal. Those individuals must be detained in accordance with criminal institutions and procedures that respect the safeguards and guarantees enshrined in international law.

27. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Messrs. Ahmed ‘Omar ‘Einein, Khaled Hammaami, Khaled Jema’ ‘Abd al-‘Aal, Mustafa Qashesha, Muhammad Asa’d, Ahmed Huraania, Hussein Jema’ ‘Othmaan, Samer Abu al-Kheir, Abd al-Ma’ti Kilani, Muhammad ‘Ali Huraania, Muhammad ‘Ezz al-Din Dhiyab and Muhammad Kilani, is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights and falls

under categories II and III applicable to the consideration of cases submitted to the Working Group on Arbitrary Detention.

28. The Working Group further request the Government to provide information concerning the legal basis for the prosecution and the current situation of Messrs. Ziad Kilani, 'Ali 'Othman and Na'em Qasem Marwa.

29. Consequent with the Opinion rendered, the Working Group request the Government to take the necessary steps to remedy the situation and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 12 September 2008

**OPINION No. 29/2008 (CHINA)**

**Communication addressed to the Government on 21 April 2008.**

**Concerning Mr. Alimujiang Yimiti (Alimjan Yimit).**

**The State has signed but not ratified the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group acknowledges the cooperation received from the Government which submitted information on the allegations presented by the source.
3. (Same text as paragraph 1 of Opinion No. 17/2008.)

4. The case summarized below was reported to the Working Group as follows: Alimujiang Yimiti (Alimjan Yimit in Uyghur), male, ethnic Uyghur, a Christian in Xinjiang, married with two children, resident in Hami, Xinjiang Province, was arrested on 12 January 2008. His family was not informed of his arrest. Later, he was accused of subversion against the national Government and endangering national security, a serious crime which can carry the death penalty.

5. The source further reports that Alimujiang Yimiti was working as a project manager for a British company, Jirehouse, known as Xinjiang Jiaerhao Foodstuff Company Limited. He was in charge of managing the fruit garden funded by the company located at Boyakeqigele Village, Hannanlike Township, Shule Country. The company was reportedly targeted in a series of closures of foreign companies belonging to Christians in Xinjiang in September 2007 and Mr. Alimujiang Yimiti was accused of illegal religious infiltration activities in Kashi region in the name of doing company business. He was accused of preaching Christianity among people of Uyghur ethnicity and distributing religious propaganda materials. Mr. Yimiti is reported to be currently held in Kashi detention centre.

6. On 25 February 2008, Mr. Yimiti's lawyer was denied a meeting with him on grounds of national security. The investigations against Mr. Yimiti were being carried out in secret. Mr. Yimiti's detention followed years of reported intimidation and interrogation while working with his most recent employer and his previous employer, an American owned company, the Xinjiang Taipingyang Nongye Gongsi. Mr. Yimiti was regularly called in, both day and night, for interrogation by the local State Security Bureau. He was allegedly physically abused and injured. His house was also ransacked and possessions, including his computer, seized. He made complaints to the State Security Bureau headquarters in Urumqi, but without success. Alimujiang Yimiti was forbidden from revealing any details of these interrogations as such action would be deemed to equate to "leaking State secrets".

7. Those close to Mr. Yimiti say there is no proof of wrongdoing and are gravely concerned about the high level of secrecy surrounding his case. They are deeply concerned for his welfare. According to them, Mr. Yimiti is a quiet and very professional young man of immense integrity,

who was careful not to mix his faith and business activities. Mr. Yimiti is neither a terrorist nor a separatist and is said to be a loyal Chinese citizen.

8. In its response, the Government reported that Alimjan Yimiti, born on 10 June 1973 in Hami, Xinjiang Province; originally Muslim, converted to Christianity in 1995, was detained in January 2008 by the Kashi public security authorities, pursuant to articles 103 and 111 of the Chinese Criminal Code, on suspicion of involvement in fomenting separatism and illegally passing State secrets abroad. On 20 February 2008, he was arrested with the approval of the procuratorial authorities. His trial opened on 27 May 2008 at the People's Intermediate Court in Kashi, Xinjiang Province, and the Court ordered further investigation by the public security authorities.

9. Alimjan Yimiti is being held in Kashi prison. He is in good physical condition and is entitled to receive visits, appoint counsel and so forth in accordance with the law. His case is currently at the judicial procedure stage. According to the Government, his arrest has nothing to do with his religious belief.

10. The Government further states that Chinese citizens' right to freedom of religious belief is protected by the Constitution and the law. Article 36 of the Constitution states : "Citizens of the People's Republic of China enjoy freedom of religious belief." Every citizen of China is free to believe in a religion or not, to believe in different religions, and to change from one religion to another. Chinese law and practice are consistent with the relevant provisions of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other such international instruments and agreements.

11. Lastly, the Government points out that China is a country of many religions, and its citizens can freely choose and express their own religion and manifest their membership of it. It reports that, at present, there are over 100 million religious believers of all kinds, including 16 million Protestant Christians, five million Catholics and over 20 million Muslims. There are 100,000 places of religious worship, 300,000 clergy, and over 30 million religious associations.

All religions are equal in status and coexist harmoniously; religious and non-religious people respect each other and mingle.

12. The source notes that Alimujiang Yimiti was arrested for having distributed religious propaganda materials and intending to convert people to Christianity, violating several Chinese laws and statutes, among them, articles 20, 43 and 45 of the 1 March 2005 Regulations on Religious Affairs as well as some Guidelines to apply the Regulations issued by the Party Committee of the Xinjiang Uyghur Autonomous Region. The Regional Ethnic Autonomy Law provides a specific framework for the Autonomous Regions to adapt national laws in the light of existing local conditions. Mr. Yimiti was previously accused of violating articles 3, 4 and 5 of the 1984 Regulations No. 1166 ; the 1990 Notice No. 30 and the 1992 Regulations No. 42.

13. According to the source, Mr. Alimujiang Yimiti was detained for having conducted activities which were considered illegal as well as religious infiltration in Kashi region. Although the 2005 Regulations on Religious Affairs (RRA) protect in general religious belief, and the rights of registered religious organizations, it attempts to control the growth and scope of activities of both registered and unregistered religious groups. These Regulations seem to be introduced with the purpose of strengthening certain aspects of governmental control over religious activities. They distinguish between normal religious activities and religious extremism and public-order disturbances. Local officials can take decisions to detain and arrest religious believers. Particularly sensitive are religious activities in Xinjiang Uyghur Autonomous Region, a region with a Moslem majority and with separatist problems.

14. The Working Group notes that Mr. Alimujiang Yimiti (Alimjam Yimiti) has been charged with fomenting separatism and illegally passing State secrets abroad. If convicted, he could be subject to capital punishment. However, the People's Intermediate Court in Kashi did not find enough evidence against Mr. Yimiti regarding the charges for political crimes brought against him and ordered the Public Security Bureau to carry out further investigations.

15. Mr. Alimujiang Yimiti has been arrested and is being kept in detention solely for his religious faith and religious activities. Freedom of religion is a right recognized by article 18 of

the Universal Declaration of Human Rights and by article 18 of the International Covenant on Civil and Political Rights, which China has signed but not ratified. His detention is also contrary to the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the General Assembly in its resolution 36/55 of 25 November 1981.

16. The Working Group recalls that the Universal Declaration of Human Rights guarantees persons the right to manifest their own religion either alone or in community with others and in public or in private; the right to be free from discrimination based upon religions and the right to be free from unnecessary and arbitrary government regulation in exercising religious beliefs.

17. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Mr. Alimujiang Yimiti (Alimjan Yimit in Uyghur) is arbitrary, being in contravention of articles 7, 9, 10, 11 (1), 12, and 18 of the Universal Declaration of Human Rights and falls within categories II and III of the categories applicable to the consideration of the cases submitted to the Working Group.

18. Consequent upon the Opinion rendered, the Working Group requests the Government of China to take the necessary steps to remedy the situation of the above mentioned person and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights.

19. The Working Group also calls upon the Government to consider the possibility of an early ratification of the International Covenant on Civil and Political Rights.

Adopted on 12 September 2008

**Communication addressed to the Government on 19 December 2007.**

**Concerning Mr. Gunasundaram Jayasundaram.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 1 of Opinion No. 17/2008.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.
5. The case was reported to the Working Group as follows: Mr. Gunasundaram Jayasundaram, a dual Sri Lankan-Irish citizen, resident in Singapore, married and father of three children, was arrested on 4 September 2007 at Katunayake International Airport by agents of the Police's Terrorist Investigation Division (TID). He had just arrived from Singapore on a business trip to Colombo.
6. It appears that Mr. Jayasundaram has been detained on remand during three months and a half on the orders of the Secretary of the Ministry of Defence. No reasons for his arrest were communicated to him.
7. Mr. Jayasundaram has only been allowed access to a defence lawyer once during this period, despite repeated written requests to the authorities for regular access to legal counsel. On 29 October 2007, a writ of *habeas corpus* was filed on his behalf by Senior Counsel Mr. Appapillai Vinayagamoorthy, without any results.

8. The source adds that consular access to the detainee is also severely restricted. The Honorary Consul of the Republic of Ireland in Colombo has been allowed to visit him only once, on 14 December 2007.

9. According to the source, Mr. Jayasundaram's arrest and detention is arbitrary, since no reason was communicated to him to proceed to his arrest and no arrest warrant was shown to him. The source adds that, despite the time already elapsed, no charges have been brought against Mr. Jayasundaram. He has not been brought before a judge and no date for a trial has been set. The source concludes that Mr. Jayasundaram's detention is arbitrary.

10. In its response, the Government of Sri Lanka states that according to the investigation conducted by the authorities, on 4 April 2007, customs officers at Colombo International Airport arrested Visvalingam Gobidas – a resident of Colombo – for bringing high-powered communication sets to Sri Lanka without a permit.

11. Subsequent inquiries revealed that Visvalingam Gobidas is a member of the procurement team of the LTTE, a terrorist outfit banned in many countries, including the United States of America and the member countries of the European Union. These high-powered communication sets were brought for the use of the LTTE. On revelations made by Gobidas, Mr. Jayasundaram was providing monetary and material support to the LTTE. Mr. Jayasundaram was informed of these charges, and he was detained at the Terrorist Investigation Division (TID) in Colombo under Emergency Regulations No.19/(2). A copy of the detention order has been handed over to Mr. Jayasundaram.

12. The arrest of Mr. Jayasundaram was officially notified to the International Committee of the Red Cross (ICRC) and the National Human Rights Commission of Sri Lanka. Accordingly, representatives of the ICRC visited him a couple of times. The Honorary Consul of the Republic of Ireland in Sri Lanka visited Mr. Jayasundaram on 18 September, 26 October, 15 November and 14 December 2007. The defense lawyers, Mr. Appapillai Vinayagamoorthy and K.D. Kalupahana, visited Mr. Jayasundaram on 24 October, 20 November, and 21 December 2007.

13. According to the Government, further inquiries have revealed that Mr. Gunasundaram Jayasundaram is a member of the LTTE international procurement team and had been involved in the following:

(a) After the signing of the Ceasefire Agreement between the Government of Sri Lanka and the LTTE in 2002, he visited Vanni (an area in Sri Lanka temporarily controlled by the LTTE) with his spouse Biretta and children and met LTTE leader Velupillai Prabakaran and Sea Tiger leader Soosai, and discussed opening up businesses in foreign countries for the LTTE;

(b) He had sent a plastic-bag manufacturing machine worth RS. 5 million to the LTTE through his company in Sri Lanka named “Lamipack Private Ltd.”;

(c) In early 2005, Mr. Gunasundaram Jayasundaram visited Vanni with an Australian citizen and held discussions with the LTTE and its front organization, the Tamil Rehabilitation Organisation, regarding raising funds for a primary education centre in Vanni for the family members of the LTTE cadres.

14. Upon instructions of the LTTE leader in London in the years 2005/06, Mr. Jayasundaram purchased radar, satellite phones, deep-sea cameras, walkie-talkie sets, generators, marine boat engines, diving kits and spare parts for radar from Singapore on six occasions, shipped them to Colombo and sent them to the LTTE through his company and contacts in Colombo and Vanni. (The Government reports that the name of the leader in London, names of the ships, invoices, and e-mails are withheld due to security reasons). Mr. Gunasundaram Jayasundaram is presently in detention at the TID pending arraignment.

15. In its observations on the Government’s response, the source denies that Mr. Jayasundaram is a member of LTTE international procurement team. It also claims that Mr. Jayasundaram’s original detention order has expired and that he has never been provided with another order extending his detention. As regards Visalingam Gobidas’ revelations about Mr.

Jayasundaram procuring high-powered communication sets, the source notes that this is a mere allegation unsubstantiated by evidence. Mr. Jayasundaram does not know of and has never met with a person known as Visalingam Gobidas.

16. Mr. Jayasundaram had not visited Vanni in 17 years and when he had the opportunity to visit in 2003, his family and he visited Vanni solely for the purpose of seeing his family and helping rebuild the orphanage there. It is denied that Mr. Jayasundaram met any LTTE leaders. In fact, he and his family met many foreign dignitaries and well-wishers of the Tamil people, including the Ambassador of Norway.

17. The plastic-bag manufacturing machine sent to Sri Lanka was merely a business deal that Mr. Jayasundaram had been involved in. Furthermore, Mr. Jayasundaram's partner at Lamipak Private Ltd. in Sri Lanka is Singhalese and has not been arrested or detained within five years for sending this machine or, for that matter, all the other equipment mentioned to Sri Lanka.

18. The source does not deny that Mr. Jayasundaram did visit Vanni with an Australian woman. He had the backing of the World Bank and the Norwegian Government, which agreed to jointly fund an overhaul of the early childhood and primary curriculum for the North and the East of Sri Lanka. Mr. Jayasundaram merely introduced that Australian woman as an expert in the area and the project was meant for the general public. The source alleges that it is not true that the project was for the family members of the LTTE cadres.

19. The source further states that Mr. Jayasundaram has only had access to his appointed lawyer on two occasions and not three. The other lawyer, K.D. Kalupahana, was appointed by Mr. Jayasundaram on the recommendation of the TID and she demanded USD 1,000 a day to represent Mr. Jayasundaram. She was subsequently discharged from acting on his behalf since she had the interest of the TID rather than that of Mr. Jayasundaram in mind.

20. A *habeas corpus* case was brought against the Government of Sri Lanka on 29 October 2007 and subsequently three hearings took place as late as 23 January, 5 and 26 March 2008. However, Mr. Jayasundaram was not brought before the court on any occasion.

21. The Working Group, in summing up this information, would like to draw attention to the following circumstances: Mr. Jayasundaram was arrested without an arrest warrant on orders of military authorities under the Emergency Regulations No.19/ (2) which resulted in his prolonged detention. The accusations against him are based solely on statements of another person, with whom, as the source attests, Mr. Jayasundaram has never met. Moreover, the Working Group finds the argument of the Government that Mr. Jayasundaram was providing monetary and material support to the LTTE unsubstantiated.

22. At any rate, the activities listed in the Government's response could only hardly amount to a criminal act, which could justify the arrest and detention of Mr. Jayasundaram for such a long term without proper charge or detention. Doubts are further confirmed by the fact that, for a similar business, Mr. Jayasundaram's partner, a member of the Singhalese ethnic group, was never arrested. The arrest and detention seems to be, among others, discriminatory towards Mr. Jayasundaram, as a member of the Tamil ethnic group.

23. The Working Group further notes that Mr. Jayasundaram has been detained without being charged before an independent judicial authority. He was arrested and held in detention without prompt access to a lawyer. He was not informed timely about his right to contact the Consul of the Republic of Ireland, as is provided for in the 1963 Vienna Convention on Consular Relations. In addition, the Government's response does not contain any information about whether Mr. Jayasundaram's detention was officially extended, when the initial detention order had expired. Finally, the Working Group also notes that Mr. Jayasundaram was not brought *in personam* before the court during the *habeas corpus* hearings.

24. All these acts violate fundamental human rights guaranteed under article 14 of the International Covenant on Civil and Political Rights, which states in particular the following: "1. 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. ... 3. In the determination of any criminal charge against him, everyone shall be entitled to the

following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; ... (d) ... to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; ... (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

25. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Mr. Gunasundaram Jayasundaram is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9, 14, and 26 of the International Covenant on Civil and Political Rights, and falls under categories II and III applicable to the consideration of cases submitted to the Working Group.

26. Consequent upon the Opinion rendered, the Working Group requests the Government of Sri Lanka to remedy the situation of Mr. Gunasundaram Jayasundaram and to bring it into conformity with its international human rights obligations under the International Covenant on Civil and Political Rights.

27. Finally, the Working Group reminds the Government that, according to the recommendations of the Human Rights Council,<sup>4</sup> national laws and measures aimed at combating terrorism shall comply with all obligations under international law, in particular international human rights law.

Adopted on 12 September 2008

**OPINION No. 31/2008 (SAUDI ARABIA)**

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<sup>4</sup> Human Rights Council resolution 7/7 of 27 March 2008.

**Communication addressed to the Government on 11 June 2008.**

**Concerning Mr. Abdel Rahman Marwan Ahmad Samara.**

**The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. According to the source, Mr. Abdel Rahman Marwan Ahmad SAMARA (hereafter Mr. Abdel Samara), a Palestinian citizen born in 1984 and resident in Riyadh with a regular resident permit, married to Soundous Houssam Eddine Lofti and father of a girl, was arrested on 17 July 2007 at his shop in Riyadh by agents of the Intelligence Services. No arrest warrant was shown to him, nor was he informed of the reasons and legal basis for his arrest. Without a search warrant, his house was searched late in the night and the familiar computer confiscated.
5. Mr. Abdel Samara was detained in secret in police facilities for the first month after his arrest, and transferred first to Alichia prison, where he was held for approximately five months, and then transferred to Al Hayr prison. Finally, he was transferred to his current place of detention at Asir prison.
6. Mr. Abdel Samara's relatives have made several appeals, initially concerning his whereabouts, and then to the reasons for his arrest. After many months they have obtained the right to visit him in prison twice a month.
7. Mr. Abdel Samara remains in detention without having been formally charged with an offence; without having received any information on the proceedings initiated against him or

about the legal basis of his detention; without access to a lawyer, in spite of his repeated requests to the penitentiary authorities in this sense, and without having been presented before a judge. Consequently, he has not had the possibility to challenge the legality of his detention before a judicial authority.

8. The source considers that the detention of Mr. Abdel Samara is arbitrary and contrary to the Universal Declaration of Human Rights and to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988. It is also contrary to Saudi Arabia domestic law, particularly articles 2 and 4 of Royal Decree No. M.39 of 16 October 2001 which regulates the criminal procedure and establishes the guarantees of all persons subjected to arrest and detention.

9. The Government reported that there is no detainee known as Abdel Rahman Marwan Ahmad Samara, although there is a detainee known as Abdel Rahman Marwan Ahmad Abdel Hamid, a Jordanian citizen, who was arrested on 18 July 2007 after being named by another detainee. An investigation showed that he had travelled to Afghanistan where he received weapons training before returning to the Kingdom. He will be referred to the judicial authority to determine the legal action to be taken against him.

10. The source, in its observations to the Government's response, reported that Mr. Abdel Samara and Mr. Adel Hamid are the same person. Mr. Abdel Samara, although of Palestinian origin, is holder of a Jordanian passport and of a residence permit in Saudi Arabia No. 201 487 4966. The source further stated that Mr. Abdel Samara has been kept in incommunicado detention, without any possibility to contact a defence lawyer or any other person. On 1 June 2008, he was transferred to Asir prison.

11. The source confirmed that Mr. Abdel Samara effectively carried out a visit to Afghanistan in 2000, when he was 16 years old, staying some months in that country. Upon his return to the Kingdom, he was interrogated about his trip, but no measure was adopted against him. No reprehensible fact was imputed to him. According to the source, the Government's reply

does not respond to the allegations concerning the arbitrary character of Mr. Abdel Samara's deprivation of liberty.

12. The Working Group notes that the Government cannot ignore the identity of the person detained. It further notes that the source has provided the precise identification number relative to Mr. Abdel Samara's regular residence permit. Furthermore, the source has confirmed that, effectively, Mr. Abdel Samara undertook a trip to Afghanistan. Therefore, the Working Group can consider that the person acknowledged as detained since 18 July 2007 is indeed the same person to which the communication refers.

13. The Working Group notes that the Government, in its response, has not refuted the following allegations put forward by the source:

(a) Mr. Abdel Samara was arrested and detained without a warrant since July 2007;

(b) His house was searched without a search warrant and his personal computer was confiscated;

(c) He was not given notice of any reasons for his apprehension;

(d) He was detained in incommunicado detention;

(e) He has not been brought before a judge, nor was he given the opportunity to challenge the legality of his detention;

(f) He has not been given the possibility to get the assistance of a defence lawyer.

14. If the Government, after 16 months of keeping this person in detention, is not able to clearly determine whether there would be judicial proceedings against Mr. Abdel Samara, then the Working Group considers that the Government, by this one and only fact, acknowledges the allegations formulated by the source.

15. Consequently, the Working Group must consider that Mr. Abdel Samara has been kept in incommunicado detention without access to a defence lawyer; without contact with the outside world; without a judicial order authorizing his detention; without possibility to challenge the lawfulness of his detention; without having been presented before a judge; without concrete charges and without the perspective of a fair trial.

16. In the light of the foregoing the Working Group expresses the following Opinion:

The detention of Mr. Abdel Rahman Marwan Ahmad Samara (Mr. Abdel Rahman Marwan Ahman Abdel Hamid) is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights, and falls within categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group.

17. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of the above-mentioned person in order to bring it into conformity with the provisions and principles enshrined in the Universal Declaration of Human Rights.

18. The Working Group further invites the Government to consider the possibility to become a party to the International Covenant on Civil and Political Rights.

Adopted on 20 November 2008

**OPINION No. 32/2008 (MALAYSIA)**

**Communication addressed to the Government on 10 June 2008.**

**Concerning Mr. Mat Sah Bin Mohammad Satray.**

**The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. In the light of the allegations made, the Working Group conveys its appreciation to the Government for having forwarded the requisite information. The Working Group transmitted the reply provided by the Government to the source which has not provided its comments.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The Working Group considers that it is in a position to render an Opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.
5. According to the source, Mr. Mat Sah bin Mohammad Satray, aged 39, a Malaysian national, technician at a semi-governmental institution called Dewan Bahasa dan Pustaka, a company producing school books, and who was usually residing in Kuala Lumpur, was arrested on 17 April 2002 at his home by three police officers and 15 plainclothes officials on the orders of the Ministry of Home Affairs and Internal Security. No arrest warrant was shown to him during his arrest. For 55 days, Mr. Satray was detained at the Police Remand Centre at Kampung Batu.
6. After his transferral on 12 June 2002, Mr. Satray was detained in solitary confinement without charge or trial at Kamunting Detention Camp in Taiping, Perak State, by a Special Branch of the Police. The detention order for an initial period of two years was issued by the Minister of Home Affairs invoking the provisions of the Internal Security Act (ISA) and has been extended twice since then.
7. The Government initially alleged that Mr. Satray was a member of the “Kumpulan Militan Malaysia”. Thereafter, it accused him of being a member of the “Jemaah Islamiyyah” (JI), which

is reportedly dedicated to establishing a pan-Islamic State in South-East Asia and has been added to the United Nations Committee's list of terrorist organisations linked to al-Qaeda or the Taliban on 25 October 2002, pursuant to Security Council resolution 1267 (1999).

8. Mr. Abu Bakr Bashir, an Indonesian national who is alleged to be the spiritual leader of "JI", used to deliver lectures during Islamic classes which were organized at Mr. Satray's workplace, where 90 per cent of the staff are reportedly Muslim. Mr. Satray had joined this study group.

9. In September 2003, a habeas corpus petition was filed on behalf of Mr. Satray. It was rejected by the Kuala Lumpur High Court in February 2004 and on appeal by the Federal Court in July 2004. The remedy of habeas corpus as being the only avenue under the ISA only refers to the technicalities of the arrest. The Government is under no obligation to produce any substantial evidence justifying the detention.

10. In a press statement issued by Mr. Satray and 30 other detainees in preventive detention, in September 2003, he denied any involvement in any purported secret organization such as the "JI" and stated he had merely engaged in Islamic activities as a devout Muslim, in compliance with the constitutional provisions on freedom of religion.

11. On 11 June 2004, Mr. Satray, together with seven other ISA detainees, was taken to the Police Remand Centre in Kuala Lumpur and interrogated by agents of a Special Branch of the Police about their alleged links with militant Islamic organizations. The following day their detention was extended for two more years.

12. Mr. Satray is allowed limited access to his family and lawyers. While in detention, on 9 December 2004, Mr. Satray, together with more than 25 other detainees, was ill-treated by prison officials following an unannounced security check in cell blocks T2B and T4, where alleged members of the "JI" were being held. The prison guards flung Mr. Satray hard on the cement floor and put their knees on his neck. He was also forced to sit cross-legged in the prayer hall of

the detention centre facing the wall and prison officials hit his head against it. Mr. Satray sustained a fractured rib, but was denied medical treatment until 13 December 2004 when he was taken to the hospital.

13. It is reported that the Government justified the actions since weapon-like items were discovered and, hence, coercion had to be used to overcome violent and threatening detainees. The detainees, however, claim that the items had been approved by authorities and were being used as tools to make handicrafts.

14. The source argues that the detention of Mr. Satray is arbitrary, since the legal basis invoked for his continued detention without charge or trial, namely the ISA, is an arbitrary piece of preventive detention legislation. The ISA was enacted in the 1960s during the fight against communist guerrillas as counterterrorism legislation and has been in force ever since. Pursuant to its section 73 (1), the Police is competent to detain any person for up to 60 days, without warrant or trial and without access to legal counsel, on suspicion that the person “has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to maintenance of essential services therein or to the economic life thereof”. Under section 8, after 60 days, the Minister of Home Affairs is competent to extend the period of detention without trial for up to two years, without submitting any evidence for review by the courts, by issuing a detention order, which is renewable indefinitely.

15. The Government, in its reply, reported that Mr. Satray (“the subject”) was arrested on 18 April 2002, and not 17 April 2002, pursuant to section 73 (1) of the Internal Security Act 1960 (Act 82). The arrest was made due to the subject's involvement in activities which are prejudicial to the security of Malaysia

16. Section 73 of Act 82 makes provision for the power of any police officer to detain suspected persons. The provisions are as follows:

*“1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe:*

- (a) *that there are grounds which would justify his detention under section 8, and*
- (b) *that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.*
- 2) *Any police officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.*
- 3) *Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8*

*Provided that -*

- (a) *he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;*
- (b) *he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and*
- (c) *he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister.*
- 4)-5) (Deleted by Act A61).

*6) The powers conferred upon a police officer by subsections (1) and (2) may be exercised by any member of the security forces, any person performing the duties of guard or watchman in a protected place and by any other person generally authorized in that behalf by a Chief Police Officer*

*7) Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorized generally or specially by the Minister."*

17. Mr. Satray was detained in Taiping Protection Detention Centre, Perak for a two-year period commencing on 13 June 2002 under a Ministerial detention order issued pursuant to section 8 (1) of Internal Security Act 82. The detention order was issued as the Minister considered that the detention was necessary to prevent the subject from pursuing with his involvement in activities which are prejudicial to the security of Malaysia.

18. Section 8 of Internal Security Act 82 makes provisions for the power to order detention or restriction of persons. The provisions are as follows:

*"(1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as "a detention order") directing that that person be detained for any period not exceeding two years.*

*(2) In subsection 1) "essential services" means any service, business, trade, undertaking, manufacture or occupation included in the Third Schedule.*

*(3) Every person detained in pursuance of a detention order shall be detained in such place (hereinafter referred to as 'a place of detention') as the Minister may direct and in accordance with any instructions issued by the Minister and any rules made under subsection 4).*

*(4) The Minister may by rules provide for the maintenance and management of places of detention and for the discipline and treatment of persons detained therein, and may make different rules for different places of detention.*

*(5) If the Minister is satisfied that for any of the purposes mentioned in subsection 1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but that for that purpose it is unnecessary to detain him, he may make an order (hereinafter referred to as "a restriction order") imposing upon that person all or any of the following restrictions and conditions:*

*(a) for imposing upon that person such restrictions as may be specified in the order in respect of his activities and the places of his residence and employment;*

*(b) for prohibiting him from being out of doors between such hours as may be specified in the order, except under the authority of a written permit granted by such authority or person as may be so specified;*

*(c) for requiring him to notify his movements in such manner at such times and to such authority or person as may be specified in the order;*

*(d) for prohibiting him from addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to, any organization or association, or from taking part in any political activities; and*

*(e) for prohibiting him from traveling beyond the limits of Malaysia or any part thereof specified in the order except in accordance with permission given to him by such authority or person as may be specified in such order.*

*(6) Every restriction order shall continue in force for such period, not exceeding two years, as may be specified therein, and may include a direction by the Minister that the person in respect of whom it is made shall enter into a bond with or without sureties and*

*in such sum as may be specified for his due compliance with the restrictions and conditions imposed upon him*

*(7) The Minister may direct that the duration of any detention order or restriction order be extended for such further period, not exceeding two years, as he may specify, and thereafter for such further periods, not exceeding two years at a time, as he may specify, either-*

- (a) on the same grounds as those on which the order was originally made;*
- (b) on grounds different from those on which the order was originally made;*

*or*

- (c) partly on the same grounds and partly on different grounds:*

*Provided that if a detention order is extended on different grounds or partly on different grounds the person to whom it relates shall have the same rights under section 11 as if the order extended as aforesaid was a fresh order, and section 12 shall apply accordingly.*

*(8) The Minister may from time to time by notice in writing served on a person who is the subject of a restriction order vary, cancel or add to any restrictions or conditions imposed upon that person by that order, and the restrictions or conditions so varied and any additional restrictions or conditions so imposed shall, unless sooner cancelled, continue in force for the unexpired portion of the period specified under subsection (6) or (7)."*

19. The detention order dated 13 June 2002 was subsequently extended for three times on 13 June 2004, 13 June 2006 and 13 June 2008, respectively, for a period of two years for each extension, pursuant to section 8 (7) of Act 82, as quoted above. The orders for extension were made as the subject had been found to be continuously adamant that his actions were not prejudicial to the security of Malaysia.

20. The Government pointed out that the arrest and detention of Mr. Satray was not because of his involvement with *Kumpulan Militan Malaysia*, as alleged in the communication. The involvement of the subject with a dissident group which is prejudicial to the security of Malaysia was proven through his confession during the interrogations as well as the disclosure by the other detainees, and therefore his detention under Internal Security Act 82 is legitimate and valid. The bases of the subject's detention are abundant and justifiable under the laws of Malaysia.

21. The habeas corpus application filed by the subject was rejected by the High Court of Malaya in Kuala Lumpur on 17 May 2004. The subject filed an appeal against the said decision but was also dismissed on 10 October 2005 by the Federal Court, which is the Malaysian apex court.

22. As in the case of other detainees, subject is entitled to right of visitation once a week, whereby the time allocated for such visit is 30 minutes for each visit. This right is statutorily provided under Regulation 81 (4), Internal Security (Detained Persons) Rules 1960. In the event there is a need for the right of visitation of more than once a week, subject may make such an application to that effect to the officer in charge of the detention centre.

23. The Government expresses the view that the allegation with regard to the ill-treatment suffered on 9 December 2004 is not accurate. The allegation, which states that the subject, together with more than 25 other detainees, was ill-treated by prison officials, is unsubstantiated, as on that day, those 25 detainees had committed commotion in the detention centre which threatened the security of the institution. During the commotion, a deputy commissioner of the prison and a prison corporal were injured, after being hit with stones thrown and sprayed by a fire extinguisher.

24. In order to contain the commotion, a team of officers from the prison security unit was deployed. They exercised reasonable use of force for the purpose of restraining and controlling the violent behavior of the detainees. All those who were injured were afforded necessary treatment at Taiping Hospital. The alleged use of handicraft tools during the commotion is also

not at all accurate. The confiscated items were badminton rackets, steel, a fire extinguisher and stones.

25. Internal Security Act 82 is a law passed by the Parliament which makes provisions for the internal security of Malaysia, the prevention of subversion, the suppression of organized violence against persons and property in specified areas of Malaysia, and for matters incidental thereto. The application of Act 82 is provided under article 149 of the Federal Constitution. Act 82 authorizes the Minister of Home Affairs and Internal Security to order preventive detention (section 8) and the police (section 73).

26. The Malaysian courts may exercise judicial review in respect of detention orders issued under sections 73 and 8 of Act 82. In the case of *Mohamed Ezam bin Mohd Noor v. The Inspector General of Police, Malaysia & Others Appeals* [2002] 4 MLJ 449, the Federal Court (apex court in Malaysia) decided as follows:

“The elements of s. 73(1) ISA are objective. (*Chng Suan Tze v. The Minister of Home Affairs & Ors* (1988] 1 LNS 162 followed). Consequently, the court is entitled to review the sufficiency and reasonableness of the respondent's reasons for believing that there were grounds to justify the appellants' detention under s. 8 ISA and that the appellants had acted or was about or likely to act in a manner prejudicial to the security of Malaysia.”

27. According to the above case, the discretion of the police in issuing detention orders under section 73 of Act 82 can be subject to judicial review by the court. In this regard, the burden of proof is on the police to prove, to the satisfaction of the court, that the requirements of the existence of the reasons justifying the detention of a person under section 73 have been fulfilled. In respect of detention order issued by the Minister pursuant to section 8 of Act 82, section 8B provides that the procedural matters of the detention orders shall be subject to judicial review.

28. In the case of *Abd Malek Hussin v. Borhan Hi Daud & Ors* [2008] 11 CLJ 264, the High Court of Malaya in Kuala Lumpur held that the arrest and detention of the plaintiff was unlawful for reasons that: (a) the plaintiff was never properly informed of the grounds of his arrest as

required by article 5 (3) of the Federal Constitution; (b) the first Defendant failed to satisfy the court with sufficient particulars and material evidence of the plaintiff's activities to justify the arrest and detention of the plaintiff under section 73 (1) of the ISA; and (c) the arrest and detention was *mala fide*. It was also held that the first defendant has to provide sufficient material evidence and particulars to show the basis of his reason to believe that the detention of the plaintiff was necessary to prevent him from acting in a manner prejudicial to the security of Malaysia and further that the plaintiff had acted (or was likely to act or was about to act) in a manner prejudicial to the security of the country.

29. Various safeguards under the Malaysian law are available to the persons detained under Act 82, including the detainee's right to be informed of the reasons and grounds for his detention, his right to make representations and his right to counsel. The Government mentions the existence of the mechanism of the Advisory Board which comprises a Chairman and two members whose appointments are made by the *Yang di-Pertuan Agong* (the King of Malaysia) by virtue of article 151 clause (2) of the Federal Constitution. In this regard, the Chairman of the Advisory Board shall be or have been, or be qualified to be, a judge of the Federal Court, the Court of Appeal or a High Court, or shall before Malaysia Day have been a judge of the Supreme Court.

30. Section 11 of Act 82 provides for representations against detention orders. Subsection (1) provides that a copy of every order made by the Minister under subsection 8 (1) shall be served to the person to whom it relates. Such person shall be entitled to make representations against the order to an Advisory Board. For the purpose of enabling a person to make representations under subsection (1) the detainee shall, at the time of the service on him of the order, be informed of his right to make representations to an Advisory Board under subsection and be furnished by the Minister with a statement in writing of the grounds on which the order is made; of the allegations of fact on which the order is based; and of such other particulars, if any, as he may in the opinion of the Minister reasonably require in order to make his representations against the order to the Advisory Board.

31. The detainees are also granted the rights of visit of family members and legal counsels, as well as the rights in law to file for a writ of habeas corpus at any time following his detention.

Under section 365 of the Criminal Procedure Code, the High Court may, upon the application by the detained person, whenever it thinks that any person is illegally or improperly detained, order that be set at liberty.

32. The detainees who are subject to detention orders are not detained incommunicado. Section 81(1) of Act 82 makes provisions for publicity of orders, where any order or regulation is made under the Act, including detention orders, the Minister or other authority making such order or regulation, shall cause notice of its effect. Such order, regulation, direction or instruction shall have effect as soon as notice as aforesaid has been given, without publication in the *Gazette*.

33. Sections 73 and 8 of Act 82 makes sufficient provisions to ensure that the basic rights of persons is not infringed in the application of the Act. In this regard, for instance, Section 73 (1) provides that the power of the police to arrest without warrant and detain any person is subject to its reasonable belief that there are grounds that would justify the detention under Section 8 of the Act and the act of the arrested person is prejudicial to the security of Malaysia. Likewise, section 8 (1) of Act 82 provides that prior to issuing a detention order, the Minister must be satisfied that the detention is necessary to prevent the detainee from acting in any manner prejudicial to Malaysia. In this regard, the Government contends that Act 82 provides reasonable and/or acceptable justification as well as adequate safeguards and stringent process with regard to the power of arrest and the issuance of detention orders.

34. Internal Security Act 82 is a law to provide for the internal security of Malaysia, the prevention of subversion, the suppression of organized violence against persons and property in specified area of Malaysia, and for matters incidental thereto. It authorizes preventive detention.

35. Although the Government reaffirms its commitments with regard to the principles contained in various international human rights treaties on this matter, including the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which was adopted by General Assembly resolution 43/173 of 9 December 1988, it recalls that the Body of Principles is a non-binding text. Further, the Government reiterates its adherence to article 9 of the Universal Declaration of Human Rights and article 9 of the International

Convention on Civil and Political Rights. These rights are not absolute, by virtue of the restrictions as outlined in article 29, paragraph 2, of the Universal Declaration and the exercise of derogatory measures by the State as provided under article 4, paragraph 1, of the International Covenant. Thus, article 9 of the International Covenant on Civil and Political Rights permits some form of restrictions or limitations, whereby if a State party chooses to limit or restrict this right within the limits prescribed, this is permissible and does not amount to a violation of the right in question. It should be highlighted, nonetheless, that in terms of Malaysia's commitment in respect of this matter, it has no obligation under article 9 of the Covenant as Malaysia is yet to be a State party to the treaty. While the Universal Declaration on Human Rights is not a legally binding international instrument, Malaysia, as a Member State of the United Nations, adheres to its norms and principles.

36. The Government considers that a State must be able to justify that certain limitation satisfies the test of legality, necessity, reasonableness and legitimate purpose. The promulgation of Act 82 was justified in the light of the test of legality, necessity, reasonableness and legitimate purpose, and does not therefore constitute an infringement on human rights.

37. Lastly, the Government points out that the summary of the case contained in the Communication of the Working Group was not entirely accurate and does not reflect the reliable and credible information as envisaged by the mandate of the Working Group. The arrest and detention of the subject were carried out in accordance with the applicable Malaysian law and taking into account the statutory requirements, that aims to contain subversive elements and to guarantee public safety and order, stability and security in the country. Subject is not held incommunicado, as is normal in other jurisdictions but not in Malaysia, and has had available all the recourse accessible to persons who are subject to detention orders. The application of Act 82 is therefore valid and defensible in light of the Government's responsibility in the prevention of subversion and protection of the security of the nation and its people. During the period of detention, subject, as other detainees, shall undergo rehabilitation programmes for the sole purpose that he will no longer be regarded as a threat to the security of the country.

37. The Working Group notes that both the source and the Government have provided the same information regarding the fact that Mr. Mat Sah bin Mat Satray was arrested in April 2002, and has since then been deprived of his liberty. Charges have not been brought against him and he has not had the possibility of a fair and public hearing by an independent and impartial tribunal.

38. The Working Group considers that no one should be detained without trial. Article 10 of the Universal Declaration on Human Rights establishes that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. Therefore, an arrest carried out in virtue of the sole decision of police officers and a detention stemming from an order issued by an Executive authority, like the Minister of Home Affairs and Internal Security, and not by a judge or magistrate, is not in conformity with the Universal Declaration on Human Rights.

39. The Working Group thanks the Government for having provided, in its response, detailed information on the legal norms and proceedings under which detentions under application of Internal Security Act 82 occur in practice. According to the Government, the discretion of the Minister in issuing detention orders under section 73 of Act 82 can be subject to judicial review by a court. In this regard, the burden of proof is on the Executive authorities to demonstrate, to satisfaction of the court, that the requirements about the existence of enough reasons justifying the detention had been fulfilled. According to the source, Act 82 detainees have no effective recourse to challenge their detention because the law prevents the courts from reviewing the merits of Act 82 detentions.

40. The Working Group considers that a simply formal judicial control of the procedural requirements for detention cannot substitute the universal right of any person to a fair and public hearing by an independent and impartial tribunal.

41. The Working Group notes that under Act 82, a person can be held for up to 60 days without an arrest warrant and without the possibility to be brought before a judge; without access to legal counsel or recourse to trial, merely on the basis of a suspicion. After the 60-day period

ends, the detainee's case is referred to the Minister of Home Affairs and Internal Security who can extend the detention period for two more years, which is then renewable indefinitely. Mr. Satray has spent more than six and half years in detention without being charged or brought before a judge to be tried.

42. Mr. Satray has been accused of being a member of Jemaah Islamiyyah (JI). However, during the six and a half years he has already spent in prison, no evidence has been produced to substantiate this accusation. Instead, he is been required to attend counselling programmes in which he is being encouraged to admit to the allegations against him.

43. In this context, the Working Group recalls the universal validity of the fundamental principle of presumption of innocence. Mr. Satray has already spent several years in prison and the authorities have not yet demonstrated that he has actually engaged in any illegal activity.

44. Both the source and the Government report that Mr. Satray's lawyer filed a habeas corpus petition on his behalf, which was rejected by the Kuala Lumpur High Court in February 2004, and on appeal by the Federal Court in July 2004. The Working Group considers that the remedy of habeas corpus is not an effective resource for a detention of such characteristics as described, since it cannot substitute the universal right of any person suspected of the commission of an offence or crime to a fair and public hearing by an independent and impartial tribunal.

45. The Working Group considers that Mr. Satray must be given recourse to a fair trial in conformity with international standards of due process as well as access to full legal representation.

46. In the light of the foregoing, the Working Group expresses the following Opinion:

The detention of Mr. Mat Sah bin Mohammad Satray is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and falls within categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group.

47. Consequent upon this Opinion, the Working Group requests the Government to take the necessary steps to remedy the situation of this person in order to bring it into conformity with the provisions and principles enshrined in the Universal Declaration of Human Rights.

48. The Working Group further recommends the Government to consider the possibility of study the compatibility of the Internal Security Act 82 with the international human rights principles and norms as well as to consider acceding to the International Covenant on Civil and Political Rights.

Adopted on 20 November 2008

**AVIS N°. 33/2008 (ALGÉRIE)**

**Communication adressée au Gouvernement le 10 juillet 2008.**

**Concernant M. Mohamed Rahmouni.**

**L'État est partie au Pacte international relatif aux droits civils et politiques.**

1. Voir le texte du paragraphe 1 de l'Avis n° 17/2008.
2. Le Groupe de travail regrette que le Gouvernement n'ait pas fourni de renseignements sur le cas en question alors qu'il a eu la possibilité de formuler des observations.
3. Voir le texte du paragraphe 3 de l'Avis n° 17/2008.
4. M. Mohamed Rahmouni, citoyen Algérien ; né le 12 novembre 1980 ; résident à Bourouba, Alger ; a été arrêté à Bourouba le 18 juillet 2007 à 7.30 heures alors qu'il attendait le bus pour se rendre au travail, par trois agents des forces de l'ordre et en présence de nombreux

témoins. Les trois agents qui procèdent à l'arrestation l'interpellent par son surnom, Samir, présentent leurs papiers officiels d'identité mais pas de mandat d'arrestation et lui ordonnent de les suivre.

5. Six jours plus tard, le 24 juillet 2007, quatre agents, en civil et armés, procèdent à une perquisition du domicile des Rahmouni. Le 29 juillet, 11 jours après l'arrestation, les mêmes agents se présentent de nouveau au domicile et exigent du frère et du cousin de M. Rahmouni, Ali et Fatah, d'écrire une déclaration selon laquelle, lors de la perquisition, les agents ont trouvé les clefs d'une Mercedes et d'un camion de marque JAC. Or la famille ne possède aucun de ces deux véhicules.

6. M. Rahmouni a été détenu plus de six mois au secret et sans contact extérieur. Sa famille ne disposait d'aucune information sur les raisons de son arrestation, ni sur son lieu de détention.

7. La mère de M. Rahmouni décide de porter plainte auprès du Procureur général du Tribunal d'Hussein Dey. Celui-ci l'invite alors à s'adresser au Commissariat de Bourouba où l'officier de police refuse d'enregistrer la plainte, décrétant que M. Rahmouni était au maquis. La famille de M. Rahmouni a déposé alors une plainte auprès du Procureur général d'El Harrach. Depuis, la famille de M. Rahmouni n'a cessé de déposer des recours et d'effectuer des démarches auprès des institutions, toutefois sans succès.

8. En novembre 2007, le Procureur du Tribunal d'Hussein Dey lui aurait certifié qu'il était détenu à la prison de Serkadji. Se rendant sur place accompagnée de son avocat, il s'est avéré que M. Rahmouni n'y était pas non plus.

9. Le 26 janvier 2008, les gardiens de la prison militaire de Blida ont enfin reconnu que M. Rahmouni se trouvait effectivement dans cet établissement militaire. A sa mère il a été dit qu'elle n'aurait le droit de visite que lorsque l'instruction serait terminée mais qu'elle pouvait lui apporter de la nourriture et des vêtements.

10. Le 19 février 2008, la mère de M. Rahmouni a adressé des plaintes au Ministre de la Défense ; au Ministre de la Justice ; au Commandant de la Première région militaire de Blida, et au Procureur du tribunal militaire de Blida, en vue d'obtenir le respect de son droit de visite. Ce droit a finalement été obtenu le 20 mai 2008. Les autorités militaires ont alors prévenu Mme. Rahmouni qu'elle ne pourrait pas revenir avant un mois alors qu'un panneau mentionne à l'entrée que les visites aux prisonniers ont lieu tous les 15 jours. Selon la source, cette restriction injustifiée du droit de visite aggrave fortement la situation mentale du détenu ainsi que celle de sa mère.

11. En janvier 2008, lors d'un entretien, un officier du Commissariat de Bourouba avait affirmé à la mère de M. Rahmouni que celui-ci serait impliqué dans une affaire d'atteinte à la sécurité de l'État. Le Code de justice militaire prévoit la compétence des tribunaux militaires pour juger des civils accusés de ces crimes.

12. Un courrier adressé le 4 mai 2008 à la mère de M. Rahmouni émanant du Ministère de la Défense, autorise l'avocat de M. Rahmouni à rendre visite à son client. En dépit de cette lettre officielle, le conseil de M. Rahmouni se voit refuser l'accès à la prison et n'a toujours pas obtenu même l'accès à son dossier, ce qui l'empêche donc de préparer sa défense.

13. La source ajoute que lors de sa visite le 20 juin 2008, sa mère a trouvé M. Rahmouni dans un état lamentable : Il présentait plusieurs blessures à la main et au visage, ce qui laisserait penser que le détenu aurait subi en prison des traitements cruels, inhumains ou dégradants.

14. M. Rahmouni n'a pas été informé des inculpations que reposent sur lui. Malgré son statut de civil, il va être jugé par un tribunal militaire, dépourvu de toute indépendance et directement subordonné au Pouvoir exécutif.

15. M. Rahmouni n'a pu à aucun moment exercer son droit d'avoir un avocat. Selon la source, M. Rahmouni est, aux yeux des autorités, d'ores et déjà coupable, en violation du principe de présomption d'innocence.

16. La source conclut qu'il est nécessaire que M. Rahmouni soit détenu dans une prison civile et soit jugé par un tribunal civil pour garantir le respect de ses droits et pour s'assurer de l'impartialité du procès. De plus, le détenu n'a pas pu être jugé après 11 mois de détention, ce qui correspond à un délai excessif au terme de l'article 14.3 (c) du Pacte internationale des droits civils et politiques.

17. Selon la source, la situation de disparition forcée de cette personne pendant plus de six mois et la violation de ses droits fondamentaux est suffisamment grave et caractérisée pour considérer sa détention comme arbitraire et contraire aux articles 7, 9 et 14 du Pacte international relatif aux droits civils et politiques.

18. Par note verbale en date du 14 Juillet 2008 le Gouvernement a accusé réception de la communication et a informé qu'elle a été transmise aux autorités algériennes compétentes, sans y donner suite. Le Groupe de travail a relancé sa demande d'informations par note verbale en date 3 novembre 2008 sans toujours obtenir de réaction.

19. Dès lors, en application du paragraphe 16 *in fine* des méthodes de travail du Groupe, ce dernier est fondé, après le respect des délais impartis au Gouvernement pour présenter ses commentaires et observations, de émettre un Avis, surtout considérant que le Gouvernement n'a sollicité aucun délai supplémentaire ou aucun report.

20. D'ailleurs, cette attitude laisse entrevoir que les allégations de la source sont fondées. Ce qui signifie que M. Rahmouni a été arrêté le 18 juillet 2007 sans mandat ; gardé au secret pendant plus de six mois sans aucune inculpation précise lui permettant de se défendre ; sans possibilité de contester sa détention ; sans avocat pour assurer sa défense et sans avoir été traduit devant un tribunal.

21. Que s'y ajoute que M. Rahmouni est détenu dans un camp militaire et va être jugé par un tribunal militaire malgré son statut de civil.

22. Tous ces éléments, confirmés du reste par des informations d'autres organisations et journaux, doivent être considérés comme fiables.

23. A la lumière de ce qui précède, le Groupe de travail rend l'avis suivant:

La détention de Monsieur Mohamed Rahmouni est arbitraire, en étant en contravention aux dispositions des articles 9, 10 et 11 de la Déclaration Universelle des Droits de l'homme et 9 et 14 du Pacte international relatif aux droits civils et politiques et relève des catégories I et III applicables à l'examen des cas soumis au Groupe de travail.

24. Le Groupe de travail, ayant rendu cet avis, prie le Gouvernement algérien d'adopter les mesures nécessaires pour remédier à la situation de cette personne, conformément aux normes et principes énoncés dans le Pacte international relatif aux droits civils et politiques.

Adopté le 20 novembre 2008

**OPINION No. 34/2008 (ISLAMIC REPUBLIC OF IRAN)**

**Communication addressed to the Government on 23 May 2008.**

**Concerning Ms. Mahvash Sabet; Ms. Fariba Kamalabadi; Messrs. Jamaloddin Khanjani; Afif Naeimi; Saeid Rezaie; Behrouz Tavakkoli and Vahid Tizfahm.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)

2. The Working Group regrets that the Government did not provide it, despite repeated invitations to this effect, with the requested information on the allegations transmitted.

3. (Same text as paragraph 3 of Opinion No. 17/2008.)

4. The case summarized below was reported to the Working Group as follows: Ms. Mahvash Sabet, a resident of Tehran and acting Secretary of the group that coordinates the activities of the Baha'i community in the Islamic Republic of Iran, has been in detention since 5 March 2008 when she was summoned to Mashhad by the Ministry of Intelligence. According to the source, Ms. Sabet was required to answer questions related to the burial of an individual in the Baha'i cemetery in Mashhad.

5. Ms. Fariba Kamalabadi, Messrs. Jamaloddin Khanjani, Afif Naeimi, Saeid Rezaie, Behrouz Tavakkoli, 57-year-old, and Vahid Tizfahm, six of the seven members of the above-mentioned group, were arrested at their homes and brought to Evin Prison in Tehran in the early hours of 14 May 2008 by agents of the Ministry of Intelligence. Their houses were extensively searched for about five hours. They have not been charged with a recognizably criminal offence.

6. According to the source, these seven persons have been arrested solely because of their religious beliefs or their peaceful activities on behalf of the Baha'i community. Their group is managing the Baha'i community's religious and administrative affairs in Iran, in the absence of the National Spiritual Assembly of Iran, whose nine members were abducted on 21 August 1980 and disappeared. It was reported that, after this event, the authorities instructed the Baha'i community to disband its national and local assemblies, which led to the formation of such *ad hoc* groups.

7. According to the source, Baha'is in Iran are subject to discriminatory laws and regulations, which deny them equal rights to education, work and to a decent standard of living by restricting their access to employment and benefits, such as pensions. They are not permitted to meet, to hold religious ceremonies or to practice their religion communally. Their faith is not recognized under the Iranian Constitution.

8. The Working Group regrets that the Government of the Islamic Republic of Iran has not responded to the allegations transmitted by the Group. It wishes to remind Governments that should they desire an extension of the time limit to transmit their replies, Governments shall

request such extension within the 90-day deadline and inform the Group of the reasons for requesting one. According to its methods of work, the Working Group may then grant a further period of two months.

9. Even in the absence of any information from the Government, the Working Group considers it is in the position to render an Opinion on the detentions of the persons mentioned above, in conformity with paragraph 16 of its Methods of Work.

10. Ms. Mahvash Sabet was arrested on 5 March 2008, and Ms. Fariba Kamalabadi, Messrs. Jamaloddin Khanjani, Afif Naeimi, Saeid Rezaie, Behrouz Tavakkoli and Vahid Tizfahm were arrested on 14 May 2008 in Tehran. The common element in these detentions is that all detainees are active leaders of the Baha'i community in Iran. Ms. Sabet was transferred to Mashhad, while the rest were brought to Evin Prison in Tehran by agents of the Ministry of Intelligence.

11. The Islamic Republic of Iran does not recognize the Baha'i faith as a religion, and its members are often subjected to harassment, intimidation and discriminatory acts. The source has expressed serious concern about systematic discrimination and harassment of the Iranian Baha'is on the grounds of their religion. The Working Group has sent during the last decade several urgent appeals to the Government on cases of detention of members of this community.

12. According to article 18 of the Universal Declaration of Human Rights, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Article 18 of the International Covenant on Civil and Political Rights establishes that "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public

safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions”.

13. The deprivation of liberty that these seven persons are suffering constitutes a violation of the above-mentioned articles of the Universal Declaration on Human Rights and of the International Covenant on Civil and Political Rights. In conformity with the Working Group’s methods of work, the detention of these persons should be considered as arbitrary. These persons are detained for no reason other than their religion. While Armenian Christians, Jews and Zoroastrians are recognized as religious minorities in the Iranian Constitution and have their own representatives in the Iranian Majlis, this is not the case of the Baha’i faith.

14. Consequently, the case of the detention of the above-mentioned persons would fall within category II of the categories applicable to the consideration of the cases submitted to the Working Group. The source has not provided further elements for the Working Group to consider whether the deprivation of liberty of all seven persons also falls in categories I and III.

15. In the light of the foregoing the Working Group expresses the following Opinion:

The detention of Ms. Mahvash Sabet; Ms. Fariba Kamalabadi; Messrs. Jamaloddin Khanjani; Afif Naeimi; Saeid Rezaie; Behrouz Tavakkoli and Vahid Tizfahm is arbitrary and contrary to articles 9, 10 and 18 of the Universal Declaration of Human Rights and 9, 14 and 18 of the International Covenant on Civil and Political Rights, to which the Islamic Republic of Iran is a State party and fall within category II of the categories applicable to the consideration of the cases submitted to the Working Group.

16. Consequent upon this Opinion, the Working Group requests the Government to immediately and unconditionally release all the above-mentioned persons. The Working Group further requests the Government to be informed of the adopted measures in this regard.

Adopted on 20 November 2008

**OPINION No. 35/2008 (EGYPT)**

**Communication addressed to the Government on 6 December 2007.**

**Concerning Mr. Abdul Kareem Nabil Suliman Amer (also known in the Internet community as Karim Amer).**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having forwarded the requested information.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto as well as the observations by the source.
5. According to the source, Mr. Abdul Kareem Nabil Suliman Amer (also known in the Internet as Karim Amer), an Egyptian writer, and former Al-Azhar University student, was arrested in October 2005 because of his writings on his blog ([karam903.blogspot.com](http://karam903.blogspot.com)) about the sectarian riots which took place in the same month in Alexandria's Maharram Bek District. These riots followed reports that the video of a play believed to be anti-Islamic was being

screened in a Coptic Church in the district. Mr. Amer was detained for 12 days and was released without charge.

6. After his release, al-Azhar University took disciplinary measures against him. Mr. Amer was dismissed in March 2006 following a decision of the University's disciplinary board who found him guilty of blasphemy. The University filed also a judicial complaint against him before the Public Prosecutor of Maharram Bek District. Mr. Amer was summoned to appear before the Public Prosecutor, who ordered his detention for four days on 7 November 2006.

7. The detention term was extended for a further 15-days period, to allow the Public Prosecutor's Office further time for investigation. Mr. Amer's detention periods were further extended until 22 February 2007. On that day, he was sentenced to four years' imprisonment by Maharram Bek Misdemeanor Court in Alexandria, North Egypt (Case No. 887 of 2007).

8. Mr. Karim Amer's trial appeared intended as a warning by the authorities to other bloggers who dare criticize the Government or use their blogs to spread information considered harmful to the country's reputation. Given the repression suffered by media's journalists, the Internet has become an increasingly important forum for Egyptians issuing personal opinions and views.

9. Mr. Amer was sentenced to three years' imprisonment for the first offence and one year imprisonment for the second. The sentences were based on articles 171, 176 and 179 of the Egyptian Penal Code. On 12 March 2007, the Court of Appeal confirmed the sentence.

10. On 21 April 2007, Mr. Amer brought the case before the Court of Cassation. On 12 May 2007, the defense lawyers made public their memorandum to the Court of Cassation. The court has not yet fixed a date for a session. According to the defense lawyers, there is no legal obligation for the Court of Cassation to set a date within a certain time frame.

11. On 4 March 2007, the director of Borg Al-Arab Prison in Alexandria ordered that Mr. Amer be put in solitary confinement. Following a visit to the prison by the Alexandria public

prosecution on 8 May 2007, Karim Amer was put back with the other prisoners, after having spent 65 days in solitary confinement. Karim Amer is serving his four-year prison sentence. His mother and one of his two brothers were authorized to visit him once.

12. On 24 October 2007, Mr. Amer was beaten by punches and kicks by a prison guard and a prisoner, acting under the supervision of a prison investigations officer. As a result, his upper right canine tooth was broken and he sustained numerous bruises on his body. This came to pass after Mr. Amer uncovered some corruption acts in the prison. He was then taken to a disciplinary cell where he was handcuffed and his legs tied up before being beaten again by the same two individuals upon the orders of the prison investigations officer. During this period he was given only one meal and one bottle of water a day and not allowed to send letters.

13. Subsequently and in the same cell, a prisoner unknown to Karim Amer was brought to the cell where he was held, stripped naked and beaten by the same individuals in Karim Amer's presence. Karim Amer was then threatened that he would receive the same treatment if he intervened in the prison's affairs. Mr. Amer was examined by the prison's doctor but there was no mention of his broken tooth in the medical report. He was not allowed to file a complaint about what happened.

14. After his release from solitary confinement, Karim Amer was held for five days in an individual cell in the prison section that is usually occupied by dangerous prisoners and those with psychological problems. On 7 November 2007, he was moved back to the prison section where he was initially detained and held in an individual cell. In spite of articles 126, 127 and 129 of the Penal Code, no administrative or judicial investigation was opened on the torture suffered by Mr. Amer while in prison. He continues to be subjected to acts of ill-treatment and discriminatory practice on the hands of the prison's officers.

15. The source concludes that Mr. Karim Amer has been solely detained on account of the peaceful expression of his views on the Internet criticizing al-Azhar authorities, religious personalities and the Government. Mr. Amer is the first blogger condemned to a long imprisonment term for articles published on his web page.

16. The Government, in its reply, reported that Mr. Abdul Karim Suliman Amer is housed in a cell in the prisoner accommodation section in accordance with the rules, not in solitary confinement. He received the visit to which he is entitled during this period as well as an exceptional visit on the occasion of the Prophet's birthday on 31 March 2007, a special visit on 3 April 2007 and a visit from his lawyer on 17 April 2007.

17. On 24 October 2007, the said prisoner engaged in a brawl at lunch time with another prisoner, Mr. Wissam Tal'at Fahmi al-Sayyid, resulting in injuries to both parties. Both prisoners were taken to the prison hospital and underwent a medical examination which established that Mr. Amer had sustained a contusion on the left side of the forehead in addition to numerous abrasions and contusions on the chest and needed treatment for less than 21 days, in order to avoid complications. The examination also established that the other prisoner had sustained abrasions on the right upper arm, the back of the left shoulder and the left forearm. In his statement Mr. Amer did not indicate that he had been assaulted by guards or at the instigation of officers. The said prisoners were sent to the public prosecution and placed in solitary confinement until 2 November 2007, as an administrative penalty. A trial in absentia had handed down a sentence of imprisonment with labour for one month and bail of 300 Egyptian pounds (LE) for each prisoner, to which both objected.

18. Mr. Amer made the visit with his lawyer in the visiting area and was allowed the period of time allocated for visits in accordance with the rules and regulations. The visit was not limited to three minutes and neither he nor his lawyer brought any complaint in this regard after the visit.

19. The allegation that Mr. Amer witnessed a guard assaulting another prisoner (whom he was unable to identify) after removing his clothing, and that the guard threatened him with the same treatment, is unsubstantiated. Mr. Amer has not identified either the prisoner who was beaten or the guard in question. Mr. Amer was put in a room in the prisoner accommodation section, not in solitary confinement.

20. The prison doctor signed a medical report on 10 February 2008 stating that the vital signs of Mr. Amer were within normal ranges, the chest, heart and abdomen were clinically sound and that there were no apparent recent injuries. The dentist signed a medical report on 27 February 2008 stating that the prisoner was missing four upper incisors (12/12) and that these had probably been lost as the result of chronic gum inflammation due to poor oral hygiene. There was nothing to indicate that it was long-term, and there was no sign of injury to the tissues inside the mouth or on the face or jaws. The report on the incident with his fellow prisoner, Wissam Tal'at, was released to Mr. Amer, containing his detailed statement concerning the incident and the statement concerning the injuries that he sustained. The prisoner was taken to the prison hospital, where a detailed medical report of his injuries was made. The report did not mention any injury to the prisoner's teeth and his statement did not refer to any such injury.

21. The Government adds that Mr. Amer had previously incurred a signed penalty requiring him to be placed in solitary confinement for a period of three days, from 27 to 30 April 2008, for individual disorder. He was also placed in solitary confinement from 24 October to 2 November 2007 on the basis of a report. Article 847 of the Manual of Egyptian Prisons Working Procedures stipulates that a prisoner found guilty after investigation shall be disciplined in solitary confinement for the period stipulated in the report, provided that this period does not exceed 15 days. Mr. Amer was disciplined in solitary confinement for no longer than 10 days.

22. Mr. Amer received the same treatment as other prisoners, within the framework of the rules and regulations. He was referred to the prison hospital at his request and received treatment, most recently on 10 March 2008, for a fungal skin infection. He was allowed to correspond and to bring in books brought to him during visits. His postal orders from outside the prison were delivered to him. Mr. Amer has not been subjected to any form of assault or torture.

23. The Government adds that Mr. Amer was imprisoned on the basis of a legal judgment made by an independent, just body, in accordance with the Penal Code, for having committed prior criminal acts. He exercised his constitutional rights throughout the litigation process and enjoyed all the legal guarantees of a fair trial at all stages thereof, including the right to legal representation and communication with legal counsel, the right to a presumption of innocence

and the right to appeal, through two levels of litigation. He was not subject to any form of discrimination.

24. Penal institutions are obliged to use necessary force to maintain order. Punishment and the establishment of security are covered by a predetermined legal framework which is in accordance with international principles. The public prosecution is the authority competent to monitor the practices of the administrative authority in its administration of penal institutions and to receive complaints from prisoners. It conducts its work independently, freely and confidentially.

25. The Government considers that the details mentioned in the complaint are groundless. Mr. Amer received a fair and independent trial during which he enjoyed all substantive and procedural guarantees, in accordance with the principles of international law. He was sentenced to imprisonment for the period of one year for insulting the President of the Republic and for three years on a charge of contempt for religion.

26. With regard to the charge of insulting the President of the Republic, Egyptian law distinguishes between responsible and proper media and newspaper coverage based on facts and information, and use of the right to expression in order to harm the honour and reputation of other individuals who are protected under Egyptian law. The law criminalizes and punishes only the latter form of expression, in accordance with the provision which affirms the right of individuals to the protection of the law against attacks on their honour and reputation.

27. With regard to the charge of contempt for religion, it is necessary to distinguish between freedom of thought and the right to hold an opinion, on the one hand, and freedom to express this thought or opinion, on the other hand. The former is an absolute right and cannot be derogated, whereas freedom of expression entails special duties and responsibilities and is, therefore, subject to certain restrictions, but only such as are provided by law and are necessary for respect of the rights and reputation of others and for the protection of national security or public order, or of public health or morals. Numerous United Nations reports refer to these duties and responsibilities. Freedom of expression should be limited in some instances, in order to protect

freedom of belief and avoid inciting hatred and discrimination against a group of people. In order not to discriminate between citizens on the basis of creed, Egyptian law criminalizes contempt for all the religions and creeds of particular sanctity to any group of citizens. Mr. Amer did not bring any complaints in this regard to the public prosecution, which is the national mechanism competent to receive and investigate complaints in such cases.

28. After the original submission of the case, the source provided the Working Group with updated information, according to which Mr. Amer was able to file a complaint before the Public Prosecutor about the ill-treatment he has been suffering in Borg al-Arab prison on 24 October 2007. The complaint was registered at the Public Prosecutor's Office under complaint number 18564 on 14 November 2007. It was referred on the same day for investigation by Alexandria prosecution under number 15005, and presented before the Alexandria prosecution under number 712 on 21 November 2007. It was then registered in West Alexandria Prosecution as number 5003 on 24 November 2007. To date, however, there has still been no official investigation of the complaint carried out by the Public Prosecutor's Office. The Borg al-Arab prison administration opened their own administrative investigation, and considered that Mr. Amer and the prisoner who he alleges had beaten him were responsible of assaulting another prisoner.

29. On 19 March 2008, Mr. Amer was acquitted of the charge of assaulting another prisoner by the Borg al-Arab Misdemeanour Court in Alexandria. The other accused prisoner was sentenced to one additional month of imprisonment.

30. The Working Group considers that, according to information received, the Internet has become an increasingly important forum for Egyptians issuing personal opinions and views. Mr. Amer's case is the first in which an Internet blogger has been condemned to an imprisonment term for his published material. In its previous reports, the Working Group has observed that freedom to impart information on the Internet is protected under international law the same way as any other form of expression of opinions, ideas or convictions. Unless restrictions on the exercise of the freedom of opinion and expression comply with the conditions prescribed by international law, such restrictions are arbitrary, hence unlawful (E/CN.4/2006/7, para. 39).

31. Article 17 of the International Covenant on Civil and Political Rights establishes that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, or to unlawful attacks on his honour and reputation” and that “Everyone has the right to the protection of the law against such interference or attacks”. However, this article does not establish that the violation of privacy, honour or reputation must constitute a criminal act or a criminal offense which should be punished by a penal sanction.

32. It is well established in international human rights law that public officials should tolerate more criticism than private individuals. The Working Group observes that the above-quoted article 17 does not allow one to conclude that a person with a political or prominent position in society should be given a higher level of protection regarding his or her privacy, honour or reputation in his or her institutional role than that which should be given to an anonymous private person. On the contrary, defamation laws should not afford special protection to the Heads of States, Presidents of the Republic and other senior political figures.

33. The use of criminal law is particularly inappropriate for alleged defamation against public officials in view of the fact that officials should be expected to tolerate more criticism than private citizens. Such criminal laws have an inhibiting effect on the exercise of the right to freedom of opinion and expression in discussions of matters of public concern. The right to freedom of opinion and expression and the principles and fundamentals of the democratic system of governance involves the right to freely criticize political officials, public officers, public personalities and authorities. The fundamental right to freedom of opinion and expression, which is in the core basis of the human rights system, must prevail when it implies political criticism, even when this criticism is focussed in the activities of some concrete persons who have assumed high political responsibilities.

34. Restrictions to the exercise of the right to freedom of opinion and expression are required to respect three conditions, which must be enforced simultaneously: (a) restrictions must be provided by law; (b) they should pursue an aim recognized as lawful, and (c) be proportionate to the accomplishment of that aim. Article 19 of the International Covenant on Civil and Political Rights establishes in its paragraph 3 that the exercise of this right may be subject to certain

restrictions: (a) For respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*) and for protection of public health or morals” . These restrictions shall be provided by law, must be necessary and should have a well-defined time limit. According to the information provided by the Government, none of the above-mentioned restrictions seems to be fully applicable in *strictu sensu* to Mr. Amer’s case.

35. Restrictions on freedom of opinion and expression may be imposed only where they are necessary. In its general comment No. 22, the Human Rights Committee considered that the requirement of necessity implies that the particular interference in any particular instance must be proportionate to its intended legitimate objective. In its general comment No. 10, the Committee estimated that restrictions imposed on the exercise of freedom of expression, may not put in jeopardy the right itself. In all cases, the principle of proportionality must be strictly observed.

36. In his report to the Human Rights Council submitted in 2007 (A/HRC/4/27, para. 12), the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Ambeyi Ligabo noted, as a positive trend, the adoption, by an increasing number of countries, of legislation concerning the decriminalization of charges related to defamation, libel and slander. Nonetheless, the slowness of this trend cruelly displays the difficulty of abandoning deleterious habits related to the preservation of political and economic influence. The Working Group coincides with the Special Rapporteur in his affirmation that “jail sentences and disproportionate fines should totally be excluded for offences such as defamation” (*ibid.*, para. 48). These offences should be dealt with under civil, not criminal, law. In the Working Group’s view, prison sentences should be excluded.

37. To condemn journalists or bloggers to heavy terms of imprisonment on charges of defamation or insulting State authorities seems to be disproportionate and affects seriously freedom of opinion and expression. As noted by the Special Rapporteur, the Internet and the universal availability of new tools for communication and information may give a great impetus to social advancement and to the dissemination of knowledge, thus widening the scope of this fundamental right.

38. The Working Group reiterates that there is no contradiction between freedom of opinion and expression and freedom of religion. They are mutually reinforcing. The rights to freedom of thought, conscience and religion must coexist with the right to freedom of opinion and expression, in the sense that certain beliefs cannot limit the right of the persons with other beliefs or different opinions to express their ideas and views. Defamation of religions may offend people and hurt their feelings but it does not directly result in a violation of their rights to freedom of religion. International law does not permit restrictions on the expression of opinions or beliefs which diverge from the religious beliefs of the majority of the population or from the State-prescribed one.

39. In this connection, the Special Rapporteur on freedom of religion or belief, Asma Jahangir, stated in her 2006 report (A/HRC/2/3, para. 38) that “The right to freedom of religion or belief protects primarily the individual and, to some extent, the collective rights of the community concerned but it does not protect religions or beliefs per se”. Following the spirit of article 20 of the International Covenant on Civil and Political Rights, blasphemy should be decriminalized as an insult to a religion and, instead, statements that call for a group of persons to be subjected to hatred, discrimination or violence, should be penalized. More than a religion is the freedom of religion or belief which should be object of protection by the law, judges and prosecutors.

40. The Working Group considers that Mr. Amer has been condemned for his online criticisms and for the exercise of his rights to freedom of opinion and expression.

41. In the light of the foregoing the Working Group expresses the following Opinion:

The deprivation of liberty of Mr. Abdul Kareem Nabil Suliman Amer is arbitrary, being in contravention of articles 9, 10 and 19 of the Universal Declaration of Human Rights and articles 10, 14 and 19 of the International Covenant on Civil and Political Rights and falls within category II of the categories applicable to the consideration of the cases submitted to the Working Group.

42. Consequent upon this Opinion, the Working Group requests the Government to take the necessary steps to remedy the situation in order to bring it into conformity with the provisions and principles enshrined in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

Adopted on 20 November 2008

**OPINION No. 36/2008 (SAUDI ARABIA)**

**Communication addressed to the Government on 12 June 2008.**

**Concerning Dr. Said b. Mubarek b. Zair.**

**The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. According to the source, Dr. Said b Mubarek b. Zair (hereafter Dr. b. Zair), aged 58, a professor of information sciences at the University of Riyadh, and a well-known personality for his open position in favour of institutional reforms in the country and for his support to the so-called Reform Movement, was arrested on 6 June 2007 in Riyadh by agents of the intelligence services.

5. Dr. b. Zair was being held in Al Alichia prison and then transferred to an unknown location where he is kept in secret detention. His family has not been informed about his current whereabouts.

6. It was further reported that Dr. b. Zair was arrested and detained several times before, without conviction or legal proceedings. He experienced particularly difficult conditions while kept in detention during more than 10 years. During that period, he never had access to a lawyer or family visits. Dr. b. Zair was detained from 5 March 1995 to 24 March 2003, and arrested again on 20 April 2004 for having given an interview to the satellite television channel Al Jazeera. On 19 September 2004, he was sentenced to five years' imprisonment following a judicial process which allegedly did not respect the minimum guarantees for a fair trial. He was not allowed to have a defence lawyer and was not permitted to consult the judicial files containing the charges against him. On 8 April 2005, he was released following a decree of royal amnesty promulgated on that date (see Opinion No. 22/2005 (Saudi Arabia) adopted on 29 August 2005 (E/CN.4/2006/7/Add.1, p. 74). These successive detentions have reportedly affected seriously his health.

7. The source considers that Dr. b. Zair is being kept in detention solely for having expressed his political views and ideas. He is being maintained in secret detention, without having been charged with a concrete offence and without access to a defense lawyer or to his relatives. Dr. b. Zair has not been brought before a judge. His detention is not only contrary to articles 9, 10 and 19 of the Universal Declaration on Human Rights but also to articles 2 and 4 of Royal Decree No. M.39 concerning the rights of detainees.

8. In its response, the Government indicates that the person in question is currently detained on the basis of information which came to light during an investigation and which gave reason to believe that:

(a) He supported and was involved in acts of terrorism committed in the Kingdom;

(b) He withheld important information on some of the perpetrators of the attempted bombing of petroleum installations;

(c) He contributed a sum of money to fund the bombing of the petroleum refinery at Abqaiq;

(d) He helped persons to participate in the fighting taking place in disturbed areas;

(e) He expressed his view that there was an obligation to fight in Iraq.

9. Since his arrests, Dr. b. Zair has been treated in accordance with the judicial regulations in force in Saudi Arabia. He is receiving the requisite social and health care and was allowed to leave the prison for a period of three days to receive condolences following the death of his son in a traffic accident. His family have also been permitted to visit him in the prison.

10. In its response, the Government does not provide enough information on key factual elements related to the case; on the attributed participation in those facts of Dr. b. Zair and on the accusations and charges brought against him.

11. In its comment to the information provided by the Government, the source highlighted that Dr. b. Zair continues to be kept in secret detention ; that he has never had access to a lawyer or to any person from the outside world and that he is been unable to challenge the lawfulness of his detention. The source adds that in the occasion mentioned by the Government, where Dr. b. Zair met with his family (authorized to attend the burial of his son who died in an accident) Dr. b. Zair informed to his family that he had been subjected to acts of torture and ill-treatment. Dr. b. Zair further explained that the security services reproached him for his political attitude and for his public statements against the United States of America's policy in the region and in particular in Iraq.

11. The source ratifies that Dr. b. Zair is being kept in secret detention for political reasons. His relatives are very worried because they do not have any news from him and the authorities

refuse to communicate information on his fate or place of detention. Before his arrest, Dr. b. Zair suffered already of chronic illnesses, caused for his long years in prison.

12. The source stresses that Dr. b. Zair has always maintained public positions against terrorism and is well-known in the Arab world for his statements against any form of violence in political activity. Nevertheless, it is clear that he has condemned on Al Jazeera the United States policy in the Arab region and the human rights violations in Iraq.

13. The Working Group notes that, in its response, the Government does not explain:

- (a) Which are the acts of terrorism for which Dr. b. Zair is charged or accused;
- (b) What are the dates and places where those acts have occurred or would have occurred;
- (c) Whether those acts have or would have caused injuries or deaths; and
- (d) How did Dr. b. Zair help persons to commit terrorist acts; to who he had eventually helped, and whether those acts were in reality actually committed?

14. Furthermore, the Government does not provide information on:

- (a) The authorities who ordered the detention;
- (b) Whether Dr. b. Zair was taken before any judicial authority, and if so, when, where and before whom;
- (c) Whether any judge intervened during his detention, and, if so, if he was a civil or a military judge;
- (d) Whether Dr .b. Zair has had access to a defense lawyer; and

- (e) Whether Dr. b. Zair is subjected to an imprisonment sentence and if so, who issued that sentence and what is its duration.

15. The Government does not clarify whether Dr. b. Zair is under secret detention and it does not provide information on the place of his detention.

16. The Working Group notes that Dr. b. Zair had been previously detained on at least two occasions for similar accusations: The first for eight years, between 5 March 1995 and 24 March 2003, and the second from 20 April 2004 to 8 April 2005 for giving an interview to Al Jazeera satellite television channel. Although this second detention was brought to the Working Group's attention, the Group decided, in conformity with paragraph 17 (a) of its methods of work, to file the case as Dr. b. Zair had been released (Opinion No. 22/2005).

17. The Working Group considers that Dr. b. Zair's current detention is arbitrary as it lacks any legal basis, to the extent that the Government has not provided any information in this regard. Therefore, his detention falls within category I of the categories applicable to the consideration of the cases submitted to the Working Group.

18. Dr. b. Zair has not been charged or accused of any specific criminal act, in particular of a terrorist nature. Nevertheless, he is accused of having expressing the opinion that there was an obligation to fight in Iraq. It results that Dr. b. Zair is suffering a situation of arbitrary deprivation of liberty due to his political opinions, which is contrary to the exercise of his legitimate right to freedom of opinion and expression, as established in article 19 of the Universal Declaration of Human Rights. Therefore, the Working Group finds that his detention also falls within category II of the categories applicable to the consideration of the case submitted to the Working Group.

19. Finally, the facts that Dr. Said Zair: (a) has not been brought before a judge; (b) has not had a fair trial before an impartial and independent tribunal; (c) has been unable to challenge the lawfulness of his detention; (d) has not had a defence lawyer; and (e) has been kept in

incommunicado detention for more than one year and five months, falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

20. In the light of the foregoing the Working Group expresses the following Opinion:

The detention of Dr. Said b. Mubarek b. Zair is in contravention of articles 9, 10 and 19 of the Universal Declaration of Human Rights and falls within categories I, II and III of the categories applicable to the consideration of the cases submitted to the Working Group.

21. Consequent upon this Opinion, the Working Group requests the Government to take the necessary steps to remedy the situation of this person in order to bring it into conformity with the provisions and principles enshrined in the Universal Declaration of Human Rights.

22. The Working Group encourages the Government to consider the possibility to accede to the International Covenant on Civil and Political Rights.

Adopted on 21 November 2008

**OPINION No. 37/2008 (SAUDI ARABIA)**

**Communication addressed to the Government on 19 June 2008.**

**Concerning Mr. Matrouk b. Hais b. Khalif Al-Faleh.**

**The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)

2. The Working Group regrets that the Government has not provided the requested information on the case despite the opportunity it was given to comment within the 90-day time limit, and reiterated requests.

3. (Same text as paragraph 1 of Opinion No. 17/2008.)

4. The case concerns Dr. Matrouk b. Hais b. Khalif Al-Faleh (hereafter, Dr. Al-Faleh), born in Sekaka on 17 May 1953; former Professor of International Relations at the King Sa'ud University of Saudi Arabia in Riyadh and Head of the Political Science Department; currently detained in Al Alhayer Prison near Riyadh. He is particularly known for having written a widely published study calling for political reforms in the Kingdom and an article in the London newspaper *Al Qods Al Arabi*. He temporarily lost his position at the university in 2003 for having written those papers. Dr. Al-Faleh is a member of the Arab Committee for Human Rights.

5. The case was reported to the Working Group as follows: Dr. Al-Faleh was arrested on 16 March 2004 at his offices in Riyadh by agents of the Saudi Arabia's General Intelligence Service who failed to provide a proper arrest warrant. No reasons were given to justify his arrest.

6. Dr. Al-Faleh was not given an opportunity to be heard by a judicial authority. He was not immediately presented before a judge nor charged. Later, he was requested to withdraw his signature on an open letter addressed in January 2003 to the Crown Prince Abdellah Ben Abdelaziz and to sign pledges to liaise with the authorities before carrying out any public activity. The letter, which was signed by 104 Saudi intellectuals, petitioned the Government on several political issues, including the necessity of adopting comprehensive institutional reforms in order to establish a constitutional monarchy, to strengthen relations between the leadership and the community and to guarantee the unity and the stability of the Kingdom. It observed that the lack of freedom of expression and assembly fosters the growth of intolerance and extremism. Dr. Al-Faleh refused to withdraw his signature on the open letter.

7. Dr. Al-Faleh was later charged with the following criminal offences: propagation of discord and dissonance; incitement and encouragement against the State; rebellion against

authority; doubts about the independence and equity of the judiciary; holding political meetings and commission of crimes against the national unity. According to the source, all these charges are of a political nature.

8. The source reports that the treatment given to the co-signatories of the open letter has been quite different in each case, and thus discriminatory: some co-signatories never were questioned for their signatures; others were arrested and later released after retiring their signatures; others, like Dr. Al-Faleh, were arrested and formally charged and others are being kept arbitrarily in detention without having been presented before a judge, without charges and without clear expectations to be tried soon. A number of those arrested were released on the condition that they pledge not to sign petitions or comment publicly on political issues.

9. The source further reports that Dr. Al-Faleh had no judicial recourse to contest the lawfulness of his detention. There is no evidence that he took actions that violate laws of the Kingdom or that threaten public order. The source further alleges that the detention of this person is also in violation of Saudi Arabia domestic law, particularly of article 36 of the Saudi Basic Law, which guarantees that no citizen may be detained without due process of law and articles 2 and 4 of Royal Decree N° M. 39 of 16 October 2001, by neglecting to provide a proper detention warrant at the time of his arrest and by failing to present the detainee before a judicial authority to establish the lawfulness and the length of his detention. Dr. Al-Faleh was sentenced to five years' imprisonment and released after 17 months in detention by virtue of a Royal pardon.

10. Dr. Al-Faleh was re-arrested on 19 May 2008 at his office at the King Sa'ud University by a group of approximately 15 policemen in uniform and armed civilians. He was shackled and driven away from his office. According to the source, this re-arrest was due to the power of attorney that he was handed with from Dr. Abdallah Al Hamed, who was serving a six months sentence at Buraidah General Prison. Dr. Al-Faleh has issued a report about the poor conditions of Dr Al Hamed.

11. Since his re-arrest, Dr. Al-Faleh has not been allowed to see a judge, nor a lawyer. He is being held in incommunicado detention. Dr. Al Faleh has no access to medical treatment, in spite of being diabetic and suffering high blood pressure.

12. In the absence of any reply from the Government, the Working Group considers that it should issue an Opinion according to all the information put at its disposal. Accordingly, Dr. Al-Faleh was arrested and re-arrested and is being held in incommunicado detention for the peaceful exercise of his rights to peaceful assembly, association and freedom of opinion and expression guaranteed under articles 19, 20 and 21 of the Universal Declaration of Human Rights, as well as for his humanitarian activities on behalf of Dr. Al Hamed.

13. The signature by Dr. Al Faleh of the letter to the Crown Prince was in exercise of his right to peaceful freedom of opinion and expression. It was also an effort to take part in the government of his country by petitioning their authorities. His detention is related to his efforts to petition his Government, and show a violation of the Universal Declaration of Human Rights under its article 21, paragraph 1. The letter was a peaceful expression of political aspirations by the signatories within the legal bounds of international standards.

14. No evidence has been presented that Dr. Al Faleh did anything but express his opinions in a peaceful manner. Dr. Al-Faleh is a known intellectual and human rights defender. The Working Group had already adopted an Opinion on his favour (Opinion 25/2004 (Saudi Arabia) before his re-arrest.

15. There is no evidence that Dr. Al-Fadeh took actions which violate Saudi Arabia domestic laws or that threaten public order. He was arrested by agents of the General Intelligence Service, and re-arrested by uniformed policemen and armed civilians who did not provide proper arrest warrants.

16. In conformity with the above, and in the absence of any information provided by the Government, the Working Group concludes that the detention of Dr. Al-Faleh is arbitrary and

falls under category I of the categories applied by the Working Group, as no legal basis is invoked to justify his detention.

17. The detention of Dr. Al-Faleh also falls under category II, as the only possible explanation for his arrest is that it is understood to be due to Dr. Al-Faleh's exercise of his right to freedom of expression through the publication of articles in London newspapers, the signature of an open letter to the Crown Prince (a signature which he was requested to retire) and his humanitarian intervention on behalf of Dr. Al Hamed. Dr. Al-Faleh is being kept in detention solely for having peacefully expressed views critical of government policies and for demonstrating his solidarity with an imprisoned colleague.

18. The fact that the General Intelligence Service agents, uniformed policemen and armed civilians who arrested and re-arrested Dr. Al-Faleh did not present arrest warrants; that he was not informed of the reasons for his arrests; the fact that he is being held in incommunicado detention and that he was not brought before a judge in the briefest of delays; and that he was not given the opportunity to challenge his deprivation of liberty; are all circumstances of such gravity that grant the deprivation of liberty an arbitrary character, according to category III of the categories applied by the Working Group.

19. In light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Dr. Matrouk b. Hais b. Khalif Al-Faleh is arbitrary as it contravenes the provisions in articles 9, 10, 11 and 19 of the Universal Declaration of Human Rights and falls within categories I, II, and III of the categories applicable to the consideration of the cases submitted to the Working Group.

20. Consequent upon this Opinion, the Working Group requests the Government to take the necessary steps to remedy the situation of Dr. Al-Faleh, in order to bring it into conformity with the provisions set forth in the Universal Declaration of Human Rights. The Working Group believes that, taking into account all the circumstances of the case and the prolonged period of

deprivation of liberty, the adequate remedy would be his immediate release and the granting of some form of reparation.

21. The Working Group also invites the Government to consider the possibility to accede, as soon as practicable, to the International Covenant on Civil and Political Rights.

Adopted on 21 November 2008

### **OPINION No. 38/2008 (THE SUDAN)**

**Communication addressed to the Government on 22 August 2008.**

**Concerning Messrs. Ishag Al Sanosi Juma, Abdulhai Omer Mohamed Al Kalifa, Al Taieb Abdelaziz Ishag, Mustafa Adam Mohamed Suleiman, Mohamed Abdelnabi Adam, Saber Zakaria Hasan, Hasan Adam Fadel, Adam Ibrahim Al Haj, Jamal Al Deen Issa Al Haj, and Abdulmajeed Ali Abdulmajeed.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group regrets that the Government did not provide it with the requested information.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. According to the source, Messrs. Ishag Al Sanosi Juma, more than 70 years of age, Abdulhai Omer Mohamed Al Kalifa, Al Taieb Abdelaziz Ishag, born on 17 December 1989, Mustafa Adam Mohamed Suleiman, Mohamed Abdelnabi Adam, Saber Zakaria Hasan, Hasan Adam Fadel, Adam Ibrahim Al Haj, Jamal Al Deen Issa Al Haj, and Abdulmajeed Ali

Abdulmajeed have all been found guilty and sentenced to death on 10 November 2007 by a court in the Bahri district in northern Khartoum for the murder of Mr. Mohamed Taha Mohamed Ahmed. They are currently detained on death row at Kober Prison in Khartoum.

5. All 10 defendants are of Darfurian origin and were arrested in and around Khartoum between 9 September and December 2006 by National Intelligence and Security Services (NISS) and police forces after the General Prosecutor, by decree, had established an investigation team of high-profile state representatives to handle the case. Mr. Mohamed Taha was found beheaded in the Kalakla area of Khartoum on 6 September 2006, after reportedly having been abducted by armed men the previous night. The Sudanese authorities declared that they would find the perpetrators.

6. The source informs that the arrests carried out in response to the murder of Mr. Mohamed Taha, who was the founder and editor-in-chief of the Sudanese daily newspaper *Al Wifaq*, formed part of a wider trend of arrests and detentions of men and women of primarily Darfurian origin, most of them ethnic Fur. According to information later provided by the police investigator in court, a total of 73 arrests had been carried out.

7. On 11 November 2006, defence lawyers presented a written request to the Prosecutor for Khartoum State who was heading the investigation team to meet with the defendants. In his response of 22 November 2006, the prosecutor rejected the request by the lawyers on the grounds that this might affect the investigation. Lawyers appealed to the General Prosecutor to overturn this decision. On 11 December 2006, the General Prosecutor issued a decision that the lawyers should be given access to the defendants. Defence counsels were first granted access to some but not all of the defendants in January 2007, when they had been transferred to the remand section in Kober Prison.

8. On 21 November 2006, the Minister of Justice officially presented the first findings of the investigation team, indicating that all 28 suspects had been identified and were being held in detention while 41 people were to be released for insufficient evidence. However, arrests of Darfurians continued, lending weight to concerns that the murder investigation may have been

serving as a pretext to conduct politically motivated arrests among the Darfurian community in Khartoum.

9. On 10 February 2007, the Ministry of Justice announced that the investigation into the murder was complete. On 28 February 2007 the trial began for originally nineteen defendants, all but one of Darfurian origin (majority ethnic Fur). Nine of them, including two women, one of whom a minor, were acquitted and released on 27 August 2007. At least one of the acquitted was again detained incommunicado by the NISS between 21 October 2007 and 21 January 2008 for alleged links with the “Sudanese Liberation Army/Abdel Wahed” (SLA/AW), however, never charged or tried.

10. The prosecution’s case relied almost exclusively on statements from the defendants obtained by the police during the pre-trial investigation. These statements were made during up to four months of incommunicado detention – without permission of access to defence counsel and family visits – in the police-run Forensic Evidence Department and Criminal Investigations Department, as well as in NISS detention facilities in Khartoum.

11. All 10 defendants revoked their confessions in court, stating that they had been threatened, intimidated and subjected to torture and ill-treatment as a means to compel them to make the incriminating statements that the investigators instructed them to make. There are multiple reports of detainees being beaten with hands, hoses, and plastic pipes. Five detainees reported having been beaten while being bound or suspended from the ceiling, in some cases suspended by their feet and hung upside down. One detainee was reportedly tied by his genitals and another sodomized with a glass bottle. One defendant had been burnt with fire and electricity and that petrol was poured over him to threaten him that he would be killed; he then reportedly told the interrogators what he had been asked to say. Some of the acquitted also confirmed that they had been forced to confess the murder upon instructions by the police investigators. Two released suspects reported that they had been taken to the prosecutor’s office after having been tortured or ill-treated. One stated that he went before the prosecutor with his clothing caked in blood. During the investigation he had reportedly been exposed to police dogs that assaulted and bit him and he did not receive any medical treatment for the wounds he had sustained.

12. When the trial proceedings began, many of the defendants still bore clearly visible physical traces of injuries and scars on their arms, hands, thigh, and shoulders as a result of the alleged torture. One of the defence lawyers reported that physical injuries sustained under torture had been seen by co-detainees who were later released, but these were unwilling to testify in court on behalf of the defendants out of fear for reprisals.

13. On 3 February 2007, after meeting with the defendants, the counsel for the defence submitted a request to the prosecutor heading the investigation for the defendants to be medically examined on the grounds that they were feared to have been subjected to severe torture. The prosecutor turned down the request, arguing that he no longer had jurisdiction over the request as the case had been transferred to court.

14. On 24 March 2007 defence lawyers submitted a request to the presiding judge that the defendants be granted medical examinations by doctors of their choice, citing specific examples of the severe torture alleged by defendants and the injuries that had been observed by the lawyers. The judge referred the request to the prosecutor overseeing the investigation who dismissed the allegations of torture, stating that the prison administration of Kober Prison, to which the defendants had since been moved, would not have accepted the defendants into custody if they had complained of any health problems at the time they were admitted in January 2007. The investigation team alleged that they have records proving that the defendants were in good health, but did not provide any documentation. While the prison administration routinely conducts basic examinations upon admission, the general purpose is to register a detainee's overall health in order to absolve the prison administration of any later claims of mistreatment. The judge eventually declined the defence's request for medical examinations on the grounds that it was made during the stage of the trial reserved for the prosecution to present its case. No written decision was issued by the court. The defence counsel made several further verbal requests for medical examinations into the allegations of torture, but the judge denied these requests each time, stating that they were not made at a suitable point in the trial. None of the defendants was ever examined by a doctor.

15. Several defendants also stated that they were unaware that they were confessing before a judge. Some defendants stated that the interrogators threatened them with further torture should they deviate from the statement they were told to make before the judge, or should they tell the judge that they had been tortured or ill-treated. Some defendants reported that they were forced into recording filmed statements, which the prosecution began to present to court from 17 March 2007 onwards.

16. Despite the fact that all defendants retracted the confessions allegedly given by them, testifying that they had given these statements under torture or ill-treatment while held incommunicado, these statements were introduced repeatedly during the trial proceedings, both by the police investigators and by the judge, and admitted as evidence. In addition, the prosecution presented filmed statements given by the defendants during the pretrial investigation, in which they reiterated the same facts about their participation in the crime. The prosecution also presented a DVD containing a filmed re-enactment showing the defendants acting out the crime. The prosecution alleged that the defendants had voluntarily given their written and filmed statements and agreed to re-enact the crime. However, it could be observed that during the filmed statements and re-enactments in court and that the defendants often appeared weak and confused, even bloodied and beaten. In one case, a defendant turned around to an unseen interrogator to seek clarification on what he was supposed to say. It could also be noticed that the defendants were confined in leg shackles.

17. The main material evidence presented by the prosecution consisted of a bloodied knife found at the home of the first defendant, a bloodied garment worn by the victim, and some papers allegedly found during searches of several defendants' homes. An investigator testified in court that the blood on the knife was tested at a forensics laboratory and was conclusively not the blood of the victim. The prosecution did not produce any evidence of fingerprints on the knife, or other evidence which would link the alleged murder weapon to the defendants. The prosecution admitted that the blood found at the alleged crime scene also did not match the blood of the victim. No other evidence was found at the alleged crime scene to prove that the crime had in fact taken place there, and that it had been committed by the defendants. The investigation team attributed this absence of material evidence at the crime scene to the criminal shrewdness of the

defendants who had allegedly removed all traces of the crime. This assertion would appear to presume the guilt of the defendants, rather than establish this through proof.

18. Among the papers seized in the searches of the defendants' homes were the issue of *Al Wifaq* containing the offensive article on Darfurian women, allegedly opened to the page containing the article, and other newspaper articles highlighting an execution method used in Iraq that resembled the way in which Mr. Mohamed Taha was beheaded. A further piece of evidence presented by the prosecution was a handwritten piece of paper found at the home of the first defendant that contained the words "murder group" and "arson group". Additionally, one prosecution witness testified that the vehicle that was allegedly used to abduct Mr. Mohamed Taha on the night of his murder had been in the possession of one of the defendants. No evidence was produced to establish that this defendant was actually seen participating in Mr. Mohamed Taha's abduction or murder.

19. There were additional factors that impacted on the defendants' right to a fair trial. Defence lawyers were subject to anonymous threats, and in one instance a defence lawyer was himself arrested, apparently in a deliberate effort to weaken the case of the defence. On 2 September 2007, Mr. Kamal Omar, head of the defence counsel and legal advisor to the Popular Congress Party (PCP), was arrested at his home on allegations of defamation. He was held in solitary confinement for one night on the accusation that he had defamed the police through detailing the torture of the ten defendants in the Mr. Mohamed Taha case in an article he had published in the PCP's newspaper the previous week. Mr. Kamal Omar was released from police custody without charge at 5 pm on 3 September 2007, after the day's court hearing in the Mohamed Taha trial had concluded.

20. Interrogators allegedly also threatened arresting and sexually assaulting some of the defendants' wives and daughters. Female relatives of several defendants were in fact arrested and detained for up to several weeks, among them the pregnant wife of one of the defendants. One defendant's mother was reportedly detained and undressed in front of her son in order to force the accused into confessing. Investigators denied that this event had occurred and stated that the

defendant's mother had been summoned to try to convince the defendant, who was allegedly on a hunger strike, to eat.

21. In addition, there was also a lack of public scrutiny and discussion about the investigation and trial. From the beginning of the investigation, the authorities imposed a ban on newspapers and media reporting on the investigation, in a stated effort to prevent influencing the course of justice. Direct censorship of privately owned print media by the NISS, a practice used to restrict independent reporting on politically sensitive issues, was reinstated systematically from 6 September 2006, the day the body of Mr. Mohamed Taha was found. On 1 February 2007, three weeks before the start of the trial, the Minister of Justice imposed a new ban on publishing stories related to the trial, which applied to all media outlets except the state-run SUNA (Sudan News Agency). Papers that published articles on the murder trial were temporarily suspended. On 21 February 2007, the presiding judge met privately with journalists in order to inform them of a decision by the court to forbid photography or any news reporting inside the courtroom by any other outlet than SUNA. This measure was in accordance with article 133 of the Criminal Procedure Act of 1991, which allows the court to exclude "the public generally or any person of those attending" at its discretion. On 12 March 2007 journalists from four Arabic-language newspapers – *Al Sudani*, *Akhbar Alyoum*, *Al Dar*, and *Al Adwa* – were barred entry to the courthouse by the police and were informed that they would be forbidden to attend the court session unless they provided a written apology for having published commentary on the trial. On 27 March 2007, after protests from numerous dailies, the presiding judge granted newspapers the right to factually report on the trial without any independent commentary or analysis. However, because the gagging order was never definitively retracted and because NISS censorship of newspaper contents has continued, journalists have remained uncertain about the extent to which they could comment on the trial and have generally erred on the side of caution, rather than risk problems with the authorities.

22. On 10 November 2007, the 10 remaining defendants mentioned above were sentenced to death. In its judgment of November 2007 the court described the evidence presented by the prosecution as sound. The verdict relied heavily on the statements made by the defendants. It did not establish that any other evidence presented by the prosecution had independently established

the defendants' guilt or the veracity of the statements. The court implicitly accepted that the statements corresponded to the truth, but it did not explain how it had reached this conclusion. The judge gave no justification for not investigating the allegations of torture and ill-treatment made by the defendants.

23. In its ruling of 10 March 2008 the Court of Appeal upheld the verdict of the first instance court. It based its decision on a judicial precedent from 1975 in which a retracted confession was ruled to be acceptable as strong evidence. The defence lawyers proceed with further appeals, but have raised concern that these may not lead to a genuine review of the judgment in light of the political nature of the case.

24. Mr. Mohamed Taha generated much political controversy as editor of *Al Wifaq*, an Arabic-language newspaper with an Islamist tendency critical of the Government. In 2005 "Ansar al Sunna", an Islamist group, filed a complaint against the paper for an article published in April 2005 that questioned the lineage of the Prophet Mohamed. Mr. Mohamed Taha was subsequently charged with apostasy, detained, tried, and eventually acquitted. However, the court imposed a fine on him and suspended *Al Wifaq* for three months. In response to the publication of the article, Islamist groups held demonstrations outside the court and called for Mr. Mohamed Taha to be condemned to death. The article had angered Muslims of diverse sects, and after protests had called for his execution, Mr. Mohamed Taha apologized publicly, stating it was not his intention to insult the prophet. Other *Al Wifaq* articles also stirred up protests from several other groups, including the opposition Popular Congress Party (PCP) party and Darfurian groups. In January 2006 *Al Wifaq* published an article questioning the morality of Darfurian women in the context of widespread reports of rape in Darfur. This article prompted a lawsuit for defamation by a group of Darfurians, among them several of the defendants in the trial of Mr. Mohamed Taha trial, which was dismissed by the Minister of Justice.

25. The prosecution argued during the trial that the murder was well-organized and had been planned for several months before it was carried out. The alleged motive to murder Mr. Mohamed Taha stemmed from the defendants' indignation over an article that was published in *Al Wifaq* on 6 January 2006. The article had downplayed the widespread reports of rape and

sexual violence taking place in the course of the conflict in Darfur and instead questioned the morality of Darfurian women and girls. After the publication of the article, some of the defendants and other incensed Darfurians filed a lawsuit for defamation against Mr. Mohamed Taha, but the case was later dismissed by the Minister of Justice. The prosecution cited the frustration over the failed defamation case as one of the motives that led the defendants to murder Mr. Mohamed Taha. The chief investigator testified in court that the defendants believed that Mr. Mohamed Taha had lobbied the Minister of Justice to dismiss the defamation case and that he had sought the intervention of the Vice-President of Sudan, after which the defendants allegedly resolved to hold Mr. Mohamed Taha responsible for interfering in their case. The prosecution alleged that the defendants consequently began holding meetings at which they meticulously planned to kill Mr. Mohamed Taha. It was alleged that they established and participated in a secret cell to carry out the plan and that they planned to carry out the murder in a particularly brutal way, inspired by assassinations of alleged infidels by radical Islamist movements in Iraq.

26. The source alleges that the detention of the above-mentioned persons is arbitrary, since their arrest, detention, trial and conviction violated articles 6, 7, 9, 10, and 14 of the International Covenant on Civil and Political Rights, to which the Republic of Sudan is a State party and which form an integral part of the Sudanese national Bill of Rights. Article 27(3) of the Interim National Constitution of the Republic of the Sudan (2005) states that “all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill [of Rights]”, as well as several provisions of the Sudanese Criminal Procedure Act.

27. In particular, article 79 of the Sudanese Criminal Procedure Act allows the police to keep an individual detained in custody for a period of 24 hours for investigation purposes, but the person has to be presented to a prosecution attorney thereafter. The prosecution attorney can extend the detention for a maximum of three days if the investigation is still ongoing. If more time for investigation is needed a magistrate may no more than twice renew the detention for one week at a time, stating the reasons for the extension. In cases where an individual is charged, the superior magistrate may order further extensions of detention for the purposes of inquiry every

week. The period of detention shall not in total exceed six months (except with the approval of a competent head of the judicial organ).

28. According to the above provisions, the defendants should have been presented to a prosecutor within the first days of their detention. In addition, they should have been presented to a judge after a maximum of 18 days following their arrest, but the defendants reportedly first saw a judge after up to several months, and even then were only taken before the judge in order to register the confessions that had been coerced through torture or other forms of ill-treatment.

29. It is alleged that the prosecutor inspected the defendants in custody on a daily basis, in accordance with article 81 of the Criminal Procedure Act, however, a number of the defendants rejected that assertion. If in fact the prosecutor was visiting the defendants daily, it seems he did not clarify his role as a prosecutor and the purpose of his visits, which casts doubt on his role of overseeing the investigation and the conditions of detention.

30. Furthermore, the Criminal Procedure Act defines some basic rights of arrested persons. Article 83, paragraph 3, of the Criminal Procedure Act states that “an arrested person shall have the right to contact his advocate, and the right to meet the prosecution attorney, or the magistrate”, though no specified timeline or purpose is stipulated. However, the majority of the provisions of the Criminal Procedure Act ascribe powers to the police, investigators, and the judiciary, with few rights conferred upon the suspect or detainee. The investigation team stated that it had abided by the Criminal Procedure Act and presumed the innocence of the defendants.

31. The legal protections for detainees are very weak in the Sudanese legal system. The Criminal Procedure Act does not make any provisions for the presence of legal counsel in interrogations or the right of the detainee to receive legal advice during questioning or when recording so-called “judicial confessions”, i.e. statements recorded by a judge during a police investigation. While article 83, paragraph 3, of the Criminal Procedure Act grants the arrested person the general right to contact his advocate, there are no provisions that state how frequently the detainee may meet with legal counsel or guarantee the detainee the right to meet with legal counsel confidentially. Moreover, there is no provision to protect detainees from incriminating

themselves. However, article 60, paragraph 2, of the Criminal Procedure Act does require the magistrate, before whom the accused confesses, to confirm that the accused is admitting his guilt voluntarily and to read the confession back to the accused.

32. There are some provisions under Sudanese law that would allow the admissibility of evidence obtained under torture or other ill-treatment in judicial proceedings. However, officials who commit torture or other ill-treatment may be punished in accordance with the Criminal Act. Article 89 of the Criminal Act, which governs the conduct of public servants, states that intention “to cause injury to any person” shall be punishable by either imprisonment of up to two years or a fine, or by both. Article 90, which governs the conduct of public servants, authorized by law “to commit persons for trial or to confinement”, states that any public servant who commits acts “knowing that in so doing he is acting contrary to law” may be punished with imprisonment of up to three years or with a fine.

33. Article 81 of the Criminal Procedure Act provides for the daily inspection of detainees by the prosecution attorney, who is tasked with verifying “the validity of procedure and abidance by treatment of the arrested persons in accordance with the law”. A special prosecutor from the Criminal Investigation Bureau had been appointed to “ensure that the human rights of the detainees held as part of the Mohamed Taha murder investigation are respected, that they are treated with dignity and kept in good conditions”; they should facilitate medical care, if needed. However, the source submits that the allegations above cast serious doubts on the role of the prosecutor in overseeing detention procedures.

34. The source reports that there is some ambiguity in Sudanese legislation about the legality of the use of torture and ill-treatment in generating evidence. Article 10, paragraph 1, of the 1993 Evidence Act explicitly allows for evidence which has been “obtained through an improper procedure” to be admitted in judicial proceedings. However, article 19, paragraph 1, stipulates that “a person who makes an admission [of responsibility] must be of sound mind [and] capable of choice”. The Criminal Procedure Act does not explicitly rule out the use of torture in interrogations, but article 43, paragraph 2, stipulates that “No inquiry authorities ... shall influence any party to the inquiry by ... coercion or hurt to force him to deliver ... any

statements or information”. Article 20, paragraph 1, further provides that “in criminal matters a confession shall not be proper when it comes as a result of inducement or coercion” and article 21, paragraph 3, provides further that “a confession shall not constitute conclusive evidence if ... there is doubt as to its truth”. According to Sudanese lawyers, this provision allows judges to attribute less weight to confessions obtained under torture, and should preclude that defendants are sentenced on the basis of such confessions in the absence of other strong evidence.

35. According to the source, the death penalty is not prohibited under international law and is legal in Sudan in the cases of “retribution, *Hudud*, or punishment for extremely serious offences” (article 36, para. 1, Interim National Constitution), but its application of the death penalty in the present case would amount to a violation of the right to life given the serious irregularities of the trial described.

36. The imposition of the death penalty also has implications for the conditions in which the prisoners are held: death row prisoners in Sudan are held in a separate section of the prison and are obliged to continuously wear iron leg shackles. They are detained together with prisoners whose death sentences have been confirmed on final appeal and may witness them being taken away for execution, resulting in heightened anxiety about their own fate.

37. In addition to the general restrictions on the imposition of the death penalty, international law also prohibits the use of the death penalty against persons under the age of 18 (art. 6, ICCPR). Article 10 promotes the separation of juveniles from adults in legal proceedings, and article 14, paragraph 4, of the International Covenant on Civil and Political Rights states that a case against a juvenile shall take the defendant’s age into account and be conducted in a way that promotes his rehabilitation. The Sudan is also a State party to the Convention on the Rights of the Child which prohibits arbitrary detention and torture of persons under the age of 18 and stipulates that the treatment of the child shall take into account “the needs of persons of his or her age” (article 37, CRC).

38. Sudanese law limits the use of the death penalty to persons below the age of 18 and above the age of 70. The Sudanese Interim National Constitution provides that capital

punishment “shall not be imposed on a person under the age of 18 or a person who has attained the age of 70” (article 36, paras. 1 and 2). Article 47 of the Criminal Act provides for the possibility of alternative sentencing for “an elderly who has attained seventy years of age” subject to the opinion of the court. Article 193 of the Criminal Procedure Act provides for the same. The 2004 Child Act prohibits the application of the death penalty on children (art. 62, lit. d). Article 74, paragraph 1, of the Child Act provides that a criminal court should refer a juvenile to a “competent child court”, which would then rule on what is suitable for the juvenile. According to article 59, paragraph 1, of this Act, “the criminal court shall not pass any penalty or measures against the child where he is convicted and shall send the record to the competent Children’s Court to decide such”.

39. Despite these safeguards under national and international law, the court imposed the death penalty on two defendants who should have been exempt; one man over the age of 70 and a minor believed to be 17 years old (16 at the time of the crime). The juvenile defendant did not have documentation to prove his age, but his family has stated that he was born on 17 December 1989 and that his birth certificate was lost in a fire at the family’s home. The police investigator claimed that the defendant was 18 years of age at the time of the crime. Neither the prosecutor who brought the case nor the judge is known to have made efforts to determine the actual age of the defendant and to apply the provisions concerning minors, should he be found to have been under the age of 18. Instead, the defendant was tried and sentenced in the same case and court as the other defendants.

40. By note verbale dated 18 November 2008, the Government of the Sudan requested from the Working Group an extension of the 90 days time limit for responding to the allegations of the source. The Working Group decided not to grant this request, not only because it was not motivated in conformity with its methods of work, but mainly because of the urgency of resolving this case, as the persons involved have been sentenced to death. Paragraph 16 of the Working Group’s methods of work provides it with discretionary powers to grant a further period of a maximum of two months in which to reply, if the Government so desires and informs the Group of the reasons for requesting an extension. The Government of the Sudan, in its request, indicated that the investigations were still ongoing. Notwithstanding this, the Working

Group considers that the 90 days deadline for the Government to respond provides for sufficient time as it did not find substantial grounds in the Government's request justifying the delay in the response to the allegations of the source as transmitted to the Government, particularly when the lives of the ten defendants are at stake as is the case here.

41. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case, in the light of the allegations made, notwithstanding that the Government has failed to offer its version of facts and explanations on the circumstances of the case within the 90 days deadline.

42. The Working Group considers that all persons to whom the source refers above have not had a fair and public hearing as established in article 14 of the International Covenant on Civil and Political Rights.

43. All 10 defendants (Ishag Al Sanosi Juma, Abdulhai Omer Mohamed Al Kalifa, Al Taieb Abdelaziz Ishag, Mustafa Adam Mohamed Suleiman, Mohamed Abdelnabi Adam, Saber Zakaria Hasan, Hasan Adam Fadel, Adam Ibrahim Al Haj, Jamal Al Deen Issa Al Haj, and Abdulmajeed Ali Abdulmajeed) accused of murdering Mr. Mohamed Taha, revoked their confessions in court, stating that they had been threatened, intimidated and subjected to torture and ill-treatment as a means to compel them to make the incriminating statements that the investigators instructed them to make. These statements were made during up to four months of incommunicado detention – without permission of access to defence counsel and family visits – in the police-run Forensic Evidence Department and Criminal Investigations Department, as well as in NISS detention facilities in Khartoum.

44. A request was made to the prosecutor heading the investigation for the defendants to be medically examined on the grounds that they were feared to have been subjected to severe torture. However, the prosecutor and the judge turned down the request despite the fact that when the trial proceedings began, many of the defendants still bore clearly visible physical traces of injuries and scars on their arms, hands, thighs, and shoulders as a result of the alleged torture.

45. The sentence that condemns the defendants to death is exclusively based on their confessions during their incommunicado detention as explained above. The court did not consider: (a) that the defendants had revoked their confessions and (b) that the prosecutor and the judge turned down the request on the medical examination.

46. The sentence has not considered objective evidences in favour of the defendants, such as the fact that the blood on the knife was conclusively not the blood of the victim, according to a forensics laboratory.

47. Therefore, the violation of article 14 of the International Covenant on Civil and Political Rights confirms the arbitrariness of the defendants' deprivation of liberty. The court has not respected the right "not to be compelled to testify against himself or to confess guilt" as established in article 14, paragraph 3, lit. (g), of the International Covenant on Civil and Political Rights. Generating evidence under torture not only violates article 7 of the International Covenant on Civil and Political Rights, but it also constitutes one of the most serious human rights violations. For this reason, the Working Group does not need to consider the background information provided by the source on the Sudanese legislation on the legality of the use of torture and ill-treatment in generating evidence in the form of confessions, which were later on even revoked before a court.

48. Therefore, neither the verdict of the court that tried the defendants nor its confirmation by the Court of Appeal can be maintained. No judicial system, and in particular, the judicial system of a country that ratified the International Covenant on Civil and Political Rights on 18 March 1986, can consider as valid a confession obtained under torture and revoked before a court, and a sentence based on such confession.

49. In the light of the foregoing the Working Group renders the following Opinion:

The detention of Ishag Al Sanosi Juma, Abdulhai Omer Mohamed Al Kalifa, Al Taieb Abdelaziz Ishag, Mustafa Adam Mohamed Suleiman, Mohamed Abdelnabi Adam, Saber Zakaria Hasan, Hasan Adam Fadel, Adam Ibrahim Al Haj, Jamal Al Deen Issa Al

Haj, and Abdulmajeed Ali Abdulmajeed is arbitrary, being in contravention of articles 7 and 14 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

50. Consequent upon this Opinion, the Working Group requests the Government to take the necessary steps to remedy the situation in order to immediately stay the execution of the sentence against Ishag Al Sanosi Juma, Abdulhai Omer Mohamed Al Kalifa, Al Taieb Abdelaziz Ishag, Mustafa Adam Mohamed Suleiman, Mohamed Abdelnabi Adam, Saber Zakaria Hasan, Hasan Adam Fadel, Adam Ibrahim Al Haj, Jamal Al Deen Issa Al Haj, and Abdulmajeed Ali Abdulmajeed. The Working Group further requests the Government to take the necessary steps to remedy the situation in order to bring it into conformity with the provisions and principles enshrined in the International Covenant on Civil and Political Rights.

Adopted on 24 November 2008

**OPINION No. 39/2008 (ISLAMIC REPUBLIC OF IRAN)**

**Communication addressed to the Government on 10 June 2008.**

**Concerning Mr. Aziz Pourhamzeh, Mr. Kamran Aghdasi, Mr. Fathollah Khatbjavan, Mr. Pouriya Habibi, Ms. Simin Mokhtary, Ms. Sima Rahmanian Laghaie, Ms. Mina Hamran, Ms. Simin Gorji, Mr. Mohammad Isamel Forouzan, Mr. Mehrab Hamed, Mr. Ali Ahmadi, Mr. Houshang Mohammadabadi, Mr. Mehraban Farmanbardar and Mr. Vaheed Zamani Anari.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)

2. The Working Group regrets that the Government did not provide it, despite repeated invitation to this effect, with the requested information.

3. (Same text as paragraph 3 of Opinion No. 17/2008.)

4. The cases summarized hereafter have been reported to the Working Group on Arbitrary Detention as follows:

5. Mr. Aziz Pourhamzeh, Mr. Kamran Aghdasi both from Hamadan, and Mr. Fathollah Khatbjavan, from Mirza Hesari, were arrested on 31 January 2008, after officers of the local police department searched their homes under judicial orders and confiscated Baha'i books, pamphlets and compact discs. They are members of the Baha'i community and have not been charged nor tried.

6. Mr. Pouriya Habibi and Ms. Simin Mokhtari, from Tehran, were arrested on 27 January 2008 in a public park after officials searched them and found that they had in their possession a Baha'i book of scriptures and a card with details of a Baha'i-Persian-language radio programme. They were accused of teaching the Baha'i faith and taken into custody. After two days of trying to ascertain their whereabouts, their families were able to locate them in Evin prison and to visit them there. The authorities set bail for each, but when the families went to the Prosecutor's Office, they were told that the prisoners could not be released because their names had not yet been entered in the computer system by their interrogator. They continue to be kept in detention.

7. Ms. Sima Rahmanian Laghaie and Ms. Mina Hamran, had been arrested on 14 September 2005 and released on bail on 2 October 2005, and Ms. Simin Gorji, had been arrested on 3 August 2005 and released on bail on 17 September 2005. On 8 May 2007, all three women had their appeals rejected by the Provincial Appeal Court of Mazandaran and were found guilty of propagation on behalf of an organization which is considered anti-Islamic. They were sentenced to imprisonment.

8. Mr. Mohammad Isamel Forouzan, from Abadeh, was originally arrested in May 2007, when he was questioned about Bahá'í teaching activities. On 11 November 2007, he was sentenced to one year's imprisonment and 10 year's exile from Abide for spreading propaganda against the Government for the benefit of foreign Governments. Mr. Forouzan undertook serious efforts to secure an attorney but was unsuccessful in obtaining legal counsel. He was given notice only a day and a half before his appeal hearing. When he raised this point with the judge, his request for additional time was denied and his sentence was conveyed orally. Despite his explicit request, he was not permitted to see or to receive a copy of the court order.

9. In September 2007, Mr. Mehrab Hamed had his appeal denied by the Court of Tehran Province. He was accused of spreading propaganda against the Government by teaching the Bahá'í faith. Mr. Hamed received a sentence of one year's imprisonment.

10. On 5 August 2007, Mr. Ali Ahmadi was sentenced by the Revolutionary Court of Justice in Sari to imprisonment. He is a member of the group that coordinates the activities of the Bahá'í in Ghaemshahr on an ad hoc basis and was accused of involvement in propaganda against the Government. The judicial authorities refused to give him a copy of the verdict, and only permitted him to take some notes for the purpose of submitting an appeal.

11. Mr. Houshang Mohammadabadi, Mr. Mehraban Farmanbardar and Mr. Vaheed Zamani Anari, all from Karaj, were originally arrested on 8 November 2005, and charged with spreading anti-Government propaganda, and released on bail a month later. On 23 July 2007, the relevant Court denied their appeal. All three were sentenced to one year's imprisonment.

12. According to the source, the detention of these 14 persons is part of violent attacks targeting the members of the Baha'i community, their homes and property, as well as Baha'i cemeteries throughout the country. These persons have been detained solely on the basis of their religious faith. Their detention is denounced by the source as a form of harassment of the entire Baha'i community.

13. In the light of the allegations made, the Working Group would have welcomed the cooperation of the Government. However, it considers that it is in a position to issue an Opinion on the basis of all the information brought to its attention.

14. The Working Group attaches great importance to the adversarial and opposing character of its procedure. The Working Group considers as very important to receive the cooperation from Governments for bringing responses to the allegations brought to its attention, both regarding the facts as the applicable legislation. After 146 days without any response from the Government, a reminder was sent by the Working Group by note verbale dated 3 November 2008, informing the Government about the Working Group's intention to consider the case at the fifty-third session. No response from the Government was received.

15. In this connection, the Working Group would like to remind that in another case of detention brought to its attention in the Islamic Republic of Iran, there was no response from the Government to its communications dated 23 May, 22 August and 28 October 2008 dealing with the allegations concerning the detention of Ms. Mahvash Sabet, Ms. Fariba Kamalabadi, Mr. Jamaloddin Khanjani, Mr. Afif Naeimi, Mr. Saeid Rezaie, Mr. Behrouz Tavakkoli and Mr. Vahid Tizfahm, detention cases on which the Working Group adopted its Opinion No. 34/2008 (Islamic Republic of Iran) on 20 November 2008.

16. After the transmission to the Government of these cases, the Working Group has received new information about a recent wave of arrests and imprisonments targeting members of the Baha'i community of Iran, which is occurring in Shiraz, Hamaddan, Isfahan, Tehran and other cities and province. These detentions seem to be consistent with a pattern of harassment, intimidation, expulsions from universities, confiscation of property and even persecution.

17. The Working Group observes that arrest and detention of members of the Baha'i community in Iran appear to be more and more frequent and acquiring a systematic character. These persons are being detained solely because of the practice of their religious faith. Freedom of religion is a fundamental right recognized both in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

18. The Working Group further notes that some of these persons have not been charged with a common offence and that no trial dates have been set. Many of them have been kept in incommunicado detention and have not been allowed access to legal representation.

19. In other cases, they were condemned after trials which did not meet the guarantees for a fair trial established by international law. Some of these persons were requested to pay considerable amounts of money on bail, deeds of property to the value of several hundred millions of Rials, or the deposit of work or business licenses with the court.

20. In the light of the foregoing the Working Group expresses the following Opinion:

The deprivation of liberty of Mr. Aziz Pourhamzeh, Mr. Kamran Aghdasi, Mr. Fathollah Khatbjavan, Mr. Pouriya Habibi, Ms. Simin Mokhtary, Ms. Sima Rahmanian Laghaie, Ms. Mina Hamran, Ms. Simin Gorji, Mr. Mohammad Isamel Forouzan, Mr. Mehrab Hamed, Mr. Ali Ahmadi, Mr. Houshang Mohammadabadi, Mr. Mehraban Farmanbardar and Vaheed Zamani Anari, is arbitrary, being in contravention of articles 9, 10 and 18 of the Universal Declaration of Human Rights and articles 9, 14 and 18 of the International Covenant on Civil and Political Rights, to which the Islamic Republic of Iran is a State party, and falls under categories II and III, applicable to the consideration of cases submitted to the Working Group.

21. Consequent upon this Opinion, the Working Group requests the Government to take the necessary steps to remedy the situation of these persons in order to bring it into conformity with the provisions enshrined in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

22. The Working Group reiterates to the Government its request to receive an improved cooperation through timely responses to the allegations which are transmitted to it.

Adopted on 24 November 2008

**OPINION No. 40/2008 (YEMEN)**

**Communication addressed to the Government on 11 June 2008.**

**Concerning Mr. Abdeladhim Ali Abdeljalil Al-Hattar.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group appreciates that the Government has provided it with its reply to the allegations transmitted to it.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The case was reported to the Working Group as follows: Mr. Abdeladhim Ali Abdeljalil Al-Hattar (hereafter Mr. Al-Hattar), a citizen of Yemen born in 1982 and a resident of Sanaa, is an Imam at the Al-Haramayn Mosque, in Al-Asbahi, Sanaa. On 14 December 2007, he was arrested at the mosque by agents of the al-Amn al-Siyassi, the Political Security Services, and taken to an undisclosed location. No arrest warrant was shown to him, nor was he informed of the reasons and legal basis for his arrest.
5. Mr. al-Hattar was held in incommunicado detention in police facilities for the first three months since his arrest. He remains in detention without having been formally charged with an offence; without having received any information on the proceedings initiated against him or on the legal basis of his detention; without access to a lawyer, and without having had the possibility to challenge the legality of his detention before a judicial or other authority. Mr. Al-

Hattar's parents have appealed to the authorities for their son's release but have not received any reply.

6. The source adds that the Constitution of Yemen stipulates that any person accused of a penal offence must be brought before a judge within 24 hours of his arrest. Article 73 of the Criminal Procedure Code of Yemen (Law No. 31 of 1994) establishes that everyone who is arrested must be immediately informed of the reasons for his arrest; must be shown the arrest warrant; must be allowed to contact any person he wishes to inform of the arrest and must be allowed to contact a lawyer. According to the source, none of these guarantees has been respected in Mr. Al-Hattar's case, his detention thus being devoid of any valid justification in Yemeni law.

7. In its response dated 19 November 2008, the Government reported that Mr. Al-Hattar is detained in Yemen due to his activities against law and security which have been categorized as terrorist acts. His detention is not arbitrary since this person is available; he has never been in situation of disappeared and is currently going through normal legal procedures.

8. The Working Group notes that the Government has not denied the main allegations from the source. This attitude from the Government of not refuting the allegations of the source implies a tacit acceptance of the veracity of them.

8. The Working Group consequently observes that Mr. Al-Hattar was arrested without a valid judicial arrest warrant; that he was held in incommunicado detention during three months; that the reasons for his detention were not notified to him. The Working Group also notes that Mr. Al-Hattar has never been brought before a judge and that he has not been formally charged with a concrete criminal offence attributed to him.

9. The Working Group further notes that Mr. Al-Hattar has not been allowed to consult a defence lawyer. He continues to be detained in the premises of the Political Security Services without the possibility to contest the lawfulness of his detention and without being brought before an independent and impartial tribunal.

10. In the light of the foregoing the Working Group renders the following Opinion:

The detention of Mr. Abdeljalil Abdeladhim Ali Al-Hattar is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group.

11. Consequent upon this Opinion, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Al-Hattar; to proceed with his immediate release or to bring him before an independent and impartial tribunal within the shorter delay in case there exists sufficient charges against him, in accordance with the principles and norms enshrined in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

Adopted on 24 November 2008

#### **OPINION No. 41/2008 (INDONESIA)**

**Communication addressed to the Government on 8 July 2008.**

**Concerning Messrs. Johan Teterisa; Ruben Saiya; Romanus Basteran; Daniel Malwauw; Fredi Akihary; Abraham Saiya; Jefta Saiya; Alexander Tanate; Yusup Sapakoli; Josias Sinay; Agustinus Abraham Apono; Piter Patiasina; Stevanus Tahapary; Jhordan Saiya; Daniel Akchary; Baree Manuputty; Izaak Saimima; Erw Samuel Lesnusa; Renol Ngarbinan; Soni Bonseran; Ferdinan Waas; Samuel Hendrik; Apner Litamahaputty; Philip Malwauw; Alex Malwauw; Marlon Pattiwael; Jhon Saranamual; Yacob Supusepa; Jhonatan Riri; Petrus Rahayaan;**

**Elias Sinay; Piter Latumahina; Johanes Apono; Domingus Salamena and Deni de Fretes.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, but has not received its comments.
5. The case concerns the arrests and detention of the following 35 persons: Johan Teterisa, aged 46, a school teacher; Ruben Saiya; Romanus Basteran; Daniel Malwauw; Fredi Akihary; Abraham Saiya; Jefta Saiya; Alexander Tanate; Yusup Sapakoli; Josias Sinay; Agustinus Abraham Apono; Piter Patiasina; Stevanus Tahapary; Jhordan Saiya; Daniel Akchary; Baree Manuputty; Izaak Saimima; Erw Samual Lesnusa; Renol Ngarbinan; Soni Bonseran; Ferdinan Waas; Samual Hendrik; Apner Litamahaputty; Philip Malwauw; Alex Malwauw; Marlon Pattiwael; Jhon Saranamual; Yacob Supusepa; Jhonatan Riri; Petrus Rahayaan; Elias Sinay; Piter Latumahina; Johanes Apono; Domingus Salamena and Deni de Fretes.
6. It was reported that, on 29 June 2007, a group of Maluccan (Alifuru) dancers (ages from 19 to 49), despite tight security measures, performed a traditional Alifuru war dance in front of the President of the Republic in Ambon, capital of Maluku Province, during an official ceremony marking the National Family Day. The dance had not been programmed and began during a speech by Maluku Governor Karel Albert Ralahalu. It was performed as a sign of peaceful protest during the speech by the Governor, and when finished, a flag of the banned South

Moluccan Republic (RMS) was shown in front of the stage where the President was sitting. The protest, lasting less than five minutes, was recorded and televised nationally.

7. The Alifuru dancers and others were immediately arrested by agents of Detachment 88, the police counter-terrorism unit, and harshly interrogated, beaten and even tortured. On 1 July 2007, a military chief was quoted in the Indonesian media as saying that the incident had publicly embarrassed the National Intelligence Agency (BIN) for not anticipating the protest during the official ceremony. It was further reported that the Maluku provincial military authorities and police chief were removed.

8. In March 2008, trials against the Alifuru dancers began at the Ambon District Court. The trials were not open to the public. The accused persons were convicted of plotting against the State and treason, according to articles 106, 107 and 108 of the Penal Code. The Court imposed sentences ranging from 10 years to life imprisonment. Among those tried and sentenced, Mr. Johan Teterisa was condemned to life in prison. The sentence establishes that Mr. Teterisa, as a leader of the protest, had embarrassed the people of Indonesia in the eyes of the world. His sentence was particularly harsh because he had shown no remorse for his action. On 3 April 2008, Mr. Abraham Saiya was sentenced to 15 years in jail.

9. According to the source these persons did not receive legal assistance for their defence. Many of them have not asked for appeal for fear of reprisals and high sentences.

10. All these persons are imprisoned at Lembaga Tahanan Djaksa, situated in Waiheru on the island of Ambon. The source is concerned that they all continue to be subject to beatings and torture in their imprisonment. The source is also concerned that those with sentences of 10 years' imprisonment or more will be transferred to the Nusa Kambangan, an isolated island prison in Java, far from their homes and families.

11. The source concludes that these persons have been arrested, tried and sentenced for a non-violent protest. They only waved a flag and did not try to harm the President. The Court failed to consider that the actions of these persons were essentially non-violent. It was said that a

life sentence was uncalled for in an episode that did not endanger the lives of others. The sentences against these persons were severely disproportionate to their act of civil disobedience.

12. While the Criminal Procedure Code limits the period of pre-trial detention and authorizes a maximum length of 61 days in very specific circumstances, these persons were held more than nine months in pre-trial detention.

13. The Government, in its response, acknowledges the facts of the event as presented by the source. It states, however, that this non-violent protest constitutes a serious violation of the national laws, in particular Government Regulation 77/2007 (03/PIM-MRP/2008) on the basis that:

(a) Prior permission was not sought by the dancers;<sup>5</sup>

(b) The act of dancing and unfurling the RMS flag constituted a display of separatist symbols criminalized under the aforementioned regulations;<sup>6</sup>

(c) The individuals, by participating in the dance and unfurling the flag, posed a threat to national security falling within the definition of “makar” or rebellion; and

(d) The act was a national embarrassment since it was in the presence of the President of the Republic marking an important Indonesian national event i.e., the 14th National Family Day (Harganas).

14. The Government also makes reference to constitutional and statutory provisions protecting freedom of opinion and expression. This right however can not be used in a manner which is detrimental to the State Constitution and territorial integrity of Indonesia.<sup>7</sup>

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<sup>5</sup> Permission has to be sought under chapter 510 of the Criminal Code.

<sup>6</sup> Article 6 of Regulation 77/2007 prohibits display of the RMS flag in Maluku. The persons faced rebellion charges under articles 106-110 of the Criminal Code.

<sup>7</sup> Law No. 9 of 1998 on Freedom of Opinion in the Public Sphere; Law no. 40 of 1999 stipulating freedom of the press.

15. The Working Group has accorded due consideration to allegations by the source as well as the response of the Government and believes this to be a case of arbitrary detention falling within categories II and III outlined above on the following grounds:

16. By all accounts, the act of dancing and unfurling the RMS flag in a public meeting was conducted in a non-violent manner and lasted no more than five minutes. It was an expression of views and opinions covered under national and international laws. However, these acts of expression came into conflict with a domestic law i.e., Regulation 77/2007. An implicit hierarchy of rights/laws was thus created wherein the right to freedom of expression became subservient to the right to be protected from national disintegration. The acts of dancing and unfurling of the RMS flag was interpreted by the Government as amounting to a threat to national security and an act of treason going beyond the right to freedom of speech and expression. Judges failed to consider that these actions were non-violent.

17. The Working Group has in its work reiterated the principle that nationalist assertions through peaceful and non-violent means, such as a dance as in the instant case, which falls within the freedom of expression, is protected under the international human rights instruments, in particular the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights and for which the individual or individuals concerned, ought not to be held criminally liable by the State (see, for instance, Working Group's Opinions 28/2000 at E/CN.4/2001/14/Add.1 at 134; Opinion 7/2001 at E/CN.4/2002/77/Add.1 at 50 and Opinion 13/2003 at E/CN.4/2004/3/Add.1 at 71).

18. Whilst there does exist a law addressing offences amounting to treason which was invoked in the instant cases, the Working Group is of the view that a critical freedom of expression that is peaceful, constitutes an internationally recognised right under legal obligations accepted by Indonesia. To classify these as treason attracting prolonged detention and even life imprisonment, and responding by the counter terrorist detachment of the State, violates the above cited rights. Recalling an annual report of the Working Group, this constitutes a case of 'over-incarceration':

“61. . . .The Working Group is fully cognizant of the fact that States enjoy a wide margin of discretion in the choice of their penal policies, e.g. in deciding whether the public interest is best served by a “tough on crime” approach or rather by legislation favouring measures that are alternatives to detention, conditional sentences and early release on parole. The Working Group also recognizes that the imposition of a long term of imprisonment for an offence which in another country would have received only a light or conditional sentence cannot be taken as arbitrary, in the sense of a case falling into the categories used by the Working Group when considering individual communications.

62. The Working Group is, however, not entirely indifferent to the sentencing policies of States. Article 9 of the International Covenant on Civil and Political Rights starts with the fundamental principle that “Everyone has the right to liberty and security of person”. Regional human rights agreements enshrine the same principle.<sup>7</sup>

63. The Working Group takes the view that this principle not only means that nobody shall be deprived of his or her liberty in violation of the law or as a result of the exercise of a fundamental right, but that it first of all requires that States should have recourse to deprivation of liberty only insofar as it is necessary to meet a pressing societal need, and in a manner proportionate to that need. (E/CN.4/2006/7)”-

19. Many of the persons in the present case were held in pretrial detention for periods well over the maximum of 61 days permitted only in very specific circumstances under the Criminal Procedure Code. The Government in its response admits as much by stating that: “Since then, many of them have been remanded into custody at the Polros Ambon, Maluku and the Tantui Ambon, Maluku. Long after their arrest, the normal proceedings were followed”.<sup>8</sup>

20. The detained persons have not received a fair and open trial; neither have they had access to legal counsel. Right to a fair trial both under national and international law is a basic human

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<sup>8</sup> At p. 2, response of the Government of Indonesia communicated on 21 October 2008 via the Permanent Mission to the United Nations Office at Geneva.

right and impacts on the question of whether a detained person has been held in arbitrary detention. The Government has not responded with any explanation in this regard and not refuted the allegation by the source. The presumption made by the Working Group is therefore that the trials fall below the minimum standards of a fair trial.

21. It is pertinent to note here that, in the past, the Working Group has been seized of similar cases regarding Maluku nationalists asserting their right to expression of their beliefs and opinions (see Opinion No. 11/1999, E/CN.4/2000/4/Add.1) and where it has rendered its Opinion regarding the arbitrariness of detention under category II. The cases in hand are recent examples that arrest and detention continue to persist and prevail without recourse to a fair and free trial, equality before law and equal protection of the law, as other protestors involved in similar acts of demonstration would not have arguably been meted out similar treatment.

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

The detention of Messrs. Johan Teterisa; Ruben Saiya; Romanus Basteran; Daniel Malwauw; Fredi Akihary; Abraham Saiya; Jefta Saiya; Alexander Tanate; Yusup Sapakoli; Josias Sinay; Agustinus Abraham Apono; Piter Patiasina; Stevanus Tahapary; Jhordan Saiya; Daniel Akchary; Baree Manuputty; Izaak Saimima; Erw Samual Lesnusa; Renol Ngarbinan; Soni Bonseran; Ferdinan Waas; Samual Hendrik; Apner Litamahaputty; Philip Malwauw; Alex Malwauw; Marlon Pattiwael; Jhon Saranamual; Yacob Supusepa; Jhonatan Riri; Petrus Rahayaan; Elias Sinay; Piter Latumahina; Johanes Apono; Domingus Salamena and Deni de Fretes is arbitrary, being in contravention of articles 7, 9, 10, 18, 19 and 20 of the Universal Declaration on Human Rights, as well as articles 9, 14, 18, 19, 21, 26 and 27 of the International Covenant on Civil and Political Rights, falling within category II and III of the categories applicable to the consideration of cases submitted to the Working Group.

23. Accordingly, the Working Group calls upon the Government to release the detained persons forthwith; to give serious consideration to the domestic laws on treason and bring these into conformity with the country's international human rights law obligations.

Adopted on 25 November 2008

**OPINION No. 42/2008 (EGYPT)**

**Communication addressed to the Government on 30 May 2008.**

**Concerning Messrs. A, B, C, and D (Full names were transmitted to the Government but are not published at source's request).**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. According to the source, Messrs. A, B, C, and D were arrested on 20 November 2007 at the home of Mr. A in Agouza. An arrest warrant had only been issued against Mr. A. Their arrests were part of a crackdown on HIV-positive suspects.
5. The four men were charged with homosexual conduct and convicted by the Agouza Court of Misdemeanours (case file No. 26073/2007) to one year of imprisonment each on 13 January 2008 pursuant to article 9 (c) of Law 10/1961, which makes the “habitual practice of debauchery (*fujur*)” a crime. In addition, Mr. A was charged with “administering a house for debauchery” and the other three with “exploitation of the debauchery of others”. The Agouza Court of Misdemeanours applied the underlying criminal provisions as to include and

incriminate consensual homosexual conduct. The Agouza Appellate Court of Misdemeanours rejected the four men's appeals on 2 February 2008 and upheld their prison sentences.

6. Messrs. A, C, and D are currently imprisoned at Al Qota Prison, Giza. Mr. B was being held chained to his bed 23 hours a day at Imbaba Fevers Hospital in Cairo until his sentence was upheld on 2 February 2008. It is believed that he was to be transferred to the hospital at Al Qota Prison; however, his current place of detention could not be established.

7. The source alleges that the convictions were not based on any evidence except for coerced and repudiated statements, whose contents the men were not allowed to read, which were taken from them at the Ministry of Interior's Morality Police Department. No witnesses were heard. All men pleaded not guilty to the charges and denied before the prosecution to having ever engaged in homosexual conduct.

8. According to the arrest report the four men were fully dressed and not engaging in any illegal acts at the time of the arrest in the apartment of Mr. A. The report further stated that the arrests were based on "secret investigations" conducted by the arresting officer. However, the nature or the outcome of these investigations has never been presented to the Prosecutor, who has not asked for them, either. Motions by the defence attorneys before the Agouza Court of Misdemeanours, including a request that the judge order the Police to produce in court the contents of the report on the "secret investigations" and that the arresting officer be summoned for cross-examination, were rejected.

9. The source alleges that, after their arrests, Mr. B was ill-treated by police officers at Al-Agouza police station by being beaten across the head several times and all four were forced to stand in a painful position for three hours with their arms lifted into the air. They were not provided with any food, water or a blanket during the first four days of detention. The authorities also conducted HIV tests without their consent. When the prosecutor was informed about the positive HIV test results of Mr. B, he reportedly uttered the following: "People like you should be burned alive. You do not deserve to live".

10. It was reported that the arrest of the above-mentioned persons might solely be connected to that fact that they were present in an apartment, which had been formerly rented by Mr. E and Mr. F. This assertion is supported by the fact that an arrest warrant had reportedly been issued against Mr. A in connection with the investigation related to case No. 16087/2007 and by reports that the apartment had been placed under police surveillance after the arrests carried out in relation to this case.

11. The source argues that the arrest, detention and conviction of the four above-mentioned men violated their right to a fair trial and has led to arbitrary detention. Criminalizing adult consensual homosexual conduct is in violation of Egypt's obligations undertaken under applicable international human rights law, and particularly the discriminatory application of article 9 (c) of Law 10/1961 in such cases on the basis of assumed or declared HIV status; forced HIV tests; ill-treatment in detention; the conduct of trials driven by prejudice and the convictions based on no evidence, which violate the norms on prohibition of arbitrary deprivation of liberty.

12. These allegations were transmitted to the Government. The Government in its response, whilst acknowledging the detention and subsequent trial and sentencing of the four detainees, refutes the allegations presented by the source. It states that at all stages of the arrest, detention, trial and sentencing, legal processes and procedures were followed and there was no complaint of irregularity or violation of due process. These persons were arrested pursuant to a warrant issued by the Department of Public Prosecutions, following surveillance of the premises which Mr. A was reported to be running for the purposes of facilitating debauchery. Article 9 (c) of Anti-Prostitution Decree Law No. 10/1961 criminalizes prostitution, meaning the indiscriminate commission of lewd and obscene acts, without making distinction between the perpetrators of such acts. It explains that in so doing the State is acting within the margin of appreciation afforded to it under international law to protect public morals and safety.

13. The Government then proceeds to justify mandatory HIV testing as a measure of the Ministry of Health for safeguarding the health and safety of all citizens and to provide adequate medical coverage, including dispensing free antiretroviral treatment. HIV testing was made a

requirement for all Egyptian citizens in 2004 in order to counter any discrimination against those undergoing testing for the disease.

14. According to the Government, the fact that both prostitution (when the person committing the offence is a woman) and debauchery (when the person is a man) are designated crimes under Egyptian penal law does not constitute discrimination on grounds of sex. This is a matter of “necessity” to protect morals in Egypt with a view to preserving the cohesiveness of society and public order. The trial judge handed down minimum sentences to the individuals concerned, which shows that he did not deal with them in an arbitrary manner.

15. The Working Group has considered the allegations received from the source as well as the information provided by the Government and believes it to be in a position to render an Opinion.

16. The Working Group is of the view that circumstances of arrest, detention, trial and sentence as well as conditions of detention form an integral component of its determination of whether a detention is arbitrary or not. In the instant case, the Government has not responded to the query raised by the source that the arrests may have been the result of mistaken facts and that it might have been the previous tenants, Messrs. E and F, whose residence was under surveillance by the police. Coincidental linkages between persons appear to have been the rationale for detaining these four persons. This is an important material fact overlooked in the case and which no doubt required clarification.

17. The Government did not comment on or refute a critical allegation that a detainee was chained to his hospital bed for months and only released from their chains on an order of the Ministry of the Interior on 25 February 2008. The Working Group considers that chaining to a bed a detainee has no legal basis in national or international law and cannot form part of any regime of detention.

18. The wide discretion given to the Morality Police, charged with oversight “moral” or “immoral” behaviour and to determine what constitutes immoral actions, is a cause of concern to

the Working Group in its work on determining the arbitrariness or otherwise of a person's detention. This wide discretion given to the Police to determine what constitutes "immoral" actions, does not bode well for basic human rights such as right to privacy, right to own liberty, freedom of opinion and freedom of expression.

19. It is apparent from the information received that homosexual orientation and behaviour is at a disadvantage in this regard and the subject of a number of factually incorrect assumptions. Thus homosexuality is perceived as necessarily leading to HIV/AIDS as a consequence of same sex relationships. Thus, the detainee who informed the police officer that he was HIV-positive was immediately considered homosexual, declared immoral and criminalized with debauchery for the sole reason of being HIV-positive. All persons arrested subsequent to the interrogation of this person were also labelled as homosexuals, subjected to contemptuous treatment by the law-enforcement agents and forcibly required to undergo HIV tests.

20. The Working Group is unable to agree with the Government's view that these tests are in the best interests of Egyptian citizens, especially in view of the fact that a huge stigma is attached to HIV/AIDS-positive results and when, seen in conjunction with homosexuality, it results sufficient to marginalize and victimize a person for life. The investigation and prosecution procedures as well as the treatment meted out to such detainees, is one of multiple discriminations and falls far short of equality before law, equal protection of the law and fair trial.

21. The Working Group further notes that due process of legal standards as well as safeguards of a fair trial were not met in the instant case as the detainees were not given a fair hearing. Their ill-treatment, beatings, denial of food and bedding were not investigated by the authorities nor have these allegations been explicitly refuted or addressed vigorously in the Government's response.

22. It is to be noted that in a similar case in Egypt in 2002, the so-called "Queen Boat" case, the Working Group found that the detention of more than 50 men, who were arrested after a police raid on a night club on a boat and prosecuted on the grounds of their sexual orientation,

constituted arbitrary detention and contravened article 2 of the Universal Declaration on Human Rights and articles 2 and 26 of the International Covenant on Civil and Political Rights (Opinion No. 7/2002, E/CN.4/2003/8/Add.1).

23. While the Working Group respects national laws and health related laws to safeguard the interest of citizens, the right to privacy of medical information and non-divulgence of sexual orientation without the informed consent of the individual concerned remains a basic right accorded by international human rights law. Thus, the Working Group believes that presenting the HIV-positive status of detainees as supportive information concerning their sexual orientation or their homosexuality contributes to the arbitrariness of their detention since police officers and other law enforcing personnel have stated that these persons are a threat to the safety of others and should not be freed on the streets.

24. It is a well established principle of international law that the provisions on public morals and public health and safety, in order to restricting a right, may be invoked where undesirable and controversial acts are being committed in the public domain and likely to be disruptive of the public order. There is no suggestion that this was the predicament in the instant case. Finally, as a matter of justice and equity, matters of such personal and societal sensitivity which if known publicly would cause ill repute and possible exclusion from society and loss of face for the person and his/her family, caution and balance is required.

25. The Working Group considers that these four persons were subjected to violations of their fundamental rights during their arrests, investigations and trial proceedings and also suffered discrimination on account of their sexual orientation and HIV/AIDS status. Because Egyptian law does not expressly prohibit homosexuality, they were tried for debauchery. The vilification and persecution of persons for their sexuality violate the principles of international human rights law. The right to freedom from discrimination on the basis of sex includes sexual orientation.

26. The Working Group believes that the use of article 9 (c) of the Anti-Prostitution Decree Law No. 10/1961 in these cases to detain people on the basis of their declared HIV status, and to

test them without their consent for HIV infection, violates human rights protections to individual privacy and personal autonomy. Furthermore, the detention of persons on the basis of their HIV status violates the principles agreed to in 2001 by Member States in the Declaration of Commitment on HIV/AIDS.

27. The Working Group also considers that the interdiction of all discrimination based on sex, set forth in international human rights law, is to be understood as an interdiction to discriminate someone on the grounds of homosexuality.

28. In light of the above, the Working Group renders the following Opinion:

The detention of Messrs. A, B, C, and D constitutes arbitrary detention according to categories II and III of the categories applied by the Working Group in its consideration of cases. It is in violation of articles 2, 9, and 10 of the Universal Declaration on Human Rights and articles 2, 9, 14, and 26 of the International Covenant on Civil and Political Rights.

29. Consequently, the Working Group requires the immediate release of these persons. It further calls upon the Government to end arbitrary arrests based on HIV status; and to study the possibility of reconsidering the Anti-Prostitution Decree Law and its implementation in practice in order to bring them in conformity with the international human rights obligations undertaken by the Arab Republic of Egypt as a State party to International Covenant on Civil and Political Rights.

Adopted on 25 November 2008

**OPINION No. 43/2008 (MYANMAR)**

**Communication addressed to the Government on 23 July 2008.**

**Concerning Messrs. Min Zayar (Aung Myin); Kyaw Min Yu (Ko Jimmy); Min Ko Naing (Paw Oo Tun) and Pyone Cho (Mtay Win Aung).**

**The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.
5. The case summarized below was reported by the source to the Working Group on Arbitrary Detention as follows:

(a) Mr. Min Zayar, named at birth Aung Myin, born on 16 June 1958, is a citizen of Myanmar, usually residing at South Dagon Township, Rangoon, and a member of the “88 Generation Students Group” (hereinafter “the 88 Generation”). He was arrested on 21 August 2007 at his home by military officers. Min Zayar was taken to the Insein Prison in Rangoon, where he is detained incommunicado. Min Zayar has severe spinal problems caused by torture during previous incarcerations and he also suffers from acute high blood pressure;

(b) Mr. Kyaw Min Yu, also known as “Ko Jimmy”, born on 13 February 1969, a citizen of Myanmar, usually residing at Hlaing Township, Ba Yin Naung Road, Rangoon, is a member of “the 88 Generation” movement. It was reported that he was arrested at his home on 22 August 2007 by military officers. He was taken to the Insein Prison in

Rangoon, where he is held in incommunicado detention. Kyaw Min Yu had already been imprisoned between 1989 and 2005 and tortured in the past;

(c) Mr. Min Ko Naing, named at birth as Paw Oo Tun, born on 18 October 1962, citizen of Myanmar, usually addressed at Thingangyun Township, Rangoon, and a member of “the 88 Generation”, was arrested on 22 August 2007 at his home by military officers. He is currently being held incommunicado at the Insein Prison in Rangoon. Mr. Min Ko Naing has been awarded several international human rights awards in recognition of his peaceful work for fundamental freedoms. He had been imprisoned before from March 1989 until November 2004 and again between September 2006 and January 2007. He was tortured in the past and held in solitary confinement for most if not all of his previous terms of imprisonment. He was reported on 16 October 2007 to have had to be hospitalized within Insein Prison due to unspecified injuries. There are serious concerns as to his health;

(d) Mr. Pyone Cho, named at birth Htay Aung, citizen of Myanmar, residing at 82 Sanpyamaung House, Tamwe Township, Rangoon, also a member of “the 88 Generation” movement, was arrested on 22 August 2007 at his home by military officers. He was taken to the Insein Prison in Rangoon, where he is held in incommunicado detention. Pyone Cho has been imprisoned intermittently since 1989 for a total of more than 15 years and was tortured in the past. He developed cataracts during previous detentions, as a result of which he has become almost completely blind. He was put on a diet of rice and salt causing severe malnutrition with the consequence of long-term physical frailty.

6. According to the source, these four persons were arrested and are being detained for being members of “the 88 Generation” students group, a movement campaigning peacefully for national dialogue in Myanmar. They have been working selflessly and peacefully for national reconciliation, the substantiation of democracy and the emergence of a long-term political solution. They were arrested to prevent protests and in order to deter dissent, following a 500 per cent fuel increase implemented on 15 August 2007. Accordingly, their arrest and detention are

entirely politically motivated. Their detention is part of a targeted strategy by the authorities against “the 88 Generation” movement as a group.

7. The source adds that the arrest and continued detention of these persons are in breach of several articles of the Universal Declaration of Human Rights: article 13, which guarantees freedom of movement and residence, is violated because their detention is motivated by the desire to prevent them from travelling within the country to meet other 88 Generation members and ordinary citizens; article 18, protecting freedom of thought and conscience, is breached as their detention is a reaction to their belief in dialogue and democratic values; article 19 on freedom of opinion and expression is encroached upon because their detention is maintained to prevent them from expressing their views, from criticizing authorities and from imparting their opinions to others; article 21, guaranteeing the right to take part in the government of one’s country, is breached because their detention is and was to ensure that they had no influence on and could have no role in political matters.

8. All individuals have been held in incommunicado detention. They have had no access to a lawyer and they have not been given any entitlement to the assistance of counsel. They have not been permitted to see their families; the latter were not informed about their whereabouts and have not been able to contact them. In addition, these persons have not enjoyed their right to access to an independent and impartial judicial tribunal. They have not had a prompt hearing represented by counsel to secure their release or had any opportunity to make an application through counsel to challenge the lawfulness of their detention.

9. These persons have not been provided any opportunity to contact or correspond with the outside world. They have not been allowed to read newspapers or other information material. The source adds that these persons have been subjected to inhuman and degrading treatment, that they have not had access to adequate medical facilities or treatment and that they have not been afforded any opportunity to complain about the conditions of their detention.

10. Consequently, the circumstances of their arrests and detention are in wholesale breach of the Universal Declaration of Human Rights, and the Body of Principles for the Protection of All

Persons Under Any Form of Detention or Imprisonment as enshrined in General Assembly resolution 43/173, in particular Principles 1, 4, 6, 10, 11, 12, 13, 15, 16, 17, 18, 19, 24, 25, 28, 32 and 33.

11. The source further reports that Win Shwe, a member of the National League for Democracy who was arrested on 26 September 2007, has died in custody. His death raises similar concerns for other detainees, including the above-mentioned persons.

12. The source concludes that the detention of the above-mentioned four persons is arbitrary, contrary to the precepts of international law and in violation of core human rights norms. They have been detained for the sole purpose of repressing free speech, free conscience and free assembly.

13. In its response to the allegations of the source, the Government provided the following information:

(a) Mr. Min Zayar (Aung Myin); Mr. Kyaw Min Yu (Ko Jimmy); Mr. Min Ko Naing (Paw Oo Tun) and Mr. Pyone Cho (Htay Win Aung) were arrested for destruction of law and order and peace and stability of the community; managing to create civil unrest; delivering statements; distributing defiant letters and exhorting to destruct the works carried out by the National Convention for striving a firm State Constitution; accepting illegal money from abroad; forming unlawful organizations; printing documents and declarations illegally without applying registration; violating the Electronic Communication Law, by posting anti-government information and declarations through the Internet websites; making confrontational attempts toward the Government and communicating with anti-organizations which were declared as terrorist groups;

(b) Actions are being taken against them under the following laws:

- Section 6 of the Law on Forming Organizations;
- Section 17/20 of the 1962 Printers and Publishers Registration Act;

- Section 32 (B) of the Television and Video Law;
- Section 17 (1) of the 1908 Unlawful Associations Law;
- Section 130-B of the Penal Code;
- Section 4 of the Law Protecting the Peaceful and Systematic Transfer of the Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Oppositions;
- Section 124-A of the Penal Code;
- Section 33 (A) of the Electronic Communication Law;
- Section 24 (1) of the Foreign Exchange Regulation Act;

(c) The Government further informs that legal proceedings are under way to prosecute Mr. Min Zayar, Mr. Kyaw Min Yu, Mr. Min Ko Naing and Mr. Pyone Cho as well as to those who are in connection with the members of “the 88 Generation Students” movement.

14. In its comments to the Government’s observations, the source reiterates that the detention of the above mentioned persons is unlawful and arbitrary. It states that the purported charges were put forward by the Government between 27 August and 2 September 2008, over a year after the arrest of the four above-mentioned persons on 21/22 August 2007. Since having been formally charged, their regime of detention has also changed. Their whereabouts after their arrests have become known and family visits are permitted from time to time. All four have also had some access to legal representation, albeit improperly limited and controlled by Government authorities.

15. On or around 24 October 2008, the military-appointed judge charged Mr. Min Ko Niang and Mr. Pyone Cho with contempt of court for requesting their family members to be permitted to attend the trial. Mr. Min Ko Naing and Mr. Pyone Cho have been sentenced by the Northern District Court conducting the trial on the premises of Insein Prison to imprisonment of six months for contempt of court in response to their verbal appeal to the judge for free and fair

justice. The source informs that the defence lawyers were themselves arrested and detained in connection with their activities as counsel for the defendants.

16. On 31 October 2008, Mr. Min Ko Naing and Mr. Pyone Cho were transferred to Maubin Prison in the Irrawaddy Delta region. Their principal cases were then heard by a Special Maubin District Court in the absence of defence counsel, and were each sentenced to 65 years of imprisonment on five counts of the 21-count indictment on 15 November 2008.

17. On 11 November 2008, the Rangoon District Court sentenced Mr. Min Zayar and Mr. Kyaw Min Yu on five counts of the indictment to 65 years imprisonment each with hard labour. They were sentenced to 15 years each for four counts under Section 33 (A) of the Electronic Communications Law and five years for one count under Section 6 of the Law on Forming Organizations. The trial was conducted behind closed doors on the premises of the Insein Prison by a biased court without legal representation. The source anticipates that they will be given additional sentences when convicted of the remaining 16 counts of the indictment. It reports that 12 other members of the “88 Generation” movement were also sentenced to 65 years of imprisonment at the same time with the same remaining charges lodged against them.

18. The source concludes that the charges brought against the defendants result purely from the non-violent exercise of their right and freedoms guaranteed by the Universal Declaration of Human Rights. They are solely connected to them calling for dialogue between the National League for Democracy and the military Government of Myanmar; collecting signatures for a petition; dressing in white and asking others to dress in white clothes; initiating a prayer campaign in which people of all religions were asked to pray for a peaceful resolution to Myanmar’s political problems; and encouraging citizens to write letters explaining their plight to the military authorities.

19. Mr. Min Zayar; Mr. Pyone Cho and Mr. Min Ko Naing were already the subject of a joint urgent appeal sent by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, together with other Special Procedures mandate holders of the Human Rights Council, on 6 October 2006, to which the Government of Myanmar responded on 8 December 2006. Another

urgent appeal sent on 28 August 2007 by the Chairperson-Rapporteur of the Working Group and other Special Rapporteurs, concerning Mr. Min Ko Naing, has remained unanswered by the Government.

20. The Working Group on Arbitrary Detention believes that it is in a position to provide its opinion on the deprivation of liberty of Messrs. Min Zayar; Kyaw Min Yu; Min Ko Naing and Pyone Cho, taking into consideration all information received from the source and the Government.

21. The Working Group would like to bring to the attention of the Government the provisions of article 19 of the Universal Declaration of Human Rights which establishes that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. The Working Group would also like to stress the fundamental character of the right to freedom of association, as recognized in article 20, paragraph 1, of the Universal Declaration of Human Rights, which provides that “Everyone has the right to freedom of peaceful assembly and association”. Article 21, paragraph 1, of the Universal Declaration of Human Rights provides: “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives”.

22. The Working Group considers that nothing in the original submission indicates that the entirely non-violent activities of these four members of the “88 Generation” movement described by the source would not be protected articles 19, 20 and 21 of the Universal Declaration of Human Rights, all of which are at the core of political rights in a free and democratic society based on the rule of law. The Working Group has no reason to doubt that the harsh prison sentences all four defendants have received are in reprisal for their peaceful political activities and membership in opposition movements.

23. The Government, in its response, satisfies itself merely with referring to existing domestic laws that have allegedly been violated by the defendants, without supporting this assertion by genuine facts. It stated that the four individuals “were arrested for destruction of law

and order and peace and stability of the community; managing to create civil unrest; delivering statements; distributing defiant letters and exhorting to destruct the works carried out by the National Convention for striving a firm State Constitution; ... forming unlawful organizations; printing documents and declarations illegally without applying registration; violating the Electronic Law by posting anti-Government information and declarations through the Internet websites; [and] making confrontational attempts toward the Government.”. The sanctioning, let alone criminal sanctioning, of any of these activities, can never stand the test against the rights and freedoms as contained in the Universal Declaration of Human Rights. No one has to ask for permission for exercising, alone or collectively, orally or in print, his or her right to freedom of expression, even if the views expressed are not those of the Government of the day. As the Working Group has previously held in its Opinion No. 25/2000 (Union of Myanmar): “Peaceful expression of opposition to any regime cannot give rise to arbitrary arrest” (E/CN.4/2001/14/Add.1, para. 12).

24. Moreover, the Government mentions that these persons were arrested for communicating with “anti-organizations which were declared as terrorist groups”; and that they accepted “illegal money from abroad”, without indicating which “anti-organizations” are meant or by which authority they were declared as terrorist groups or what the source of the funding is and why it is illegal to accept such financial resources. This means that the arrest and detention of these persons can simply be qualified as being politically motivated for their membership in the “88 Generation” movement, targeting their attempts to promote democracy in the country. The Working Group notes that all defendants were arrested at the same time on 21 and 22 August 2007. The Working Group concludes that the arrest, detention and imprisonment of Messrs. Min Zayar; Kyaw Min Yu; Min Ko Naing and Pyone Cho is arbitrary in terms of category II of the categories applied for its consideration of the cases submitted to it, without having to deal with the question for which specific counts each of them have eventually been convicted.

25. The Working Group would further like to draw the attention of the Government the following provisions of the Universal Declaration of Human Rights:

(a) Article 10, which guarantees the right of the above-mentioned persons to fair proceedings before an independent and impartial tribunal; and

(b) Article 11, paragraph 1, which stipulates that “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense”.

26. All of the defendants were by military officers without any arrest warrant. All of them were held incommunicado without access to, even knowledge of, their families and lawyers for prolonged periods of time. None of them had the opportunity to make an application to challenge the lawfulness of their detention. They were charged and brought before courts only after more than a year of detention without trial. Their trials were closed and conducted inside the Insein Prison compound or at a special court in Maubin in the absence of their defence counsels. Such violations are already of such gravity as to confer upon their detention and imprisonment an arbitrary character. The violations of the right to a fair trial, however, assume a grotesque character when considering that the defendants’ lawyers were also arrested and detained in connection with their activities as defence counsel and that they were charged and sentenced for contempt of court merely for requesting their families to be allowed to attend their trial and for asking for free and fair justice in court.

27. In the light of the foregoing the Working Group renders the following Opinion:

The detention of Messrs. Min Zayar (Aung Myin); Kyaw Min Yu (Ko Jimmy); Min Ko Naing (Paw Oo Tun) and Pyone Cho (Mtay Win Aung) is arbitrary, being in contravention of articles 9, 10, 11, 19, 20, and 21 of the Universal Declaration of Human Rights and falling within Categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

28. Consequent upon the Opinion rendered the Working Group requests the Government to take the necessary steps to remedy the situation of the above-mentioned persons in order to bring it into conformity with the provisions and principles enshrined in the Universal Declaration of

Human Rights. Under the circumstances of the case, the Working Group considers that their prompt release would be the only appropriate remedy. The Working Group further recommends that the Government consider the possibility to become a State party at the International Covenant on Civil and Political Rights.

Adopted on 25 November 2008

**OPINION No. 44/2008 (MYANMAR)**

**Communication addressed to the Government on 30 June 2008.**

**Concerning Mr. U Ohn Than.**

**The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group regrets that the Government has not provided information concerning the allegations of the source during the 90-days term established in its methods of work.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The case summarized below was reported to the Working Group as follows: Mr. U Ohn Than (hereafter Mr. Than), a citizen of Myanmar, aged 61, son of U Tha Nu, an officer in the Forest Department, was arrested on 23 August 2007. On this date, sometime after 1 p.m., Mr. Than was taken from the street outside the former Embassy of the United States of America in Yangon, by a group of men in plain clothes. Mr. Than was born in Ngathinechaung Tsp, Irrawaddy Division. Graduated in Forestry from Rangoon University, he served as Deputy Manager under the State Timber Corporation (STC).

5. Mr. Than's arrest was made during a silent and solo protest where he expressed legitimate dissatisfaction about the dramatic hike in fuel prices. He appealed for United Nations intervention into the situation in Myanmar, requesting it to supervise free elections to set up a people's parliament. It was reported that Mr. Than had previously staged similar protests, most recently on 22 February and 25 April 2007.

6. Mr. Than was taken by a group of men in plain clothes, who did not identify themselves, and put into a vehicle. According to information received, at least two policemen claim to have been involved, Police Constable Bo Bo Soe, (Police ID La-211326, Kyauktada, Township Police) and Police Deputy Superintendent Thein Naing (Kyauktada Township Police). In addition, there were two others whom have identified themselves as working with the police and local councils under the "Swan-arshin", a group that has no public face in Myanmar or legal standing under the Criminal Procedure Code (CPC) with which to carry out arrests of this sort.

7. Mr. Than was taken to the Kyaikkasan Interrogation Camp, a special military facility, instead of to a police station as required under normal procedure and in violation of Section 59 of the CPC. This was done apparently with the authorization of the police officers concerned. Furthermore, Mr. Than was not held for a period of less than 24 hours, as required by Section 61 of the CPC.

8. Mr. Than was held in Kyaikkasan camp without reference to any law. A case was not filed against him in court until five months later. After his transfer to Insein Prison, he was placed in solitary confinement, banned from taking exercise and denied family visits for 160 days. On 30 January 2008, he was charged with sedition under Penal Code Law No. 124/a before Yangon Western District Court (Separate Courthouse), on Felony No. 12/2008. On 2 April 2008, he was sentenced to life imprisonment for provoking disaffection towards the Government, with a fine of 1,000 Kyats and six months' additional imprisonment in case he failed to pay the fine. Since his sentence, he has been moved three times and is now being held in Khamti prison in Sagaing Division in north-western Myanmar.

9. During his trial in closed court, Mr. Than was unable to call witnesses to aid in his defence; this according to source, being in violation to Section 2(e) of the Judiciary Law of 2000, and of Section 352 of the CPC. The only witnesses for the prosecution were Government officials and police, including the two persons who identified themselves before the court as members of the “Swan-arshin” groups operating with the police under orders of township councils. There were no independent witnesses.

10. Only five of the witnesses were related to the 23 August 2007 protest, and they were the following persons: (a) Police Superintendent Soe Naing (Police ID No. La-147569, Kyauktada Township Police); (b) Police Constable Bo Bo Soe (Police ID La-211326, Kyauktada Township Police); (c) Police Deputy Superintendent Thein Naing Oo, Papedan Township Police; (d) U Nyi Lin Hpyoe, real estate agent (National ID No. 12KaTaTa (Naing) 008822; Swan-arshin member); (e) U Khin Maung Myint, trader, (National ID No. ERGM-022560, Swan-arshin member). Other witnesses were called to testify in relation to the two other protests earlier in the year at which Mr. Than had been present but not arrested or charged.

11. The source adds that Mr. Than has been suffering from hypertension and kidney problems and needs urgent medical attention. In prison, he has contracted cerebral malaria, which if untreated, is almost always fatal. His cerebral malaria is said to be at an advanced stage. In an attempt to cover up the critical state of his health, prison authorities reportedly wrote to Mr. Than’s family in his name, saying the he no longer needed visitors and requesting that they transfer money to him instead.

12. The source adds that this was the sixth time Mr. Than was arrested, always due to his peaceful political activities. He has spent at least 14 years in jail in total. He was first imprisoned from 1988 to 1996. In 1988, he was sentenced to eight years in prison under the Emergency Provision Act Section 5(J). In 1997, he was again arrested and sentenced to seven years imprisonment for delivering a pamphlet entitled “A call for the fight for Burma’s human rights”. Mr. Than was released in 2003 and again arrested in 2004 for staging a solo protest outside the United Nations Development Programme compound. He was then condemned to two years’ imprisonment under Section 505(b). He was arrested again in February and April 2007.

13. The source concludes that the courts punished Mr. Than for exercising his right to freely express his opinion against the policies implemented by the Government. The court did not allow Mr. Than to be assisted by a defense lawyer or to call on independent expert witness to evaluate the legality of his detention.

14. The source concludes that Mr. Than's right to a fair trial was seriously violated. In addition, no process for review of his conviction has been authorized.

15. In its letter dated 30 June 2008, and in the note verbale dated 3 November 2008, the Working Group informed the Government about the Working Group's intention to consider the case of detention of Mr. U Ohn Than during its fifty-third session. No response from the Government was received during the 90-day term established by the Working Group's methods of work.

16. The Working Group considers it is in a position to provide an Opinion on the deprivation of liberty suffered by Mr. U Ohn Than.

17. The Working Group notes that Mr. Than was arrested by a group of men, most of whom were members of the government-linked paramilitary group "Swan-arshin". He was apprehended for staging a solo protest by holding a poster demanding a call for a free and fair election, under the direct supervision of the United Nations, for a people's parliament.

18. The Working Group further notes that Mr. Than was held incommunicado for 160 days. He was detained for carry out similar activities to those for which he had already spent more than 14 years in prison. The trial of Mr. Than was held in a closed session without any assistance of legal counsel or the hearing of independent witnesses. Most of the witnesses for his prosecution were persons who had participated in his apprehension. Mr. Than was unable to present witnesses and denied a defence lawyer. On 2 April 2008, he was convicted to life imprisonment. Mr. Than has no possibility for appeal. The Working Group considers that his trial was grossly unfair.

19. The Working Group further notes that Mr. Than is suffering from cerebral malaria in the remote Khamti prison, a disease which has a high fatality rate. If untreated, cerebral malaria is almost always fatal. His family has not been able to meet him. The source has suspicion that, in an attempt to cover up the critical state of his health, prison authorities do everything to not allow visits to him, including members of his family.

20. The Working Group considers that, in the case under consideration, several provisions of the international instruments relied upon by the Working Group in the examination of the cases brought to its attention have been violated.

21. In the light of the foregoing the Working Group expresses the following Opinion:

The detention of Mr. U Ohn Than is arbitrary, being in contradiction of articles 8, 9, 10, 11, 19 and 21 of the Universal Declaration of Human Rights and falls within categories II and III of the categories applicable to the consideration of the cases submitted to the Working Group.

22. The Working Group reminds the Government that under the United Nations Standard Minimum Rules for the Treatment of Prisoners, the authorities have a duty to provide the services of a qualified medical officer within the prison facilities; to transfer prisoners and detainees who require specialist treatment to specialized institutions or to civil hospitals; and to provide prisoners and detainees with adequate food of nutritional value adequate for health and strength.

23. Consequent upon this Opinion, the Working Group requests the Government to order the immediate and unconditional release of Mr. U Ohn Than so as to bring this situation into conformity with international human rights standards and principles.

24. Lastly, the Working Group further requests the Government to consider the possibility of becoming a State party to the International Covenant on Civil and Political Rights.

Adopted on 26 November 2008

**OPINION No. 45/2008 (INDIA)**

**Communication addressed to the Government on 27 August 2007.**

**Concerning Messrs. Manzoor Ahmad Waza; Nisar Ahmad Wani; Sh. Farooq Ahmad Kana; Mohammed Yousuf Mir; Mehraj-ud-Din Khanday; Nazir Ahmad Dar; Mohammed Younis Bhat; Umar Jan; Reyaz Ahmad Teeli and Abdul Qadeer.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. Despite their belated filing, the Working Group welcomes the cooperation of the Government, which has submitted information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Messrs. Manzoor Ahmad Waza, Nisar Ahmad Wani, Sh. Farooq Ahmad Kana, Mohammed Yousuf Mir, Mehraj-ud-Din Khanday (a minor), Nazir Ahmad Dar, Mohammed Younis Bhat, Umar Jan, Reyaz Ahmad Teeli, all Kashmiri, and Mr. Abdul Qadeer from Tajikistan, have all been taken into preventive detention at different, partly unknown, places pursuant to the provisions of the Jammu & Kashmir Public Safety Act 1978 (J&K PSA).
5. Mr. Manzoor Ahmad Waza, aged 29, usually residing at District Barmulla, was arrested without a warrant on 16 November 2005 in Barmulla, by Indian Army officers in collaboration with agents from the Special Operations Group, on charges under Section 307 of the Ranbeer

Penal Code (RPC) and Section 7/27 of the Indian Arms Act 1959 (IAA) (criminal case file FIR No. 283/05). Thereafter, he was handed over into the custody of the Police Station in Barmulla. Mr. Waza was detained on 6 March 2006 pursuant to a preventive detention order of the District Magistrate in Barmulla invoking the provisions the J&K PSA on grounds that his activities were allegedly prejudicial to the security of the State. He is currently being detained at an unknown place of detention under the custody of the Jammu Kashmir Police in Barmulla. A writ petition against the detention order passed by the District Magistrate is currently pending for adjudication before the High Court of Jammu & Kashmir at Srinagar.

6. Mr. Nisar Ahmad Wani, usually residing at District Anantnag, was arrested without a warrant on 14 September 2004 in Kelam, Kulgam, by officials from the Special Operations Group, for charges laid against him in terms of Sections 7/25 IAA and 4/5 of the Explosive Substance Act (criminal case file FIR No. 1205/04). He has been held in custody at an unknown place of detention by forces of the Jammu Kashmir Police Kulgam since 10 December 2005 under the authority of a preventive detention order of the District Magistrate of Anantnag. The order was passed invoking the provisions of the J&K PSA for reasons that the activities of Mr. Wani were allegedly prejudicial to the security of the State. The detention order is currently under challenge before the High Court of Jammu & Kashmir at Srinagar in a writ petition filed by the cousin of the detainee.

7. Sh. Farooq Ahmad Kana, aged 20 years, usually residing at District Barmulla, was arrested on 10 September 2005 in Shahbad Sopore by forces of the 112 BW Border Security Force (BSF) on charges under Section 7/25 IAA (criminal case file FIR No. 306/05). No arrest warrant was shown to him. Forces of the Jammu Kashmir Police held him for some days since 20 December 2005 at the Police Station in Sopore; thereafter he was transferred to a place of detention unknown to his relatives. The detention order was passed by the District Magistrate in Barmulla citing the J&K PSA for activities of the detainee, which were allegedly prejudicial to the security of the State. The detention order has been challenged before the Honorable High Court of Jammu & Kashmir at Srinagar on 25 February 2005.

8. Mr. Mohammed Yousuf Mir, usually residing at District Kupwara, was arrested without a

warrant on 14 December 2004 in Srinagar by police forces of the Counter-Insurgency Kashmir Unit (CIK) in Srinagar on charges laid under Sections 7/25 IAA, 2/3 E&IMCO, 120(b) RPC (criminal case file FIR No. 22/2004) and under Sections 2/3 E&IMCO, 153(a) 153(b), 120(b) RPC, and 7/25 IAA (criminal case file FIR No. 16/2004), the latter of which carrying imprisonment for life. Mr. Mir is currently detained at the Central Prison in Kotbalwal Jammu by the Jammu Kashmir Police.

9. The first detention order No. DMK/PSA/05 was passed by the District Magistrate in Kupwara on 8 January 2005, which was quashed by the High Court in Habeas Corpus Petition No. 29/05. On 14 December 2005, Mr. Mir was granted bail by the 2nd Additional District and Sessions Judge in case FIR No. 22/2004 and directions were given to the Superintendent of the Central Prison in Kotbalwal to release the detainee. Immediately after his release, Mr. Mir was apprehended by the officials from the Counter-Intelligence Jammu Unit (C.I.J.) on the premises of the Central Prison in Kotbalwal and was then held at Tallab Tallo Interrogation Centre before being transferred to the holding cells of the CIK in Srinagar. From there the detainee was moved to the Interrogation Centre in Humhama and detained there until 10 January 2006. During this period Mr. Mir was not produced before a court of law for a remand hearing as required by law. While in the custody at the Humhama Interrogation Centre, the detainee was incriminated in another criminal case bearing FIR No. 16/2004. Thereafter, he was again transferred to the Central Prison in Kotbalwal and detained in preventive custody.

10. The second detention order was passed on 27 February 2006 (order No. 05/DMK/PSA/2006) and was based in fact on the allegation that the activities of Mr. Mir were prejudicial to the security of the State and in law on the provisions of the J&K PSA. The detention order was never served to Mr. Mir. A writ petition against this detention order has been pending for adjudication before the High Court of Jammu & Kashmir at Srinagar since 25 April 2006.

11. Mr. Mehraj-ud-Din Khanday, 16 years of age, Indian citizen of the Kashmiri region, usually residing at District Pulwama, was arrested without a warrant on 5 August 2005 at his home in Panner Jagar, Tral, by officials from the Special Investigation Team South District

Srinagar, on charges of two accounts under Sections 307, 307 and 427 RPC, and 3/5 Explosive Substance Act (criminal case file FIR No. 56/2005), and in a third case under Sections 302 and 307 RPC, section 3/5 Explosive Substance Act in criminal case FIR No 142/2005. The charges levelled against Mr. Khanday carry imprisonment for life. The minor was first detained by the Jammu Kashmir Police at the Police Station in Rajbagh Srinagar on 28 February 2006 pursuant to an order of the District Magistrate in Srinagar on grounds that his activities were allegedly prejudicial to the security of the State in terms of the J&K PSA, but was later transferred to a detention facility unknown to his family. The detention order passed by the District Magistrate has been challenged before the High Court of Jammu & Kashmir at Srinagar on 13 April 2006.

12. Mr. Nazir Ahmad Dar, usually residing at District Baramulla, was arrested on 10 December 2003 without a warrant in JVC Bemina Srinagar by forces of the Jammu Kashmir Police and Special Operation Group on charges under Sections 7/25 IAA, and 3/6 of the Terrorist & Disruptive Activities (Prevention) Act 1987 (TADA), registered with the Police Station of the CIK in Srinagar (criminal case file FIR No. 18/2003). He has been taken into preventive detention on 3 March 2004 by the Jammu Kashmir Police at the District Prison in Udhampur Jammu. The detention order was passed by the District Magistrate in Srinagar invoking the provisions of the J&K PSA for reasons that the activities of the detainee are allegedly prejudicial to the security of the State.

13. The detention order was successfully challenged before the High Court of Jammu & Kashmir by Habeas Corpus Petition No. 210 of 2004 and set aside on 12 March 2005. The copy of the Court's order was served on the prison authorities; however, instead of releasing Mr. Dar, the prison authorities detained him as under trial. Thereafter, the Additional District & Sessions Judge in Srinagar, upon application of Mr. Dar, granted bail after hearing the State. The bail order was duly served on the prison authorities, which, however, did not release him but handed him over into the custody of the Joint Intelligence Committee (JIC) in Humhama. Officials from the JIC Humhama charged him in another criminal case FIR No. 3/2002 pursuant to Sections 2/3 E & IMCO, 7/25 IAA, 302 and 120-B RPC. Mr. Dar was kept in custody at the premises of the JIC Srinagar for some days. Thereafter, he was transferred to the District Prison in Kotbalwal, where he was detained in preventive custody again under the provisions of the J&K PSA (order

No. 257 of 2006 dated 6 March 2006). This detention order passed by the District Magistrate in Barmulla has been challenged before the High Court of Jammu & Kashmir in Srinagar on 26 April 2006.

14. Mr. Mohammed Younis Bhat, usually residing at District Srinagar, was arrested in 1999 by forces of the Jammu Kashmir Police on charges of two accounts under Section 7/25 IAA (criminal case file FIR No. 8/99) registered with the Police Station in Panth Chowk and the Police Station in Kheer Bawani, respectively. Later, further charges were laid against him under Section 7/25 IAA (criminal case files FIR No. 78/2002 and FIR No. 81/2005). No warrant was shown to Mr. Bhat upon arrest. Case FIR No. 8/99 was presented to the court of competent jurisdiction and Mr. Bhat was awaiting his trial. While already in detention in connection with this case, Mr. Bhat was detained concurrently in preventive custody under the provisions of the J&K PSA. The detention order was passed by the District Magistrate in Srinagar for reasons that his activities were allegedly prejudicial to the security of the State. However, after the expiry of the said detention order, the detainee was not released. In 2002, Mr. Bhat was again charged in another criminal case bearing FIR No. 78/2002 pursuant to Section 7/25 IAA. On 29 September 2005 Mr. Bhat was incriminated in criminal case FIR No. 81/2005 and while in custody and awaiting his trial, a preventive detention order was issued by the District Magistrate in Srinagar on 18 October 2005. One order of detention has been challenged by his father in a writ petition before the High Court of Jammu Kashmir Srinagar which is pending adjudication since May 2006. Mr. Bhat has been in continuous detention since 1999.

15. Mr. Umar Jan, usually residing at District Anantnag Kashmir, was arrested without a warrant on 16 August 2005 at his home in Takya Behram Shah, Tehsil & District Anantnag, by forces of the 1<sup>st</sup> Rashtria Rifles (RR) in Khanabal Anantnag on charges under Section 7/25 IAA (criminal case file FIR No 651/2005). At the Interrogation Centre of the 1<sup>st</sup> RR Khanabal, Mr. Jan was ill-treated. Later, he was transferred to the Air Cargo Interrogation Centre in Srinagar and held there for around nine days. He was then detained at the Joint Interrogation Centre (JIC) for about one month before being returned to the 1<sup>st</sup> RR Khanabal and detained there for some days. Also because of public pressure exerted by locals during demonstrations, officials of the 1<sup>st</sup> RR Khanabal handed Mr. Jan over to the Police in Anantnag who incriminated the detainee

under criminal case bearing FIR No. 651/2005 on charges pursuant to Section 7/25 IAA. The District Magistrate in Anantnag passed the preventive detention order on 26 November 2005 (order No. Det/PSA/05/176) under the provisions of the J&K PSA alleging that Mr. Jan's activities were prejudicial to the security of the State. He was then detained at the Central Prison in Kotbalwal Jammu under the authority of its Superintendent.

16. Mr. Jan filed a writ petition (No. 418/2005) before the High Court of Jammu & Kashmir challenging the legality of his detention. During the pendency of the said writ petition, the Government revoked the detention order of the detainee on 6 February 2006. Thereafter, Mr. Jan was handed over from the Central Prison in Kotbalwal to forces of the CIK Jammu and was detained there for about 40 days. In the meantime Mr. Jan was granted bail by the Judicial Magistrate in Anantnag on 22 April 2006 related to the criminal charges put against him under case FIR No. 651/2005. The bail order was served on the concerned Police. Instead of releasing Mr. Jan, however, he was again transferred to the Central Prison in Kotbalwal Jammu and detained under the provisions of J&K PSA. Mr. Jan has never been released from the custody of the State since his initial arrest on 16 August 2005. A writ petition against his detention is pending adjudication before the High Court of Jammu & Kashmir at Srinagar since May 2005.

17. Mr. Reyaz Ahmad Teeli, aged 27 years, usually residing at District Anantnag, was arrested without warrant on 23 March 2004 in Bijbehara by officials of the Jammu & Kashmir Police and of the Special Operations Group. He was charged under Sections 307 RPC and 7/25 IAA (criminal case file FIR No. 117/04) and later again in a separate case pursuant to the same provisions (FIR No. 84/04), both registered with the Police Station in Bijbehara. The detainee did not apply for bail regarding the first charges put against him under FIR No. 117/04. While being held in custody, upon request of the Jammu & Kashmir Police, the District Magistrate in Anantnag passed the preventive detention order on 6 August 2004 for an indefinite period time invoking the provisions of the J&K PSA on grounds that the activities of Mr. Teeli were allegedly detrimental to the integrity and sovereignty of the State (order No. 303/DMA/PSA/2004/549-54). He is currently being detained at the Joint Interrogation Centre in Humhama.

18. The preventive detention order dated 6 August 2004 was successfully challenged before the High Court of Jammu & Kashmir in a writ of Habeas Corpus petition and the Court directed the authorities to release Mr. Teeli in a judgement dated 27 September 2005. Meanwhile, the trial court of competent jurisdiction also granted bail to the detainee in criminal case FIR No. 117/04. Both orders were served to the Police for his release. However, instead of releasing Mr. Teeli, the Police transferred him to the Interrogation Centre, where he was ill-treated for some days. Mr. Teeli was then implicated in another criminal case (FIR No. 84/04). A corresponding bail application was accepted by the Sessions Judge in Anantnag. The bail order was duly served to the Police authorities concerned; however, Mr. Teeli was again not released. Under criminal case file FIR No. 84/04, anew detention of Mr. Teeli was requested by the Deputy Superintendent of the Police Joint Interrogation Centre in Hayhama according to letter No. JIC/06/H-O/13333 dated 4 January 2006. The request for preventive detention was approved by the District Magistrate in Anantnag on 29 April 2006 subject to the provisions of the J&K PSA (order No. Det/PSA/06/09). This order has been challenged before the High Court of Jammu & Kashmir at Srinagar on 29 May 2006.

19. Mr. Abdul Qadeer, 45 years of age, a Tajik national, usually residing at R/O Shaheed Mazar in Tajikistan, was arrested without a warrant by Indian forces in the year 1995 in the Kashmir region invoking the provisions of the J&K PSA in connection with criminal case FIR No. 101/1995 on charges pursuant to Section 7/25 IAA. Of these charges Mr. Qadeer was acquitted by the competent court on 20 June 2006. Still during the conduct of his trial, he was preventively detained for an indefinite period of time on 19 January 2006 pursuant to the J&K PSA under the authority of the Deputy Director of the Home Department, Civil Secretariat Jammu/Srinagar, in order to make the necessary arrangements for his deportation to his native country. The current place of detention of Mr. Qadeer is unknown. A writ petition is pending adjudication before the High Court of Jammu & Kashmir at Srinagar since 24 April 2006. The Court has been requested to order the detaining authorities to release Mr. Qadeer and remove him to Tajikistan.

20. The source alleges that the arrests and detention of the above-mentioned 10 persons is arbitrary. Concerning Mr. Manzoor Ahmad Waza his detention is arbitrary because he was ill-

treated by the forces arresting him and unlawfully detained in preventive custody. The ordinary laws of the land would have been sufficient to deal with the detainee and prevent him from the activity from which he was sought to be restricted in terms of the detention order and there was no cogent material presented before the detaining authorities warranting the passing of a detention order. Furthermore, he was deprived of his right to effective representation to the Government and due process, since he was not given the opportunity to rebut the evidence recorded under Section 161 of the Criminal Procedure Code, which was allegedly provided by the Senior Superintendent of the Police in Barmulla to the detaining authorities, however, not to Mr. Waza himself as the concerned person. Moreover, the detention process has been conducted in breach of the procedural safeguards, thereby violating Sections 13, 15 and 16 of J&K PSA. Mr. Waza's order of detention was neither approved within the period of time provided by the applicable law nor was reference made to the Advisory Board within the stipulated period. The detainee has never been produced before the Advisory Board and has never been given an opportunity of being heard in person or through his legal counsel. The Advisory Board has failed to submit its opinion to the Government for confirmation of the detention order within the stipulated period. Finally, Mr. Waza is being confined to his cell.

21. Mr. Nisar Ahmad Wani he had been arrested on 14 September 2004 and continuously detained until 10 December 2005 when the detention order was passed. The authorities have not provided any compelling reasons for passing the detention order and its belated execution. The detention order was neither approved in time nor was Mr. Wani able to make presentation to the Advisory Board. Mr. Wani is being detained concurrently under the provisions of J&K PSA, despite the fact that he had already been subjected to punitive custody of the State before. The detention order and procedure followed by the detaining authorities violate article 22 (5) of the Indian Constitution and the relevant safeguards provided under the J&K PSA, so the source alleges.

22. The source argues that the arrest and detention of Sh. Farooq Ahmad Kana is arbitrary, because he was ill-treated by officials of the 112 Border Security Force (BSF) for days. There was no cogent material before the detaining authority to pass the detention order under the J&K PSA. Sh. Kana further moved an application for bail before Sessions Judge Barmullah, which

was accepted by the court on 20 November 2005, but not mentioned by the detaining authorities in the detention order. Material forming the factual basis for the order was not furnished to the detainee and he was not informed of his right of representation to the Advisory Board, contrary to the provisions of the J&K PSA.

23. The detention orders passed by the District Magistrate in Kupwara concerning Mr. Mohammed Yousuf Mir is, according to the source, unlawful and amount to arbitrary detention, because the arresting police forces ill-treated him. Given the nature and seriousness of the charges related to criminal case FIR No. 16/2004 a second bail application could not have been successful. Therefore, it would have been sufficient to deal with Mr. Mir in terms of ordinary criminal law rather than detaining him in preventive custody pursuant to the provisions of the J&K PSA. In any event, there was no convincing material and compelling reasons on the basis of which the detaining authorities could satisfy them to pass the second detention order as required by the provisions of the J&K PSA. Since Mr. Mir has not been served with the second detention order he was deprived of his right to effective legal representation in violation of article 22 (5) of the Indian Constitution. Finally, the District Magistrate in Kupwara erroneously held that the first detention order was set aside by the High Court on mere technical grounds, whereas it was in fact revoked on the merits. Therefore, the District Magistrate could not have passed another detention order without levelling new charges against Mr. Mir.

24. The arrest and detention of Mr. Mehraj-ud-Din Khanday is arbitrary for the following reasons: The detainee was a minor of 16 years of age. He was ill-treated by officials of the Special Investigation Team carrying out his arrest and then detained in preventive custody under the provisions of the J&K PSA. The preventive detention order was passed by the District Magistrate in Srinagar upon request of the Police without awaiting the decision of the trial court designated under the applicable Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA). This court would be the competent court assigned to conduct the trial under ordinary law against Mr. Khanday as required for minors. However, these circumstances were not taken into consideration by the District Magistrate when ordering his preventive detention. Finally, Mr. Khanday has neither been served with the order of detention nor with the material referred to on the factual grounds of detention. This prevented him from making effective representation

against the detention request.

25. The arrest and detention of Mr. Nazir Ahmad Dar is arbitrary, since the forces arresting him did so without justification and ill-treated him after the arrest. Furthermore, the District Magistrate in Barmulla did not take into consideration when passing the preventive detention order on 26 April 2006 that Mr. Dar had already been continuously in custody since 10 December 2003 and could therefore not have committed any crime for which he has been charged under the second criminal case FIR No. 3/2003 laid against him. At the time of his initial arrest the detaining authorities did not make mention of this criminal case. Furthermore, the detainee has never been produced before a Magistrate to obtain remand as required by the applicable criminal laws. Therefore, the preventive detention order pursuant to the J&K PSA was passed by the authorities only to frustrate the ordinary course of criminal justice, so the source argues.

26. Concerning Mr. Mohammed Younis Bhat the source argues that his arrest and detention is arbitrary because he has repeatedly been taken into preventive detention on new charges as soon as the Police became aware of the fact that a court of law could order his release. Furthermore, he has not been informed of his right of representation to the Advisory Board in violation of article 22 (5) of the Constitution.

27. Furthermore, the arrest and detention of Mr. Umar Jan is unlawful, unconstitutional and arbitrary and in violation of internationally recognized principles for the following reasons: Mr. Jan was ill-treated after his arrest when in custody at the Interrogation Centre of the 1<sup>st</sup> RR Khanabal. He has been detained since his initial arrest on 16 August 2005 notwithstanding that a detention order was revoked by the Government and he was granted bail by the Judicial Magistrate in Anantnag. There was no new evidence produced or compelling reasons given on the basis of which the detaining authorities would have been able to continue the detention of Mr. Jan. The District Magistrate in Anantnag, at the advice of the Police, passed the second (preventive) detention order against Mr. Jan on exactly the same grounds known to the Government when revoking the first detention order. Moreover, the material on the basis of which the detaining authorities passed the detention order has neither been furnished to the

detainee to enable him to make effective representation to the Advisory Board against the detention order nor was Mr. Jan informed of his right of representation. According to the source, this conduct violates article 22 (5) of the Constitution.

28. The source further argues that the arrest and detention of Mr. Reyaz Ahmad Teeli is arbitrary, since the Police have been violating several court orders instructing Mr. Teeli's release from custody. Furthermore, the second detention order was passed on identical grounds as the first one. There was no well-argued material before the detaining authorities warranting the passing of the second detention order. Mr. Teeli did not have to be prevented from any activity as he has been in custody of Government authorities already since 23 June 2004. Consequently, the District Magistrate in Anantnag did neither take into consideration all relevant facts when passing the second detention order nor reached the threshold of "subjective satisfaction" as required by the provisions of the J&K PSC. Mr. Teeli was not provided with an opportunity to make effective representation before the Advisory Board since he was not provided with the relevant evidence, including a copy of the FIR, a seizure memorandum, or other pertinent dossiers. Finally, the detaining authorities did not transmit his case to the Board as required by law.

29. Finally, the arrest and detention of Mr. Abdul Qadeer is arbitrary and violates international human rights law as he is a foreign national who has been acquitted of all criminal charges put against him by the court of competent jurisdiction. However, he is still being deprived of his right to liberty without justification. Instead of removing him to Tajikistan the detaining authorities took him into preventive custody without reason. According to the source, Government authorities are duty bound under applicable international law to return Mr. Qadeer to his native country.

30. These allegations from the source were transmitted to the Government on 27 August 2007. The response of the Government was received by the Working Group on 4 September 2008 and may be summarized as set out below.

31. Mr. Manzoor Ahmed Waza s/o Abdul Khaliq r/o Tawheed Guni, Baramulla. Mr. Waza is a

member of Hizbul Mujahideen outfit who was arrested for attacking the security forces with a grenade at Cement Bridge Baramulla on November 16, 2005. He was detained under Public Safety Act (PSA) by District Magistrate Baramulla and lodged at District Jail Udhampur from 10 March 2006. Following the quashing of the detention order by the High Court of Jammu and Kashmir, Mr. Waza was released on bail by the trial court in May 2007.

32. Mr. Nishar Ahmed Wani s/o Abdul Gani r/o Kelam Kulgam\_Mr. Nishar Ahmed Wani is a member of Hizbul Mujahideen outfit. He was arrested on 4 September 2004, for providing food/shelter to HM militants and concealing arms & ammunition in the house. At the time of arrest, one pistol, one magazine with four rounds, one packet of RDX (20 kgs.) and a cleaning rod was recovered from his house. He was detained under Public Safety Act (PSA) by District Magistrate Anantnag and lodged at Kotbalwal Jail Jammu with effect from 17 February 2006. Following the quashing of the detention order by the High Court of Jammu and Kashmir, Mr. Wani was released on bail by the trial court on 14 November 2006.

33. Mr. Farooq Ahmed Kana (s/o Abdul Khaliq r/o Shahabad Sopore Baramulla) is a member of Lashkar-e-Taiba outfit. He provided food and shelter to terrorists while also informing them about the movement of security forces. He was arrested on 7 September 2005 at Police Station Sopore for violation of the Arms Act and one hand grenade and one detonator were recovered from him. He was detained under Public Safety Act (PSA) by District Magistrate Baramulla and lodged at District Jail Udhampur from 12 January 2006. Following the quashing of the detention order by the High Court of Jammu and Kashmir, Mr. Kana was released on bail in December 2006.

34. Mr. Mohammad Yousuf Mir (S/o Abdul Gani s/o Gagol Lolab Kupwara) is a member of the Islamic Front outfit, for which he acted as a guide and motivator. He was detained under the Public Safety Act (PSA) by District Magistrate Kupwara on 13 January 2005 and lodged at Kotbalwal Jail Jammu. This detention order was quashed by the High Court of Jammu and Kashmir on 17 November 2005. The subject continued with his anti-national activities. He was again arrested in another case for violation of inter alia, the Arms Act. He was again detained under PSA by District Magistrate Kupwara and lodged in Central Jail Srinagar w.e.f. 1 March 2006. This detention order was revoked by the Government on 6 June 2006, and Mr. Mir was subsequently released on bail by

the trial court on 3 August 2006.

35. Mr. Mehraj-ud-Din Khanday (s/o Ghulam Nabi r/o Panner, Tral, Pulwama) was arrested on 5 August 2005 on charges of being a militant of the Hizbul Mujahideen outfit and his involvement in three attacks on security forces. He was charged for violation of the Explosive Substance Act and the Arms Act. At the time of arrest, a Remote Control Device was recovered from him. He was detained under the Public Safety Act (PSA) by District Magistrate Srinagar and lodged in Kotbalwal Jail Jammu w.e.f. 9 March 2006. The detention order was quashed by the High Court of Jammu and Kashmir on 16 October 2006. Mr. Khanday is presently under judicial custody and is facing trial in respect of the case registered at Police Station Nishat.

36. Mr. Nazir Ahmed Dar (s/o Sonaullah Dar r/o Doora Sopore, Baramulla) is a trained militant and Group Commander of the Tehreek-ul-Mujahideen (TuM) outfit. He was arrested for violation of the Arms Act on 28 October 2003. One AK rifle, one radio set, one pistol and 120 rounds were recovered from him during arrest. He was detained under Public Safety Act (PSA) by District Magistrate Baramulla and was lodged at District Jail Udampur w.e.f. from 5 April 2004. The detention order was quashed by the High Court on 30 August 2005. He was arrested in another case of violation of the Arms Act. He was detained under PSA by District Magistrate Baramulla and lodged at District Jail Udampur from 10 March 2006. This order stands quashed and Mr. Dar was released on 29 June 2007.

37. Mr. Mohammad Younis Bhat (s/o Ghulam Mohammad r/o Khonmuh Srinagar) is affiliated with Hizbul Mujahideen (HM) outfit as a Local Trained Militant. He remained associated with Peer Abdul Rashid, a self-styled Chief Commander of HM outfit. Mr. Bhat was arrested in 1999 for violation of the Arms Act and one Chinese pistol, one pistol magazine, seven rounds and one hand grenade were recovered from him. He was detained under PSA and then released in 2002. He was again arrested on 30 November 2002 for violation of the Arms Act at Police Station Kheerbhawani. He was detained under PSA for his terrorist activities at Kotbalwal Jail Jammu from 6 March 2003. The detention order, however, was quashed and also revoked by the Government and Mr. Bhat was released on 11 September 2005. As he continued to carry out subversive activities, he was arrested from Zakoora Srinagar and one IED time device, one detonator, one battery and 15 AK rounds were

recovered from him. A case was registered at Police Station Pantha Chowk. He was detained under PSA at Kotbalwal Jail Jammu from 10 November 2005. Following the quashing of the detention order by the High Court of Jammu and Kashmir, Mr. Bhat was released by the trial court on 18 August 2007.

38. Mr. Umar Jan (s/o Ghulam Najar r/o Takiya Bahram Shah, Anantnag) was arrested on 18 October 2005 for being a local trained militant of Hizbul Mujahideen outfit and for providing food, shelter and information about movement of security forces to militants. A case was registered at Police Station Anantnag against him. He was detained under PSA by the order of District Magistrate Anantnag and lodged at Kotbalwal Jail from 29 November 2005. The detention order was revoked by the Government and he was released on 11 February 2006. After his release, he remained a close associate of Javed Sepan, HM militant and provided food and shelter to him. Accordingly, he was again detained under PSA by District Magistrate Anantnag and lodged at Kotbalwal Jail, Jammu from 26 April 2006. Following the quashing of the detention order, Mr. Umar Jan was released on 6 October 2006. After his release, Mr. Umar Jan was found to be in possession of five kilograms of RDX and one UBGL shell and was arrested by Police Anantnag. A case stands registered in this behalf against the subject in Police Station Anantnag. He was detained under PSA vide District Magistrate Anantnag and lodged at Kotbalwal Jail from 6 November 2006. This detention order has been quashed by the Court and the case is under process.

39. Mr. Reyaz Ahmed Teeli (s/o Abdul Majeed Teeli r/o Teeli Mohalla Biibehara, Anantnag), a Government employee, was affiliated with Hizbul Mujahideen outfit. He was arrested on 4 October 2004 for cases registered at Police Station Bijebhera involving violation of the Arms Act. During interrogation, the subject admitted that he had undertaken a grenade attack against security forces near district hospital Bijebhera in which 24 civilians were injured. He was detained under PSA by District Magistrate Anantnag on 6 August 2004 and was lodged in District Jail Kathua w.e.f. 16 October 2004. The said order was quashed by the High Court of Jammu and Kashmir and Mr. Teeli was released. He was again detained under PSA by District Magistrate Anantnag on 29 April 2006 on the basis of his continued involvement in subversive activities and was lodged in Kotbalwal Jail with effect from 29 April 2006. This order was revoked by the Government and Mr. Teeli was handed over to local police for further process.

40. The response from the Government was transmitted to the source which has not transmitted its comments or observations. The Working Group is able to render an Opinion on the basis of the information provided.

41. At the outset, the Working Group notes with appreciation the positive role of the Indian judiciary, in particular the superior courts (the High Courts and Supreme Court), in protecting and upholding individual liberty and fundamental rights of the people. This is evident from the significant number of cases of detention which have been successfully challenged before the High Court of Jammu and Kashmir.

42. Recourse to an impartial and independent judicial forum is important in view of the fact that some of the laws under which persons are being detained, provide a wide power of discretion and margin of appreciation to the law enforcing authorities including the police, the para-military and military forces. Of particular note is the Public Safety Act (PSA) under which all persons in the instant case have been detained. The Government has not refuted the allegation that these persons were detained by security forces under the said Act without serving them with an arrest warrant, which constitutes a violation of due process in detention.

43. All detained persons are alleged by the Government to be members of militant outfits and engaged in acts of omission and commission that constitutes a threat to security forces as well as the public at large. Charges by the Government include attacks on security forces, providing shelter to militants as well as being in possession of arms and ammunition. These are very serious charges indeed. But, if these persons are accused of such dangerous offences, why have they successfully challenged their detention despite the alleged recovery of contraband material (including grenades, explosives, pistols, rifles etc.)?

44. The Working Group is not convinced that the detentions of these persons are indeed triggered by anti-State and terrorist activities posing a threat to the State as the detentions (except in two cases) were not followed to their logical conclusion of sentencing and end up being let off by the Judiciary every few months.

45. The Working Group also finds a deficit of due process in the manner in which the law enforcement authorities apply the mechanism of “serial detention” in order to deprive these persons of their liberty. The Working Group notes with concern that, as soon as a detainee is ordered by the court to be released on bail, he is promptly re-arrested and detained on another charge without affording him a chance to leave the jail, prison or place of detention.

46. The Working Group further notes that detainees have not been explained or provided the grounds on which they have been detained. In particular, charges have been leveled during their periods of detention resulting in successive/continuing deprivation of liberty.

47. The Working Group notes with concern that one of the detainees, Mr. Mehraj-ud Din Khanday is a minor, 16 years of age, and hence more vulnerable than his adult peers. In this case, the Government has not commented on or provided a reason for not extending the rights accorded under international law to a minor. In fact, in its response the Government states that this person is in judicial custody and facing trial for a case registered at Police station Nishat despite the fact that the High Court has quashed the detention order passed by the magistrate.

48. The Working Group is aware that in India, as in some other States, the concept of “preventive detention” is prevalent. This mechanism is one whereby law enforcing authorities such as the police detain persons as a preventive measure and without having to present a clear, cogent case to court for deprivation of liberty. Laws such as the PSA and TADA create legal space for apprehending persons suspected of subversive activity against the State. This concept of “preventive detention” informing laws of a country are in danger of falling below the minimum standards to a fair and free trial with safeguards of recourse to legal counsel, being given the opportunity to generate an effective defence.

49. As indicated earlier, the Working Group appreciates the role of the superior judiciary to protect individual liberty but also notes that, despite handing down release orders, detainees are either not released and re-arrested within the premises of detention or soon thereafter on some other set of charges. A more robust control over implementation and respect for

detention decisions taken by courts is imperative to prevent arbitrariness in detention as per Principle 4 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

50. Finally, as part of due process, it is important that upon detention, legal counsel and family members be informed as soon as possible, and that whereabouts of the detained persons be made known to them. In the present cases, the detainees have been moved to different locations unbeknown to their family. This places them at a clear disadvantage in accessing justice.

51. The Working Group is aware of the political sensitivities regarding the state of Jammu and Kashmir and the complex law and order situation ensuing in that part of the country. As a part of its crisis management strategy, the Government is using laws of preventive detention, including the PSA and TADA. Be that as it may, any legal, administrative or other mechanism employed, must conform to international human rights standards and obligations undertaken by the Government of India.

52. According to paragraph 17 (a) and (e) of its methods of work, the Working Group issues the following Opinion:

(a) The detention of Messrs. Manzoor Ahmad Waza; Nisar Ahmad Wani; Sh. Farooq Ahmad Kana; Mohammed Yousuf Mir; Nazir Ahmad Dar and Mohammed Younis Bhat was arbitrary and falls under categories II and III of the categories used by the Working Group to consider cases of privation of liberty and was in contradiction with articles 7, 9, 10 and 11, para. 1, of the Universal Declaration on Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights;

(b) The Working Group is of the opinion that the detention of Messrs. Mehraj-ud-Din Khanday; Umar Jan; Reyaz Ahmad Teeli and Abdul Qadeer is arbitrary and falls under categories II and III of the categories used by the Working Group to consider cases of privation of liberty and are in contradiction with articles 7, 9, 10 and 11, para.

1, of the Universal Declaration on Human Rights, and articles 9 and 14 of the International Covenant on Civil and Political Rights. The Working Group calls for the immediate release of the above mentioned detained persons;

(c) In the case of minor Mehraj-ud-Din Khanday, article 14, paragraph 4, of the International Covenant on Civil and Political Rights, and Principle 16 (3) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also stand violated.

53. The Working Group also calls upon the Government to consider the possibility of a reconsideration of the relevant domestic laws to bring these in conformity with international human rights obligations undertaken by the State.

Adopted on 26 November 2008

**OPINION No. 46/2008 (MYANMAR)**

**Communication addressed to the Government on 29 August 2008.**

**Concerning Ms. Aung San Suu Kyi.**

**The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. (Same text as paragraph 3 of Opinion No. 17/2008.)
3. The Working Group on Arbitrary Detention has adopted four Opinions relating to Ms. Aung San Suu Kyi, relating to her previous detentions in 1992, 2002, 2004 and 2007.

4. The additional information on the case of Ms. Aung San Suu Kyi summarized below was reported to the Working Group on Arbitrary Detention as follows: Ms. Aung San Suu Kyi, General Secretary of the National League for Democracy (NLD) and Nobel Prize laureate; of 62 years of age, residing in Yangon, has been, since 30 May 2003, consecutively put under house arrest on an annual basis. Her order of house arrest was lastly renewed on 28 May 2008 by security forces invoking article 10, lit. b), of the 1975 State Protection Law (Puithu Hluttaw Law No. 3, 1975), which states that “[i]f necessary, the movements of a person against whom action is taken can be restricted for a period of up to one year”.<sup>9</sup>

5. No warrant or decision was presented to Ms. Aung San Suu Kyi. No reasons were given to her for the extension of her house arrest, and she has not been charged with any offence. In addition the source reports that there is no opportunity for domestic judicial review of her detention. Since her initial term of house arrest began, Ms. Aung San Suu Kyi has only been given minimal access to the outside world. According to the source, United Nations Under-Secretary-General Mr. Ibrahim Gambari has been her only outside visitor, besides her doctor; a person who delivers food to her; and, on rare occasions, a diplomat. She has no access to relatives or lawyers and her communications and visits are permitted at the Government’s sole discretion.

6. The source recalls that during Ms. Suu Kyi’s 12 years of detention, the Working Group has adopted four Opinions (Opinion Nos. 8/1992, 2/2002, 9/2004 and 2/2007) declaring her respective deprivations of liberty to be arbitrary as being in contravention of Articles 9, 10, and 19 of the Universal Declaration of Human Rights. The source argues that with the expiration of Ms. Suu’s detention on 25 May 2008, the Working Group’s Opinion No. 2/ 007 expired as well. The new order of detention issued by the Government of Myanmar on 28 May 2008 has not yet been considered by the Working Group.

7. Ms. Suu Kyi has been the head of the pro-democracy movement in Myanmar. She is General Secretary of the NLD, the leading opposition party, and daughter of General Aung San,

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<sup>9</sup> Article 1 describes the State Protection Law as the “Law to Safeguard the State against the Dangers of Those Desiring to Cause Subversive Acts”.

Commander of the Burma Independence Army and founder of the Anti-Fascist People's League which led the struggle for the country's independence. Aung San, maximum hero of Burma Independence, was assassinated in 1947. Since 1988, Ms. Suu Kyi has been struggling to bring democracy to Myanmar. Her defiant response to continued detention has made her a world-wide symbol of non-violent resistance to military autocracies. In 1991, she was awarded the Nobel Peace Prize. Despite her frequent arrests, Ms. Suu Kyi continues to speak out against the Government and play an active role in opposition whenever she is able to.

8. The source argues that the latest renewal of the order to place Ms. Suu Kyi under house arrest not solely violates international law but also national domestic laws of Myanmar, since the situation does not meet the terms of the 1975 State Protection Law, and since this Law only allows for annually renewable house arrest orders with the maximum time limit of five years in total. This five year period ended at the end of May 2008.

9. Ms. Suu Kyi is being held under the 1975 State Protection Law which allows the authorities to order the detention or restricted residence without charge or trial of anyone the authorities believe is performing or might perform "any act endangering the sovereignty and security of the State or public peace and tranquility" (see article 7 of this Law). But even according to the authorities themselves, the extended deprivation of liberty of Ms. Suu Kyi does not meet this already very low and subjective threshold. On 23 May 2006, Major General Khin Yi, who serves as the Nation's Police Chief, told a conference of regional police that the release of Ms. Suu Kyi would likely have little effect on the country's political stability and that there would not be rallies and riots if Ms. Suu Kyi were to be released, since public support for her had fallen. Furthermore, as the Working Group previously noted in its Opinion No. 2/2002, Ms. Suu Kyi "is a known advocate of political change exclusively by peaceful means. (...) No controlling body, acting in good faith, would find or believe that she is a potential danger to the State".

10. According to the source, there can be no legal justification for Ms. Suu Kyi's deprivation of liberty under the Union of Myanmar's domestic law, yet if her release does not endanger State sovereignty or public peace and tranquility.

11. The Working Group transmitted the allegations contained in the communication by the source to the Government. It notes that the Government has not responded transmitting its observations or comments to the allegations of the source. The Working Group considers that it is in a situation to issue an Opinion with the elements put at its disposal.

12. The Working Group considers that Ms. Aung San Suu Kyi continued placement under house arrest is arbitrary and in violation of article 9 of the Universal Declaration of Human Rights. Even if her release could be said to endanger State sovereignty or public peace and tranquility, however, individuals detained under the State Protection Law may only be kept for five years, renewable on an annual basis. Ms. Suu Kyi's detention commenced in May 2003 and has been extended for each of the past five years. A plain reading of the 1975 State Protection Law clearly shows that such extensions were only permissible until late May 2008 – the point where Ms. Suu Kyi had been under house arrest for five years-. Therefore, the most recent extension on 28 May 2008 amounts to a *prima facie* violation of the Union of Myanmar's own laws.

13. Under article 10 of the 1975 State Protection Law, "in the protection of the State against dangers," the Government, and in particular a Central Board including the Ministers of Defense, Foreign Affairs, and Home & Religious Affairs have "the right to implement the following measures through a restrictive order ... (b) if necessary, the movements of a person against whom action is taken can be restrained for a period of up to one year." Article 14 states that "[t]he Cabinet may grant prior approval to continue the detention or restriction of rights of a person against whom action is taken for a period ... up to three years." In amendments to the State Protection Law, the time limit was subsequently raised to five years. Although Ms. Suu Kyi was initially detained on 30 May 2003, under article 10(b), the Government has extended her terms of her house arrest prior to their expiration, which has moved the date of expiration of this particular term of house arrest to earlier in the month of May. In particular, her fifth term of house arrest was extended on 25 May 2007, for a period of one year. As a result, her house arrest expired on 24 May 2008. The Government had declared earlier that the General Body had not issued its order restraining Ms. Suu Kyi until 28 November 2003, and that the subsequent

extensions applied to that date instead of late May. If that were correct, Ms. Suu Kyi could be kept under house arrest until 27 November 2008.

14. Nevertheless, even if such an argument were made, it would be invalid. The 1975 State Protection Law is unclear as to whether detention begins when a person is arrested or the moment that an order is issued. The act defines “commit”, “central board”, and “person against whom actions is taken” but not “detain”. It would be inconsistent with basic principles of rule of law for a detention to begin only when an order is issued under this law and not when a person’s liberty or freedom of movement is restricted. Ms. Suu Kyi’s movement has been forcibly restricted since she was taken into “protective custody” on 30 May 2003. Therefore, it is reasonable to conclude that, under the 1975 State Protection Law, Ms. Suu Kyi has been detained since 30 May 2003, and was due to be released, in accordance with domestic law, no later than 30 May 2008. While the State Protection Law is overbroad and vague on several points, it is clear that a person may be held for a maximum of five years. The one year extension will keep Ms. Suu Kyi imprisoned well beyond the Government’s own five-year mark of 27 November 2008, and thus violates the 1975 State Protection Law.

15. The renewal of Ms. Aung San Suu Kyi’s placement under house arrest is arbitrary as it violates the rights and fundamental freedoms established in the Universal Declaration of Human Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Standard Minimum Rules for the Treatment of Prisoners, falling under Categories I, II and III of the categories applicable to the cases submitted to the Working Group on Arbitrary Detention.

16. In the light of the foregoing the Working Group expresses the following Opinion:

(a) The Working Group confirms its previous Opinions (Opinion Nos. 8/1992, 2/2002, 9/2004 and 2/2007), declaring Ms. Aung San Suu Kyi’s placement under house arrest as arbitrary, being in contravention of articles 9, 10 and 19 of the Universal Declaration of Human Rights;

(b) The Working Group considers that the further extension of Ms. Aung San Suu Kyi's placement under house arrest by administrative way is arbitrary as it violates the rights and fundamental freedoms, established in articles 9, 10 and 19 of the Universal Declaration of Human Rights and even domestic law, particularly the State Protection Law 1975, which itself contradicts to the basic principles and norms of modern international law. Violations of Ms. Aung San Suu Kyi's liberty fall under categories I, II and III of the categories applicable to the cases submitted to the Working Group of Arbitrary Detention;

(c) The Working Group decides to transmit this Opinion to the Special Adviser of the Secretary-General, Mr. Ibrahim Gambari, as well as to the Special Rapporteur on the situation of Human Rights in Myanmar, Mr. Tomás Ojea Quintana, for their consideration.

17. Consequent upon this Opinion, the Working Group requests the Government to immediately release, without any condition, Ms. Aung San Suu Kyi from her continued placement under house arrest. It also requests the Government to take practical steps to remedy the situation in order to bring it into conformity with the standards of International Human Right's Law and to study the possibility of an early accession to the International Covenant on Civil and Political Rights and to other core international human rights treaties.

Adopted on 28 November 2008

#### **OPINION No. 1/2009 (VIET NAM)**

**Communication addressed to the Government on 14 October 2008.**

**Concerning: Mr. Nguyen Hoang Hai (also known as Dieu Cay); Mr. Nguyen Van Ha; Mr. Nguyen Viet Chien; Mr. Truong Minh Duc; Mr. Pham Van Troi; Mr. Nguyen Xuan Nghia; Ms. Pham Thanh Nghien; Mr. Vu Hung; Ms. Ngo Quynh and Mr. Nguyen Van Tuc.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source in due course and much in advance of the fifty-fourth session, when this Opinion was adopted. The Working Group transmitted the reply provided by the Government to the source; however, has not received any comments from it.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The cases summarized hereinafter have been reported to the Working Group on Arbitrary Detention as follows:
5. Mr. Nguyen Hoang Hai (also known as Dieu Cay), one of the founding members of the Club of Free Journalists (Can Lac Bo Nha Bao Tu Do), was arrested by police officers on 19 April 2008 in the city of Dalat. Prior to his arrest, the police had summoned Mr. Hoang Hai for interrogation 15 times.
6. Mr. Hoang Hai, who is an Internet writer and “blogger”, posted a number of articles on the Internet calling for human rights and democratic reforms, including articles contesting claims by China to the Spratly (Truong Sa) and Paracel (Hoang Sa) Archipelagos, over which both Viet Nam and China claim sovereignty. In January 2008, Mr. Hoang Hai and other activists unfurled banners in front of the Opera House in Ho Chi Minh City denouncing China’s claims to the disputed islands. Mr. Hoang Hai’s arrest occurred shortly before the arrival of the Beijing Olympic Games torch relay in Ho Chi Minh City, an event the Vietnamese authorities were determined to ensure was protest-free.
7. On 10 September 2008, Mr. Hoang Hai was sentenced to 30 months in prison by a court in Ho Chi Minh City after a closed trial. He was accused of tax evasion on a rental property that he

owns. Mr. Hoang Hai's lawyers argued that the renter, not Mr. Hoang Hai, was liable for back taxes owed on the property, because the rental contract provided for the renter to assume payment of all property taxes, which is permitted under Vietnamese law.

8. The source further informed that police officers from the Internal Security and Counter-Espionage Departments (Cue An Ninh Noi Chinh and Cue Phan Gian) of the Ministry of Public Security in Ho Chi Minh City were the officers who arrested Mr. Hoang Hai. According to the source, this department is primarily responsible for monitoring and intervening in political cases. The source alleges that the tax evasion charges were an unfounded pretext to punish Mr. Hoang Hai for his political activism.

9. The source considers that Mr. Nguyen Hoang Hai has been deprived of his liberty for the exercise of the rights or freedoms guaranteed by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

10. According to the source, Mr. Nguyen Van Hai, a journalist who worked at *Tuoi Tre* (Youth Magazine), and Mr. Nguyen Viet Chien, a journalist who worked at *Thanh Men* (Young People), were arrested for their coverage of a major corruption scandal which involved several high-ranking officials. It was reported that both journalists were arrested on 13 May 2008, accused of "inaccurate reporting and abuse of power". Their arrests were carried out just two months after one of the principal suspect of the corruption scandal, Deputy Transport Minister Nguyen Viet Tien, was suddenly cleared of all charges and released due to lack of evidence.

11. The two journalists were placed in custody under investigation for two months. In July 2008, the Government prolonged their detention for another two months. Messrs. Van Hai and Viet Chien have not been released and are at risk of continued detention. Under the Vietnamese Criminal Procedures Code, investigative detention must not exceed four months, beyond which defendants must either be charged or be released. However, this four-month period may be extended four times for national security offenders (i.e. for a total of 20 months), after which the People's Procurator is entitled to apply "other deterrent measures" (art. 120 of the Criminal Procedure Code).

12. Mr. Truong Minh Duc, a freelance journalist, was arrested in May 2007 and sentenced to five years in prison on 18 July 2008 following his trial in the Southern Province of Kien Giang. It was reported that Mr. Minh Duc was charged with “taking advantage of democratic freedoms and rights to abuse the interests of the State” (art. 258 of the Criminal Code). Mr. Duc’s lawyer said he was “writing about the plight of the rural population, about corruption, lack of government honesty and the constraints imposed on peasants in Kien Giang”, and added that his client was forced to sign confessions. Mr. Minh Duc is in poor health due to harsh detention conditions.

13. The source considers that Messrs. Nguyen Van Hai, Nguyen Viet Chien, and Truong Minh Duc have been deprived of their liberties for the exercise of their rights and freedoms guaranteed by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

14. Mr. Pham Van Troi, a member of the Committee for Human Rights in Viet Nam, was arrested in Hanoi on 10 September 2008. Mr. Nguyen Xuan Nghia was arrested at his home in Haiphong on 11 September 2008. Ms. Pham Thanh Nghien was arrested at her home in Haiphong by ten police officers on 11 September 2008 and taken to Hanoi for interrogation.

15. In June 2008, municipal authorities in Hanoi rejected an application submitted by these three persons to conduct a demonstration protesting against China’s presence on Paracel and Spratly Islands. Ms. Pham Thanh Nghien was temporarily released after interrogations, but was arrested again at her home in Haiphong on 18 September 2008. She is being detained with other activists at B14 Prison (Thanh Liet) near Hanoi, charged with “conducting propaganda against the Socialist Republic of Viet Nam” (art. 88 of the Criminal Code).

16. Mr. Vu Hung was arrested at his home in Ha Tay Province on 11 September 2008. He was temporarily released after interrogation, but re-arrested at his home on 18 September 2008. He was dismissed from his job as a high school physics teacher allegedly due to his contact with Vietnamese pro-democracy activists.

17. Ms. Ngo Quynh was arrested in Hanoi on 10 September 2008, on her way to Thai ha parish, where a mass rally by demonstrators of Catholic faith protesting against Government policies was taking place.

18. Mr. Nguyen Van Tuc was arrested on 11 September 2008 at his home in Thai Binh Province in a midnight raid by police officers.

19. According to the source, the arrests of Mr. Pham Van Troi; Mr. Nguyen Xuan Nghia; Ms. Pham Nghien Thanh; Mr. Vu Hung; Ms. Ngo Quynh and Mr. Nguyen Van Tuc are reportedly connected to a demonstration that was planned for 14 September 2008 outside the Embassy of the People's Republic of China in Hanoi. This date marked the 50th Anniversary of a Diplomatic Note signed by former North Vietnamese Prime Minister Pham Van Dong recognizing China's sovereignty over the islands of Paracel and Spratly. It was reported that tight Security Police controls were set up in Hanoi, pre-empting any gatherings.

20. The source considers that Mr. Pham Van Troi, Mr. Nguyen Xuan Nghia, Ms. Pham Nghien Thanh, Mr. Vu Hung, Ms. Ngo Quynh and Mr. Nguyen Van Tuc have been deprived of their liberties for the exercise of the rights or freedoms guaranteed by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

21. On 12 January 2009, the Government transmitted its reply providing the Working Group with the information that is set out below.

22. Nguyen Hoang Hai, also known as blogger Dieu Cay, was born in 1952, residing in Ho Chi Minh City. He was sentenced to 30 months in prison by the People's Court of District 3, Ho Chi Minh City on 10 September 2008. He was found guilty of tax evasion in accordance with article 161 of the Penal Code. The trial was open, not closed as mentioned.

23. Nguyen Van Hai was born in 1975, residing in Hanoi. He was an ex-journalist of the *Tuoi Tre* magazine.

24. Nguyen Viet Chien was born in 1952, residing in Hanoi. He was an ex-journalist of the *Thanh Nien* newspaper.

25. Introductions of instance were made against these two ex-journalists on the charge of “abusing job title and power while carrying out official mission” in accordance with article 281 of the Penal Code. They were arrested and provisionally detained on 12 May 2008. From 14 to 15 October 2008, the People’s Court of Hanoi openly tried them. In accordance with paragraph 2 of article 258 of the Penal Code, Nguyen Van Hai was sentenced to 24 months of re-education without detention and Nguyen Viet Chien was sentenced to two years in prison.

26. Truong Minh Duc was born in 1960, residing in Kien Giang Province. On 5 May 2007, he was arrested and provisionally detained. On 28 March 2008, the People’s Court of Kien Giang Province tried Truong Minh Due in the first instance and sentenced him to five years in prison. On 18 July 2008, the People’s Court of Kien Giang Province retried him and decided to retain the verdict of the first trial. Truong Minh Duc, as well as Nguyen Van Hai and Nguyen Viet Chien had intentionally abused their job title, power and the rights of freedom to carry out activities infringing the legitimate interests of the State, organizations and other citizens. Their activities violated provisions of the Penal Code.

27. With regard to the cases concerning Mr. Pham Van Troi (born in 1972, residing in Hanoi); Mr. Nguyen Xuan Nghia (born in 1949, residing in Hai Phong City); Ms. Pham Thanh Nghien (born in 1977, residing in Hai Phong City); Mr. Vu Hung (born in 1966, residing in Hanoi); Ms. Ngo Quynh (born in 1984 in Bac Giang Province, provisionally residing in Hanoi) and Mr. Nguyen Van Tuc (born in 1964, residing in the Thai Binh Province), they are provisionally detained and the professional agencies are carrying out investigations to identify activities of law violation of each of these persons.

28. All the above-mentioned persons are suspected of violating the existing laws of Viet Nam. The arrest, provisional detention and investigation have been carried out in the due course of laws of Viet Nam and in conformity with international practice. The Government strongly

affirms that there are no cases of arbitrary detention in Viet Nam. Only an individual who violates laws is arrested, detained and tried in the due course of laws.

29. The Working Group regrets that the source has not commented on the information submitted by the Government despite an invitation to do so. Nonetheless, the Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the cases, taking into consideration all the information it has at its disposal.

30. The source informed that Mr. Nguyen Hoang Hai was arrested on 19 April 2008 and has been sentenced to 30 months in prison on 10 September 2008. In its reply, the Government confirmed the conviction of Mr. Nguyen Hoang Hai to 30 months in prison and the date of the sentence, but there is no confirmation of his arrest on 19 April 2008 and no explanation is offered for Mr. Nguyen Hoang Hai's detention for almost five months before his trial. The question why Mr. Nguyen Hoang Hai was summoned by the police for interrogation 15 times prior his arrest, still remains open. If the accusations against Mr. Nguyen Hoang Hai were related to tax evasion on a rental property, the arresting officers from the Internal Security and Counter-Espionage Department of the Ministry of Public Security should not have become involved in the case.

31. In the context of the source's account of the timing of his arrest and Mr. Hoang Hai's journalistic and political activities prior to his arrest, the peacefulness and legitimacy of which not having been disputed by the Government, and the lack of valid reasons given by the Government for his arrest, the Working Group concludes that Mr. Nguyen Hoang Hai's detention is arbitrary. It falls within Category II of the categories applicable to the consideration of cases by the Working Group, as representing an attempt to stifle the exercise of his rights to freedom of opinion and expression and of peaceful assembly.

32. In its reply, the Government confirmed that Mr. Nguyen Van Hai and Mr. Nguyen Viet Chien were arrested on 12 May 2008 (the source reported that it was 13 May 2008) and were sentenced on 15 October 2008. Under the Criminal Procedures Code, investigative detention

must not exceed four months, when the pretrial detainee must be either charged or released, unless the accusations relate to a crime against national security.

33. The Working Group regrets that it has not had the benefit of a Government's explanation as to whether the two journalists were charged after the expiry of the general maximum period of four months of detention on remand, or whether crime in terms of article 281 of the Penal Code falls within the category of national security offences, which would allow for a further extension of the pretrial detention period in terms of Vietnamese law, as the source informed. The Government further fails to provide the Working Group with any information about the actual reasons for the sentencing of Mr. Van Hai and Mr. Viet Chien for the crime of "abusing job title and power while carrying out official mission". The Working Group is left in the dark about in what way the defendants had abused their job titles or their powers; what official mission they were carrying out and whether the charges of "inaccurate reporting", as reported by the source, were dropped.

34. Furthermore, with a view to article 19, paragraph 3, of the International Covenant on Civil and Political Rights, the Government does not provide any justification for the investigative detention related to, and the subsequent criminal punishment of, actions, which fall squarely within the scope of the right to freedom of opinion and expression, i.e. reporting on a case of corruption within the Government in Mr. Van Hai's and Mr. Viet Chien's professional capacities as journalists. The Government satisfies itself with a general reference that the measures taken were carried out in conformity with national laws and international practice.

35. The Working Group therefore concludes that the detention of Mr. Ngyuen Viet Chien is arbitrary, resulting from the legitimate exercise of his right entrenched in articles 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, and falling within Category II of the categories applicable to the consideration of cases submitted to the Working Group. The same applies as to the period of arbitrary detention of Mr. Ngyuen Van Hai from the moment of his arrest on 12 May 2008 until his release into "re-education without detention", which presumably took place on or shortly after 15 October 2008, when the verdict was rendered.

36. The Working Group recalls its Deliberation No. 4 on “rehabilitation through labour”,<sup>10</sup> in which it, inter alia, held that coercive administrative measures in the form of forced labour whose purpose is not only occupational rehabilitation, but mainly political and cultural rehabilitation through self-criticism renders inherently arbitrary the deprivation of liberty. However, if, as in the present case, “re-education” is not done in connection with detention, the Working Group cannot express an opinion, although the coercive character of the measure imposed upon Mr. Van Hai raises serious doubts as to its conformity with the right to freedom of opinion and expression.

37. Based on the information before it, the Working Group concludes that the case of Mr. Truong Minh Duc is a particularly grave case of arbitrary detention in terms of Category II of the categories applicable to the consideration of cases by the Working Group. In its Opinion No. 1/2003 (Viet Nam) the Working Group reiterated that “[o]n the question of the violation of national legislation mentioned by the Government, the Working Group recalls that, in conformity with its mandate, it must ensure that national law is consistent with the relevant international provisions set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments to which the State concerned has acceded. Consequently, even if the detention is in conformity with national legislation, the Working Group must ensure that it is also consistent with the relevant provisions of international law..<sup>11</sup>

38. Broad criminal law provisions, which make “taking advantage of democratic freedoms and rights to abuse the interests of the State” a crime, such as article 258 of the Criminal Code, are inherently inconsistent with any of the rights and liberties guaranteed by the Universal Declaration of Human Rights and by the International Covenant on Civil and Political Rights, to which Viet Nam is a State party. In its reply, the Government neither attempts to reconcile article 258 of the Criminal Code with the right to freedom of opinion and expression, applicable in the case of Mr. Minh Duc, nor does it contest the allegations of the source that Mr. Minh Duc, who is a journalist, was merely reporting about public affairs in the Southern province of Kien Giang.

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<sup>10</sup> E/CN.4/1993/24, p. 16.

<sup>11</sup> E/CN.4/2004/3/Add.1, para. 17.

His criminal conviction resulting from such activities amount to arbitrary detention in terms of Category II.

39. The length of Mr. Minh Duc's provisional detention for more than one year, for which no explanation was provided by the Government, and the harsh sentence of five years in prison further add to the seriousness of the arbitrary character of his detention. As the source did not substantiate its allegation that Mr. Minh Duc was forced to sign confessions, the Working Group cannot conclude that there were also grave violations of the right to fair trial which, in addition, would render his detention to be arbitrary pursuant to Category III of the categories applicable to the consideration of cases submitted to it.

40. There is no confirmation in the Government's reply about the dates or the reasons for the arrests of Mr. Pham Van Troi, Mr. Nguyen Xuan Nghia, Ms. Pham Thanh Nghien, Mr. Vu Hung, Ms. Ngo Quynh and Mr. Nguyen Van Tuc. The source informed that these individuals were arrested on 10 and 11 September 2008 (or re-arrested after initial release on 18 September), all in connection with a demonstration planned for 14 September 2008. In accordance with the Government's reply this means, firstly, that all these persons have been detained without trial for approximately four months at the time of the Government's response.

41. Secondly, it would also appear that all six detainees might be provisionally held without suspicion of having committed any crime in terms of Vietnamese criminal legislation as the authorities, on the Government's own account, were still in the process of identifying violations of the law of each of these individuals, which would bring their detention close to arbitrary detention pursuant to Category I as being without any legal basis. The Government's reply does not explain which provisions of "the existing laws of Viet Nam" were infringed and how the arrests, detention and investigations could have been carried out in "conformity with international practice". The Working Group would have expected a more detailed account in view of the allegations of the source transmitted to the Government that Ms. Pham Thanh Nghien had in fact been charged pursuant to article 88 of the Criminal Code for "conducting propaganda against the Socialist Republic of Viet Nam".

42. Since the Government does not specify the nature of the charges, if any, provided for under article 88 and possibly other criminal provisions, and what acts might give rise to such charges, the Working Group, accordingly, considers that the acts for which the six women and men are being held in detention were indeed those described in the communication of the source, namely, organizing and attempting to participate in a demonstration. The Working Group concludes that these actions merely represent the peaceful exercise of the right to freedom of assembly and of opinion and expression, which are guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the International Covenant on Civil and Political Rights.

43. Based on the available information, which has not been contested by the Government, the Working Group concludes that the detention of Mr. Van Troi; Mr. Xuan Nghia; Ms. Thanh Nghien; Mr. Vu Hung; Ms. Ngo Quynh and Mr. Van Tuc is arbitrary, falling within Category II. The consequences of the Government's measures are especially grave for Mr. Vu Hung as he was reportedly dismissed from his post as a high school teacher.

44. In the light of the foregoing, the Working Group renders the following Opinion:

(a) The detention of Mr. Nguyen Hoang Hai, Mr. Pham Van Troi, Mr. Nguyen Xuan Nghia, Ms. Pham Thanh Nghien, Mr. Vu Hung, Ms. Ngo Quynh and Mr. Nguyen Van Tuc is arbitrary, being in contravention of articles 9, 19 and 20 of the Universal Declaration of Human Rights and articles 9, 19 and 21 of the International Covenant on Civil and Political Rights and falling within Category II of the categories applicable to the consideration of cases submitted to the Working Group on Arbitrary Detention;

(b) The detention of Mr. Nguyen Viet Chien and Mr. Truong Minh Duc is arbitrary being in contravention of articles 9 and 19 of the Universal Declaration of Human Rights and articles 9 and 19 of the International Covenant on Civil and Political Rights and falling within Category II of the categories applicable to the consideration of cases submitted to the Working Group;

(c) The detention of Mr. Nguyen Van Hai was arbitrary between the date of his arrest on 12 May 2008 until his release following his criminal sentence to “re-education without detention” on 15 October 2008, being in contravention of articles 9 and 19 of the Universal Declaration of Human Rights and articles 9 and 19 of the International Covenant on Civil and Political Rights and falling within Category II of the categories applicable to the consideration of cases submitted to the Working Group.

45. Consequent upon the Opinion rendered, the Government of Viet Nam is requested to take the necessary steps to remedy the situation of Mr. Nguyen Hoang Hai; Mr. Nguyen Viet Chien; Mr. Truong Minh Duc; Mr. Pham Van Troi; Mr. Nguyen Xuan Nghia; Ms. Pham Thanh Nghien; Mr. Vu Hung; Ms. Ngo Quynh and Mr. Nguyen Van, in order to bring it into conformity with the norms and principles enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

46. Given his reported poor status of health due to harsh detention conditions, a fact that was not contested by the Government, and the particularly serious case of arbitrary detention, the appropriate remedy for Mr. Truong Minh Duc, according to the Working Group, would be his immediate release.

Adopted on 5 May 2009

**OPINION No. 2/2009 (UNITED STATES OF AMERICA)**

**Communication addressed to the Government on 1 July 2008.**

**Concerning Mr. Mohammed Abdul Rahman Al-Shimrani.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)

2. The Working Group conveys its appreciation to the Government of the United States of America for having provided it, on 21 November 2008, with information concerning the allegations of the source. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.

3. (Same text as paragraph 3 of Opinion No. 17/2008.)

4. According to the source, Mr. Mohammed Abdul Rahman Al-Shimrani (hereafter Mr. Al-Shimrani), a 31 year-old Saudi Arabian national, a master's degree student, and a public high-school teacher in Najran, Saudi Arabia, is currently detained at the United States Naval Base in Guantánamo Bay, Cuba. He received a Bachelor of Arts from Imam Mohammed Bin Saud University in 1999. While in Saudi Arabia, he founded an organization that gives food and books to the poor.

5. Mr. Al-Shimrani was seized by Pakistani forces in November 2001, and interrogated at a Pakistani military base in Kohat, Pakistan. The Pakistani military then turned him over to the United States military, which flew him to the United States military base in Kandahar, Afghanistan, where he was allegedly subjected to abusive interrogation. After 12 days, he was transferred to the United States Naval Base at Guantánamo Bay, Cuba (hereafter Guantánamo), where he has been imprisoned without charge for over six years and half.

6. There is information indicating that the continuation of Mr. Al-Shimrani's detention constitutes a serious danger to his physical and mental health and his life. He may have been hospitalized for mental health problems caused by his ongoing confinement in oppressive conditions. He also has stomach problems, which have caused him to cough up blood after eating, and a lung condition that causes bleeding and coughing up blood.

7. The source recalls that in 2004, following the judgment of the United States Supreme Court in the case of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the United States Department of Defense (US DoD) created the Combatant Status Review Tribunals (CSRTs) to review the "enemy combatant" status of detainees. It is pointed out that the CSRT procedures depart from

the basic requirements of due process, fair trial procedures, and fundamental human rights. The CSRT panel is composed of military personnel who owe formal allegiance to the detaining authority. The CSRT rules require a presumption in favour of the Government's evidence.

8. The source reports that during CSRTs hearings, which are closed to the public, detainees, are prohibited from rebutting evidence; they are denied legal counsel; they are required to disprove their guilt; and are compelled to self-incriminate. In addition, although the CSRT procedures require CSRT personnel to collect exculpatory evidence from other Government agencies, these agencies allow CSRT personnel access only to "pre-screened and filtered" information. Access to many intelligence databases, required to further search for relevant information, is also denied. CSRT procedures also create an unreliable body of evidence by permitting the panel to consider "hearsay" evidence and evidence allegedly procured by torture. Thus, the CSRT was permitted to rely on conclusions and evidence obtained through coercion and torture and was not required to conduct even cursory inquiries into the source of such information to assess its reliability and probative value. The vast majority of the CSRT panels' decisions are based on classified evidence, which detainees are prohibited from accessing.

9. According to the source, the CSRT tribunal was structurally, and actually, biased against Mr. Al-Shimrani. The CSRT procedures provided Mr. Al-Shimrani with no meaningful notice of the alleged factual basis for his continued detention. Virtually all the evidence the Government presented to the CSRT tribunal was classified, and therefore concealed from Mr. Al-Shimrani. The evidence that was presented to him was unreliable and one-sided. Mr. Al-Shimrani had neither opportunity to fairly and effectively defend himself nor real opportunity to introduce any evidence of his own. Coupled with the fact that the Government's evidence was presumed as being the truth, and his inability to have legal counsel, it was impossible for Mr. Al-Shimrani to refute the charges against him.

10. At his CSRT hearing, Mr. Al-Shimrani was denied a fair and public hearing; he had no access to legal counsel; he was convicted on the basis of unreliable and one-sided evidence which he could not contest; he was not brought before a judicial authority within a reasonable time; and he has never been informed of his fundamental rights. It is believed that CSRT

procedures in no way guarantee Mr. Al-Shimrani the minimum international standards as required by the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights.

11. The source argues that although the Working Group does not consider itself in a position to determine whether detainees in Guantánamo are entitled to prisoner-of-war status under the relevant Geneva Conventions, it is however competent to undertake the task of appreciating whether the absence of minimum guarantees provided under articles 9 and 14 of the International Covenant on Civil and Political Rights may confer upon detention an arbitrary character within the scope of its mandate. Furthermore, the source believes that the United States' obligations under the International Covenant on Civil and Political Rights unequivocally apply, since the State has not at any time discussed, let alone implemented, the procedural requirements for the derogation from the International Covenant on Civil and Political Rights.

12. The source concludes that Mr. Al-Shimrani's detention is arbitrary because it fails to meet international standards relating to the right to a fair trial pursuant to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Mr. Al-Shimrani was not given a hearing by an independent and impartial tribunal. He was not brought before a judicial authority within a reasonable amount of time; he was not informed of any of his rights and he was denied communication with the outside world. Additionally, there is no evidence that the United States Government ever provided him the option of communicating with a Saudi consular official or the Saudi Government in order to seek assistance from an official in his own country.

13. The Government of the United States responded to the above allegations, presenting its position on the case under three broad areas: detention of enemy combatants; treatment in detention; and, applicable international law.

14. Regarding the first point, the Government reiterates its stated position on the status of Guantánamo detainees by qualifying them as "enemy combatants" and thus not enjoying the right to a fair trial and other related rights accorded to accused persons. It argues that Mr. Al-

Shimrani is an enemy combatant and deserves the detention and treatment meted out to him and that his classification as such gives the United States Government the right to detain him for the duration of the conflict. In view of this position, it therefore disagrees with an Opinion of the Working Group (No. 43/2006) adopted earlier where it had stated that “the struggle against international terrorism cannot be characterized as an armed conflict within the meaning that contemporary international law gives to that concept”.<sup>12</sup>

15. Further, the Government believes that the CSRT procedure, the Administrative Board Review (ARB) and the recently permitted right to challenge their detention in the Federal court “provides an unprecedented protection to the detainees in the history of war”.

16. Regarding the treatment in detention of Mr. Al-Shimrani and the concerns raised by the Working Group in this regard, the United States Government denies any act of torture and/or abuse. It presents a detailed account of the medical facilities available and accessible to detainees as well as avenues for redress of any ill-treatment by officers at the detention facility. The Government denied the information offered by the source about the medical problems of Mr. Al-Shimrani. In turn, it provided some confidential details about his health and medical history which, in its view, do not present any hazard to the detainee’s well-being, arguing that whatever ailments may have arisen in the past, have been dealt with quite adequately.

17. On the third and final point of applicable international law to Mr. Al-Shimrani, the United States Government believes that he falls within the category of enemy combatant and therefore the rights to a fair trial and other safeguards outlined in the International Covenant on Civil and Political Rights do not apply. Further, under its interpretation of article 2, paragraph 1, of the International Covenant on Civil and Political Rights, since the geographical location of Guantánamo falls outside its territory, the Government is not obligated to extend relevant rights enumerated in the International Covenant on Civil and Political Rights to detainees in that facility.

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<sup>12</sup> Opinion No. 43/2006 (United States of America), A/HRC/7/4/Add.1, p. 29, para. 31.

18. As per the methods of work of the Working Group, the response of the Government was transmitted to the source for its comments, which are summarized below.

19. The source considers that the response of the Government does not fully address its initial submission. For instance, it asserts that while Mr. Al-Shimrani's detention was reviewed through the CSRT, in *Boumediene v. Bush* the United States Supreme Court concluded that the review provided by this tribunal was "inadequate". The CSRT procedures departed in numerous ways from the basic requirements of due process, fair trial procedures, and fundamental human rights. The source refers to its submission explaining how he was (a) not brought before a judicial authority within a reasonable amount time; (b) never informed of his rights; (c) required to disprove his presumed guilt; and (d) denied legal counsel. The review was not conducted until almost three years after Mr. Al-Shimrani was secretly detained, tortured and then transferred to Guantánamo.

20. The source argues that while the Government asserts that Mr. Al-Shimrani is being "detained pursuant to the law of war", there has yet to be any proceeding that examines whether the detention is in fact justified pursuant to international humanitarian law. The CSRT proceedings were designed to confirm that the prisoners at Guantánamo were "enemy combatants", but the laws of war do not authorize indefinite military detention based on the United States Government's expansive definition of this designation.

21. According to the source, while the United States Government asserts that "the purpose of this detention is to prevent them from returning to the battlefield", there is no procedure in place that applies this factor in examining whether or not continued detention is necessary. The ARB that conducts annual post-CSRT reviews to determine the need for continued detention does not even consider this as a key factor in its decision making process; instead it looks at (a) whether the detainee poses any danger to the United States and its allies; (b) whether the detainee continues to have any intelligence value; and (c) whether there is any other reason to detain.<sup>13</sup>

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<sup>13</sup> Memorandum from the United States Department of Defense, Administrative Review Board Process, §3(f) "Standards and Factors to be Considered by the ARB" (Jul. 13, 2006) available at: <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>. Indefinite detention for the purpose of interrogation is not permissible under the Law of War. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2006).

22. The source further suspects that the United States Government continues to delay the meaningful review to Federal court to which the detainee is now entitled by filing motion after motion thwarting the judges' efforts to further the speedy resolution of all habeas corpus cases before them. It also continues to use secret evidence and resist disclosure of exculpatory evidence. Such conduct demonstrates the Government's repeated failure to observe Principle 11, paragraph 1, of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>14</sup> which requires that "[a] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority."

23. The source submits that the assertion of the United States Government that the purpose of detention is to prevent return to the battlefield is belied by Mr. Al-Shimrani's individual circumstances. A national of Saudi Arabia, Mr. Al-Shimrani has been approved by his home Government for release into its highly sophisticated and very successful reintegration program. The program is widely acclaimed and more than 100 men released from Guantánamo have been successfully reintegrated into Saudi society. There is an initial period of intense "deprogramming" in a Saudi prison facility, following which the men are closely monitored with the compliance of their families. The source states that the allegations against Mr. Al-Shimrani do not differ from those raised against many of his countrymen who have already been released into this program which also prevents their travel outside the Kingdom, rendering impossible any return to the battlefield.

24. The source emphatically challenges the information included in the United States Government response regarding the health condition of Mr. Al-Shimrani which, they argue, is incomplete and as such does not address the specific concerns raised. Assertions that Mr. Al-Shimrani has not been treated for particular conditions or that said conditions do not appear in the medical history referenced do not assuage concerns about his health. The suggestion of the United States Government seems to be that he has not suffered from any health problems in the seven years he has been incarcerated at Guantánamo except for three days of heartburn for which

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<sup>14</sup> General Assembly resolution 43/173.

he was treated in 2002. The source finds it difficult to accept this claim and states that it greatly heightens their concerns about Mr. Al-Shimrani's access to medical care.

25. Based on the range of documentation and information received, the Working Group believes itself to be in a position to render an Opinion on this case.

26. The United States Government appears to adopt the position that the definition of what constitutes a state of war, enemy combatant and other international laws governing armed conflict, has undergone a modification in a post-September 11th world. This seems to be the main justification for detention of persons from any jurisdiction in the world, detaining them without a warrant or without informing family of the detainee, as well as denying basic minimum rights under international humanitarian law and human rights law (such as the International Covenant on Civil and Political Rights to which it is a State party).

27. The Working Group perceives a number of deficiencies in this position and stance of the Government and would like to recall its position adopted in its "Legal Opinion Regarding the Deprivation of Liberty of Persons Detained in Guantánamo Bay".<sup>15</sup> It would be pertinent to also refer to an Opinion rendered earlier by the Working Group stating that "[it] would like to stress as a matter of principle that the application of international humanitarian law to an international or non-international armed conflict does not exclude application of human rights law. The two bodies of law are complimentary and not mutually exclusive. In the case of a conflict between the provisions of the two legal regimes with regard to a specific situation, the *lex specialis* will have to be identified and applied".<sup>16</sup>

28. The Working Group on Arbitrary Detention is unable to bring into the fold of legality the secretive methods of detention, interrogation and rendition adopted by the Government in its detention of Mr. Al-Shimrani as it does not find support in international law to this effect. It does not find legal support for the act of arrest and interrogation of Mr. Al-Shimrani by Pakistani forces before being turned over to the United States military which flew him to the United States

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<sup>15</sup> E/CN.4/2003/8, p. 19, paras. 64 *et seq.*

<sup>16</sup> Opinion No. 44/2005 (*Iraq and the United States of America*), A/HRC/4/40/Add.1, p. 25, para. 13.

military base in Kandahar, Afghanistan, where he was allegedly subjected to abusive interrogation. After 12 days, he was transferred to the Naval Base at Guantánamo Bay, where he has been imprisoned without charge or trial. The total period of detention is now almost eight years.

29. The Working Group would like to state that it has been seized of similar cases of detention in Guantánamo Bay for more than seven years leading to a consistent analysis of the nature of detention at this facility and consequent Opinions being rendered. A robust and on-going jurisprudence is thus being generated which may be referred to in annual reports of the Working Group as well as in Opinions rendered on the subject.<sup>17</sup>

30. The Working Group would further like to recall here the joint report<sup>18</sup> of five special procedures mandate holders of the former Commission on Human Rights, in which it has stated quite categorically that “The persons held at Guantánamo Bay are entitled to challenge the legality of their detention before a judicial body in accordance with article 9 of the International Covenant on Civil and Political Rights, and to obtain release if detention is found to lack a proper legal basis. This is currently being violated, and the continuing detention of all persons held at Guantánamo Bay amounts to arbitrary detention in violation of article 9 of the International Covenant on Civil and Political Rights”.<sup>19</sup>

31. The Working Group notes that the Government does not avail the opportunity of offering an explanation of the various facts related to the arrest, interrogation and detention either by acknowledging that these have indeed taken place as indicated by the source, or by denying the various detention periods.

32. The Working Group further notes that the Government does not adequately address the serious issues arising from the allegations of abuse, prolonged detention, denial of due process,

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<sup>17</sup> For instance, see annual reports of the Working Group on Arbitrary Detention E/CN.4/2006/7, p. 20, paras. 68 *et seq.*; A/HRC/4/40, p. 16, paras. 30 *et seq.*; E/CN.4/2005/6, p. 20, paras. 59 *et seq.*; E/CN.4/2004/3, p. 17, paras. 50 *et seq.*; E/CN.4/2003/8, p. 19, paras. 61 *et seq.*

<sup>18</sup> E/CN.4/2006/120.

<sup>19</sup> *Ibid* at para. 84.

fair trial, or any meaningful review in respect of both. Since 1991, the Working Group has adopted a clear position that it is not convinced that military tribunals and adjudicating processes offer the requisite protection of due process. To this end, therefore, the procedures of the CSRT and the ARB are not adequate procedures to satisfy the right to a fair and independent trial as these are military tribunals of a summary nature.

33. It is relevant to note here that the United States has not derogated from substantive provisions of the International Covenant on Civil and Political Rights and thus remains bound by its provisions. Even if it had, the right to habeas corpus, although not explicitly enumerated in the catalogue contained in article 4 of the International Covenant on Civil and Political Rights, belongs to the non-derogable rights even in states of emergencies.<sup>20</sup>

34. In view of the above analysis, the Working Group renders the following Opinion:

The detention of Mr. Mohammed Abdul Rahman Al-Shimrani is arbitrary, being in contravention of articles 9, 10, and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights and falling within Category III of the categories applicable to the consideration of cases submitted to the Working Group.

35. The Working Group requests the Government of the United States of America to remedy the situation of Mr. Mohammed Abdul Rahman Al-Shimrani and to bring it into conformity with applicable international human rights norms and standards as contained, inter alia, in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Under the circumstances, the Working Group requests the Government of the United States of America to forthwith release Mr. Al-Shimrani from detention.

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<sup>20</sup> Working Group on Arbitrary Detention, Opinion No. 43/2006 (United States of America), A/HRC/7/4/Add. 1, p. 29, para. 36, concurring with the Human Rights Committee's general comment No. 29, on article 4: Derogations during a state of emergency, para. 15.

36. Finally, the Working Group welcomes the statement of the new United States Administration regarding its intention to shut down the detention facility at the Naval Base at Guantánamo Bay Cuba, and encourages it to implement this decision as soon as possible.

Adopted on 6 May 2009

**OPINION No. 3/2009 (UNITED STATES OF AMERICA)**

**Communication addressed to the Government on 7 July 2009.**

**Concerning Mr. Sanad Ali Yislam Al-Kazimi.**

**The State is a party in the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it, on 21 November 2008, with information concerning the allegations of the source. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. According to the source, Mr. Sanad Ali Yislam Al-Kazimi (hereafter Mr. Al-Kazimi), is a citizen of Yemen, born on 17 February 1970; currently detained at the United States Naval Base at Guantánamo Bay, Cuba (hereafter Guantánamo). Mr. Al-Kazimi, married in 1994, has two daughters, aged 13 and 11, and two sons, aged 12 and 9. He left Yemen in May 2002 to find work in the United Arab Emirates.

5. Mr. Al-Kazimi was apprehended in Dubai in January 2003 and held at an undisclosed location in or near Dubai for two months. He was then transferred to a different place about two hours away. He was kept naked for 22 days, at times shackled, and subjected to extreme climatic conditions and simulated drowning. After six months, he was then transferred to United States custody, allegedly pursuant to a United States Central Intelligence Agency (CIA) rendition programme, and taken to Kabul, Afghanistan, where he was held in the so-called “Prison of Darkness” for nine months. In this prison, he suffered severe physical and psychological torture by unidentified persons. He was then transferred to Bagram Airbase in Afghanistan where he was held for a further four months in United States custody. Again, he was allegedly subjected to severe physical and psychological torture by what he believed were the same unidentified persons he encountered in the “prison of darkness”.

6. On or around 18 September 2004, Mr. Al-Kazimi was transferred to Guantánamo, where he is currently held in incommunicado detention without charge. It is believed he has again suffered severe physical and psychological mistreatment.

7. There is information indicating that the continuation of Mr. Al-Kazimi’s detention constitutes a serious danger to his physical and psychological health. He has been diagnosed with adjustment disorder and a personality disorder and may additionally have clinical depression.

8. It was recalled that in 2004, following the judgment of the United States Supreme Court in the case of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the United States Department of Defense (US DoD) created the Combatant Status Review Tribunals (CSRTs) to review the “enemy combatant” status of detainees. It is alleged that CSRT procedures depart from basic requirements of due process; fair trial procedures, and fundamental human rights. During CSRT hearings, which are closed to the public, detainees are prohibited from rebutting evidence; denied legal counsel; required not to disprove their guilt; and are compelled to self-incrimination.

9. In addition, although the CSRT procedures require its personnel to collect exculpatory evidence from other government agencies, these agencies allow CSRT personnel access only to “pre-screened and filtered” information. Access to many intelligence databases, required to

further search for relevant information, is also denied. CSRT procedures also create an unreliable body of evidence by permitting the panel to consider “hearsay” evidence and evidence allegedly procured by torture. Thus, the CSRT is permitted to rely on conclusions and evidence obtained through coercion and torture and is not required to conduct even cursory inquiries into the source of such information to assess its reliability and probative value. The vast majority of the CSRT panels’ decisions are based on classified evidence, which detainees are prohibited from accessing.

10. Virtually all of the evidence the Government presented to the CSRT was classified and therefore concealed from Mr. Al-Kazimi. The evidence that was presented to him was unreliable and one-sided, providing Mr. Al-Kazimi with no opportunity to fairly and effectively defend himself. Nor did Mr. Al-Kazimi have any real opportunity to introduce any evidence of his own. Coupled with the fact that all the Government’s evidence was presumed true, and his inability to have legal counsel, it was impossible to Mr. Kazimi to refute the charges against him.

11. The source adds that CSRT procedures provided Mr. Al-Kazimi with no meaningful notice of the alleged factual basis for his continued detention. At his CSRT hearing in 2004, Mr. Al-Kazimi was denied a fair and public hearing; he had no access to legal counsel; he was accused on the basis of unreliable and one-sided evidence which he could not contest; he was not brought before a judicial authority within a reasonable time; and he was never informed of his fundamental rights. The source claims that CSRT procedures in no way provided Mr. Al-Kazimi with the minimum international standards required by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, to which the United States of America is a State party.

12. The CSRT procedures state that the “detainee shall not be represented by legal counsel” (Ex. 10, Implementation Procedures at Encl. 1, p. 4). The “personal representative” who is assigned to each detainee is not a lawyer and does not advocate for the detainee’s interests. The script for the personal representative’s first meeting with the detainee instructs that “I am neither a lawyer nor your advocate ...None of the information you provide me shall be held in confidence, and I am obligated to divulgate it at the hearing” (Ex. 10, Implementation

Procedures at Encl 3, p.3). The appointment of a “personal representative” to Mr. Al-Kazimi in no way satisfied his right to counsel as required by international law.

13. The CSRT rules require it to presume that the Government’s evidence of “enemy combatant status” is genuine and accurate (Ex. 10, Implementation Procedures at Encl. 1, p. 6). This presumption places the burden on the detainee to disprove his guilt.

14. CSRT proceedings are structurally biased against detainees, both because the CSRT panel is composed of military personnel (specifically three officers of the United States Armed Forces) who owe formal allegiance to the detaining authority and because the CSRT rules require a presumption in favor of the Government’s evidence. Mr. Al-Kazimi did not receive a hearing by an independent and impartial tribunal as required by international law.

15. The source adds that Mr. Al-Kazimi was not brought before a judicial authority within a reasonable amount of time. At no point during his detention in the United Arab Emirates, Afghanistan or at Guantánamo Bay was Mr. Al-Kazimi ever brought before any kind of judicial authority. He was never informed of his fundamental rights. Additionally, the United States Government never gave him the option of communicating with a Yemeni consular representative or the Yemeni Government in order to seek assistance from an official in his own country. He was denied communication with the outside world.

16. Although the Working Group does not consider itself in a position to determine whether detainees in Guantánamo are entitled to prisoner-of-war (POW) status under the Geneva Conventions, it is however competent to undertake the task of appreciating whether the absence of minimum guarantees provided under articles 9 and 14 of the International Covenant on Civil and Political Rights may give detention an arbitrary character. Furthermore, the source believes that the obligations of the United States under the International Covenant on Civil and Political Rights unequivocally apply since the State has not at any time discussed, let alone implemented, the procedural requirements for the derogation from the Covenant. Thus, the United States obligations under the International Covenant unequivocally apply.

17. The source concludes that Mr. Al-Kazimi's detention is arbitrary because it fails to meet international standards relating to the right to a fair trial pursuant to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

18. The Government responded to the above allegations presenting its position on the case under three broad areas, i.e., detention of enemy combatants; treatment in detention and applicable international law.

19. Regarding the first point, the United States Government reiterates its stated position on the Guantánamo detainees by describing them as "enemy combatants" and thus possessing no right to a fair trial and other related rights accorded to accused persons. It argues that Mr. Al-Kazami is an enemy combatant and deserves the detention and treatment meted out to him. Further, that the CSRT procedure, the Administrative Board Review and the recently permitted right to challenge their detention in the Federal court provides "an unprecedented protection to the detainees in the history of war".

20. Regarding the treatment in detention of Mr. Kazami, the United States Government denies any acts of torture and/or abuse. It presents a detailed account of the medical facilities available and accessible to detainees as well as avenues for redress of any ill treatment by officers of the detention facility. The Government also offered some confidential details of the health condition of Mr. Al- Kazami which in its view has been dealt with adequately.

21. On the third and final point of applicable international law to Mr. Al-Kazami, the United States Government believes that he falls within the category of enemy combatant and therefore the rights to a fair trial and so on outlined under the International Covenant on Civil and Political Rights do not apply. Further, its interpretation of article 2, paragraph 1, of the International Covenant on Civil and Political Rights implies that the geographical location of Guantánamo falls outside its territory; hence detainees held in that facility are outside the protection of the relevant rights enumerated in the International Covenant.

22. As per the methods of work of the Working Group on Arbitrary Detention, the response of the Government was transmitted to the source for its comments, and are summarized below.

23. The source believes that the response of the Government does not fully address their initial submission. For instance, it asserts that while Mr. Al-Kazami's detention was reviewed through the CSRT in the case of *Boumediene v. Bush*, the United States Supreme Court concluded that the review provided by this tribunal was "inadequate". The CSRT procedures departed in numerous ways from the basic requirements of due process, fair trial procedures, and fundamental human rights. The source refers to its submission explaining how he was (a) not brought before a judicial authority within a reasonable amount time; (b) never informed of his rights; (c) required to disprove his presumed guilt; and, (d) denied legal counsel. The review was not conducted until almost two years after Mr. Al-Kazimi was secretly detained, tortured and then transferred to Guantánamo.

24. The source argues that while the United States Government asserts that Mr. Al-Kazami is "being detained pursuant to the law of war", there has yet to be any proceeding that examines whether the detention is in fact justified pursuant to international humanitarian law. The CSRT proceedings were designed to confirm that the prisoners at Guantánamo were "enemy combatants", but the laws of war do not authorize indefinite military detention based on the United States Government's expansive definition of this designation.

25. According to the source, while the Government asserts that "the purpose of this detention is to prevent them from returning to the battlefield", there is no procedure in place that applies this factor in examining whether or not continued detention is necessary. The ARB that conducts annual post-CSRT reviews to determine the need for continued detention does not even consider this as a key factor in its decision making process; instead it looks at (a) whether the detainee poses any danger to the United States and its allies; (b) whether the detainee continues to have any intelligence value; and (c) whether there is any other reason to detain.<sup>21</sup>

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<sup>21</sup> Memorandum from Department of Defense, Administrative Review Board Process, §3(f) "Standards and Factors to be Considered by the ARB" (Jul. 13, 2006) available at [www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf](http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf). Indefinite detention for the purpose of interrogation is not permissible under the Law of War. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2006).

26. The source further suspects that the Government continues to delay the meaningful review by Federal courts to which the detainee is now entitled by filing motion after motion thwarting the judges' efforts to further the speedy resolution of all habeas corpus cases before them. It also continues to use secret evidence and resist disclosure of exculpatory evidence. Such conduct demonstrates the Government's repeated failure to observe Principle 11, para. 1, of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>22</sup> "[a] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority."

27. The source also argues that the response of the Government does not address the secret detention of Mr. Al-Kazimi in the United Arab Emirates and Afghanistan; nor does it address the allegations of torture and abuse during this period of secret detention or the fact that it only applied Common article 3 of the Geneva Conventions after the United States Supreme Court held that it was mandatory to do so in *Hamdan v. Rumsfeld* at the end of June 2006. Finally, the source claimed insufficient attention in the Government response to harsh interrogation techniques as well as the health condition of Mr. Al-Kazami.

28. Based on the range of documentation and information received, the Working Group believes itself to be in a position to render an Opinion on this case.

29. The United States Government appears to adopt the position that the definition of what constitutes a state of war, an enemy combatant and other international laws governing armed conflict have undergone a modification in a post-September 11th world. This seems to be the main justification for detention of persons from any jurisdiction in the world, detaining them without a warrant or informing family of the detainee, as well as denying basic minimum rights under international humanitarian law and human rights law (such as the International Covenant on Civil and Political Rights, to which the United States of America is a State party).

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<sup>22</sup> General Assembly resolution 43/173.

30. The Working Group perceives a number of deficiencies in this position and stance of the United States Government and would like to recall its position adopted in its “Legal Opinion Regarding the Deprivation of Liberty of Persons Detained in Guantánamo Bay”.<sup>23</sup> In an Opinion rendered the Working Group stated that it “would like to stress as a matter of principle that the application of international humanitarian law to an international or non-international armed conflict does not exclude application of human rights law. The two bodies of law are complimentary and not mutually exclusive. In the case of a conflict between the provisions of the two legal regimes with regard to a specific situation, the *lex specialis* will have to be identified and applied”.<sup>24</sup>

31. The Working Group is unable to bring into the fold of legality the secretive methods of detention, interrogation and rendition adopted by the United States in its detention of Mr. Al-Kazimi, as it does not find support in national and international law to this effect. It does not find legal support for the act of arrest of Mr. Al-Kazimi in Dubai, removal to an unnamed location for six months, relocation to Afghanistan and being held there for nine months, followed by another four months before being removed to Guantánamo Bay on 18 September 2004, where he continues to be held.

32. The Working Group further notes that the United States Government does not adequately address the serious issues arising from the allegations of abuse, prolonged detention, denial of due process, fair trial, or any meaningful review in respect of both.

33. The Working Group would further like to recall here the joint report<sup>25</sup> of five special procedures mandates holders of the former Commission on Human Rights in which it was stated quite categorically that “The persons held at Guantánamo Bay are entitled to challenge the legality of their detention before a judicial body in accordance with article 9 of the International Covenant on Civil and Political Rights, and to obtain release if detention is found to lack a proper legal basis. This is currently being violated, and the continuing detention of all persons

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<sup>23</sup> E/CN.4/2003/8, p. 19, paras. 64 *et seq.*

<sup>24</sup> Opinion No. 44/2005 (Iraq and the United States of America), A/HRC/4/40/Add.1, p. 25, para. 13.

<sup>25</sup> E/CN.4/2006/120.

held at Guantánamo Bay amounts to arbitrary detention in violation of article 9 of the International Covenant on Civil and Political Rights”.<sup>26</sup>

34. The Working Group notes that the United States Government does not avail the opportunity of offering an explanation of the various facts related to the arrest, interrogation and detention either by acknowledging that these have indeed taken place as indicated by the source, or by denying the various detention periods.

35. The Working Group further notes that the Government does not adequately address the serious issues arising from the allegations of abuse, prolonged detention, denial of due process, fair trial, or any meaningful review in respect of both. Since 1991, the Working Group has adopted a clear position that it is not convinced that military tribunals and adjudicating processes offer the requisite protection of due process. To this end therefore, the CSRT and ARB are not adequate procedures to satisfy the right to a fair and independent trial as these are military tribunals of a summary nature.

36. It is relevant to note here that the United States has not derogated from substantive provisions of the International Covenant on Civil and Political Rights and thus remains bound by its provisions. Even if it had, the right to habeas corpus, although not explicitly enumerated in the catalogue contained in article 4 of the International Covenant on Civil and Political Rights, belongs to the non-derogable rights even in states of emergencies.<sup>27</sup>

37. In view of the above analysis, the Working Group renders the following Opinion:

The detention of Mr. Sanad Ali Yislam Al-Kazimi is arbitrary, being in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights and falls

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<sup>26</sup> Ibid at para. 84.

<sup>27</sup> Working Group on Arbitrary Detention, Opinion No. 43/2006 (United States of America), A/HRC/7/4/Add. 1, p. 29, para. 36, concurring with the Human Rights Committee’s general comment No. 29, on article 4: Derogations during a state of emergency, para. 15.

within Category III of the categories applicable to the consideration of cases submitted to the Working Group.

38. The Working Group requests the Government of the United States of America to remedy the situation of Mr. Sanad Ali Yislam Al-Kazimi and to bring it into conformity with applicable international human rights norms and standards as contained, inter alia, in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Under the circumstances, the Working Group requests the Government of the United States to forthwith release Mr. Al-Kazimi from detention.

39. Finally, the Working Group welcomes the statement of the new United States Administration regarding its intention to shut down the detention facility at Guantánamo Bay and encourages it to implement this decision as soon as possible.

Adopted on 6 May 2009

#### **OPINION No. 4/2009 (MALDIVES)**

**Communication addressed to the Government on 28 August 2008.**

**Concerning Mr. Richard Wu Mei De.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source in due course and much in advance of the fifty-fourth session, when this Opinion was adopted. The Working Group transmitted the reply provided by the Government to the source and has received its comments.

3. (Same text as paragraph 3 of Opinion No. 17/2008.)

4. The case summarized hereafter was reported to the Working Group on Arbitrary Detention as follows:

5. Mr. Richard Wu Mei De, 40 years of age, a Chinese national, Manager of the Shanghai Restaurant and of the Grace Inn in Malé, was arrested without a warrant on 4 November 1993 in Malé by forces of the Ministry of Defence and National Security (MDNS), invoking immigration and foreign investment laws, and was accused of non-compliance with the directives of the authorities. He has been detained ever since under the authority of the MDNS, the Maldivian Police Services (MPS) and the Department of Penitentiary and Rehabilitation Services, at first at Gaamaadhoo Jail. However, it is not clear, which authority has actually ordered his detention. He was later transferred to his present place of detention at Mafushi Prison.

6. The source alleges that this detention might have been based on the collusion between one of Mr. Wu Mei De's erstwhile employers, Mr. Mohamed Musthafa Hussain, a former Government Minister and Representative to the United Nations, and the MDNS, as he became too vocal about his work permit not being renewed for dubious reasons.

7. Upon request the Ministry of Foreign Affairs explained to his ex-wife, Ms. Zhang Lin Zheng that Mr. Wu Mei De had not invested in the country according to the procedures laid down in the investments regulations of the Maldives. The MDNS reported, however, that he was detained because he had been making incriminating remarks about the Government and senior Government officials.

8. Mr. Wu Mei De claims that five Chinese nationals had raised more than 70,000 United States dollars to set up the Shanghai Restaurant and to rent the Grace Inn. Although both establishments were registered under Mr. Musthafa Hussain's name, the five Chinese nationals bore all expenses and kept the profit as well. As a result of a dispute with his employer, Mr. Wu Mei De's work permit was not extended. He filed a complaint in court against his employer and

wrote to the Minister of Public Works and Labour, on 29 August 1993, requesting to grant him 60 extra days of stay in the Maldives as he had an ongoing court case against Mr. Musthafa Hussain for the conversion of the investment. He was arrested and detained two months after he had lodged a civil case in Justice Court No. 2 concerning a business dispute with his local employer and partner. The Embassy of China was informed of his detention and embassy officials were provided with consular access to him.

9. In 1997, the Government agreed to release him; however, he refused to be released until his case was discussed in a court of law. The Government of Maldives, in consultation with the Chinese authorities, has also attempted on several occasions to deport him, which he refused for the same reasons. In a letter dated 30 April 1997, addressed to the President of the Republic of Maldives, Mr. Wu Mei De stated that he would be willing to accept release or a settlement on two conditions: The proceedings of his release be conducted officially by the Embassy of China with a representative of the embassy and a representative of an international human rights organization present at the release; and an assurance for his personal safety until he leaves the country. Mr. Wu Mei De has also demanded from the Government of Maldives an apology; a written confirmation stating that he is an innocent person; to be compensated for all his losses, both material and non-material, caused by his long imprisonment; and to investigate the case and bring those responsible to justice. He has reiterated these demands on 25 July 2005. Several international governmental and non-governmental institutions have been seized with the case of Mr. Wu Mei De.

10. The case of Mr. Wu Mei De was already the subject matter of an urgent appeal by the former Chairperson-Rapporteur of the Working Group on Arbitrary Detention on 6 September 2006, which has remained without a reply from the Government to date.

11. The Working Group notes that the Republic of Maldives became a party to the International Covenant on Civil and Political Rights 13 days after this urgent appeal, on 19 September 2006.

12. On 25 September 2008, the Government requested an extension of the 90 day deadline to submit its response, “in order to be able to facilitate an intensive consultative process and investigations with regard to the above mentioned matter”. On 23 April 2009, the Working Group received the reply from Government, which consists of three parties.

13. In the first part the Government states that “the case of Mr. Wu Mei De should be examined in the context of the broad and deep changes in the Maldives under the new administration which are aimed at improving human rights promotion and protection for all-irrespective of nationality. An important illustration of these changes is provided by the adoption, on 7 August 2008, of the new Constitution which is based on the International Bill of Rights. This part of the reply contains a number of steps which the Government has taken to promote human rights through engagement of various United Nations and national human rights mechanisms. Two Special Rapporteurs of the Human Rights Council have recently visited the country. Both visited places of detention and met with non-Maldivians detainees, including Mr. Wu Mei De, who was found to be in a good health. Since 2003, despite severe human and technical resource constraints, the Government has responded to human rights related appeals and communications and has one of the highest response ratios in the Asia-Pacific Region.

14. In the second part of its reply the Government recognizes that before the implementation of the reform measures over the last few years, detention conditions and procedures were not fully consistent with international human rights standards. Appropriate human rights safeguards were not in place to prevent and respond to all human rights concerns. The Government concedes that at the time, there was no regular system of prison visits by independent authorities mandated with that role”. However, the Government notes that now police, court and detention procedures are rigorously followed and people in the detention system are fully protected.

15. In the third part of its reply the Government confirms that Mr. Richard Wu Mei De is a Chinese national who was arrested in relation to a civil dispute arising from allegations of breach of foreign investment laws in 1991. He was released shortly afterwards. At the time, arrest powers rested with the Ministry of Defense and National Security. In 2006 the Maldives Police

Service was established as a civil force and all arrest and investigative powers rests with them under the Police Act 2008.

16. Mr. Wu Mei De was again arrested in August 1993 on public disorder charges apparently angered at the progress of the civil dispute. Soon after his arrest and due to his extremely unruly behaviour, the Maldives Government in cooperation with the Embassy of the People's Republic began the first of many attempts to deport him to China. However, Mr. Wu has repeatedly refused to leave the detention facilities, opting for voluntary detention, and has forcibly resisted all efforts to move him until his business grievances were resolved to his satisfaction.

17. On 30 April 1997, he made four demands to the Government of Maldives in granting him justice and said that upon failure to meet these demands he would lodge his case against Maldives in an international court. These demands were: An apology from the Government of Maldives for his arbitrary detention" a written statement stating that he is an innocent person; compensation for all losses – both pecuniary and non pecuniary – caused by his imprisonment; and the Government to investigate the matter of his court case against his business partner and to bring those responsible to justice.

18. The Government was unable to meet these demands because Mr. Wu Mei De had never been convicted of any crime: His grievances being civil and not related to the Government; but rather he had remained in custody since his arrest under his own volition.

19. In 2007, after more failed attempts to arrange his release and deportation to China, the Government, in order to resolve the impasse, agreed to grant him a sum of 30,000 United States Dollars on humanitarian grounds together with a detailed Note of his case. Mr. Wu has refused these arrangements and continued to stay in voluntary detention.

20. The Government further reports that Mr. Wu was released in February 2009, under Articles 45 and 46 of the Constitution. Article 45 of the Constitution stipulates that everyone has the right not to be arbitrary detained, arrested or imprisoned except as provided for by law enacted by the Parliament. In addition, article 46 of the Constitution stipulates that no person

shall be arrested or detained for an offence unless the arresting officer observes the offence being committed, or has reasonable and probable grounds or evidence to believe the person has committed an offence or is about to commit an offence, or under the authority of an arrest warrant issued by the court.

21. Upon his release, Mr. Wu Mei De was accommodated by the Government in a guest house and granted the necessary visa permits to facilitate his stay. However, shortly after his release, Mr. Wu Mei De insisted to the Ministry of Home Affairs that he wished to go back into detention facilities. Furthermore, he became a daily visitor to the Department of Penitentiary and Rehabilitation Services where he continuously demanded to be put back into detention. Now, Mr. Wu refuses to leave the Department of Penitentiary and Rehabilitation until he is put back into detention.

22. Through out his detention representative of the Government has met with Mr. Wu, endeavoring to clarify and accommodate his wishes and needs. He has stated that he did not want to return to China, and that he has submitted a case to an international court, and therefore he wishes to stay in detention until the matter be resolved by the court. Mr. Wu Mei De insists that he does not want to return to his home country despite the Chinese and the Maldivian Governments facilitation of all procedures for his safe return. On his request, the Government has facilitated his conversion to the Islamic Faith. The Government still maintains to provide Mr. Wu with the amount of US\$ 30,000 on humanitarian grounds. It further reports that although Mr. Wu he has not filed any cases in a court of the country, the Human Rights Commission of the Maldives is currently investigating his case.

23. On 24 April 2009, the Working Group transmitted the reply from Government to the source. The Working Group received the comments from the source on 6 May 2009. It did not find any major inaccuracies in the response from the Government: Whereas Mr. Wu has been released, his previous arrest and detention were unlawful and in contradiction with international human rights law. Mr. Wu does not trust the justice of Maldives and he relies on what he calls “international justice”. He filled a complaint to the Human Rights Commission of Maldives concerning his arbitrary detention and unlawful release from Maafushi Jail.

24. The source confirms that Mr. Wu was officially released from jail on 7 February 2009 to be admitted in IGM hospital for medical treatment. On 14 February 2009 he was officially discharged with all his bills paid by the DPRS.

25. The Working Group is in a position to provide its Opinion on the case taking into consideration all the information and relating circumstances.

26. The Government reported that Mr. Wu was arrested first time in 1991. The source had informed that he had been arrested first time in November 1993. The Government confirmed that the legal basis for his arrest were a breach of foreign investment laws of Maldives. The Working Group notes that the legal provisions justifying Mr. Wu's more than 17 years of detention are contradictory. While according to the Ministry of Foreign Affairs Mr. Wu was detained because he had not invested in the country according to the procedures laid down in the investments regulations of the Maldives, the Ministry of Defense and National Security reported that he was detained because he had been making incriminating remarks about the Government and senior Government officials.

27. The Working Group observes that the Government has not provided a clear explanation about the reasons for which Mr. Wu has been arrested several times without an legal arrest warrant and why he has been kept in long term detention without trial. Mr. Wu was detained at the instigation of a Maldivian citizen whom he tried to sue for irregularities in a business partnership.

28. The Government in its reply recognizes that Mr. Wu "has never been convicted of any crime". In this case, the Working can not understand the reasons for his detention. Furthermore, the Working Group can not accept the Government's explanation that Mr. Wu has been kept in detention "under his own volition" or his continued staying in "voluntary detention".

29. There is also no explanation in the reply from the Government why the Government avoids investigating the matter of the court case against Mr. Wu business partner and to bring

those responsible to justice. The Government solely affirms that it is trying to provide him with the amount of US\$ 30,000 “on humanitarian grounds” and repatriate Mr. Wu Mei De back to China.

30. Consequently, the Working Group considers that the arrest and detention of Mr. Richard Wu Mei De for more than 15 years without an arrest warrant, without concrete charges brought against him and without a trial or a decision by a tribunal is arbitrary as being devoid of any legal basis and in grave non-observance of international norms relating to the right to a fair trial. Mr. Wu has never been officially informed about the reasons of his arrest and detention and has never been allowed to contest his arrest and detention before a court of law.

31. In the light of the foregoing the Working Group, according to paragraph 17 (a) of its methods of work, renders the following Opinion:

The detention of Mr. Richard Wu Mei De for more than 15 years was arbitrary and in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights and fell within categories I, II, and III of the categories applicable to the consideration of cases submitted to the Working Group.

32. The Working Group requests the Government to exhaust of all available domestic remedies in order to provide Mr. Richard Wu Mei De with access to and the ability to bring the matter for resolution before a court of law, with a view to potentially obtain reparation and compensation for all losses, including those related to his investments, caused by his unlawful and prolonged period of imprisonment, however, not only on “humanitarian grounds”.

Adopted on 6 May 2009

**Communication adressée au Gouvernement le 13 novembre 2008.**

**Concernant : MM. Alaa Kasem Lefte ; Kaseem Atalla Zayer ; Walid Taleb Suleiman Muhammad Al Dilimi ; Ali Fadel Al Hsaynawi Elyawi ; Kheiry Hussein Hajji ; Mouayed Allawi Al Kinany Abed ; Ali Al-Tamimi ; Ahmad Fathi Hamid ; Ziad Tarek Al Abdallah Touman ; Ramadan Abdelrahman Hajj et Ahmad Naji Al Aamery.**

**L'État est partie au Pacte international relatif aux droits civils et politiques.**

1. Voir le texte du paragraphe 1 de l'Avis n° 17/2008.
2. Voir le texte du paragraphe 3 de l'Avis n° 17/2008.
3. Vu les allégations formulés, le Groupe de travail aurait souhaité la coopération du Gouvernement. En l'absence de toute information émanant de ce dernier, le Groupe de travail estime être en mesure de rendre un avis sur les faits et les circonstances se rapportant aux cas en question, d'autant plus que les faits mentionnés et les allégations contenues dans la communication n'ont pas été contestés par le Gouvernement.
4. Les cas mentionnés ci-dessous ont été rapportés au Groupe de travail sur la détention arbitraire comme suit :
  5. (a) M. Alaa Kasem Lefte, de nationalité irakienne ; né le 1er janvier 1986 ; ouvrier dans une fabrique de ciment ; domicilié à Hindiya, Jadwal Al Gharbi, Towarij, Karbala ; reconnu comme réfugié par l'Office du Haut-commissaire des Nations Unies pour les réfugiés (HCR) ; fut arrêté le 1<sup>er</sup> février 2007 par des membres des forces de sécurité qui n'ont pas présenté de mandat d'arrêt. Postérieurement il fut condamné à deux mois et demi de prison pour entrée illégale sur le territoire libanais.

(b) M. Kassem Atalla Zayer, de nationalité irakienne ; né en 1982 ; propriétaire d'une laverie ; domicilié à Kerbala, Al Hindiya ; reconnu comme réfugié par le HCR ; fut arrêté le 10 avril 2007 par des agents des forces de sécurité qui n'ont pas présenté de mandat d'arrêt. Il était entré au Liban en mai 2005. Il fut condamné à un mois de prison pour entrée illégale sur le territoire selon l'article 32 de la loi de 1962 sur l'entrée, le séjour et la sortie des étrangers.

(c) M. Walid Taleb Suleiman Muhammad Al Dilimi, de nationalité irakienne ; né en 1978 ; domicilié à 8th February Street, Hay Al Tamim, Ramadi ; reconnu comme réfugié par le HCR, fut arrêté le 23 avril 2007 par des membres des forces de sécurité qui n'ont pas présenté de mandat d'arrêt.

(d) M. Ali Fadel Al Hsaynawi Elyawi ; de nationalité irakienne, né le 20 janvier 1969 ; domicilié à Basra, Ashar ; reconnu comme réfugié par le HCR ; avec Certificat de Réfugié n° 245-00C16182 émis le 6 juillet 2007 ; fut arrêté le 20 février 2007 par des agents de la sûreté générale. Il fut condamné à un mois de prison pour entrée illégale sur le territoire libanais et pour avoir donné le nom d'une personne inexistante comme garant.

(e) M. Kheiry Hussein Hajji ; de nationalité irakienne ; né le 10 août 1972 ; avec carte d'identité irakienne No. 350727 ; membre de la minorité religieuse Yezidi ; employé dans le magasin de liqueurs de son père ; domicilié à Ninewa, Mosul ; reconnu comme réfugié par le HCR avec le Certificat de Réfugié n° 245-04C02044 ; fut arrêté le 17 décembre 2006 par des agents des forces de sécurité qui n'ont pas présenté de mandat d'arrêt. Il fut condamné à un mois de prison. La source ajoute que, considérant son appartenance à une minorité religieuse, son maintien en détention peut affecter son intégrité et sa sécurité personnelle.

(f) M. Mouayed Allawi Al Kinany Abed ; de nationalité irakienne, né le 25 août 1982 ; domicilié à Sadr City, Bagdad ; modiste ; reconnu comme réfugié par le HCR ; fut arrêté le 9 avril 2007 par des membres des forces de sécurité du Ministère de l'intérieur. Il fut condamné à un mois de prison.

(g) M. Ali Al-Tamimi, de nationalité irakienne ; né en 1966 ; avec carnet d'identité No. 141092 émise pour le Ministère irakien de l'intérieur le 22 novembre 2004 ; concierge ; domicilié à Hay Al Jihad, Bagdad ; reconnu comme réfugié par le HCR ; fut arrêté le 12 avril 2007 dans le secteur Wadi Khalid de la frontière libanaise avec l'Iraq par des agents de la Sûreté Générale. Il fut condamné à un mois de prison et a été détenu dans les prisons de Tripoli, Quba, Halba et Roumieh.

(h) M. Ahmad Fathi Hamid, de nationalité irakienne ; né en 1974 ; domicilié à Hay Al Zuhur, Mousi ; reconnu comme réfugié par le HCR ; avec certificat de réfugié No. 245-07C00429 émis le 5 mars 2007 ; fut arrêté le 17 février 2007 par des agents des forces de sécurité. Il fut condamné à un mois de prison.

(i) M. Ziad Tarek Al Abdallah Touman, de nationalité irakienne ; né le 1er novembre 1983 ; vendeur ; domicilié à Bagdad ; reconnu comme réfugié par le HCR ; fut arrêté le 12 avril 2007 par des membres des forces de sécurité du Ministère de l'Intérieur et condamné à un mois de prison.

(j) M. Ramadan Abdelrahman Hajj, de nationalité irakienne ; né en 1953 ; chauffeur d'ambulance en Iraq et concierge au Liban ; domicilié à route de l'Aéroport, Hay el Jezaer, Mosul ; reconnu comme réfugié par le HCR ; fut arrêté le 3 mars 2007 par des membres des forces de sécurité du Ministère de l'intérieur. Il fut condamné à 10 jours de prison.

(k) M. Ahmad Naji Al Aamery, de nationalité irakienne ; né en 1988 ; boulanger ; domicilié à Ghazaleya, Bagdad ; reconnu comme réfugié par le HCR ; avec Certificat de réfugié n° 245-06C00967 émis le 9 mars 2007, fut arrêté le 27 juillet 2006 par des membres des forces de sécurité du Ministère de l'intérieur. Il fut condamné à trois mois de prison, à une amende de 200,00 L.L. et à la déportation par le tribunal de Beyrouth après avoir été considéré coupable d'entrée illégale sur le territoire et de possession de trois documents d'identité syriens falsifiés, de conformité avec l'article 32 de la loi de 1962 sur l'entrée, le séjour et la sortie des étrangers et les articles 463/219, 463/454 et 464/454 du Code pénal.

6. Selon les informations reçues, ces 11 personnes furent mises à disposition de la sûreté générale afin d'être déportées et conduites à la prison de Roumiyeh, bâtiments C et D, après avoir purgé leurs peines. À la prison de Roumiyeh, on leur confisqua leurs passeports et documents d'identité irakiens. Malgré le fait que le HCR leur avait reconnu le statut de réfugiés, leur déportation fût ordonnée en raison de leur entrée ou leur permanence illégale sur le territoire libanais, en application de l'article 32 de la loi de 1962 sur l'entrée, le séjour et la sortie des étrangers.

7. Ces personnes sont maintenues en détention bien que le délai de leurs respectives condamnations ait expiré. Il n'y a eu aucune décision, ni judiciaire ni administrative, pour leur maintien en détention après l'expiration du terme de leurs condamnations pénales. En plus, ils sont maintenus en prison avec des malfaiteurs et des délinquants communs.

8. La source ajoute que le pouvoir discrétionnaire de la sûreté générale est très étendu et imprécis et que la détention de ces personnes pendant l'exécution des ordres de déportation est toutefois contraire à l'obligation internationale de la République libanaise de respecter le principe de non-refoulement. Il n'existe pas de période maximale de détention pendant l'attente de déportation. En outre, les détenus n'ont pas la possibilité d'être présents auprès d'un juge pour demander la révision judiciaire de la décision de déportation.

9. Le Groupe de travail, dans sa délibération n° 5 sur la détention des immigrants et demandeurs d'asile (Voir E/CN.4/2000/4, annexe II), a déjà affirmé avec clarté que la détention administrative des immigrants et demandeurs d'asile ne peut, en aucun cas, être illimitée ni d'une durée excessive, car un délai maximum doit impérativement être prévu par la loi (Délibération n° 5 ; Principe 7). La détention à durée indéfinie de citoyens étrangers en situation irrégulière, des immigrants et demandeurs d'asile, n'est pas conforme au droit international.

10. Le Groupe de travail a aussi précisé que le demandeur d'asile ou l'immigrant doit pouvoir exercer une voie de recours devant une autorité judiciaire qui statue dans un bref délai sur la légalité de la mesure, et, le cas échéant, ordonne la mise en liberté du demandeur. La

mesure de détention doit préciser les conditions dans lesquelles le demandeur d'asile ou l'immigrant doit pouvoir exercer ladite voie de recours judiciaire (Principe 8).

11. Étant donné l'extension du phénomène universel de l'émigration irrégulière, le Groupe de travail, depuis 1999, a réitéré diverses déterminations dans lesquelles il déclare que la détention à durée indéterminée d'un non nationale en raison de sa situation irrégulière est arbitraire.

12. Ainsi, dans son dernier rapport (A/HRC/10/21, para. 67) le Groupe de travail rappelle aux États que la détention des demandeurs d'asile, des réfugiés et des immigrants en situation irrégulière doit être une mesure de dernier ressort et n'être autorisée que pour une durée aussi brève que possible. Des solutions autres que la détention doivent être préférée chaque fois que possible.

13. Le Gouvernement n'a pas contesté que la détention des 11 personnes citées ci-dessus confirme une pratique selon laquelle les autorités libanaises arrêtent des réfugiés irakiens sans visas valides et les placent en détention pour une période indéfinie, afin de les forcer à retourner en Iraq. Ces personnes risquent de dépérir indéfiniment en prison, à moins d'accepter de rentrer en Iraq.

14. N'ayant pas signé la Convention des Nations Unies relative au statut des réfugiés de 1951, les autorités libanaises n'accordent majeure valeur juridique à la reconnaissance du statut de réfugié aux Irakiens par le HCR.

15. Le Groupe de travail considère que forcer des réfugiés à retourner dans un pays où leurs vies et leurs libertés sont menacées viole clairement le principe de non refoulement. Ces personnes ont été accusées et condamnées pour entrée illégale ou permanence illégale dans le territoire du Liban lorsqu' en réalité ils cherchaient la protection internationale de la République libanaise, en exercice de leur droit à demander et à jouir de l'asile selon l'article 14 de la Déclaration universelle des droits de l'homme. Considérant la situation exceptionnelle de guerre, violences et persécutions dans leur pays, on ne peut pas prétendre que ces personnes doivent

avoir suivi la procédure normale et les formalités administratives ordinaires pour quitter leur pays, obtenir un passeport valide et demander un visa pour entrer régulièrement au Liban.

16. Le Groupe de travail considère que ces personnes sont maintenues en détention malgré qu'ils aient déjà purgé leurs sentences pénales et sans aucune autorisation judiciaire ; sans possibilité de recours de révision auprès d'un juge ou magistrat ou d' avoir un autre moyen pour contester la légalité de leur détention ; et en violation du droit international coutumier et des principes et normes en vigueur sur le droit d'asile.

17. Le Groupe de travail réitère que la légalité de la détention doit pouvoir être contestée devant une juridiction ordinaire et donner lieu à un examen en bonne et due forme dans un délai déterminé. Des dispositions devraient en tout temps être prises pour rendre illégale la détention, inter alia, si des considérations juridiques –dont le principe de non-refoulement qui exclut l'éloignement en cas de risque de torture ou de détention arbitraire dans le pays de destination– rendent l'expulsion impossible.

18. L'emprisonnement des personnes entrées dans un pays de manière irrégulière ne pourra être appliqué que comme une mesure de dernier ressort avant d'en venir à l'expulsion : L'emprisonnement aura la durée aussi brève que possible et pourra seulement être appliquée selon des règles clairement établies et exhaustivement définies. Les demandeurs d'asile, réfugiés ou immigrants en situation irrégulière ne devraient pas être qualifiés de délinquants ou être traités comme tels.

19. La détention administrative devra toujours pouvoir être contestée devant les tribunaux ; dans aucun cas devrait être indéfinie ou excessivement prolongée ; et ne dépendra pas de la conduite de la personne non nationale entrée de manière irrégulière sur le territoire nationale s'il y a motif pour lequel le gouvernement ne peut pas effectuer l'expulsion.

20. Le Gouvernement libanais n'a pas contredit les affirmations de la source qui démontreraient que ces 11 personnes sont privées de liberté de façon indéfinie pour le seul motif qu'elles sont des non-nationales entrées dans le pays de manière irrégulière. Cette situation

provoque une violation additionnelle puisqu'il s'agit de personnes à lesquelles le HCR a concédé le statut de réfugiés conformément à la Convention des Nations Unies de 1951 et que dans ces cas le principe de non-refoulement n'est pas pris en considération.

21. Le Groupe de travail note que le refus des autorités libanaises de régulariser leur situation n'affecte pas uniquement ceux qui sont placés en détention mais peut contraindre la plupart des réfugiés irakiens à vivre dans la peur permanente d'être arrêtés.

22. À la lumière de ce qui précède, le Groupe de travail rend l'Avis suivant :

La privation de liberté de Messieurs Alaa Kasem Lefte ; Kaseem Atalla Zayer ; Walid Taleb Suleiman Muhammad Al Dilimi ; Ali Fadel Al Hsaynawi Elyawi ; Kheiry Hussein Hajji ; Mouayed Allawi Al Kinany Abed ; Ali Al-Tamimi ; Ahmad Fathi Hamid ; Ziad Tarek Al Abdallah Touman ; Ramadan Abdelrahman Hajj et Ahmad Naji Al Aamery est arbitraire en ce qu'elle contrevient aux articles 9, 10 et 14 de la Déclaration universelle des droits de l'homme et aux articles 9 et 14 du Pacte international relatif aux droits civils et politiques et relève des catégories I et III des catégories applicables à l'examen des cas dont est saisi le Groupe de travail.

23. Le Groupe de travail, ayant rendu cet avis, prie le Gouvernement d'adopter les mesures nécessaires et urgentes pour remédier à la situation, conformément aux normes et principes énoncés dans la Déclaration universelle des droits de l'homme et dans le Pacte international relatif aux droits civils et politiques.

Adopté le 7 mai 2009

**OPINION No. 6/2009 (ISLAMIC REPUBLIC OF IRAN)**

**Communication addressed to the Government on 29 September 2008.**

**Concerning Dr. Arash Alaei and Dr. Kamiar Alaei.****The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. (Same text as paragraph 3 of Opinion No. 17/2008.)
3. The two cases summarized hereafter have been reported to the Working Group on Arbitrary Detention as follows:
4.
  - (a) Dr. Arash Alaei, the former Director of the International Education and Research Cooperation of the Iranian National Research Institute of Tuberculosis and Lung Disease;
  - (b) His brother, Dr. Kamiar Alaei, a doctoral candidate at the State University of New York (SUNY) Albany School of Public Health. He holds a Master's degree in Population and International Health from the Harvard School of Public Health and is the founder of clinics specialized in health planning. The Asia Society recognized him as 2008 Asia Fellow, "one of 23 new fellows identifies as being among the most promising trendsetters and emerging leaders in the Asia-Pacific region".
5. Both brothers are medical doctors specializing in the prevention and management of HIV and AIDS. They are deeply involved in HIV prevention and treatment and are known internationally for their efforts to raise the profile of HIV/AIDS issues with the Iranian Government, as well as for creating harm reduction programs for prisoners and young people. Since 1998, they have been carrying out programmes dealing with HIV and AIDS in Kermanshah Province, particularly focused on harm reduction for injecting drug users. They have sought the integration of prevention and care of HIV and AIDS, sexually transmitted infections and drug-related harm reduction, into the Iran's national health care system. In addition to their work in Iran, they have held training courses for Afghan and Tajik medical

workers. They have worked to encourage regional cooperation among 12 Middle Eastern and Central Asian countries.

6. It was reported that these two persons were arrested on 22 and 23 June 2008, respectively, by agents of the Iranian Police who did not shown arrest warrants. Documents were seized from both brothers at their homes. They are being separated and held in solitary confinement without charges in Evin Prison in Tehran. It was alleged that their arrest was motivated by the brothers' association with non-governmental organizations based in the United States of America.

7. Concern has been expressed that the two medical doctors could be subjected to tough interrogatories, which could include ill-treatment and even torture, in order to compel them to fake confessions suggesting their involvement in a plot against the Government. According to *E'temad* newspaper, these two physicians are held in detention on "suspicion of plotting to overthrow the Government of the Islamic Republic". It was said that they have been harassed by different parts of the Intelligence services for the past two years.

8. It was further reported that these two persons have been denied legal counsel and adverted not try to ask for legal assistance. Contacts with their relatives have not been authorized. In an interview with the Farsi-language Radio Zamaneh before his arrest, Dr. Kamiar Alaei had expressed serious concern over the spread of HIV and AIDS and stated that the spread could be contained.

9. The source considers that the detention of these two medical doctors is politically motivated. These persons have been arrested and are being kept in incommunicado detention solely for exercising their rights to freedoms of assembly, association, opinion and expression.

10. By note verbale dated 25 March 2009, the Working Group reminded the Government about its request for information on these cases, advising it that the cases would be considered during its fifty-fourth session. Unfortunately, the Working Group has not received any response from the Government.

11. The Working Group considers itself dutybound to adopt an Opinion on the basis of the allegations from the source and of all other information put at its disposal, which have not been contradicted by the Government. in spite of the fact it had the opportunity to do so.

12. The Working Group notes that Drs. Arash and Kamiar Alaei were arrested without any arrest warrant and are being held in solitary confinement in Evin prison in Tehran without charges. They have been denied the possibility to get legal counsel and the authorities have adverted them not try to ask for legal assistance. These two medical doctors are being kept in incommunicado detention for more than 10 months without charges nor trial. The Government has ignored the requests by the Working Group, which were made twice, asking for information on these cases and about the legal basis justifying the maintain in detention of the two physicians.

13. The Working Group considers that the activities of these two medical doctors in the sphere of the prevention and treatment of HIV and AIDS could only strengthen and to make stronger Iran's national health care system. These two medical doctors, who took the Hippocratic Oath when they graduated, have raised the profile of HIV and AIDS issues with the Government of the Islamic Republic of and have worked with other 12 Middle Eastern and Central Asian countries, holding training courses for Afghan and Tajik medical workers. They have been in the vanguard in combating AIDS. It is difficult to understand the allegation relating to the fact that they have been harassed for their activities during the past two years by the Intelligence Services or that their activities could be considered "plotting to overthrow the Government". Particularly, Dr. Kamiar Alaei has been considered by the Asia Society as "one of the most promising trendsetters and emerging leaders in the Asia-Pacific region".

14. In light of the foregoing, the Working Group expresses the following Opinion:

The detention of Drs. Arash and Kamiar Alaei is arbitrary, being in contravention of articles 9, 10, 25 and 26 of the Universal Declaration of Human Rights and articles 9, 14, 18, 19 and 22 of the International Covenant on Civil and Political Rights, to which

the Islamic Republic of Iran is a State party and falls within categories I, II and III of the categories applicable to the consideration of cases submitted to the Working Group.

15. The detention of the above-mentioned physicians is also contrary to articles 12 and 13 of the International Covenant on Economic, Social and Cultural Rights and to Principles 11-1, 17-2 and 18-1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

16. In accordance with this Opinion, the Working Group request the Government to immediately release these two medical doctors or to immediately charge them with a recognizable criminal offence and try them under conditions meeting the standards for a fair trial and to take the necessary steps to redress the situation in order to bring it into conformity with the provisions enshrined in the relevant international instruments.

Adopted on 7 May 2009

**AVIS n° 7/2009 (NIGER)**

**Communication adressée au Gouvernement le 15 Octobre 2008.**

**Concernant Monsieur Moussa Kaka.**

**L'État est partie au Pacte international relatif aux droits civils et politiques.**

1. Voir le texte du paragraphe 1 de l'Avis n° 17/2008.
2. Le Groupe de travail remercie le Gouvernement de lui avoir communiqué les renseignements demandés.
3. Voir le texte du paragraphe 3 de l'Avis n° 17/2008.

4. Le cas mentionné ci-dessous a été rapporté au Groupe de travail comme suit : Moussa KAKA (ci-après, M. Kaka), un citoyen nigérien, directeur de la station de radio privée Radio Saraouniya, et journaliste-correspondent pour Radio France Internationale (RFI) au Niger, a été arrêté le 20 septembre 2007 par des agents de la Brigade de recherches de la Gendarmerie Nationale sur son lieu de travail, Radio Saraouniya, Place du Marché, à Niamey. Il a été retenu par la Police pendant 72 heures avant d'être transféré à la prison civile à Niamey. Il n'a pas été présenté devant un juge, comme la loi le requiert ; et il n'a pas été informé de la raison de sa détention.

5. Le 25 septembre 2007, M. Kaka a été finalement présenté devant un juge. Il a été accusé de « complicité d'atteinte à l'autorité de l'État ». La raison derrière cette accusation serait ses liens avec le groupe armé d'opposition, Mouvement des Nigériens pour la justice (MNJ), créé en février 2007 et qui agit dans le nord du pays. Une condamnation pour cette accusation encoure une peine maximale d'emprisonnement à perpétuité.

6. Les charges d'accusation envers M. Kaka sont uniquement basées sur des enregistrements de conversations entre M. Kaka et des cadres supérieurs du MNJ. Le 17 novembre 2007, le juge d'instruction a décidé de ne pas utiliser les enregistrements parce qu'ils auraient été illégalement obtenus. Il a pris une ordonnance afin que les bandes magnétiques contenant les conversations soient écartées du dossier d'instruction en raison du fait que ces écoutes avaient été obtenues par des moyens non-conformes à la législation en vigueur. Dans la mesure où ces écoutes constituaient l'unique preuve matérielle des accusations portées contre M. Kaka, ce dernier aurait dû être remis en liberté.

7. Cependant, le procureur a fait appel contre cette décision. Le 12 février 2008, la cour d'appel de Niamey a refusé à M. Kaka sa liberté provisoire. La cour a rejeté la décision de novembre 2007 du juge, et a également décidé de remettre le dossier de M. Kaka à un autre juge. Suite à ceci, les avocats de M. Kaka ont décidé de faire appel à la Cour suprême du pays. Le 15 mai 2008, la Cour a rejeté l'appel de M. Kaka de faire invalider les enregistrements ; et a également rejeté sa demande de liberté provisoire. Suite à une autre demande de liberté provisoire par l'avocat de M. Kaka lors d'une audience en juin 2008 ; le Doyen des juges

d'instruction de la cour de Niamey a accordé la liberté provisionnelle à M. Kaka le 23 juin 2008. Le même jour, le parquet d'accusation a fait appel contre cette décision, et M. Kaka continue d'être détenu. Il est actuellement détenu à la prison centrale de Niamey, où il partage une cellule de 8 mètres carrés avec 14 autres détenus. Il reçoit de la nourriture et la visite de sa famille.

8. Le 16 septembre 2008, le ministère public/procureur général de la cour d'appel de Niamey a fait une demande pour changer les charges d'accusation envers M. Kaka, de « complicité d'atteinte à la sûreté de l'État » à « actes probables visant à porter atteinte la sécurité de l'État ».

9. Cependant, les avocats de M. Kaka ont rejeté cette nouvelle accusation sur la base que l'amendement serait plausible seulement en « période de temps de guerre », soulignant également que les autorités ont systématiquement considéré les rebellions dans le nord du pays en tant qu' « actes de crimes organisés de la part de criminels et narcotrafiquants », et non de situations de guerres ou conflits.

10. La source souligne que pendant de nombreuses années, M. Kaka a été victime d'harcèlements et de menaces par les autorités du Niger, pour ses activités de journaliste. En août 2005, M. Kaka a été interpellé et détenu pendant quatre jours, après avoir interviewé un individu suspecté d'être un rebelle, qui avait revendiqué une attaque dans le nord du pays. Le 14 juillet 2007, M. Kaka a été publiquement menacé de mort par le Chef d'état major des forces armées (FAN), M. Moumouni Boureima.

11. La source ajoute que durant plusieurs années les autorités ont harcelé, détenu arbitrairement, et condamné des journalistes dans une tentative de restreindre la liberté d'expression. Les journalistes arrêtés couvraient sur des cas de mauvaise gestion de la part du Gouvernement ou autres thèmes politiques.

12. Le 30 août 2007, le Conseil supérieur de la communication (CSC) du Niger a interdit la radiodiffusion en direct de débats sur la situation dans la région d'Agadez, une région du nord du pays. En juin 2008, le Gouvernement a fermé l'Association de presse nationale jusqu'à nouvel

ordre. En août 2007, un décret d'état d'urgence (nommé « mise en garde ») pour la région d'Agadez, a été émis, puis plusieurs fois renouvelé depuis, et jusqu'à présent reste encore effectif. Ce décret d'état d'urgence permettrait non seulement à l'armée et à la police d'utiliser des pouvoirs apparemment illimités d'arrestation et de détention de suspects pour une durée au delà de 48 heures (période durant laquelle normalement il serait requis que le détenu soit présenté devant un juge, magistrat ou fonctionnaire judiciaire) ; mais aussi à l'armée de perpétrer des exécutions sur des membres de MNJ.

13. Le Gouvernement, dans sa réponse date du 21 avril 2009, confirme que M. Moussa Kaka a été effectivement interpellé par des éléments de la brigade de recherches de la gendarmerie nationale au regard de certains indices graves de son implication dans des événements malheureux qui ont cours dans la partie Nord du pays.

14. Au sens de l'article 71 du Code de procédure pénale, le délai de garde à vue est de 48 heures renouvelable une seule fois, et après le renouvellement de la garde à vue, M. Kaka a été déféré devant le procureur de la République. Ce dernier a dû procéder à d'autres investigations avant de saisir le Juge d'instruction qui l'a placé sous mandat de dépôt le 25 septembre 2007.

15. Le Gouvernement précise dans sa réponse que la garde à vue est une détention légitime. Les détentions arbitraires ne reposent sur aucune convention, aucune loi, aucun règlement. Au cours de la garde à vue, les personnes mises en cause bénéficient du droit de se faire assister par un conseiller de leur choix. Ils ont également droit à une visite médicale. Ils reçoivent notification des faits mis à leur charge afin qu'ils puissent s'expliquer.

16. Le Gouvernement ajoute que le 17 novembre 2007, le juge d'instruction a cru devoir écarter du dossier certaines pièces avant d'élargir l'inculpé, avec comme motif que lesdites pièces ont été obtenues illégalement. Le procureur de la République a alors immédiatement interjeté appel, lequel est suspensif de la décision.

17. La Chambre d'accusation saisie a infirmé la décision du juge d'instruction et a saisi, selon le Gouvernement, « un autre juge plus expérimenté, susceptible de gérer le dossier avec

plus de compétence et de sérénité ». La défense a par la suite formé un pourvoi en cassation contre la décision de la chambre d'accusation et la Cour suprême, par une décision du 15 mai 2008, a confirmé l'arrêt de la chambre d'accusation.

18. Le Gouvernement poursuit en indiquant que le 16 septembre 2008, suite à une autre demande de mise en liberté provisoire, que le juge d'instruction a favorablement accueilli, le procureur a fait appel à nouveau avant de requérir la requalification des faits initialement reprochés à M. Kaka, en « actes susceptibles de porter atteinte à la sécurité de l'État ».

19. M. Kaka a recouvré la liberté et son dossier a fait l'objet d'une ordonnance de renvoi devant le tribunal correctionnel pour y être jugé conformément à la loi.

20. Enfin le Gouvernement estime devoir préciser que M. Kaka a bénéficié d'un régime de faveur pendant sa détention, dans un des locaux réservés aux cadres de l'État, dans un pays qui est un État de droit où il n'y a aucune restriction de la liberté d'expression et où un projet de loi est en cours d'élaboration à l'Assemblée nationale sur la dépénalisation des délits de presse.

21. La source confirma que la cour d'appel de Niamey ordonna la liberté provisoire de M. Kaka et renvoya M. Kaka devant le tribunal correctionnel de Niamey pour être jugé pour « délit d'atteinte à l'intégrité du territoire national par entente avec des éléments du MNJ » au titre de l'article 80 du Code pénal. Il encourt notamment un à dix ans de prison. M. Kaka a été détenu pendant plus d'un an, depuis le 25 septembre 2007 jusqu'au 7 octobre 2008.

22. Suite à cette réponse du Gouvernement, et malgré la libération de M. Kaka après plus d'une année de privation de liberté, le Groupe de travail estime, en application du paragraphe 17 (a) de ses méthodes de travail (chapitre « Suite donnée aux communications »), devoir apprécier le caractère arbitraire ou non de la détention de cette personne en raison de la durée de la détention, de sa qualité de journaliste et par voie de conséquence de la liberté d'expression liée à cette fonction.

23. Cela étant, le Groupe de travail note que le Gouvernement ne conteste pas que M. Kaka a été interpellé le 20 septembre 2007 et n'a été placé sous mandat de dépôt que le 25 septembre 2007, soit cinq jours, soit 120 heures. Que la garde à vue étant de 48 heures renouvelable une seule fois, soit quatre jours, soit 96 heures, il en résulte que pendant 24 heures M. Moussa Kaka qui n'a pas encore été déféré devant le juge d'instruction, était dès lors toujours en garde à vue en violation de la législation nationale, et c'est peut-être ce que le Gouvernement entend dans sa réponse lorsqu'il dit que le procureur de la République « a du procéder à d'autres investigations ».

24. Qu'il est dès lors permis de penser, à l'instar de la source, qu'il a été détenu à la prison avant sa présentation devant un juge. Cette détention ne répond dès lors à aucune base légale qui justifie la privation de liberté.

25. Le Groupe de travail note également, comme soutient la source, qu'aucun fait précis n'a été invoqué à l'appui des poursuites intentées contre M. Kaka, et le Gouvernement se borne simplement à indiquer qu'il est impliqué dans les événements malheureux qui ont cours dans la partie nord du pays.

26. De la même manière, l'inculpation ou sa requalification autour de la notion de « complicité d'atteinte à l'autorité de l'État » ne constitue pas des faits précis articulés.

27. Cette absence de précisions dans les poursuites constitue un manquement au droit à un procès équitable, puisqu'il ne permet pas à la personne poursuivie de se défendre convenablement. Cela est d'autant plus fondé qu'il n'est pas contesté que le seul élément de preuve est constitué par des enregistrements de conversations téléphoniques illégalement obtenus aux termes des articles 22 de la Constitution du 9 août 1999 ; 59 et suivants de l'ordonnance n° 99-045 du 26 octobre 1999 portant réglementation des télécommunications ; et 60 et 416 du Code de Procédure Pénale. En novembre 2007, le juge d'instruction en charge du dossier a pris une ordonnance afin que les écoutes soient écartées du dossier d'instruction et annulée. Ces écoutes des conversations de M. Kaka avec des éléments du MNJ avaient été obtenues par des moyens non conformes à la législation en vigueur. Cependant le Juge qui a annulé les

enregistrements comme étant illégaux s'est vu retiré le dossier au profit d'un juge « plus expérimenté, susceptible de gérer le dossier avec plus de compétence et de sérénité ».

28. Le Groupe de travail note que ces écoutes obtenues par des moyens illégaux constituaient l'unique preuve matérielle des accusations portées contre M. Kaka. En conséquence ce dernier aurait dû être remis en liberté en novembre 2007.

29. Enfin, le Groupe de travail note pour s'en étonner, que le Gouvernement ai gardé le silence sur les harcèlements et menaces dont M. Kaka a été victime pendant de nombreuses années ; sur les allégations de harcèlement d'autres journalistes qui s'intéressaient à l'activité gouvernementale ; sur le fait que le 30 août 2007, le Conseil supérieur de la communication du Niger a interdit la radiodiffusion en direct sur la situation dans la région d'Agadez ; ainsi que sur la fermeture en juin 2008 de l'Association de la presse nationale.

30. Ces éléments sont de nature, en l'absence de charges articulées sur des faits précis et juridiquement qualifiés ; et en présence de la qualité de journaliste de Moussa Kaka, à établir que ce dernier a été victime de l'exercice de sa liberté d'expression.

31. Ainsi, sur la base de l'ensemble de ces éléments, considérant que M. Moussa Kaka a été provisoirement libéré en vertu du paragraphe 17 (a) de ses méthodes de travail, le Groupe de travail rend l'Avis suivant :

La détention de M. Moussa Kaka a été arbitraire et en contravention des dispositions des articles 9, 10 et 19 de la Déclaration universelle des droits de l'homme et des articles 9, 14 et 19 du Pacte international relatif aux droits civils et politiques et relève des catégories I, II et III applicables à l'examen des cas soumis au Groupe de travail.

32. Le Groupe de travail, ayant rendu cet avis, prie le Gouvernement de veiller à réparer la situation.

Adopted on 7 May 2009

**OPINION No. 8/2009 (UNITED ARAB EMIRATES)**

**Communication addressed to the Government on 14 October 2008.**

**Concerning Mr. Hassan Ahmed Hassan Al-Diqqi.**

**The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group expresses its thanks to the Government for having submitted information on the allegations transmitted.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The case has been transmitted to the Working Group as set out below.
5. Mr. Hassan Ahmed Hassan Al-Diqqi (hereafter Mr. Al-Diqqi) is a citizen of the United Arab Emirates, born on 3 January 1957. He is an accountant by trade, having held various posts within the administration of the country, as an independent expert with consultative status to the courts, and as a human rights defender.
6. It was reported that Mr. Al-Diqqi was arrested on 20 July 2008, in Sharjah, and taken to premises of the State Security Services. According to the information received, it would have been proposed to Mr. Al-Diqqi that he ceases all political activity and closes his Internet website, or else he would be facing legal proceedings concerning a case of rape. He refused such proposal.
7. Mr. Al-Diqqi was then taken to the central prison where he is currently detained. His arrest was not officially communicated to his family, but rather reported in a press article, non-

signed, published on 24 July 2008 in the daily newspaper *Al-Imarat Al-Yawm*, considered to be close to the authorities. This article presented Mr. Al-Diqqi as the person behind a rape crime committed three years before on a Filipino female citizen, and for which he would be sentenced *in absentia* to capital punishment. Another press article, non-signed, in the daily *Al Itihhad*, also considered to be close to Government, published on 26 July 2008, presented Mr. Al-Diqqi as the “initiator of an Internet website which aims at politicizing his case which is of criminal nature”.

8. During a recent family visit to the prison, Mr. Al-Diqqi confirmed to the visitor that he was indeed subjected to blackmailing by the authorities since his arrest; and that he was indeed asked to shut down his Internet site and to cease all activities pertaining to defence of human rights in his country; all of it in exchange for his release.

9. The source maintains that Mr. Al-Diqqi might be victim of fabricated legal proceedings by the authorities, with the sole aim of discrediting Mr. Al-Diqqi as a human rights defender known throughout the country, and to cause him to cease all related activities.

10. The source further notes that Mr. Al-Diqqi’s arrest was decided in order to impede him from making his contribution to the third session of the Working Group on the Universal Periodic Review at the United Nations Human Rights Council in December 2008, at which the human rights situation of the United Arab Emirates was examined.

11. According to the source, the arrest and detention of Mr. Al-Diqqi are exclusively due to the exercise of his right to freely and peacefully express his political opinions and that of denouncing human rights violations and abuse within his country. His arrest and detention are clearly connected to Mr. Al-Diqqi’s engagement in the fight against violations of human rights and fundamental freedoms in the United Arab Emirates; the purpose behind these being to prevent him from pursuing peaceful activities but also de facto ban all activity of this nature in the country.

12. Furthermore, the source argues that the authorities are maintaining a secure grip on the activities of human rights defenders, with the express aim of imposing a complete blackout on all information concerning human rights violations in the Emirates.

13. The source also provides information concerning Mr. Al-Diqqi's work in defence of human rights, and denouncing violations in the country. In 2006, Mr. Al-Diqqi created his own organization for defence of human rights, the Emirates People's Rights Organization (Emirates PRO), which has not been recognized by the authorities. This organization is known throughout the country via Mr. Al-Diqqi's Internet website, in which he denounces the absence of civil and political freedoms, as well as various abuses and violations of the rights of his fellow citizens. The source notes that the content of his "weekly letters,, is an indicator of his legalist and pacifist battle against arbitrariness and for the establishment of the rule of law.

14. On 27 April 2009, the Government reported that the case file was sent back to the court by the Department of Public Prosecutions and Mr. Hasan Ahmad Al-Daqi (Al-Diqqi) was released on bail. His passport was confiscated in accordance with the applicable laws of the State and the matter is currently before the competent judicial body.

15. The source confirmed that Mr. Al-Diqqi was released on 12 May 2009, reiterating that he was deprived of his liberty since 20 July 2008, that is to say, nearly 10 months, without any other reasons than the mere exercise of his fundamental rights to freedom of opinion and expression and his work as human rights defender, and in order to obtain the closing of his Internet website ([www.emiratespro.com](http://www.emiratespro.com)), which was indeed achieved.

16. Mr. Al-Diqqi's arrest was not communicated to his family. Their relatives became aware of his detention solely by pro-Government media, which presented him as a delinquent linked to the commission of offences of a common nature. However, Mr. Al-Diqqi's responsibility for the commission of such offences was never demonstrated. The same court which imposed him the death penalty subsequently modified its decision, imposing first 10 years of imprisonment and then lowering its condemnation to six months of imprisonment, when Mr. Al-Diqqi had already spent more than nine months in prison.

17. The Working Group notes that Mr. Al-Diqqi is the founder of the non-governmental human rights organization Emirates People Rights Organization (Emirates PRO), which has permanently denounced human rights violations in his country, which has caused inconveniences in the authorities which motivated his arrest.

18. The Working Group recalls that the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), adopted by the General Assembly on 8 December 1998 in its resolution 53/144, recognizes the right of human rights defenders to seek, obtain, receive and hold information relating to human rights, as well as recognizes their unhindered access to and communications with non-governmental and intergovernmental organizations. Human rights defenders have the right to investigate, gather information regarding and report on human rights violations. They are entitled to bring their reports to the attention of the public and to publish their findings directly or by conduit of the media. The Declaration recognizes the right of human rights defenders to investigate and to debate whether human rights and fundamental freedoms are observed and respected in a particular region or country, both in the law as in practice. The Declaration on Human Rights Defenders contains a series of principles and rights that, in the Working Group's view, are based on human rights standards enshrined in the Universal Declaration of Human Rights and in the Charter of the United Nations.

19. The Working Group further notes that the Government of the United Arab Emirates, together with around other 25 States, submitted a declaration in which it declares that the Declaration on Human Rights Defenders should be interpreted in conformity with its domestic legislation. However, the Working Group considers that such domestic legislation should be in full conformity with the Universal Declaration of Human Rights and with all applicable human rights principles and standards, including those contained in the Declaration on Human Rights Defenders .

20. Although Mr. Al-Diqqi's detention and the consequent judicial process against him may have been in conformity with the domestic legislation of the United Arab Emirates, that fact does not deprive his detention of its arbitrary character according to international law.

21. Paragraph 17 (a) of the methods of work of the Working Group provides that even if the person has been released, the Working Group reserves the right to render an Opinion whether or not the deprivation of liberty was arbitrary, on a case-by-case basis. Given the character of Mr. Al-Diqqi's detention, the Working Group has decided to render an Opinion on his case, notwithstanding his release.

22. Consequently, the Working Group renders the following Opinion:

The deprivation of liberty of Mr. Hassan Ahmed Hassan Al-Diqqi was arbitrary according to category II of the categories applicable by the Working Group to the consideration of the cases which have been submitted to it, and was in serious contravention of articles 9, 11, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and of the Declaration on Human Rights Defenders, as well as of Principles 1, 2, 10, 11, 12, 13, 15, 16, 17 et alia contained in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly by its resolution 43/173 of 9 December 1988.

23. Consequent upon the Opinion rendered, the Working Group requests the Government to remedy the situation of Mr. Al-Diqqi and to grant him adequate reparation.

Adopted on 1 September 2009

**OPINION No. 9/2009 (JAPAN)**

**Communication addressed to the Government on 16 March 2009.**

**Concerning Messrs. Junichi Sato and Toru Suzuki.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group expresses its thanks to the Government for having submitted information on the allegations transmitted.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
3. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case, in the light of the allegations made and the response of the Government thereto.
4. The case summarized below was reported to the Working Group on Arbitrary Detention as follows:
5. Mr. Junichi Sato, aged 32, and Mr. Toru Suzuki, aged 42, two environmental campaigners, anti-whaling bloggers and Greenpeace Japan activists, were arrested on 20 June 2008 by police agents on suspicion of stealing about 50 pounds of whale meat that the environmentalists said had been illegally siphoned by whalers from Government-backed hunts. The box, which had been marked “cardboard”, contained cuts of the most expensive whale meat which had been illicitly removed from the whaling factory ship and sent to a private address.
6. Messrs. Sato and Suzuki were conducting an in-depth investigation into allegations of official Japanese Government science trips being used to provide cover for illegal whaling. On 15 May 2008, they took the box and other evidence they had gathered to the office of the Tokyo Public Prosecutor and requested an official investigation.

7. The same day they were arrested, the Tokyo Public Prosecutor announced that he was dropping the investigation into Greenpeace's allegations of embezzlement. Messrs. Sato and Suzuki's homes were searched as were the homes and offices of other five Greenpeace staff in Japan. The server at the Greenpeace office was confiscated by the authorities. After 23 days of their arrest, Messrs. Sato and Suzuki were charged with trespass and theft.

8. According to the source, Messrs. Sato and Suzuki's investigation was designed to gather information and evidence on alleged Government complicity in whale meat embezzlement. The aim of their action was to inform the official authorities as well as the public about ongoing illegal activities. A key piece of evidence was an intercepted box of salted whale meat. Messrs Sato and Suzuki delivered the information about their findings on the whale meat embezzlement at a press conference and by a press release and received wide media coverage.

9. On the same day of the press conference, Messrs. Sato and Suzuki filed a report about the suspected embezzlement and offered their full collaboration in order to help the authorities to investigate further on this matter.

10. Messrs. Sato and Suzuki cooperated fully both with the police and the Prosecutor's Office. They have provided written depositions to the Public Prosecutor, and voluntarily and proactively submitted relevant evidence. They acted with a view to raising public awareness around the Government-sponsored Southern Ocean whaling programme, rather than for illegitimate personal gain, while working for a well-respected environmental organization.

11. The source considers that the arrest and detention of these persons, the charges brought against them, and the police raids on Greenpeace's office and the homes of five of its staff were aimed at intimidating both activists and non-governmental organizations.

12. In its response, dated 27 May 2009, the Government informed the Working Group that the factual backgrounds of this case, from investigation, arrest, detention, parole to the trial up to 1 May 2009, was as follows:

(a) 20 June 2008: The Police arrested Messrs. Junichi Sato and Toru Suzuki at 6.42 a.m. and 7.08 a.m., respectively, and put them in detention cells;

(b) 21 June 2008: The Police referred the case to the Public Prosecutor, who recognized the necessity to maintain them in detention;

(c) 22 June 2008: The Police presented these two persons before the Public Prosecutor, who requested the Judge for a 10-day extension of their detention. That was authorized by the Judge who ordered to proceed with the inquiry;

(d) 1 July 2008: The Public Prosecutor requested a further extension of another period of 10 days. The judge conceded the authorization;

(e) 11 July 2009: The Public Prosecutor indicted Messrs. Sato and Suzuki.

(f) 15 July 2008: They were freed on bail. Their trial is still underway.

13. The Government reports that on 16 April 2008, these two persons, in conspiracy, broke into a branch of a transportation company in Aomori City and stole a box containing 23.1 kg. of whale meat. The Japanese Constitution provides that “No persons shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law”. The legal bases for their arrest are the following provisions of the law:

#### **1. Legal Basis for the Arrest.**

(a) Penal Code, article 130 (Breaking into a residence): “A person who, without justifiable ground, breaks into a residence of another person or into the premises, building or vessel guarded by another person, or who refuses to leave such a place upon demand shall be punished by imprisonment with work for not more than three years or a fine of not more than 100,000 yen”;

(b) Penal Code, article 235 (Theft): “A person who steals the property of another commits the offense of theft and shall be punished by imprisonment with work for not more than 10 years or a fine of not more than 500,000 yen”;

(c) Penal Code, article 60 (Co-Principals): “Two or more persons who commit an offense in joint action are all principals”;

(d) Code of Criminal Procedure, article 199, paragraph 1 excerpt: “When there exists sufficient probable cause to suspect that an offense has been committed by a suspect, a public prosecutor, public prosecutor’s assistant officer or judicial police official may arrest him/her upon an arrest warrant issued in advance by a judge”;

(e) Code of Criminal Procedure, article 199, paragraph 2: “In cases where a judge deems that there exists sufficient probable cause to believe that the suspect has committed an offense, he/she shall issue the arrest warrant set forth in the preceding paragraph, upon the request of a public prosecutor or a judicial police officer (in the case of a judicial police officer who is a police official, only a person designated by the National Public Safety Commission or the Prefectural Public Safety Commission and who ranks as equal to or above police inspector; the same shall apply hereinafter in this article); provided, however, that this shall not apply in cases where the judge deems that there is clearly no necessity to arrest the suspect”;

## **2. Detention of a suspect**

Code of Criminal Procedure, article 203, paragraph 1: “When a judicial police officer has arrested a suspect upon an arrest warrant or has received a suspect who was arrested upon an arrest warrant, he/she shall immediately inform the suspect of the essential facts of the suspected offense and the fact that the suspect may appoint defense counsel. Then, given the suspect an opportunity for explanation, he/she shall immediately release the suspect if he/she believes that it is not necessary to detain him/her, or shall carry out the procedure of referring the suspect, together with the documents and articles of evidence, to a public

prosecutor within 48 hours of the suspect being placed under physical restraint, if he/she believes that it is necessary to detain the suspect”;

### **3. Detention of the accused**

(a) Code of Criminal Procedure, article 60, paragraph 1: “The Court may detain the accused when there is probable cause to suspect that he/she has committed an offense and when: (i) The accused has no fixed residence; (ii) There is probable cause to suspect that he/she may conceal or destroy evidence; (iii) The accused has fled or there is probable cause to suspect that he/she may flee”;

(b) Code of Criminal Procedure, article 61 excerpt: “The accused may not be detained unless he/she has been informed of the case and a statement has been taken from him/her”;

(c) Code of Criminal Procedure, article 205, paragraph 1: “When a public prosecutor has received a suspect referred pursuant to the provision of article 203, he/she shall give the suspect an opportunity for explanation and, if he/she believes that it is not necessary to detain him, he/she shall immediately release the suspect; when he/she believes that it is necessary to detain the suspect, he/she shall request a judge to detain the suspect within 24 hours of receiving him”;

(d) Code of Criminal Procedure, article 205, paragraph 2: “The time limitation set forth in the preceding paragraph shall not exceed 72 hours of the suspect being placed under physical restraint”;

(e) Code of Criminal Procedure, article 207, paragraph 1: « The judge who has been requested detention pursuant to the provision of the preceding three articles shall have the same authority as a court or a presiding judge regarding the disposition thereof; provided, however, that this shall not apply to bail”;

(f) Code of Criminal Procedure, article 207, paragraph 4: “When a judge has received the request for detention set forth in paragraph 1, he/she shall promptly issue a detention warrant; provided, however, that when the judge deems that there are no grounds for detention or when a detention warrant cannot be issued pursuant to the provisions of paragraph 2 of the preceding article, he/she shall immediately order the release of the suspect without issuing a detention warrant”;

(g) Code of Criminal Procedure, article 208, paragraph 1: “When a public prosecutor has not instituted prosecution against a suspect within ten days of the request for detention regarding a case in which the suspect was detained pursuant to the provisions of the preceding article, he/she shall immediately release the suspect”;

(h) Code of Criminal Procedure, article 208, paragraph 2: “When a judge deems that it exists unavoidable circumstances, he/she may extend the period set forth in the preceding paragraph upon the request of a public prosecutor. The total period of such extensions shall not exceed ten days”;

#### **4. Bail**

(a) Code of Criminal Procedure, article 89: “The request for bail shall be granted, except when:

(i) The accused has allegedly committed a crime which is punishable by death penalty, life imprisonment with or without work, or a sentence of imprisonment with or without work whose minimum term of imprisonment is one year or more;

(ii) The accused was previously found guilty of a crime punishable by death penalty, life imprisonment with or without work or a sentence of imprisonment with or without work whose maximum term of imprisonment was in excess of ten years;

(iii) The accused allegedly committed a crime punishable by imprisonment with or without work whose maximum term of imprisonment was in excess of three years;

(iv) There is a probable cause to think that the accused may conceal or destroy evidence;

(v) There is probable cause to suspect that the accused may harm or threaten the body or property of the victim or of any other person who is deemed to have essential knowledge of the case for the trial or the relatives of such persons;

(vi) The name or residence of the accused is unknown”;

(b) Code of Criminal Procedure, article 90: “The court may, when it finds it appropriate, grant bail ex officio”.

14. The Government adds that in Japan, in order to arrest a suspect, there must be a probable cause sufficient to believe that an offence has been committed by him/her. An arrest warrant issued in advance by a judge is required, except in cases of emergency including on-the-spot arrest against in flagrant offenders. The police, prosecutors and judges, in sequence, strictly check the case and decide whether or not the suspect should be maintained in detention after his/her arrest. The suspect must be released, unless the judge authorizes the detention, at the latest, within 72 hours after his/her arrest.

15. The Government reports that the procedures of arrest and detention in Japan are fully compatible with applicable international human rights norms and standards. Extensions of a period of detention are only authorized when the judge deems that unavoidable circumstances exist. The investigative authority carries out its duties by investigating illegal cases on a neutral, impartial and fair ground, under relevant legal provisions as well as with credible evidence; paying due consideration to the criminal situation and to the requirements to constitute a crime.

16. The Government concludes that the allegations of the source are not factually correct and that the detention of Messrs. Sato and Susuki is not arbitrary.

17. Although the response from the Government was transmitted to the source on 24 June 2009, it has not provided its comments.

18. The Working Group considers that it is in a position to render an Opinion on this case. It notes that the two Greenpeace's activists were arrested after having exposed a whale meat scandal involving a Government-sponsored whaling programme.

19. The source, in its communication, has well explained that Messrs. Sato and Suzuki are two environmental campaigners who acted in the framework of their activities as member of the environmental organization Greenpeace Japan; that they proceeded to an in depth investigation into allegations of official Government science trips being used to provide cover for illegal whaling. Messrs. Sato and Suzuki seized a box filled with salted whale meat and took this and other evidence they had gathered on this illegal activity to the Tokyo Public Prosecutor Office in order to demand an official investigation. They acted with transparency, delivering the information about their findings at a press conference and by a press release which received wide media coverage. Everything about their investigative work was made public. The source invokes that the detention of the above-mentioned two persons is in violation of article 19 of the International Covenant on Civil and Political Rights which refers to the exercise of the freedom of opinion and expression.

20. These two persons voluntarily went to the Office of the Tokyo Public Prosecutor, submitted the evidence they had gathered, and offered their cooperation in the eventual public investigation they were requesting. However, the same day that the Tokyo Public Prosecutor announced that he was dropping the investigation on the alleged whale meat embezzlement, they were arrested. Subsequently, almost a month after their arrest, they were charged with trespass and theft.

21. The Working Group further notes that the Government has devoted its response to strongly indicate that the Japanese legislation is in accordance with the principles and norms of international human rights law concerning arrest and detention, and has provided detailed information about the Japanese criminal and procedural legislation. However, the Government has not provided enough information on the circumstances of the arrest and detention of these two investigators nor has given detailed response to the different allegations from the source.

22. In its response, the Government limits itself to conclude that the allegations from the source “are not factually correct” and concludes that the detention of the above-mentioned two persons is not arbitrary. The Government does not submit information on the activities carried out by Messrs. Sato and Susuki as environmental activists; about the investigations they were carried out on a major corruption scandal surrounding the whaling programme; on the evidence they had gathered into the allegations of embezzlement; nor on the collaboration they offered to the police and the Public Prosecutor in order to help the authorities to investigate the allegations they had submitted. The Working Group considers that these points are essential.

23. The fact that the Government has kept silent on these important points is of a nature to discredit the source thesis. Especially, the fact that the Government does not give any specifics or details on the charges brought against these persons and about their participation in peaceful environmental activities and on the other allegations submitted by the source.

24. Consequently, the Working Group may conclude that these two persons have acted in the framework of their capacities as active members and investigators of the environmental organization Greenpeace. They acted considering that their actions were in the greater public interest as they sought to expose criminal embezzlement within the taxpayer-funded whaling industry. Their willingness to cooperate with the police and the Public Prosecutor concerning the manner in which they obtained the evidence of their allegations of corruption and their attitude of conciliation and collaboration have not been recognized. In its response, the Government does not refute these allegations. nor raise in this cooperative attitude a breach.

25. The Working Group considers that the right to freedom of opinion and expression, the right to assembly, the right to investigate corruption and to voice opposition to government policies must always be upheld. Citizens have the right to investigate and expose evidence on public servants suspected of corruption.

26. The right of these two environmental activists not to be arbitrarily deprived of their liberty; their rights to freedom of opinion and expression and to exercise legitimate activities, as

well as their right to engage in peaceful activities without intimidation or harassment has not been respected by the justice system.

27. The Working Group further notes that these persons have not been allowed to challenge their detention before an independent and impartial court in proceedings which meet international standards of fairness, in accordance with articles 2, 10, 14 and 19 of the International Covenant on Civil and Political Rights, to which Japan is a State party.

28. Consequently, the Working Group renders the following Opinion:

The detention of Messrs. Junichi Sato and Toro Susuki is arbitrary and contravenes the dispositions contained in articles 18, 19 and 20 of the Universal Declaration of Human Rights and articles 18 and 19 of the International Covenant on Civil and Political Rights to which Japan is a State party, and falls under category II of the categories applicable to the consideration of cases submitted to the Working Group.

29. The Working Group request the Government to ensure that the above-mentioned two persons be subjected to fair proceedings which meet international standards of fairness, in accordance with articles 2, 10, 14 and 19 of the International Covenant on Civil and Political Rights, ensuring that all their rights of defence in trial be fully respected.

Adopted on 1 September 2009

**OPINION N.º 10/2009 (REPÚBLICA BOLIVARIANA DE VENEZUELA)**

**Comunicación dirigida al Gobierno el 28 de mayo de 2009.**

**Relativa al Sr. Eligio Cedeño.**

**El Estado es parte en el Pacto Internacional de Derechos Civiles y Políticos.**

1. (Texto del párrafo 1 de la Opinión N.º 17/2008.)
2. El Grupo de Trabajo lamenta que el Gobierno no le proporcionase la información solicitada, a pesar de haberla requerido por carta de 28 de mayo y nota verbal de 8 de agosto de 2009.
3. (Texto del párrafo 3 de la Opinión N.º 17/2008.)
4. Según la fuente, el Sr. Eligio Cedeño, nacido el 1.º de diciembre de 1964 en el Estado de Miranda; de nacionalidad venezolana; domiciliado en Urbanización Ávila, La Florida, Caracas; de profesión banquero; antiguo vicepresidente de finanzas del Banco Canarias de Venezuela; presidente de Bolívar Banco, fue detenido el 8 de febrero de 2007 en la sede de la Dirección de los Servicios de Inteligencia y Prevención (DISIP), por funcionarios de dicha entidad, quienes no mostraron orden de detención.
6. Se afirma que el Sr. Cedeño se presentó voluntariamente en dichas dependencias, al haber sido informado de que agentes de la referida Dirección policial tenían la intención de detenerle. Al día siguiente, el Tribunal Tercero de Primera Instancia en lo Penal en Funciones de Control del Circuito Judicial Penal del Área Metropolitana de Caracas a cargo de la Abogada Veneci Blanco García expidió la orden de detención (Expediente 8845-06). El Sr. Cedeño se

encuentra recluido en las dependencias de la DISIP en El Helicoide desde el 8 de febrero de 2007.

7. Se informa de que el Sr. Cedeño es percibido por las autoridades como una figura política contraria al régimen. De origen muy humilde, al punto que según la fuente debió compartir con su hermano ropa y libros, logró culminar con éxito sus estudios y hacer carrera como financista. En 1997, creó la Fundación CEDEL con el objeto de luchar contra la pobreza endémica de los barrios marginales de Venezuela valorizando el trabajo duro y el esfuerzo personal. Se afirma que la Fundación ha brindado asistencia a 27 escuelas; 40 centros de salud; otorgado ayuda financiera mensual a más de mil familias y hecho importantes donaciones a “TeleCorazón”, el principal programa televisivo de recaudación de fondos.

8. La detención del Sr. Cedeño se produjo sin que se hubiese producido una previa imputación formal del delito en que se fundaba; en este caso, el de distracción de recursos financieros, previsto y sancionado en el artículo 432 de la Ley General de Bancos y otras Instituciones Financieras. Según la fuente, este hecho violó el derecho del Sr. Cedeño a la defensa y, consecuentemente, afectó todo el proceso y principalmente el derecho al debido proceso de ley.

9. Como consecuencia, el Sr. Cedeño fue impedido de solicitar al tribunal que declarase anticipadamente la improcedencia de la detención, violándose de esta manera el numeral 8 del artículo 125 del Código Orgánico Procesal Penal (COPP).

10. Los dos años y tres meses que el Sr. Cedeño ha sido privado de libertad constituyen además, según la fuente, una violación de su derecho a la presunción de inocencia. No se ha acreditado en todo este largo período ninguna responsabilidad penal. En adición, la detención de esta persona no se funda en la peligrosidad procesal pues existe evidencia suficiente de que el peligro de fuga es inexistente. Tanto la Constitución de la República Bolivariana de Venezuela como el Código Orgánico Procesal Penal exigen a fiscales y jueces que acrediten peligros concretos para demandar u ordenar una detención. En el presente caso, sin embargo, el Sr. Cedeño ha dado muestras reiteradas que su voluntad no ha sido huir sino enfrentar el correspondiente proceso judicial. Pese a contar con medios económicos e instrumentos suficiente para abandonar el país u ocultarse en la clandestinidad, decidió presentarse voluntariamente a las dependencias policiales para aclarar su situación y ponerse a derecho, siendo detenido sin previa orden de arresto.

11. Lo anterior ha sido corroborado por la Sra. Fiscal General de la República, Dra. Luisa Ortega Díaz, quien ha precisado que, en su opinión, la privación de libertad no debe proceder cuando el imputado se ha sometido voluntariamente a un proceso.

12. Tampoco ha podido acreditarse en concreto la eventualidad que el Sr. Cedeño pudiese recurrir a conductas que tuviesen por objeto obstruir el alcance de la verdad durante el proceso.

13. Por consiguiente, nunca debió ordenarse la detención de esta persona sino simplemente su comparecencia para presentarse en juicio. Su detención preventiva resulta así arbitraria y hace presumir una voluntad política que materializa una sanción penal anticipada sin juicio previo. El

Sr. Cedeño nunca debió haber sido sometido a detención pues nunca se acreditó ni peligro de fuga ni voluntad de obstruir el alcance de la verdad. Su mantenimiento en detención por más de dos años y tres meses confirma la arbitrariedad de la medida. En adición, la fuente informa que los bienes del Sr. Cedeño fueron ilegalmente confiscados luego de su arresto.

14. Según se informa, en febrero de 2003 ante una seria escasez de divisas, el Gobierno impuso un estricto sistema de control de cambios. El Banco Central de Venezuela estableció la tasa de cambio oficial con el dólar de los Estados Unidos de América en 1.600 bolívares por dólar. Los dólares eran exclusivamente vendidos por una entidad oficial creada para tal efecto, la Comisión de Administración de Divisas (CADIVI). En junio de 2003, el Consorcio Microstar, la principal empresa distribuidora de computadoras en Venezuela, solicitó dólares a la CADIVI a través del Banco Canarias para poder desaduanar un importante lote de computadores que había importado. Microstar es una entidad que ha vendido cientos de millones de dólares en computadoras en Venezuela. El Banco Canarias accedió a lo solicitado por Microstar y gestionó el otorgamiento de la divisa extranjera ante CADIVI, la cual accedió a lo solicitado. Con posterioridad, la Administración de Aduanas de Venezuela informó de que las computadoras no se encontraban en sus depósitos.

15. El Ministerio Público acusó al Sr. Cedeño de haber beneficiado a la Empresa Consorcio Microstar, C.A. con la cantidad de cuarenta y tres mil millones trescientos sesenta y ocho mil cuatrocientos noventa y seis Bolívares (43.368.496) para adquirir del organismo estatal Comisión de Administración de Divisas (CADIVI) la suma de 27.105.310 dólares de los Estados Unidos a un precio preferencial, en base a operaciones previas que se estimaron simuladas. El Sr.

Cedeño fue acusado de haberse prevalido de su condición de directivo del Banco Canarias y de haber causado un perjuicio a la institución a la que prestaba sus servicios. La CADIVI nunca fue investigada.

16. El juicio contra el Sr. Cedeño ha estado caracterizado por graves faltas del Ministerio Público y por abusos judiciales. El Ministerio Público no pudo probar sus imputaciones durante el juicio oral. Por el contrario, quedó demostrado que las operaciones financieras no fueron simuladas, sino reales; que el Sr. Cedeño no tenía relación con las compañías con las cuales se realizaron las operaciones financieras cuestionadas; y que el Banco Canarias no sufrió perjuicios. Se acusó también al Sr. Cedeño de complicidad en los delitos de contrabando por simulación de importación y estafa cambiaria. El Ministerio Público no pudo aportar pruebas para acreditar estos delitos.

17. El Código Orgánico Procesal Penal (COPP) establece en su artículo 244 que las medidas de coerción penal no pueden exceder de dos años. Sólo podrá concederse una prórroga cuando la duración desmedida del proceso sea atribuible al imputado o a sus defensores. En el presente caso, la dilación ha provenido siempre del Estado; particularmente de los Fiscales y del Tribunal Supremo de Justicia.

18. Evacuadas las pruebas, las acusaciones fiscales fueron desvirtuadas por la defensa. Al momento de convocarse al acto de Conclusiones, que precede a la sentencia, la Fiscalía recusó, ilegal y extemporáneamente, a la Juez de juicio. Apelada la medida, se declaró inadmisibile la recusación. Acto seguido, la Sala de Casación Penal del Tribunal Supremo de Justicia requirió el

expediente, lo que paralizó la emisión de la sentencia. Lo hizo atendiendo a una olvidada solicitud de avocamiento efectuada ocho meses antes.

19. El artículo 244 del COPP precisa que no se podrá ordenar una medida de detención cuando ésta aparezca desproporcionada en relación con la gravedad del delito, con las circunstancias de su comisión y con la posible sanción. Pese a ello, el 17 de diciembre de 2008, la Fiscal Lisette Rodríguez Peñaranda solicitó a la Sala de Casación Penal la prórroga del juicio con reo en cárcel. Fue ésta la última de una serie de maniobras de la Fiscalía por demorar el desarrollo del proceso judicial y la emisión de la sentencia, con el objeto de mantener al Sr. Cedeño en situación de castigo penal sin haber sido nunca declarado culpable. Entre estas medidas dilatorias la fuente menciona:

- a) Paralización del proceso por vacaciones de los miembros del Ministerio Público durante los meses de agosto y diciembre de 2007 y de 2008;
- b) Paralización por los días de depuración de los escabinos (legos que colaboran con el juez);
- c) No presentación de los representantes de la Fiscalía a cuatro importantes audiencias judiciales consecutivas, con el evidente y único propósito de retardar el proceso;
- d) Recusación de cinco jueces en la etapa de juicio;

e) Ausencia de los fiscales en la etapa conclusiva.

20. La fuente precisa que pese a que el artículo 335 del COPP establece un plazo máximo de suspensión del juicio oral de diez días, éste ha sido paralizado durante diez meses, sin que la Sala de Casación Penal hubiese emitido el pronunciamiento que estaba obligada a emitir en un plazo máximo de 30 días.

21. También en la imputación por distracción de fondos el Ministerio Público ha cometido graves irregularidades. Ello obligó a la Sala de Casación Penal del Tribunal Supremo de Justicia a anular el 4 de mayo de 2009 (Acta número 73) las acusaciones fiscales del Ministerio Público en lo que respecta al delito de distracción de recursos financieros así como los actos consecutivos que de los mismos emanaren o dependieren. Declaró así con lugar el avocamiento del expediente. Sin embargo, dispuso mantener la medida de privación judicial preventiva de libertad del Sr. Cedeño, sin atender a los dos años y tres meses que esta persona ha pasado en los calabozos de la sede policial sin haber sido hallado culpable.

22. Según dicho auto, el juicio oral vuelve a fojas cero y el Ministerio Público debe proceder a una nueva imputación del Sr. Cedeño que debe ser hecha esta vez de conformidad con la ley y en un plazo de 45 días.

23. La acusación que se presentó contra el Sr. Cedeño con fundamento en el delito de distracción de recursos financieros tuvo como presupuesto una investigación preliminar en la que se cercenó su derecho a la defensa material. El 16 de marzo de 2007, el Juzgado Tercero de

Control dictó un auto mediante el cual prohibió que el Sr. Cedeño pudiera trasladarse al Ministerio Público para enterarse personalmente del contenido de las actas del proceso, en violación flagrante del artículo 49 numeral 1 de la Constitución y de los artículos 12 y 125, numeral 7, del CCPP. Se impidió así al imputado conocer el contenido de la investigación a la que estaba sometido y de las actas procesales. Ello nulificó por ende el cabal ejercicio del derecho a la defensa material. La investigación preliminar, presupuesto de la acusación penal, resultó de esta manera afectada por graves vicios de inconstitucionalidad.

24. El Ministerio Público ha también afectado el derecho a la defensa del Sr. Cedeño al no señalar en su acusación las razones que le permitieron efectuar la tipicidad. En ningún momento la Fiscalía realizó la necesaria adecuación de los hechos a las normas jurídicas cuya aplicación requirió. La defensa tuvo así que confrontar simples adivinanzas y suposiciones.

25. La acusación no precisa cuál es la conducta irregular que se reprocha al Sr. Cedeño; no establece qué operaciones beneficiaron ilegalmente a la firma Microstar; no explica por qué hubo un beneficio ilegal; no hay un solo cuestionamiento, ni serio ni superficial, a dichas operaciones. El Ministerio Público se limita a afirmar generalidades y a una imputación tácita, no expresa, lo que obstaculiza gravemente una defensa efectiva.

26. Los Fiscales se han limitado durante el proceso a afirmar que las referidas operaciones eran irregulares, pero en ningún momento han precisado en qué consistía la supuesta anomalía.

27. En la promoción de múltiples pruebas, el Ministerio Público tampoco cumplió con establecer, como era su deber funcional, el hecho que pretendía acreditar con ellas, ni la utilidad que las mismas representaban con respecto al proceso. En clara violación del numeral 5 del artículo 326 del CCPP, se cercenó el derecho de la defensa a contra-probar.

28. No solamente se negó al Sr. Cedeño el acceso al expediente, obstaculizando su defensa material, sino que se violó el derecho a la defensa:

a) Por defectos substanciales de forma de la acusación relativa al delito;

b) Por falta de señalamiento claro, preciso y circunstanciado del elemento fáctico que funda el delito;

c) Por falta de motivación de la correcta adecuación del hecho atribuido y relacionado con el delito;

d) Por ilegalidad en el ofrecimiento de los medios de prueba que el Ministerio Público presentó en juicio.

29. La defensa opuso en estos casos las excepciones contempladas en los literales (e) e (i) del numeral 4 del artículo 28 del COPP. Dichas excepciones fueron inmediatamente resueltas, de manera negativa, por la Juez Tercero de Control en la fase intermedia del proceso.

30. Según la fuente, la misma Juez de Control a quien correspondió conocer hasta en tres oportunidades de la medida privativa de libertad, ha sido la misma:

a) Que conoció acerca de la admisibilidad de las pruebas promovidas por la defensa;

() Quien dictó un auto mediante el cual las negó casi todas.

Todo ello resultó en la indefensión del imputado en la fase de juicio.

31. En contra de lo establecido por los instrumentos internacionales, el mismo juez que acuerda la privación de libertad durante la fase preparatoria, actúa también en Venezuela en la fase intermedia; se pronuncia sobre la admisibilidad de la acusación e incluso, dicta el auto que obliga a ir a juicio. El mismo juez que ordena la privación de libertad se pronuncia luego sobre la probabilidad de condena. Resulta así un juez prejuiciado. En el presente caso, la Juez Tercero de Control:

a) Dictó la medida privativa de libertad;

b) Ante la oposición efectuada, determinó la legalidad de la misma;

c) En la fase intermedia, desechó diversas solicitudes de nulidad efectuadas por la defensa;

d) Rechazó los alegatos de que el hecho atribuido no constituía delito;

e) Ordenó la apertura a juicio;

f) Evaluó por tercera vez la alta probabilidad de condena;

g) Declaró la legalidad de todas sus decisiones anteriores.

32. Se ha violado así, en el presente caso, el derecho del imputado a ser juzgado por un juez imparcial.

33. La fuente agrega que sobre la base de consideraciones de carácter político, el Sr. Cedeño ha sido también posteriormente imputado con otros delitos que no fueron sin embargo mencionados como base para su detención. Así se le atribuyó complicidad en la comisión de un delito de contrabando por simulación de importación. La acusación fiscal no establece qué conducta atribuida al Sr. Cedeño le permite al Ministerio Público atribuirle complicidad en dicho delito. Sólo se dice que “respaldó al representante de Microstar y le suministró los medios para la comisión del delito”. Pero no establece cómo lo respaldó, ni qué medios le suministró. El Ministerio Público violó así también el numeral 2 del artículo 326 del COPP, que es presupuesto y requisito *sine qua non* para el cabal ejercicio del derecho a la defensa. Ni siquiera hay mención discriminada, separada, de los elementos que pretenden acreditar uno u otro delito.

34. Esta grave confusión del Ministerio Público resultó en la total indefensión del imputado, impidiéndose la promoción de pruebas dirigidas a destruir o enervar dichos elementos, obstaculizándose de manera grave el ejercicio de la defensa y afectándose de manera seria el debido proceso de ley.

35. El Ministerio Público no señaló en su acusación las razones que le permitieron efectuar la tipicidad; no hizo la necesaria adecuación de los hechos a las normas jurídicas cuya aplicación requirió porque no los estableció previamente. En la promoción de múltiples pruebas, no cumplió con establecer el hecho que pretendía acreditar con ellas ni la utilidad de las mismas con respecto al juicio.

36. El Ministerio Público, durante más de dos años y tres meses, no solamente ha violado seriamente el derecho a la defensa del Sr. Cedeño sino que además ha incurrido en una grave ilegalidad al ofrecer actas de allanamiento como pruebas documentales.

37. Además, la fuente denuncia otro hecho grave: el Ministerio Público pretendió ejercer una acción penal inexistente para lograr una sentencia condenatoria arbitraria al referir que un delito de estafa cambiaria se habría consumado entre agosto y octubre de 2003 sin considerar que dicho delito tiene un término de prescripción de tres años, según lo dispuesto por el artículo 108, numeral 5, del Código Penal. Consecuentemente, la prescripción ordinaria de la acción penal operó ya entre agosto y octubre de 2006. El Ministerio Público pretendió en abril de 2007 interrumpir una prescripción que había ya operado por expreso imperio de la ley.

38. En resumen, el proceso al que está sometido el Sr. Cedeño muestra una serie de graves irregularidades y de violaciones a la Constitución de la República Bolivariana de Venezuela; al Código Penal; al Código Orgánico Procesal Penal; a reiterada jurisprudencia del Tribunal Supremo de Justicia y a la doctrina jurídica internacional y venezolana.

39. El Sr. Cedeño ha venido también siendo víctima de una campaña de insultos, calumnias y difamaciones en medios de comunicación afines a las autoridades gubernamentales. Así, el 23 de marzo de 2009, en una edición del Programa “Los papeles de Mandinga” de Venezolana de Televisión, el Sr. Cedeño fue calificado de “Choro, choro, ladrón delincuente, que propició, realizó, efectuó una estafa con una empresa llamada Microstar, que obtuvo un chorrerón de dólares de CADIVI para efectuar una importación de equipos electrónicos que jamás ingresaron a Venezuela. Estos tipos están acostumbrados a derrochar, a vivir, a mandar, a hacer lo que les da la gana. Su abogado es un traidor a la patria, un delincuente; él mismo es un pelón, un traidor que odia a Venezuela, que amparado en los miedos y en la desesperación del malandro de Cedeño le está sacando real, pero como monte; plata como arroz”.

40. La fuente concluye que el Sr. Eligio Cedeño está detenido desde hace más de dos años y tres meses sin juicio definitivo ni sentencia por un supuesto delito de fraude tributario y desviación de recursos que los fiscales no han podido probar hasta el momento en las distintas etapas del largo proceso. Según la fuente, pese a todas las violaciones constitucionales y legales cometidas y todas las irregularidades procesales, no existen elementos para poder demostrar que es culpable.

41. La jurista Yuri López, quien se pronunció en favor del Sr. Cedeño, ha tenido que abandonar el país y solicitar asilo político en los Estados Unidos de América, después de recibir serias amenazas de sus superiores en la Judicatura de que “su vida sería destruida” y luego del intento de secuestro de uno de sus hijos. El antiguo Fiscal Hernando Contreras declaró en noviembre de 2008 que el Ministerio Público había sobornado testigos para que testimoniasen en contra del Sr. Cedeño.

42. La fuente expresa el temor de que ante la imposibilidad de que se le pueda imponer al Sr. Cedeño una sanción judicial, esta persona pueda ser víctima de actos en agravio de su integridad física o psicológica.

43. La fuente concluye que el Sr. Eligio Cedeño ha sido privado arbitrariamente de su libertad durante más de dos años y tres meses y sujeto a un proceso penal que adolece de graves irregularidades y violaciones del derecho a la defensa y al debido proceso. Su detención sin condena desde el 8 de febrero de 2007 es contraria a las normas contenidas en la Declaración Universal de los Derechos Humanos; en el Pacto Internacional de los Derechos Civiles y Políticos, en la Constitución (artículo 49 numeral 1); en el Código Penal (artículos 37 y 108) y en el Código Orgánico Procesal Penal (artículos 12, 28 numeral 4 literal (e) e (i); 31; 250; 326; 335).

44. El Grupo de Trabajo solicitó al Gobierno en dos oportunidades información oportuna y detallada sobre estas alegaciones, sin recibir respuesta.

45. Como se ha manifestado en el párrafo 3 precedente, en concepto del Grupo de Trabajo, según sus Métodos de trabajo aprobados en 1991 y aprobados por la antigua Comisión de Derechos Humanos y hoy por el Consejo, sólo es posible considerar arbitraria una privación de libertad por alguna de las tres categorías ahí mencionadas.

46. Desde luego, cabe desestimar la categoría I, pues la privación de libertad del Sr. Cedeño emana de una orden judicial, a solicitud del Ministerio Público, lugar este último al que se presentó voluntariamente esta persona el 8 de febrero de 2007, advertida de la decisión del referido Ministerio Público. Sobre la extemporaneidad de la orden de detención se volverá más adelante.

47. Que también debe desestimarse la calificación de arbitrariedad de la detención por la Categoría II, toda vez que la detención se funda en la supuesta comisión de delitos comunes, y no en el ejercicio legítimo de derechos humanos consagrados en la Declaración Universal de los Derechos Humanos, en el Pacto Internacional de Derechos Civiles y Políticos, o en otro instrumento sobre la materia. En parte alguna de la comunicación de la fuente que da origen a esta Opinión se señala cuál o cuáles derechos habría ejercido el Sr. Cedeño, que hubiesen motivado su detención. Es cierto que la fuente informa que “el Sr. Cedeño es percibido por las autoridades como una figura política contraria al régimen”, pero no acusa de ser ése el motivo de su privación de libertad. Más aún, también se entrega información sobre que el inculpado y su abogado habrían sido injuriados con graves epítetos. Pero también es cierto que los insultos y descalificaciones no son emitidas sino en marzo de 2009, es decir más de dos años después de su privación de libertad.

48. Corresponde analizar si se trata de la Categoría III, es decir si en la especie ha habido una “inobservancia, total o parcial, de las normas internacionales relativas al derecho a un juicio imparcial, enunciadas en la Declaración Universal de Derechos Humanos y en los pertinentes instrumentos internacionales aceptados por los Estados Partes que sea de una gravedad tal que confiera a la privación de libertad, en cualquier forma que fuere, un carácter arbitrario”. Como ha sostenido el Grupo de Trabajo en Opiniones anteriores, “el Grupo de Trabajo no ha sido concebido como un tribunal de última instancia, que en sus Opiniones deba evaluar la prueba rendida en un juicio contra un detenido, tanto en la etapa de investigación como en la posterior sentencia definitiva. No es su mandato y por lo demás, le es imposible hacerlo sin un estudio en profundidad del expediente, salvo que la sentencia se apoye utilizando como prueba una confesión obtenida bajo tortura”. Y ha agregado que “Así, si el auto de procesamiento —o la sentencia definitiva— en un proceso por un delito común (y no por un delito en que la acción impugnada es el ejercicio de uno de los derechos mencionados en la Categoría II de las consideradas por el Grupo), se ajustan o no a los elementos de convicción que obran en el expediente, no es un análisis que competa al Grupo de Trabajo. Sí lo sería si el Tribunal hubiese denegado admitir una prueba ofrecida por el acusado, y se trataría de una eventual infracción mencionada en la Categoría III y la detención podría ser arbitraria”.

49. La mayor parte de las alegaciones contenidas en la comunicación de la fuente se refieren a la naturaleza de los hechos considerados como delitos; a debilidades de la prueba; a no haberse acogido una excepción perentoria, y, en consecuencia, el Grupo de Trabajo no podría pronunciarse sobre la procedencia de las alegaciones.

50. Según la comunicación, la primera anomalía del proceso habría sido la de haberse practicado la detención antes que la orden emanada de la autoridad judicial competente la hubiese emitido. El beneficiario de la comunicación dice haber sido detenido el 7 de febrero de 2007, mientras que la orden habría sido emitida el día siguiente. No obstante, a juicio del Grupo de Trabajo, lo que el Pacto Internacional de Derechos Civiles y Políticos exige es que “Toda persona detenida o presa a causa de una infracción penal será llevada sin demora ante un juez u otro funcionario autorizado por la ley para ejercer funciones judiciales” (artículo 9, párrafos 2 y 3 del Pacto Internacional de Derechos Civiles y Políticos). De donde se desprende que, si bien la infracción a la legislación venezolana de orden previa —exigida por todas las legislaciones—, el hecho que el detenido haya sido puesto a disposición del tribunal o autoridad judicial competente el mismo día del arresto, puede considerarse una infracción a las normas del debido proceso de derecho, pero no de “una gravedad tal que confiere a la privación de libertad, en cualquier forma que fuere, un carácter arbitrario”.

51. Alega la comunicación que también se han transgredido los derechos de toda persona a ser juzgada dentro de un plazo razonable o a ser puesta en libertad. La prisión preventiva de las personas que hayan de ser juzgadas no debe ser la regla general, pero su libertad podrá estar subordinada a garantías que aseguren la comparecencia del acusado en el acto del juicio, o en cualquier momento de las diligencias procesales y, en su caso, para la ejecución del fallo. Así está previsto en el párrafo 3 del artículo 9 del Pacto ya citado.

52. El Grupo de Trabajo estima que estas normas relativas al debido proceso de derecho constituyen violaciones que sí le dan a la privación de libertad del Sr. Cedeño el carácter de arbitraria, y ello porque:

a) El juicio ha estado paralizado largo tiempo por inercia de la Procuraduría, sin que el Gobierno haya justificado esta dilación, en violación de lo consagrado en el artículo 14 del Pacto Internacional de Derechos Civiles y Políticos;

b) Porque la larguísima detención preventiva supera ya los dos años y seis meses, siendo que la legislación venezolana obliga a otorgar la libertad provisional a los dos años de la detención (artículo 244 del Código Orgánico Procesal Penal). Más injustificada es la denegación de este derecho dado el hecho que el Sr. Cedeño, al tener noticia de la existencia de una orden de detención (que en realidad no se había aún dictado), concurrió voluntariamente al Tribunal competente, y, al encontrarlo cerrado, se presentó a la Dirección de los Servicios de Inteligencia y Prevención (DISIP), lo que demuestra que no ha habido interés alguno de escapar a la justicia.

53. Habida cuenta de lo que antecede, el Grupo de Trabajo emite la siguiente Opinión:

La privación de libertad del Sr. Eligio Cedeño es arbitraria, ya que contraviene a lo dispuesto en los artículos 9, 10 y 11 de la Declaración Universal de Derechos Humanos, y 9, 10 y 14 del Pacto Internacional de Derechos Civiles y Políticos, y corresponde a la categoría III de las categorías aplicables al examen de los casos presentados al Grupo de Trabajo.

54. Consecuente con la Opinión emitida, el Grupo de Trabajo pide al Gobierno de la República Bolivariana de Venezuela que ponga remedio a la situación del Sr. Eligio Cedeño, de conformidad con las disposiciones de la Declaración Universal de Derechos Humanos y el Pacto Internacional de Derechos Civiles y Políticos, mediante la concesión de la libertad provisional hasta la terminación del juicio, adoptando además medidas para que el proceso que se sigue en su contra no sufra nuevas dilaciones indebidas.

Adoptada el 1.º de septiembre de 2009

**OPINION No. 11/2009 (MALAWI)**

**Communication addressed to the Government on 1 April 2009.**

**Concerning Messrs. Paul Newiri, Boxton Kudziwe and Lawrence Ndele.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group regrets that the Government has not presented its observations on the allegations submitted by the source, despite several invitations to do so.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
3. The cases summarized hereafter have been reported to the Working Group on Arbitrary Detention as set out below.

4. Mr. Paul Newiri, a Malawi citizen, usually residing at M'gunda village, was arrested without a warrant at his home on 22 July 2004 at 11 p.m. by officers of the Thyolo police. At the time of his arrest he was 26 years old. According to remand warrants, the High Court of Blantyre recorded that the incident of the same day forming the basis of his arrest took place in February 2004, i.e. months before his arrest. It is unclear whether this is a mistake on the part of the Thyolo police or of the High Court or whether Mr. Newiri had even been the person intended to be arrested.

5. Mr. Newiri was held at Thyolo police station between 22 and 28 July 2004, when he was transferred to Thyolo Prison, where he remained until November 2004. He is currently being detained at Chichiri Prison of Blantyre, together with the general prison population including convicts. Mr. Newiri was brought before the Thyolo Magistrate Court on 28 July 2004 at which time he was informed that he was being charged with homicide under section 209 of the Penal Code of Malawi. Mr. Newiri does not have any prior criminal record and had never been arrested before this incident.

6. During the court hearing Mr. Newiri was not provided with legal counsel and the Magistrate Court neither informed him of this right, nor of the right to be presumed innocent until proven guilty nor of his right to apply for release on bail. To date, Mr. Newiri has not been tried for any crime. He was scheduled to appear before the High Court in Blantyre on 29 July 2008, but was brought before this Court only on 31 August 2008 where he was informed that he would be tried before the Thyolo High Court on 1 September 2008. It is unclear whether any investigation into the crime has ever taken place.

7. Mr. Newiri remains in limbo indefinitely waiting for a trial date and has been unable to provide for his wife and three young children. His family has been able to afford to travel to Blantyre to visit him only once or twice each year since 2004. Due to his situation and the extremely poor conditions at Chichiri Prison, Mr. Newiri suffers from depression and anxiety, has difficulties sleeping and has developed mental health problems. Because of the distance between his place of detention and his home village, his family is unable to provide him with

food on a regular basis, and because prisoners often go without any meals due to a lack of resources, Mr. Newiri also suffers from hunger and malnutrition.

8. Mr. Newiri has approached welfare officers at Chichiri Prison twice to seek a resolution of his case, but to no avail.

9. Mr. Boxtan Kudziwe (court records show his first name incorrectly as “Boston”), born on 19 February 1978, a high school-educated small-business owner, usually residing in Chisombezi, Limbe, was arrested near his residence by two police officers without a warrant on 10 April 2006, at approximately 10 a.m. When arresting him, the police demanded that he informed them of the whereabouts of an individual with the name of Vierra Chidzidzira. Mr. Kudziwe explained to the police officers that he did not know a person by that name, but was nonetheless taken to Bangwe police station without a reason provided, where he was detained for three days.

10. The police informed him that he was being held liable for crimes committed by Mr. Chidzidzira, who, according to the police, had been involved in the robbery and sale of cell phones, and was also accused of murder. Mr. Kudziwe was told that he would be released if he disclosed the hiding place of Mr. Chidzidzira. After learning more about the circumstances Mr. Kudziwe realised that he indeed knew Mr. Chidzidzira, however, under the name of Felix Funali, with whom he had conducted some business transactions in the past. He, however, did not know that Mr. Funali was in fact Mr. Chidzidzira and that this person was accused of murder and robbery.

11. Still unable to provide the police with the whereabouts of Felix Funali, alias Vierra Chidzidzira, Mr. Kudziwe was reportedly beaten with the butt of a rifle for three days by police officers while in detention. As a result, he sustained a scar on his head. The police stopped beating him only when Mr. Kudziwe led them to the mother-in-law of Mr. Funali/Chidzidzira who could not provide information about the whereabouts of her son-in-law, either. Mr. Kudziwe was held at Bangwe police station for another two months without charge or trial until he was finally taken before the Midima Magistrate Court on 23 June 2006, where he learned for the first

time that he was being charged with murder under section 209 of the Penal Code. He was transferred to Chichiri Prison in Blantyre on that day where he has been detained ever since.

12. Beyond his limited business relationship with Mr. Funali/Chidzidzira, the police officers were unable to link Mr. Kudziwe with the allegations of murder and robbery. Mr. Funali/Chidzidzira was arrested in August 2006 in connection with another offence. At that time Mr. Kudziwe was brought to Bangwe police station to confirm that the person he knew as Mr. Funali was indeed Mr. Chidzidzira, which he did. When confronted with Mr. Kudziwe, Mr. Funali/Chidzidzira accused him of having committed the crimes he had been accused of himself. In February 2007, Mr. Funali/Chidzidzira attempted to escape from Chichiri Prison and was subsequently transferred to a maximum security prison.

13. In August 2006, Mr. Kudziwe applied for bail. His legal-aid lawyer left Malawi without informing his client. The bail application did not produce any results. His parents hired a private lawyer, but his second bail application was denied in light of the escape attempt of Mr. Funali/Chidzidzira.

14. Since his arrest and detention Mr. Kudziwe has been unable to provide for his wife and two young children, which has left him depressed and anxious. In addition, he suffers from malnourishment, sleeplessness and ulcers. Given his penchant for learning, he spends his time at Chichiri Prison studying IT and marketing, as well as reading to co-inmates.

15. In July 2008 Mr. Kudziwe was again formally charged before the High Court in Blantyre, however, no trial date has been set.

16. Mr. Lawrence Ndele, born on 28 September 1981, whose most recent place of residence was Soche Township in Blantyre, was arrested on 8 June 2004 near Manje market without a warrant by four officials of the Criminal Investigation Department from Bvumbwe. The officers explained to him that they were taking him to the police station for further questioning. On 11 June 2004 the First Grade Magistrate Court in Midima issued a remand warrant on suspicion of homicide under Section 209 of the Penal Code and ordered his detention until 30 June 2004

without formally charging him. On the same day he was transferred from the police station in Bvumbwe to Chichiri Prison where he has been detained ever since.

17. Mr. Ndele filed a bail application for the first time in May 2008. His hearing on the bail application was adjourned twice before being denied on 8 June 2008 on the grounds that he had run away to Blantyre from his usual home in Msamuti village in Thyolo where an alleged manslaughter took place. It was not until September 2008 that Mr. Ndele was granted a committal hearing before the Blantyre High Court which charged him with manslaughter to which he pleaded not guilty following the advice of a lawyer. The High Court informed Mr. Ndele that his case would be adjourned for trial to a later date without specifying it. Mr. Ndele has not been called to appear before the High Court since September 2008.

18. The source argues that the arrest and detention of Messrs. Newiri, Kudziwe, and Ndele is arbitrary. At the time of their arrests the police did not inform them of their right to remain silent which is guaranteed under section 42(2) (a) of the Malawi Constitution: “Every person arrested ... have the right promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement”. They were not informed of the charges against them when they were arrested, which is in violation of section 42(1) (a) of the Malawi Constitution which requires that “[e]very person who is detained ... shall have the right to be informed of the reason for his or her detention promptly, and in the language which he or she understands”.

19. Mr. Newiri was brought before a court only six days after his arrest in violation of section 42(2)(b) of the Malawi Constitution which provides: “Every person arrested for, or accused of an alleged omission of an offence shall, in addition to the rights which he or she has as a detained person, have the right ... as soon as it is reasonably possible, but not later than when 48 hours expire, outside ordinary court hours or on a date which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason of his or her further detention, failing which he or she must be released”. Mr. Kudziwe was brought before the Magistrate Court in Midima only two and a half

months after his arrest. Mr. Ndele was not brought before a court within 48 hours of his arrest, either, and was not formally charged by the Midima Magistrate Court.

20. Mr. Newiri and Mr. Ndele were not informed of their right to legal counsel guaranteed under section 42(1) (c) of the Malawi Constitution, which reads as follows: “Every person who is detained... shall have the right ... to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State”.

21. Since Mr. Newiri, for more than four years, Mr. Kudziwe, for more than two and a half years, and Mr. Ndele, for more than four and a half years, have been detained without trial, their rights under section 42(2) (i) of the Malawi Constitution have also been violated: “Every person who is detained... shall have the right... to public trial before an independent and impartial court of law within a reasonable time after having been charged”. In addition, the Magistrate Court authorised Mr. Ndele’s detention on remand only until 30 June 2004.

22. In the interest of ensuring mutual cooperation, the above-mentioned allegations were transmitted to the Government of Malawi by letter from the Chairperson-Rapporteur of the Working Group dated 1 April 2009. The Government did not reply to this letter within the 90 days limit established by paragraph 15 of the Working Group’s methods of work.

23. A reminder was sent by note verbale dated 20 August 2009 expressing that the Working Group intended to render an Opinion on these cases during its fifty-fifth session, however, no reply from the Government was received. The Government did not request an extension of the time limit to submit a response. The Working Group considers, on the basis of the dispositions of paragraph 16 of its Methods of Work, that it is in a position to render an Opinion on the basis of all the information it has obtained on these cases.

24. The failure of the Government to respond should be considered as a tacit acceptance of the allegations received from the source and transmitted by the Working Group.

25. On this basis, the Working Group considers that Messrs. Newiri, Kudziwe and Ndele were not informed at the moment of their arrests of their right to keep silent and to not declare against themselves. They were not informed about the nature and cause of the charges brought against them. Mr. Newiri was brought before a court solely six days after his arrest. He was not informed of his right to legal counsel and has been detained without trial during more than four years. Mr. Kudziwe was brought before a Court only two and half months after his arrest. He has been kept on remand for more than two and half years. Mr. Ndele was not brought before a court within 48 hours of his arrest and was not formally charged. He was not informed of his right to legal counsel and has been detained without trial for more than four and half years.

26. These three persons were held during several months without having had the possibility to challenge the lawfulness of their detention before a judge and have been kept in pretrial detention during several years (in two cases, during more than four years) without being able to benefit from a regular trial.

27. Consequently, the Working Group expresses the following Opinion:

The violations of applicable international norms relating to the right to a fair trial and to the due process of law are of such gravity as to render the deprivation of liberty of Messrs. Paul Newiri, Boxtan Kudziwe and Lawrence Ndele an arbitrary character, according to category III of the categories applied by the Working Group to the consideration of cases brought before it. The detention of the above-mentioned three persons is contrary to articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.

28. Having rendered this Opinion, the Working Group requests the Government to take all appropriate measures to remedy the situation of these three persons and to comply with its international commitments in this matter.

Adopted on 2 September 2009

**AVIS n° 12/2009 (LIBAN)**

**Communication adressée au Gouvernement le 11 May 2009.**

**Concernant Monsieur Nawar Ali Abboud.**

**L'État est partie au Pacte international relatif aux droits civils et politiques.**

1. Voir le texte du paragraphe 1 de l'Avis n° 17/2008.
2. Vu les allégations formulées, le Groupe de travail accueille la coopération du Gouvernement. La réponse du Gouvernement a été transmise à la source, qui a fait des observations à ce sujet. Le Groupe de travail estime être en mesure de rendre un avis sur les faits et circonstances de l'affaire, eu égard aux allégations formulées et à la réponse du Gouvernement, ainsi qu'aux observations de la source.
3. Voir le texte du paragraphe 3 de l'Avis n° 17/2008.
4. Le cas mentionné ci-dessous a été rapporté au Groupe de Travail comme suit : Nawar Ali Abboud (ci-après Mr. Abboud), citoyen syrien, âgé de 45 ans, résidant de Tripoli, au Liban, est une dirigeant de l'opposition politique syrienne et trésorier d'une organisation syrienne nommée Alliance nationale unie, un groupe politique affilié à l'organisation Ref' at al-Asad.
5. Selon les informations reçues, M. Abboud, qui est l'oncle du Président de la République arabe syrienne, Bashar al-Asad, fut arrêté le 24 décembre 2008, aux environs de 18 h 00 ou 19 h 00, près de son bureau situé sur rue Maarad, à Tripoli, par des agents de renseignements de l'armée libanaise.
6. Selon la source, ce jour-là M Abboud a été arrêté, avec son chauffeur et son garde de corps de nationalité libanaise, par des personnes en civil s'identifiant comme membres des services de renseignements militaires, alors qu'il revenait à son bureau après avoir distribué des

cadeaux durant un événement chrétien à l'Église Bechara. À cette occasion, sa voiture a été confisquée. Tous les trois ont été conduits au siège des renseignements militaires d'Al Qubbeh, où ils ont été maintenus pendant une journée; suite à laquelle, le garde du corps et le chauffeur ont été relâchés.

7. Après l'arrestation, des agents des services de renseignement militaire seraient venus au bureau de M. Abboud pour confisquer du matériel électronique, des CDs, CD-ROMs et DVDs, et à une seconde occasion trois jours plus tard, pour confisquer une deuxième voiture appartenant à M. Abboud.

8. La source soutient que depuis cette date, le sort et la situation légale de M. Abboud restent inconnus. Ses deux voitures et le matériel électronique confisqué n'ont pas été retournés à ses familiers.

9. Selon la source, le maintien en détention de cette personne, dans un lieu inconnu et pour une durée indéterminée, sans inculpation et sans jugement, viole les normes du droit à un procès équitable et contrevient aux dispositions de la Déclaration universelle des droits de l'homme et du Pacte international des droits civils et politiques auxquels le Liban est partie.

10. La source a aussi exprimé sa préoccupation concernant l'éventuelle sortie de M. Abboud du territoire libanais pour être transféré illégalement en République arabe syrienne. Selon l'agence officielle libanaise responsable des étrangers et des frontières, il n'existe pas de registre d'une éventuelle sortie de M. Abboud du territoire libanais.

11. Le Gouvernement, dans une courte réponse datée du 18 mai 2009, a simplement répondu que Nawar Ali Abboud a été effectivement arrêté par les services de renseignements de l'armée puis libéré le lendemain avec ses deux véhicules.

12. La source, qui a reçu communication de cette réponse, a fait les observations suivantes :

13. M. Abboud ne semble pas avoir été libéré puisqu'il n'est pas rentré chez lui et n'a contacté ni ses proches ni son avocat. Après la date indiquée de la libération, ses voitures étaient

encore stationnées devant le quartier général des services de renseignements de l'armée. Surtout, la source ajoute, le Gouvernement n'apporte aucune preuve de sa libération.

14. La réponse du Gouvernement n'indique pas les raisons pour lesquelles M. Abboud a été arrêté ni par quelle autorité son arrestation a été ordonnée.

15. La source termine en sollicitant un complément d'information auprès des autorités libanaises pour savoir quelle est l'autorité qui avait ordonné l'arrestation, sur la base de quels motifs, et les circonstances précises de sa libération, tout en ayant le sentiment que M. Abboud n'est jamais parti libre du quartier général.

16. Le Groupe de travail considère que l'attitude du Gouvernement qui consiste, à la suite des allégations particulièrement précises et concrètes de la source, de répondre de manière aussi brève et imprécise face à la gravité des faits, est de nature à accréditer la thèse avancée par la source.

17. Cette position est d'autant plus concevable, que le Gouvernement, qui est considéré comme le principal garant en matière de respect des droits de l'homme, doit être en mesure de donner des informations circonstanciées sur une personne arrêtée par ses services, sur les raisons de cette arrestation et des suites réservées à une telle affaire.

18. En l'absence de telles informations, le Groupe de travail rend l'Avis suivant:

La détention de Nawar Ali Abboud est arbitraire, comme étant contraire aux dispositions des articles 9 et 10 de la Déclaration universelle des droits de l'homme et 9 et 14 du Pacte international relatif aux droits civils et politiques et rentre dans le cadre de la catégorie III des méthodes de travail du Groupe.

19. Cette décision étant prise, le Groupe de travail demande au Gouvernement de faire la lumière sur les circonstances et conditions d'arrestation de Nawar Ali Abboud ; d'indiquer avec précisions les preuves de sa libération ou, le cas échéant, de le traduire dans les meilleurs délais

devant une juridiction compétente, le tout dans le cadre du respect de ses engagements internationaux.

Adopté le 2 Septembre 2009

**OPINION No. 13/2009 (YEMEN)**

**Communication addressed to the Government on 28 May 2009.**

**Concerning Messrs. Amir Abdallah Thabet Mohsen Al Abbab, Mohamed Abdallah Thabet Mohsen Al Abbab and Movad Thabet Mohsen Al Abbab.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group regrets that the Government has not replied within the 90-day deadline.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. In the light of the allegations made, the Working Group would have welcomed the cooperation of the Government. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case, in the light of the allegations made, notwithstanding that the Government has failed to offer its version of facts and explanations on the circumstances of the case.
5. The case was reported to the Working Group on Arbitrary Detention as summarized below.

6. Mr. Amir Abdallah Thabet Mohsen Al Abbab, born in 1978, an employee at a gas station; Mr. Mohamed Abdallah Thabet Mohsen Al Abbab, born in 1984, a student; and Mr. Mouad Thabet Mohsen Al Abbab, born in 1985, a student, all of whom are brothers and Yemeni nationals, usually residing at Al-Sabiin Region, Al-Qadissya Neighbourhood, Sana'a, were arrested without a warrant on 19 July 2007, at 2 a.m., by three agents of the Yemeni Political Security Services (Al Amn Asiyassi).

7. According to the source, they have not been presented with a reason for their arrests and have been detained to date without any legal procedure.

8. It would appear that the three Al Abbab brothers were arrested in place of their oldest brother, Mr. Adel Thabet Mohsen Al Abbab, an Arabic teacher, who is sought, according to the Political Security Services, for alleged membership of Al Qaeda. When the agents did not find Adel Al Abbab they proceeded to arrest his three brothers and their father, who suffers from high blood pressure and diabetes. The father was released two days later.

9. The three brothers have been detained at the Political Security Services' prison in Sana'a since their arrest. During the first two months of their detention, they were held incommunicado; however, currently, they are in contact with their family, and their father is able to visit them once a week. They have not been formally charged, brought before a judge or faced any other type of legal process. Their father has petitioned the Head of the Political Security Services, Mr. Ghalib Al Kamsh, but to no avail.

10. Although the Constitution of the Republic of Yemen's article 47 (c) provides that any person temporarily apprehended on suspicion of committing a crime shall be presented before a court within a maximum of 24 hours from the time of his detention, and although article 73 of the Code of Criminal Procedure (Law No. 31 of 1994) stipulates that all person arrested must immediately be informed of the reasons for the arrest; that they have the right to know about the arrest warrant, and that they may also contact all persons who should, in their opinion, be informed and to request the assistance of a lawyer, no legal reason has been provided by the authorities to justify the arrests and detention of the three Al Abbab brothers.

11. The source further reports that Yemeni domestic law establishes that individuals must be promptly informed of charges being held against them. Article 269 of the Criminal Procedure Code stipulates that all accusations against a person, who for this reason has been placed in detention before being brought before a judge, must be examined in all urgency by a tribunal which must rapidly make a decision. To date, and despite their requests, the three Al Abbab brothers have not been able to obtain the assistance of a lawyer. They are currently being detained outside of any legal context and in manifest violation of Yemeni domestic law.

12. Having examined the information received and in the absence of a reply from the Government, the Working Group considers that the three Al Abbab brothers are arbitrarily detained, in contravention of article 9 of the Universal Declaration of Human Rights, which establishes that “no one shall be subjected to arbitrary arrest, detention or exile”; and of article 9, paragraph 1, of the International Covenant on Civil and Political Rights, according to which “everyone has the right to liberty and security of person”; and “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”.

13. The detention of the above-mentioned three brothers is also in violation of article 14, paragraph 3 (a) and (c), of the International Covenant on Civil and Political Rights, which requires that everyone shall be entitled “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him” and “to be tried without undue delay”.

14. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Amir Abdallah Thabet Mohsen Al Abbab, Mohamed Abdallah Thabet Mohsen Al Abbab and Movad Thabet Mohsen Al Abbab is arbitrary, being in contravention of article 9 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. It falls under categories I and III of the categories applicable to the consideration of cases submitted to the Working Group.

15. The Working Group requests the Government to take the necessary steps to remedy the situation, which, under the specific circumstances of this case, are the immediate release of, and the adequate reparation to the three Al Abbaba brothers.

16. The Working Group would emphasise that the duty to immediately release Amir Abdallah Thabet Mohsen Al Abbab, Mohamed Abdallah Thabet Mohsen Al Abbab and Movad Thabet Mohsen Al Abbab would not allow further detention, even in the eventual case that further actions taken against the three brothers may satisfy the international human rights obligations of the Republic of Yemen.

17. Furthermore, the Working Group points out that the obligation to provide adequate compensation under article 9, paragraph 5, of the International Covenant on Civil and Political Rights is based on the consideration that the three brothers have been the victims of arbitrary detention and that subsequent proceedings or findings concerning them cannot limit the State's responsibility.

Adopted on 3 September 2009

#### **OPINION No. 14/2009 (THE GAMBIA)**

**Communication addressed to the Government on 28 May 2009.**

**Concerning Chief Ebrima Manneh.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)

2. The Working Group regrets that the Government has not replied within the 90-day deadline.

3. (Same text as paragraph 3 of Opinion No. 17/2008.)

4. In the light of the allegations made, the Working Group would have welcomed the cooperation of the Government. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case, in the light of the allegations made, notwithstanding that the Government has failed to offer its version of facts and explanations on the circumstances of the case.

5. The case was reported to the Working Group on Arbitrary Detention as summarized below.

6. On 7 July 2006, Chief Ebrima Manneh, citizen of the Republic of the Gambia (“the Gambia”), born on 18 February 1978, usually residing in Lamin Village, the Gambia, a senior reporter for the Banjul-based Daily Observer newspaper, was arrested without a warrant at the Banjul offices of the Daily Observer by two plain clothes agents of the Gambian National Intelligence Agency. He has since been held incommunicado without charge or trial under the authority of the Gambian state security forces, likely with the assistance of the National Intelligence Agency. Mr. Manneh has never been offered a reason for his arrest or detention.

7. Mr. Manneh’s place of detention is unknown, and he has no contact with the outside world. The Gambian Government has never admitted that it has Mr. Manneh in custody. The Gambian National Security Council claimed ignorance of Mr. Manneh’s predicament. Other Gambian officials, including Gambian State Police, have publicly denied holding Mr. Manneh. It is believed, however, that he is currently held at Fatoto police station in eastern Gambia. During his detention witnesses have observed Mr. Manneh in Gambian custody at various locations. He is known to have been detained in the Mile Two Prison in Banjul. He has also been held in harsh conditions in the remote Fatoto Prison in eastern Gambia. In 2007, he was also observed at the

Royal Victorian Teaching Hospital in Banjul in the custody of security forces. After a few hours at the hospital, security forces transferred Mr. Manneh to a nearby military clinic in Banjul in order to avoid publicity. A spokesperson for the Royal Victoria Teaching Hospital in Banjul, however, stated that he had “no idea who gets admitted in the hospital”. Mr. Manneh was also held at the National Intelligence Agency Headquarters, Kartong police station, Sibanor police station, and Kuntaur police station.

8. The source maintains that substantial evidence suggests that Mr. Manneh is still alive. For instance, the Minority Leader of the Gambian Parliament urged Gambia’s President, on 3 July 2008, to release Mr. Manneh. If he were dead, the Minority Leader likely would not have put his own life at risk by making such a bold demand. Similarly, United States Senator Richard J. Durbin gave a speech in Congress on 30 July 2008 calling on the Gambia to release Mr. Manneh. In his address, Senator Durbin lamented the fact that his inquiries to the Gambian Ambassador to the United States had been met with only “shameful silence”.

9. The source reports about claims that Mr. Manneh’s arrest stemmed from his interactions with a reporter of the British Broadcasting Corporation (BBC) who filed a story about an upcoming African Union (AU) Summit in Banjul. The BBC story apparently mentioned the fact that Gambian President Yahya Jammeh attained his position through a coup d’état. Mr. Manneh may have tried to republish this story, qualified by the source as being innocuous, in the *Daily Observer*, at which point the National Intelligence Agency arrested him. Though Mr. Manneh does not know exactly which BBC story may have spurred the arrest, a BBC story of 29 June 2006 is the most likely impetus. It was stated: “The host of this [African Union] meeting, Gambian President Yahya Jammeh, like several of his peers, is a former soldier and coup-maker who later legitimized his rule through an electoral process”. Given the factual nature of the article, Mr. Manneh’s attempts to republish it cannot be considered harmful or unlawful. According to the source, nevertheless, President Jammeh seemingly opted to arrest and detain Mr. Manneh.

10. The source reports that representatives of local organizations and newspapers covering Mr. Manneh’s story put themselves at extreme personal risk. Gambian police arrested a reporter

for the Foroyaa newspaper while he investigated Mr. Manneh's detention at a police station outside Banjul.

11. Mr. Manneh suffers from serious medical problems, including high blood pressure that he reportedly developed while in detention. Further, Mr. Manneh has been denied access to adequate medical care despite the fleeting visit to a hospital in Banjul described above. Abysmal prison conditions likely aggravate his medical problems.

12. The source further reports that Mr. Manneh has been held in solitary confinement and forced to bear dehumanizing detention conditions, as he has been made to sleep on bare floors in overcrowded cells. The source asserts that such conditions, magnified by his inability to communicate with relatives or colleagues, gravely endanger Mr. Manneh's physical and emotional health.

13. The source also reports that Mr. Manneh is at serious risk of being tortured by agents of the Gambian Government as numerous Gambians allege credible claims of torture at the hands of their Government. The source supports this allegation by referring to the 2007 country report on human rights on the Gambia of the United States State Department. In this report it is stated that Gambian security forces have tortured defendants with "electrocution, cigarette burns, plastic bags held over people's heads, knife wounds, cold water treatments, and threats of being of shot." The editor of the Gambian newspaper *The Independent* alleges that he received "electric shocks to his naked body" while detained by Gambian security forces. Mr. Manneh's treatment is part of a wider practice whereby Gambian "security forces harassed and mistreated detainees ... and journalists with impunity."<sup>28</sup> The source reports that some members of the press have been tortured.

14. In addition to violation of the International Covenant on Civil and Political Rights, the source maintains that the detention of Mr. Manneh also violates article 6 of the African Charter of Human and People's Rights (African Charter), preventing deprivations of liberty when not "for reasons and conditions previously laid down by law", and article 19, paragraph 1, of

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<sup>28</sup> United States State Department, Country Reports on Human Rights, *The Gambia* (2007).

Gambian Constitution with an identical guarantee. According to the source his detention also violates article 9 of the African Charter which guarantees the right of one to “express and disseminate his opinions within the law”, and article 7 of the African Charter and article 19, paragraph 5, of the Gambian Constitution, both of which provide for a right to a trial within a reasonable time.

15. The source points out that the case of Chief Ebrima Manneh has already been the subject of a binding judgment of the Community Court of Justice (CCJ) of the Economic Community of West African States (ECOWAS) on 5 June 2008.<sup>29</sup> In its decision, the CCJ declared Mr. Manneh’s detention to be in violation of international law and demanded that the Gambia immediately release Mr. Manneh from his “unlawful detention” and pay him US\$ 100,000 in punitive damages. The Government of the Gambia never appeared to defend the case in the CCJ and has ignored the ruling. In its judgment, the CCJ recounts credible testimony of eye-witnesses’ sightings of Mr. Manneh in detention and found that “[a]ll [of] these facts stand uncontroverted, and they appear credible so the Court accepts them”. The source emphasizes that Mr. Manneh’s detention cannot be linked to any legal basis, and that highlighting this fact, the CCJ observed that “no criminal offence known to the law of the Republic of Gambia has been leveled against” Mr. Manneh. The CCJ held that “[s]ince [Gambia] has failed to establish that the arrest and detention of the plaintiff was in accord with the provisions of any previously laid down law, the plaintiff is entitled to the restoration of his personal liberty and the security of his person”.

16. The source reports that court actions inside the country have been extremely limited, given the alleged inhospitality of Gambian courts to claims of this nature. Mr. Manneh’s family has been made to suffer extreme economic and emotional hardship since his arrest and detention.

17. Having examined the information received and in the absence of a reply from the Government, the Working Group relies on the credible submission of the source, corroborated by witness evidence outlined in the judgment of the CCJ, that Mr. Manneh is still being detained at the hands of Gambian authorities following his arrest without a warrant on 7 July 2006 by agents

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<sup>29</sup> *Chief Ebrima Manneh v. The Republic of The Gambia*, ECW/CCJ/JUD/03/08.

of the Gambian intelligence service. Despite the source's own account that various Gambian authorities have publicly denied holding Mr. Manneh in custody, the reported and judicially backed eye witnesses' accounts clearly indicate that Mr. Manneh was seen in various detention facilities in the country.

18. The Working Group considers that the detention of Mr. Manneh is in contravention of article 9 of the International Covenant on Civil and Political Rights, and in particular of the guarantees that "everyone has the right to freedom and security of person", that "no one shall be subjected to arbitrary arrest or detention", and that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

19. Beginning with Opinion No. 47/200530, the Working Group has classified detention at a secret place as arbitrary detention in terms of Category I of the categories applicable to the examination of cases submitted to the Working Group as being devoid of any legal basis. No jurisdiction can allow for incommunicado detention where no reasons for the arrest and detention are put forward to the detainee, where no access to counsel or relatives is granted, no judicial control over the deprivation of liberty is exercised, no charges known to exist in Gambian legislation are laid against the detainee with a view to the conduct of a trial, in short, where no legal procedure established by law whatsoever is followed.

20. The detention of Mr. Manneh under such circumstances outside the confines of the law for close to three years has also exposed him to the risk of torture, and other cruel, inhuman or degrading treatment.<sup>31</sup>

21. The Working Group has also considered that secret detention of a person is in itself a violation of the right to a fair trial,<sup>32</sup> where the guilt or innocence of the accused could be established by a competent, independent and impartial tribunal established by law, as required by article 14, paragraph 1, clause 1, of the International Covenant on Civil and Political Rights.

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<sup>30</sup> A/HRC/4/40/Add.1, p. 41.

<sup>31</sup> Cf. annual report of the Working Group on Arbitrary Detention, E/CN.4/2006/7, p. 19, para. 57.

<sup>32</sup> Opinion No. 5/2001, E/CN.4/2002/77/Add.1, p. 45, para. 10 (iii).

22. Mr. Manneh has not had his day in court. He has not even been charged with a criminal offence. He has not been allowed access to a lawyer to prepare his defence. His detention in this case is thus in violation of article 14, paragraph 3 (a), (b) and (c), of the International Covenant on Civil and Political Rights, which require that everyone shall be informed promptly of the nature and cause of the charge against them, to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing, as well as to be tried without undue delay. His detention falls within Category III of the categories of arbitrary detention developed by the Working Group.

23. The Working Group further considers that the deprivation of liberty of Mr. Manneh results from the peaceful exercise of his fundamental right to freedom of opinion and expression as a newspaper reporter, guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. Although the latter's paragraph 3, allows the restriction of the right to freedom of opinion and expression in certain circumstances, such circumstances do not present themselves in the case of Mr. Manneh. This right can only be limited when "provided by law" and when "necessary ... for respect of the rights or reputations of others" or "for the protection of national security or of public order (ordre public) ".

24. Detaining a newspaper reporter who sought to republish an article that is critical about the manner in which the President as the Head of State and Head of Government of the day came to power is not necessary to preserve any reputational interest or to protect national security. It has not been argued by the Government and there is no evidence apparent that Mr. Manneh was involved in any subversive activities.

25. Even if censoring the article itself were deemed to be necessary to achieve these ends of protecting the President's reputation or the Gambia's national security, detaining Mr. Manneh completely incommunicado without any charge for almost three years can certainly not be considered necessary within the meaning of article 19, paragraph 3, of the International Covenant on Civil and Political Rights. The use of arbitrary detention to restrict press freedom is

a particularly invidious violation of civil and political rights. Mr. Manneh's deprivation of liberty thus also falls within Category II of the Working Group's categories.

26. Having reached this conclusion in the case, the Working Group further points out that the Gambia has not complied with the judgment of the CCJ of the ECOWAS of 2008, a copy of which has been made part of the case file, ordering the release of Mr. Manneh and awarding him damages.

27. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Chief Ebrima Manneh is arbitrary, being in contravention of articles 9, 10 and 19 of the Universal Declaration of Human Rights and of articles 9, 14 and 19 of the International Covenant on Civil and Political Rights. It falls under Categories I, II and III of the categories applicable to the consideration of cases submitted to the Working Group.

28. Having rendered this Opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, which, under the specific circumstances of this case being a particularly serious case of secret detention, are the immediate release of Mr. Manneh and adequate reparation to him in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

Adopted on 3 September 2009

**OPINION No. 15/2009 (ZIMBABWE)**

**Communication addressed to the Government on 20 March 2009.**

**Concerning Messrs. Lloyd Tarumbwa, Fanny Tembo and Ms. Terry Musona.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group welcomes the cooperation of the Government, which has submitted information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case, in the light of the allegations made and the response of the Government thereto, as well as observations by the source.
4. The case summarized below was reported to the Working Group on Arbitrary Detention as follows:.
5. Mr. Lloyd Tarumbwa, 39 years old, a Zimbabwe citizen, Co-ordinator at Mashonaland West Province of the Movement for Democratic Change (MDC), was arrested on 30 October 2008 at around 3 a.m. at his home by members of the Zimbabwe Republic Police (ZRP) and State security agents referred to as Central Intelligence Organisation (CIOs), who did not show any arrest warrant. Mr. Tarumbwa's arrest was witnessed by his relatives.
6. Ms. Terry Musona, aged 55, a Zimbabwe national, Vice Secretary of the MDC at Mashonaland West Province, resident in Gumbo Road, Kuwadzana Township, Banket; and Ms. Fanny Tembo, 41 years old; also a Zimbabwe citizen, elected local government official (Councilor) for the MDC, were picked up from 445 Muonde Street, Kuwadzana Township, Banket, by four unknown men. One of the men identified himself as Mpofu and told the family members to attend to Banket Police station.
7. The whereabouts of the above-mentioned three persons were unknown for 58 days. They were initially held in unacknowledged custody of the Police before being moved and placed

clandestinely in the custody of CIOs agents. During this period they were held in incommunicado detention, handcuffed and were victims of acts of ill-treatment and torture. They were not allowed access to their lawyers nor relatives and were denied basic pretrial rights.

8. Given that their detention was beyond the statutory limitation of 48 hours, in November 2008 the High Court of Zimbabwe, in accordance with the Criminal Procedure and Evidence Act, ruled that the detention of these three people was unlawful from the onset and ordered their release (Case of *Fidelis Chiramba and 11 others vs. Minister of Home Affairs and others* – Reference: HC 6420/08). In his resolution, Justice Hungwe stated that the continued detention of these MDC activists was unlawful and that they should be released. The High Court also stated that the Police would have to continue by way of summons if they wanted to institute any proceedings against them. Despite this judicial order, these three persons were released into the hands of the CIOs and continued to be held in detention. The High Court order remains defied to date.

9. In order to ascertain the whereabouts of these persons as they were not being held in an official place of detention, lawyers had to file another writ, this time an Urgent Chamber application with the High Court of Zimbabwe (*Lloyd Tarumbwa and 11 others vs. The Minister of State Security, Lands, Land Reform and Resettlement in the President's Office*; Reference: HC 23/09). The above-mentioned three persons were brought before Justice Chitakunye J., a judge of the High Court. The judge, as well as the lawyers of these three persons and the State lawyers, were allowed to question them under very strict and limited conditions. Their lawyers were not allowed to consult with them in private.

10. The above-mentioned three persons stated that they had been told to say, under threats of torture, that they were in Police protective custody as they were now considered State witnesses. In January 2009, the Judge advised the ZRP and CIOs and State representatives that they were obliged to comply with existing judicial orders and sanctioned the immediate release of the above-mentioned three persons from unlawful custody. However, this order was also defied.

11. These persons are held in detention under police protective custody and as State witnesses. They are housed in a single room, where their right to free movement is severely restricted. Permission to use the bathroom is at times denied. In instances where this is allowed they are blindfolded during their transit. Blankets are not provided. According to the source, their new status as protected State witnesses motivated, in January 2009, the end of the torture these three persons were suffering. However, Mr. Tarumbwa has been denied access to medical services. He is complaining of pain all over the body as a consequence of the assaults with hosepipes he suffered and as a result of having been kicked with booted feet for long periods.

12. The source further reports that these persons do not want to be State witnesses as they do not have any knowledge of what they are supposed “to have witnessed”. They are requested to give evidence in a case concerning other MDC activists who were also arbitrarily detained, abducted and temporarily subjected to enforced disappearance before they were subsequently released into the hands of the Police and who are now under prosecution. These people included MDC activists Fidelis Chiramba, Jestina Mukoko, Concilia Chinanzvavana (Mashonaland West Women’s Assembly Provincial Chairperson); Manuel Chinanzvavana, Pieta Kaseke, Colleen Mutemagau, Violet Mupfuranhewe, Broderick Takawira and others accused of plotting insurgency; banditry and sabotage.

13. The source considers that the above-mentioned three persons have been arbitrarily detained during more than four months. They were abducted, technically disappeared, tortured and were not charged with a recognizable criminal offense nor voluntarily brought before a judicial authority. They were denied their most basic rights including freedom of association, right to engage in political activities without intimidation and harassment, and treated as hostages. The limited access to their relatives was by court order and not voluntary. The source also points out that Mr. Fanny Tembo, as an elected MDC Councilor, is impeded from conducting his political duties on behalf of the constituency that voted him into office.

14. In its response the Government confirms that Lloyd Tarumbwa, Terry Musona and Fanny Tembo had been picked up by the law enforcing agencies following information that certain persons from Banket, in collaboration with foreign elements, were involved in training bandits

and insurgents. On investigation it transpired that the above named persons were not involved in these acts but willing to give information/evidence to the police in this regard. These persons were thus retained in protective custody at a safe place to prevent the actual perpetrators from harming them.

15. The Government further states that the High Court ordered the release of Fidelis Chiramba and his co-accused. In that (court order) list were included the names of Lloyd Tarumbwa, Terry Musona and Fanny Tembo “but these had not been formally charged with the offence and had at that time been released from police custody”. A further Urgent Chamber Application was made on behalf of these individuals before the High Court. The judge on 16 January 2009 visited the three named individuals in police protective custody and confirmed the position of the State. According to the Government response, the Judge did not order their release.

16. The Government confirms that the three named individuals indicated to the police that they had been away from their homes for a long time and stated that they wanted to go back home to which the Government agreed and after deposing affidavits, were allowed to go home.

17. The Government, in its response, also refutes the allegation of the source regarding ill treatment and torture stating that they willingly agreed to become State witnesses and were brought to Court on 2 June 2009 by a police officer and after being interviewed, returned to their homes. The following day an Urgent Chamber Application was filed on behalf of the three named individuals alleging abduction. The Government states that the Judge asked for the three to be produced before the Court who confirmed, in the presence of the judge, that they had never been abducted and had been brought into Harare for purposes of an interview at the Attorney General’s Office. In light of this evidence the Judge asked the petitioners to withdraw the application filed on behalf of the trio, which they did.

18. The above presented information received from the Government was sent to the source to comment upon who responded as follows: At the outset the source describes, as misleading, the response of the Government stating that the three named individuals had been detained with their

consent, especially since the Government response in no way denies the arrest and detention of these persons.

19. The source then produced evidence comprising a provisional order (case No. HC 872/09) dated 6 March 2009 wherein the Judge declared the abduction and detention of Lloyd Tarumbwa, Fanny Tembo and Terry Musona beyond 48 hours as wrong and unlawful. The Judge also declares the conduct of the respondents in refusing to allow the relatives of their abductees to meet them as wrong and unlawful. Further, the order also declares unlawful the refusal of the State functionaries to allow the lawyers of the above named persons. Finally, the order commands the State and her functionaries to refrain from re-abducting the said persons and immediately release them.

20. The Working Group, on the basis of the information made available to it, notes the information set out below.

21. There are a number of discrepancies in the response of the Government, which inference is also supported by the information provided. For instance, the Government acknowledges that the three individuals were “picked up”; were not involved in any wrong-doing, but that their detention was required and prolonged due to their requirement as State witnesses in a case. The Government further states that these individuals willingly remained in the protective custody of the police. Yet, a copy of the affidavits of the three supporting this fact attached by the Government in its response has a number of giveaway sentences that point to the non-consensual nature of their detention.

22. Lloyd Tarumbwa in his deposition states that: “I do not have any problems over my being kept under protective custody but I now want to go home and stay with my family, despite the security threats being highlighted to me”. Fanny Tembo, in his deposition makes a similar plea saying that “I now feel I must be with my family which I always think of. My wife is ill and I also feel that it is my responsibility to take care of her”. Terry Musona states, “I do not have any problems over general upkeep whilst in protective custody but I feel I have overstayed and thus need to go home”.

23. The Working Group also notes that the information given by the Government stating that the High Court did not order the release of the three detainees is at variance with its own stance that these persons were free to go and not detained beyond a certain time. A copy of the High Court order provided by the source contains a provisional order to the contrary, declaring continued detention of these persons in protective custody as wrong and illegal and demanding their immediate release from police custody.

24. The information provided both by the Government and by the source shows all three persons as political activists and members of the main opposition party MDC and working as office-bearers in various capacities. This has not been denied by the Government and is a common element in the profiles of all three detainees. There is no indication in the response of the Government to suggest that the three detainees would not be available to give evidence as State witnesses.

25. Therefore the Working Group is of the view that there is no legal basis for their continued detention.

26. In light of the foregoing, the Working Group expresses the following Opinion:

The arrest and detention of Mr. Lloyd Tarambwa, Ms. Terry Musona and Mr. Fanny Tembo is arbitrary, being in contravention of articles 7, 9, 10, 11, paragraph 1, 13, paragraph 1, and 19 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights, and fall under categories I and III of the categories applicable to the consideration of cases submitted to the Working Group.

27. Consequent upon the Opinion rendered, the Working Group requests the Government to take necessary steps to remedy the situation of Mr. Lloyd Tarambwa, Ms. Terry Musona and Mr. Fanny Tembo by releasing them from custody of the Police forthwith and to bring it into

conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

28. Finally, the Working Group requests that, in accordance with article 9, paragraph 5, of the aforementioned Covenant, the detainees be accorded an enforceable right to compensation for loss of earnings, health and personal life during the period of arbitrary detention described above.

Adopted on 3 September 2009

**OPINION No. 16/2009 (UKRAINE)**

**Communication addressed to the Government on 1 May 2009.**

**Concerning Mr. Alexandr Rafalskiy.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group welcomes the cooperation of the Government, which has submitted information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case, in the light of the allegations made and the response of the Government thereto, as well as observations by the source.

5. The case was reported to the Working Group on Arbitrary Detention and is summarized below.

6. Mr. Alexandr Rafalskiy, born on 21 May 1971; a Ukrainian citizen; deputy director of the private firm “Polimerzaschita”, usually residing in Kyiv, was arrested on 13 June 2001 in an apartment in Volgodonskiy Pereulok in Kyiv by officers from the Department of Internal Affairs. He was not provided with any warrant or explanation for the arrest. At first, Mr. Rafalskiy was held at a detention facility of the Department of Internal Affairs at Vladimirski Street 15, in Kyiv. On the next day, he was transferred to an unknown place of detention. Mr. Rafalskiy was allegedly tortured in both places in order to obtain a confession.

7. On 13 June 2001, at approximately 11.30 p.m., Mr. Rafalskiy was brought to the Obukhiv Central Regional Hospital. He was examined by two medical doctors, who diagnosed a wound on his head and numerous wounds on his back.

8. Between 14 and 16 June 2001, Mr. Rafalskiy was transferred to the Obukhov Temporary Detention Centre (TDC) run by the Obukhov District Police Department and held as a vagrant and unidentified person, pursuant to article 5, paragraph 5, of the Law on the Militsia (Police), although the police officers were aware of his identity and arrested him under the identity of Alexandr Rafalskiy. On 16 June 2001, Mr. Rafalskiy wrote an application, requesting the Head of the Obukhov Temporary Detention Center to contact his parents and to inform them about his place of detention.

9. Mr. Rafalskiy was transferred three times from one TDC to another without any further explanation. On 17 June 2001 he was detained at Staviche TDC; between 17 and 21 June 2001, at Tetiev TDC; and from 21 until 25 June 2001, again at Staviche TDC. All these three detention centres are located in the Kyiv region. On 17 June 2001, at approximately 8.40 p.m., Mr. Rafalskiy received medical treatment at the Staviche Central Regional Hospital. He was diagnosed with a veins dysfunction and a wound in the area of the chest and waist.

10. Mr. Rafalskiy was continuously interrogated during the period of 14 and 21 June 2001. As Mr. Rafalskiy was not allowed access to his lawyer or his relatives, he was not able to resort to legal remedies to prevent violations of his rights. It was only on 25 June 2001 that he was informed that he was to remain in detention on suspicion of murder. Since then, he has been detained under the authority of the Kyiv Regional Prosecutor's Office at the Kyiv Investigating Detention Ward.

11. On 26 June 2001, Mr. Rafalskiy was, for the first time, brought before a judge, who ordered his detention. On 30 July 2004, Mr. Rafalskiy was convicted for murder and sentenced to life imprisonment. He is currently serving his sentence in Prison No. 1, Ostovski Street 2, Vinnitha.

12. Subsequently, Mr. Rafalskiy submitted applications and appeals alleging torture and illegal deprivation of liberty to the Office of the Prosecutor-General, the investigator, and the Court of first instance that examined his case. Despite these applications, supported by a judicial-medical expert opinion rendered on 19 July 2001 by the Central Regional Hospital of Kyiv, which does not exclude allegations of torture, no criminal investigation ensued.

13. According to the judicial-medical expertise, requested by an investigator of the Regional Prosecutor's Office in Kyiv, Mr. Rafalskiy sustained two wounds in the area of his right and left knees; a bruise on the internal surface under his left shoulder, and a wound ahead of the left interior fontanel on his head. Except for the wound on his head, the injuries could have resulted from the use of blunt objects, possibly from beatings by hands, kicks or from a fall on blunt objects. These are considered light injuries without longstanding implications on the state of health. The expert opinion concluded that it was not likely that the aforementioned injuries could have resulted from the use of a stick.

14. On 15 September 2001, the investigator of the Prosecutor-General's Office refused to institute criminal proceedings against the police officers who ill-treated him in custody to obtain a confession, on the grounds that Mr. Rafalskiy was most likely subjected to force because of his attempted escape on 13 June 2001 through the ventilation exit in the detention facility of the

Department of Internal Affairs, Vladimirski Street 15, in Kyiv. In light of this fact, the police had to resort to "hand-fighting methods and special means" to prevent him from absconding, in strict compliance with the requirements of articles 13 and 14 of the Law on the Militia. The Prosecutor-General's Office considers critically the allegations of Mr. Rafalskiy as not corresponding to reality. With respect to the specific wound on his head, the Prosecutor-General argues that it could have resulted from the use of a sharp object and that it is not likely that it could have been inflicted by beating or similar means.

15. As the Office of the Prosecutor-General is the only body in Ukraine that could institute criminal proceedings against police officials, which has proven ineffective, Mr. Rafalskiy has no further domestic remedies available.

16. Accordingly, the source argues that the arrest, detention and imprisonment of Mr. Rafalskiy are arbitrary. Under article 29, paragraph 3, of the Constitution and articles 106 and 165-2, paragraph 4, of the Code of Criminal Procedure, arrest without order is permissible only "in case of urgent necessity to prevent or stop a crime". Article 165-2, paragraph 4, of the Code of Criminal Procedure stipulates the procedure for issuing a reasoned court decision authorizing detention. The applicant was detained on the basis of suspicion of a crime, committed a few months before his actual detention, thereby not meeting the requirements enshrined in article 29 of the Constitution and articles 106 and 165-2, paragraph 4, of the Code of Criminal Procedure.

17. Furthermore, on 14 June 2001, State authorities detained subject as a vagrant, despite the fact that his identity had been well known to them since the day preceding his arrest. Such detention was used by police authorities as Ukrainian legislation does not require judicial review of vagrant detention and does not oblige them to inform relatives or other persons about the detention and its place. It was only on 25 June 2001 that Mr. Rafalskiy's detention was approved by the Prosecutor's Office.

18. It is further argued by the source that actions of the authorities were aimed at avoiding obstacles for torturing Mr. Rafalskiy with the purpose of extracting a confession, hiding evidence of torture and preventing responsibility for these acts. Such actions violated article 5 of the

Universal Declaration of Human Rights; articles 7 and 9 of the International Covenant on Civil and Political Rights; articles 3 and 5, paragraph 3, of the European Convention of Human Rights, and Principles 4, 6, 9 and 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

19. Finally, the source contends that the arbitrary arrest, detention without registration and subsequent false detention as a vagrant, resulted in the violation of Mr. Rafalskiy's right to fair trial, guaranteed by article 10 of the Universal Declaration of Human Rights; article 14 of the International Covenant on Civil and Political Rights; article 6 of the European Convention of Human Rights, as well as Principles 17, 18 and 21 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

20. On 1 May 2009, the Working Group transmitted these allegations to the Government of Ukraine requesting it to provide the Working Group with detailed information about the current situation of Mr. Alexandr Rafalskiy and clarification about the legal provisions justifying his arrest and continued detention. By note verbale dated 20 August 2009 the Working Group sent a reminder regarding its request for information to the Permanent Mission of Ukraine to the United Nations Office and other International Organizations at Geneva.

21. On 21 August 2009, the Government submitted its response. According to it, Mr. Rafalskiy was arrested on 25 June 2001 by agents working for the Regional Prosecutor's Office in Kyiv for suspicion of having committed a criminal offence under article 93 (g) of the Penal Code of Ukraine. By decision of the Regional Prosecutor's Office in Kyiv dated 26 June 2001, Mr. Rafalskiy was held at the Investigating Detention Ward of Kyiv. The term of his detention was prolonged several times by the decisions of the District Court and of the Regional Appeal Court of Kyiv.

22. The Government further reports that Mr. Rafalskiy was convicted for murder and sentenced to life imprisonment on 30 July 2004. The Supreme Court of Ukraine confirmed his sentence to life imprisonment. He is being held in detention in the prison of Vinnitha since 11 July 2006. The Government concludes that the findings of the investigation carried out do not

cover any illegal actions attributable to the police officers. The acts practiced by officers of the Militia to avoid Mr. Rafalskiy's attempts to escape were fully legal.

23. In its observations to the Government's reply, submitted on 25 August 2009, the source considers that the information provided by the Government does not refute the allegations submitted concerning illegal arrest and acts of torture and ill-treatment carried out in order to extract a confession. The response from the Government is considered by the source irrelevant in connection with the allegations contained in its original communication. The Government simply ignores that Mr. Rafalskiy was detained between 13 and 25 June 2001, and it does not present any explanation concerning the legal grounds for this period of the detention. The Government's reply covers only the period subsequent to 25 June 2001. For that reasons, the source concludes that it could not be taken into account by the Working Group in its consideration of the case.

24. The Working Group considers that it should take into consideration the following circumstances:

(a) The original communication from the source contains allegations of torture, ill-treatment and illegal deprivation of Mr. Rafalskiy's liberty by police officers in several temporary detention centres during the first 13 days of his pretrial detention. There was not formal registration of his detention and Mr. Rafalskiy was even partially held in incommunicado detention;

(b) Two central regional hospitals in Kyiv have diagnosed that Mr. Rafalskiy presented wounds in several parts of his body;

(c) Mr. Rafalskiy was not allowed access to a defence lawyer nor to his relatives;

(d) The reasons of his detention were only communicated to him after 13 days of his detention, when he was informed that he should be held in detention on suspicion of murder. Only after that, Mr. Rafalskiy was, for the first time, brought before a court.

25. These allegations have not been refuted by the Government.

26. However, there is a discrepancy between the information provided by the source and that provided by the Government concerning the date of Mr. Rafalskiy's arrest (13 and 25 June 2001, respectively). It is during this period of pre-trial detention, immediately subsequent to Mr. Rafalskiy's apprehension, that the alleged acts of torture and ill-treatment and serious violations to the right to liberty and security took allegedly place.

27. Consequently, the Working Group requests the Government to provide it with more detailed information about the date, the legal grounds and the circumstances of the arrest of Mr. Rafalskiy; about the duration and conditions of his pre-trial detention and about the results of the investigation carried out concerning the actions of the police officers during his arrest and pre-trial detention.

28. The Working Group, in conformity with paragraph 17 (c) of its methods of work, decides to keep the case pending until the information requested to the Government is received.

Adopted on 4 September 2009

### **OPINION N.º 17/2009 (ESPAÑA)**

**Comunicación dirigida al Gobierno el 28 de mayo de 2009.**

**Relativa al Sr. Karmelo Landa Mendibe.**

**El Estado es parte en el Pacto Internacional de Derechos Civiles y Políticos.**

1. (Texto del párrafo 1 de la Opinión N.º 17/2008.)
2. El Grupo de Trabajo expresa su apreciación al Gobierno por haber proporcionado oportunamente la información solicitada.
3. (Texto del párrafo 3 de la Opinión N.º 17/2008.)
4. Habida cuenta de las alegaciones formuladas, el Grupo de Trabajo acoge con satisfacción la cooperación recibida del Gobierno. El Grupo de Trabajo transmitió la respuesta del Gobierno a la fuente de la comunicación y ha recibido sus comentarios. El Grupo de Trabajo estima que está en condiciones de emitir una Opinión acerca de los hechos y circunstancias del caso considerado, teniendo en cuenta las alegaciones formuladas, la respuesta del Gobierno sobre ellas y los comentarios de la fuente.
5. Según la fuente, el Sr. Karmelo Landa Mendibe, de nacionalidad española; Profesor de la Universidad del País Vasco en Bilbao; Diputado Europeo (1990-1994) y miembro del Parlamento Vasco (1994-1998) por la coalición Herri Batasuna, fue arrestado el 11 de febrero de 2008, aproximadamente a las 2.00 horas de la madrugada, en su domicilio, por un numeroso grupo de agentes de la Policía Nacional vestidos de paisano, armados y con los rostros cubiertos.
6. Los autores de la aprehensión no mostraron orden, decisión ni mandato de ninguna autoridad pública en la cual constasen los motivos del arresto practicado. La detención fue realizada tras un registro domiciliario de dos horas. El Sr. Landa Mendibe fue sacado por la

fuerza de su domicilio, esposado, conjuntamente con los bienes confiscados: dos ordenadores; dos teléfonos móviles; una agenda y libros propios de su trabajo como profesor universitario. Su esposa fue testigo de la detención. El arresto fue filmado y fotografiado por periodistas que habían acompañado a los agentes de la Policía Nacional durante la operación y fue difundido ampliamente en los telediarios y periódicos durante los días siguientes.

7. El Sr. Landa Mendibe fue introducido en un vehículo sin distintivos en el cual se le colocó una capucha o tela de saco opaca sobre la cabeza. Se le informó que a partir de ese momento se encontraba en situación de incomunicado y sin derecho a contar con abogado propio.

8. Luego de un largo viaje de madrugada, fue internado en un calabozo en la ciudad de San Sebastián. Una mujer se presentó como médico forense y le informó que se la había hecho venir desde Madrid “para atenderle”. Luego fue conducido nuevamente a Bilbao, donde se le encerró en los calabozos de la Jefatura de Policía. Después fue conducido a la Dirección General de la Policía Nacional en Madrid, donde se le mantuvo durante dos días en un minúsculo calabozo de tres metros por cuatro, sin ventanas y sin muebles. Durante todo ese tiempo el Sr. Landa Mendibe no fue interrogado ni se le hizo siquiera pregunta alguna.

9. El 13 de febrero de 2008, fue conducido ante el juez titular del Juzgado de Instrucción N.º 5 de la Audiencia Nacional, donde se le comunicó el auto de procesamiento con base en la imputación de pertenencia a la organización terrorista ETA y se decretó su consiguiente prisión provisional incondicional. El juez tampoco procedió a formularle pregunta alguna. No obstante,

el detenido negó rotundamente la imputación y denunció el modo en que había sido arrestado y los malos tratos sufridos.

10. El Sr. Landa Mendibe recordó al juez que en un procedimiento anterior, que ese mismo juez había instruido, el Tribunal Constitucional había anulado una condena emitida luego de un proceso que le recluyó en prisión preventiva durante dos años, entre 1997 y 1999.

11. Tras su comparecencia, el Sr. Landa Mendibe fue trasladado en un furgón de la Guardia Civil, esposado y prácticamente inmovilizado, a la prisión madrileña de Soto del Real. Pasó la noche del 13 al 14 de febrero en los pasillos del módulo de Ingresos de la mencionada prisión.

12. El 14 de febrero se comunicó al Sr. Landa Mendibe la “Orden de Dirección” de la prisión, en la que se manifestaba “la capacidad criminal y la peligrosidad del interno patente en los delitos cometidos (terrorismo) y por los que actualmente se encuentra preso”. Señala también “la vinculación del interno a la organización terrorista ETA”. El Ministerio del Interior decidió clasificar e incluir al interno en el Fichero FIES 1-3.

13. El Sr. Landa Mendibe fue internado en una celda compartida con un hombre joven que presentaba hematomas y marcas de pelea en la cara. Se le despojó la ropa que vestía y se le obligó a vestir en su lugar un buzo blanco de una pieza con cremallera en la parte anterior, de varias tallas inferiores a la del detenido. En reacción a su protesta por estos hechos, fue enviado a una pequeña celda del módulo especial de aislamiento, donde se le internó totalmente desnudo.

Se informa de que la celda estaba infestada de cucarachas que correteaban por suelo y paredes; estaba extremadamente sucia y permanentemente iluminada con una cegadora luz blanca.

14. El 17 de febrero, las autoridades negaron a los familiares del Sr. Landa Mendibe, quienes habían viajado expresamente desde Bilbao, la posibilidad de visitarle. El 18 de febrero fue trasladado a una celda ordinaria del Módulo 1. Ahí se le informó que había cometido faltas muy graves, por lo que el Director de la prisión había ordenado un nuevo aislamiento de entre seis y 14 días en régimen de incomunicación. Sin embargo, fue trasladado el 20 de febrero a la prisión de Madrid II (Alcalá-Meco), localizada en la ciudad de Alcalá de Henares.

15. El Sr. Landa Mendibe permaneció en la prisión de Alcalá-Meco hasta el 18 de diciembre de 2008. Durante dicho período se le denegaron los siguientes recursos:

- a) Solicitud de ser encarcelado en un módulo con presos preventivos y no con sentenciados y convictos: formulada el 18 de marzo de 2008 y denegada;
- b) Solicitud de participar en las actividades del polideportivo de la prisión y de practicar atletismo: formulada el 27 de marzo de 2008 y denegada;
- c) Solicitud de entrevista con el juez de Vigilancia Penitenciaria durante una de sus visitas ordinarias a la prisión: formulada el 9 de abril de 2008 y sin merecer respuesta;

d) Solicitud de que se le permitiese disponer de un ordenador portátil y de una impresora para poder continuar trabajando en su tesis doctoral: formulada el 7 de julio de 2008 y denegada;

e) Solicitud de que se le permitiese disponer de un medidor de tensión arterial: formulada el 7 de julio de 2008 y denegada;

f) Solicitud de autorización para mantener comunicación telefónica con su abogada defensora más allá del cupo semanal de llamadas familiares: formulada el 6 de agosto de 2008 e igualmente denegada;

g) Solicitud de que se le entregase una copia del reglamento interno de la prisión: nunca respondida.

16. El 19 de agosto de 2008, el Sr. Landa Mendibe fue sancionado con prohibición de visitas familiares y 30 días de prohibición de salidas al patio carcelario, al habersele hallado, durante un registro, un álbum de fotos familiares y un disco de música. Esta sanción no fue comunicada por escrito por lo que el Sr. Landa Mendibe no pudo impugnarla. El Sr. Landa Mendibe fue trasladado el 13 de diciembre de 2008 en un autobús de la Guardia Civil a la prisión de Valdemoro, situada a unos 60 kilómetros de Madrid. No obstante la escasa distancia que separa los dos centros de reclusión, el viaje duró más de seis horas. Fue trasladado encerrado con otro recluso en un habitáculo metálico y opaco. Al llegar fue sometido a régimen de incomunicación durante cinco días sin que se le brindase ninguna explicación. Ni su abogado ni sus familiares

fueron informados de dicho desplazamiento. Cinco días después, en iguales condiciones, fue conducido a la prisión de Cáceres en Extremadura, a 300 kilómetros de Madrid y a más de 600 kilómetros de Bilbao, donde reside su esposa. No existen en la práctica medios de transporte público que comuniquen directamente Bilbao y Cáceres.

17. El Sr. Landa Mendibe se encuentra procesado en el Sumario 35/02 del Juzgado Central de Instrucción número 5 de la Audiencia Nacional, a la espera de que se celebre la vista correspondiente. Ha sido acusado de pertenecer a la organización terrorista ETA sobre la base del Art. 515.2 del Código Penal. Sin embargo, según la fuente, no consta en autos ningún elemento de prueba que pudiera justificar tal grave imputación.

18. Se ha solicitado en varias ocasiones la libertad bajo fianza del Sr. Landa Mendibe pero ésta ha sido sistemáticamente denegada; la última denegación tuvo lugar en julio de 2008. Actualmente se encuentra en vía de resolución una nueva petición.

19. Según la fuente, el Sr. Landa Mendibe ha sido privado de su derecho a la libertad y a la seguridad personales y a no ser sometido a detención o prisión arbitrarias (art. 9 de la Declaración Universal de Derechos Humanos y art. 9 del Pacto Internacional de los Derechos Civiles y Políticos). Su detención y procesamiento se producen en represalia al ejercicio de su derecho a la libertad de opinión y expresión (art. 19 de la Declaración y art. 19 del Pacto). Al ejercer pacíficamente sus legítimas actividades políticas de oposición, no lesionó en ningún momento los derechos o la reputación de los demás. Tampoco ha atentado contra la seguridad nacional, el orden público, la salud o la moral públicas, ni incurrido en propaganda en favor de la

guerra, apología del odio nacional, racial o religioso que constituyese una incitación a la discriminación, la hostilidad o la violencia. Sólo en estos casos las autoridades estarían legitimadas para restringir el ejercicio de las mencionadas libertades (cfr. arts. 19 y 20 del Pacto). Se ha violado también el derecho del Sr. Landa Mendibe a ser tratado durante su arresto y detención humanamente y con el debido respeto a la dignidad inherente al ser humano; a ser reconocido como preso preventivo; a estar separado de los condenados y convictos y a ser sometido a un tratamiento distinto y adecuado a su condición de no condenado (art. 10 del Pacto).

20. Se ha sometido al Sr. Landa Mendibe a tratos inhumanos y degradantes incompatibles con su derecho a la integridad física y mental proclamados en los Arts. 5 de la Declaración Universal de los Derechos Humanos y 7 del Pacto Internacional de Derechos Civiles y Políticos. Ello es también incompatible con los artículos 1 y 16 de la Convención contra la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes la cual obliga a España a adoptar “medidas eficaces para impedir los actos de tortura en todo territorio que esté bajo su jurisdicción” (art. 2 de la Convención).

21. También, por aplicación combinada de los artículos 12 y 16 de la Convención contra la Tortura, el Estado Español está obligado a proceder a una investigación pronta e imparcial tan pronto haya motivos razonables para creer que se ha cometido un acto de tortura o de malos tratos. El Sr. Landa Mendibe denunció haber sufrido malos tratos durante su arresto y detención ante el juez de la Audiencia Nacional que dictó el auto de procesamiento en su contra. Sin

embargo, el juez hizo caso omiso y no ordenó, como habría debido de acuerdo con la ley, la correspondiente investigación judicial.

22. La fuente agrega que no se ha establecido todavía en España un mecanismo independiente de la Policía que pueda llevar a cabo la investigación efectiva e imparcial a que se refiere el artículo 12 de la Convención contra la Tortura.

23. La clasificación en el fichero FIES 1-3, de alta peligrosidad, se destina a los presos que cumplen condena por delitos graves de terrorismo. El Sr. Landa Mendibe fue clasificado como tal desde el primer día de su ingreso en prisión. Durante sus más de 15 meses de estancia en prisión preventiva en centros penitenciarios españoles, el Sr. Landa Mendibe ha estado sujeto a condiciones de detención sumamente severas que suponen un maltrato continuado.

24. Dicha clasificación en el fichero FIES 1-3, aplicada inmediatamente después de su aprehensión, supone una violación del principio de presunción de inocencia durante el proceso, principio fundamental consagrado en el artículo 11 de la Declaración y en el párrafo 2 del artículo 14 del Pacto.

25. En diversas ocasiones, como las arriba descritas, la Administración Penitenciaria no ha reconocido el principio de la presunción de inocencia en favor del Sr. Landa Mendibe y le ha impuesto restricciones indebidas que no son compatibles con sus derechos humanos, los que son objeto de reserva legal.

26. Se ha vulnerado también el derecho del Sr. Landa Mendibe a ser juzgado dentro de un plazo razonable o a ser puesto en libertad (art. 9.3 del Pacto) y a ser juzgado sin dilaciones indebidas (art. 14.2. c del Pacto).

27. El párrafo 3 del artículo 9 del Pacto Internacional de Derechos Civiles y Políticos establece textualmente que “la prisión preventiva de las personas que hayan de ser juzgadas no debe ser la regla general”; si bien permite que la libertad del procesado “pueda estar subordinada a garantías que aseguren la comparecencia del acusado en el acto del juicio, o en cualquier momento de las diligencias procesales y, en su caso, para la ejecución del fallo”. La prisión provisional decretada por el juez instructor hace más de 15 meses y el largo tiempo ya transcurrido no son compatibles con dicha disposición del Pacto, obligatoria para España.

28. También, agrega la fuente, se ha violado el inciso b del párrafo 2 del artículo 14 del Pacto, al no garantizarse el derecho del detenido a comunicarse con un defensor de su libre elección en todo momento y adecuadamente.

29. Los reiterados traslados a diversos centros de detención ubicados en diferentes Comunidades Autónomas, sin aviso a los familiares ni al defensor y sin aviso previo al detenido, han resultado en una seria merma del derecho del Sr. Landa Mendibe a su vida familiar, así como del derecho de su familia a recibir protección del Estado (arts. 17 y 23 del PIDCP). Dichos traslados, aparentemente innecesarios, parecen obedecer a una política gubernamental deliberada de dispersión de los presos vascos por todo el territorio español para impedirles recibir la ayuda de sus familiares.

30. La fuente considera que se han también violado los Principios de Johannesburgo sobre la Seguridad Nacional, la Libertad de Expresión y el Acceso a la Información, y algunos principios fundamentales del Conjunto de Principios para la protección de todas las personas sometidas a cualquier forma de detención o prisión, aprobados por la Asamblea General de las Naciones Unidas el 9 de diciembre de 1988 (específicamente, los Principios 4, 8, 15, 16, 18 a 20, 28, 30, 33, 36, 38 y 39).

31. La fuente precisa que la anti-juridicidad de los hechos descritos viene avalada por la práctica convergente desarrollada por distintos mecanismos convencionales (Comité de Derechos Humanos); y extra-convencionales temáticos de protección de los derechos humanos de las Naciones Unidas (Grupo de Trabajo sobre la Detención Arbitraria; Relator Especial sobre la promoción y protección de los derechos humanos y las libertades fundamentales en la lucha contra el terrorismo; Relator Especial sobre la cuestión de la tortura; Relator Especial sobre la promoción y protección del derecho a la libertad de opinión y de expresión; Relator Especial sobre la independencia de los magistrados y abogados). Tanto el Comité de Derechos Humanos como el Relator Especial sobre la promoción y protección de los derechos humanos y las libertades fundamentales en la lucha contra el terrorismo han puesto de manifiesto su preocupación por los problemas que ocasiona en España una definición deficitaria de terrorismo. El Comité de Derechos Humanos recomendó incluso la modificación de los artículos 572 a 580 del Código Penal.

32. Los mecanismos internacionales antes mencionados también han expresado su preocupación por el mantenimiento, en la legislación y en la práctica cotidiana, del régimen de incomunicación y su relación con la tortura y los malos tratos; por el empleo de la duración de la pena aplicable como criterio para determinar la duración de la prisión provisional; por la interposición de acciones judiciales ante la Audiencia Nacional que podrían restringir de modo injustificado la libertad de expresión y de asociación; y por el carácter de jurisdicción de excepción atribuida a la Audiencia Nacional.

33. Según la fuente, el procesamiento del Sr. Landa Mendibe ante dicha jurisdicción de excepción debe ser revisado, debiéndose considerar ilegal la utilización de tribunales de excepción, como la Audiencia Nacional, para el combate y la represión del terrorismo. La fuente agrega que la vigente Ley de Partidos Políticos ha permitido la ilegalización del grupo político al cual el Sr. Landa Mendibe pertenecía y está en la base de su detención.

34. El Gobierno en su respuesta no contradice el hecho que la detención del Sr. Landa Mendibe emana de la orden de autoridad judicial dispuesta en la causa 35/02, lo que justificaría la privación de libertad y afirmaría su carácter no arbitrario, negando que en el acto del arresto y durante los días siguientes se haya incurrido en irregularidades. Agrega el Gobierno en su respuesta que el Sr. Landa Mendibe se encuentra procesado actualmente “como presunto autor de un delito de integración en organización terrorista”.

35. Manifiesta que a su respecto se adoptaron todas las medidas de higiene; otorgamiento de prendas de vestir; revisiones médicas, y demás medidas de rigor, conforme a la legislación

carcelaria. Sostiene que se le permitió llamar “en forma gratuita” a su madre, y que recibió, el 14 de febrero, la visita de su abogado.

36. Agrega que, conforme a la legislación interna, se dispuso la intervención de las comunicaciones del Sr. Landa Mendibe, excepto con su abogado. En cuanto a la calificación del preso en el fichero FIES 1-3, sostiene que es propio de quienes están “dentro del colectivo denominado bandas armadas, lo que está ajustado a la ley; lo que fue rechazado por Landa por haber en ellos presos comunes, excusa común en los internos vinculados a la organización terrorista ETA”. Dada su conducta, se le aplicaron medidas de aislamiento. Debido a su mal comportamiento, sufrió otras sanciones, impuestas reglamentariamente, incluyendo la suspensión de las comunicaciones orales por tres meses, y la entrega de paquetes alimenticios. Confirma también el Gobierno el hecho del traslado del reo a la localidad de Cáceres, por su mala conducta. Sostiene que desde ese traslado esta persona recibe visitas y comunicaciones ordinariamente.

37. Respecto a la denegación de peticiones, el Gobierno también confirma el hecho, haciendo presente que Landa “pudo haber cursado el oportuno recurso o queja ante el Juez Central de Vigilancia”.

38. Sostiene el Gobierno, en cuanto al fondo del asunto, que en la especie se ha aplicado la legislación ordinaria española. Respecto de la naturaleza del tribunal Audiencia Nacional sostiene que no es un tribunal de excepción, sino “un organismo encarnado en la organización judicial española, competente en diversas materias no sólo penales, puesto que abarca

importantes espacios en la jurisdicción contencioso administrativa y en la social. En materia penal, le está atribuido el enjuiciamiento de una amplia gama de delitos, entre ellos los de terrorismo, donde queda separada la función instructora de las causas (que compete a los Juzgados de Instrucción) de la función específicamente juzgadora (desempeñada por las Salas de Justicia)”. Informa que la aceptación de la Audiencia Nacional como tribunal ordinario fue reconocida por el Tribunal Europeo de Derechos Humanos desde 1986, en el caso Barberá.

39. No controvierte el Gobierno la ausencia de pruebas incriminatorias, porque entiende que “sería inútil y contradictorio con la referida presunción (de inocencia) el intento de justificar desde este escrito o desde cualquier otra instancia distinta al juez ordinario previsto por la ley para el enjuiciamiento de los hechos, la procedencia o la justificación de la incriminación penal del Sr. Karmelo Landa”; argumento que hace extensivo a las medidas de aseguramiento de la persona, incluida la privación de libertad.

40. La comunicación transcribe diversas disposiciones de la Ley de Enjuiciamiento Criminal relativas a las garantías judiciales de los imputados; a la prisión preventiva, tanto las que la decretan, la prorrogan o la deniegan. También transcribe normas de la legislación penitenciaria tanto de nivel constitucional, como de la Ley Orgánica Penitenciaria y de su Reglamento y modificaciones a estos preceptos.

41. Finalmente, sostiene que se le imputa al Sr. Landa Mendibe su “presunta integración en la estructura y órganos directivos (Mesa Nacional) de Batasuna”. El Tribunal Supremo Español decretó la ilegalización de esta formación política por su vinculación con la banda terrorista

ETA. El Tribunal Constitucional se pronunció en igual sentido. Agrega que el Tribunal Europeo de Derechos Humanos ha sido de la misma opinión, de la que dejó constancia en su sentencia Batasuna contra España, Causa 25803/4 y 2581/04.

42. La fuente, en carta dirigida al Grupo de Trabajo el 28 de agosto de 2009, rectifica lo que considera diversos errores de hecho en la respuesta del Gobierno, y refuta sus argumentaciones.

43. El Grupo de Trabajo se pronunciará separadamente sobre cuatro órdenes de materias que se advierten en los antecedentes: El arresto del Sr. Landa Mendibe; la naturaleza del tribunal; los hechos que se imputan al preso y su calificación jurídica; y el respeto de las reglas del debido proceso de derecho.

#### **La detención del Sr. Karmelo Landa Mendibe**

44. Las versiones de la comunicación original de la fuente y de la respuesta gubernamental son incompatibles, pues mientras la primera relata una gran cantidad de abusos contra la persona privada de libertad (ver párrafos 5 a 18 de esta Opinión), la segunda niega en bloque todas las alegaciones, sosteniendo que no se han cometido irregularidades (párrafo 34). Si bien en general las partes no ofrecen pruebas que fundamenten sus afirmaciones, hay al menos dos hechos indesmentibles, que, analizados en conjunto, permiten sostener que la presunción de inocencia de Landa fue afectada.

45. El primero es que ante las quejas y denuncias del Sr. Landa Mendibe de haber sufrido torturas, o ante el mero hecho de que hubo motivos razonables para creer que se produjeron actos de torturas, el Estado Español debió disponer una investigación de estas alegaciones, de manera pronta e imparcial, en cumplimiento de los artículos 12 y 13 de la Convención contra la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes, y no lo hizo. No tiene dudas el Grupo de Trabajo que en la especie hubo motivos razonables para pensar en este sentido. Ya el Relator Especial sobre la promoción y protección de los derechos Humanos y las libertades fundamentales en la lucha contra el terrorismo manifestó su inquietud por la cantidad de “denuncias de malos tratos físicos o psicológicos presentadas ante el juez de instrucción” que “fueron ignoradas” (A/HRC/10/3/Add.2, párr. 23).

46. El segundo hecho se refiere a que son incontestables los largos períodos de incomunicación a que el Sr. Landa Mendibe fue sometido. Y es sabido que el Derecho Internacional de los Derechos Humanos considera como una de las formas de tortura o de trato cruel e inhumano, la incomunicación prolongada, que en este caso fue, además, reiterada. El Relator Especial sostiene en su informe de misión a España que pudiera haberse recurrido al régimen de incomunicación “para obtener información que pudiera ayudar en las investigaciones y no únicamente información relacionada con los sospechosos de terrorismo” (id., párr. 22).

47. A juicio del Grupo de Trabajo, no es ilegítimo ni afecta al derecho humano a ser juzgado por un tribunal independiente e imparcial, con las debidas garantías, el que existan diferentes órganos judiciales siempre y cuando su composición y funcionamiento, el tener órganos superiores comunes, y magistrados nombrados y seleccionados de acuerdo a criterios de

objetividad, transparencia, y capacidad, demuestren su carácter de independencia e imparcialidad. Su esfera de competencia no debe estar inspirada en factores corporativos ni en motivos ideológicos o religiosos (como en el caso, por ejemplo, de los tribunales militares; los tribunales populares, los de orden público u otros semejantes). El Grupo de Trabajo estima que la Audiencia Nacional de España ha dado generalmente garantía de respeto de estos requisitos, por lo que su sola actuación no es suficiente para impugnar como arbitrario —o de sospecha de arbitrariedad— un juzgamiento particular.

48. Por lo demás, el Grupo de Trabajo entiende que el Relator Especial no deslegitima en su informe la existencia de la Audiencia Nacional, toda vez que expresa que “aunque tiene conocimiento de un fallo pronunciado en 1988 por el Tribunal Europeo de Derechos Humanos (criterio que previamente había tenido la Comisión Europea de Derechos Humanos en 1986) en el que caracterizaba a la Audiencia Nacional como un tribunal ordinario, considera problemático que un único tribunal central especializado, tenga competencia exclusiva en la aplicación e interpretación en materia de delitos de terrorismo, cuyo ámbito se ha hecho problemáticamente amplio”. En el párrafo 58 del informe citado, el Relator Especial “pide al Gobierno que considere la posibilidad de trasladar la competencia para los delitos de terrorismo a los tribunales ordinarios, en lugar de reservarla a un solo tribunal central especializado, la Audiencia Nacional”. Es decir, el Relator Especial no cuestiona ni su existencia (también tiene competencias en materia administrativa, laboral, social, delitos relativos al narcotráfico, corrupción, crimen organizado; delitos contra el Rey y su familia, contra miembros del Gobierno, delitos que dan lugar a la jurisdicción universal); ni tampoco que el ejercicio de su jurisdicción vulnere el derecho a un juzgamiento por un tribunal independiente e imparcial. Sólo

le parece problemática, al Relator Especial, la extensión territorial de la competencia del Tribunal para los delitos de terrorismo.

### **Los hechos que se atribuyen a Landa y su calificación jurídica**

49. El Grupo de Trabajo no comparte la consideración del Gobierno en cuanto a que resulta inútil discutir, desde una instancia distinta al juez, “la procedencia o la justificación de la incriminación penal del Sr. Karmelo Landa”, ni “las medidas de aseguramiento que se imponen a una persona”. Ésta es, precisamente, la labor del Grupo de Trabajo frente a una denuncia de detención arbitraria.

50. De conformidad con la información recibida del Gobierno, el único hecho que se imputa al Sr. Landa Mendibe es “la presunta integración en la estructura y órganos directivos de la Mesa Nacional de Batasuna”. El Gobierno agrega que “El Tribunal Supremo español declaró la ilegalización de esta formación política por su vinculación con la banda terrorista ETA. El Tribunal Constitucional se pronunció en igual sentido”.

51. El Grupo de Trabajo considera que el Estado tiene la obligación institucional, política y moral de garantizar la seguridad de todas las personas frente al terrorismo. Toda persona es titular del derecho humano a la seguridad, reconocido en el artículo 3 de la Declaración Universal de Derechos Humanos (junto al derecho a la vida y a la libertad) y el artículo 9 del Pacto Internacional de Derechos Civiles y Políticos (junto a la libertad personal). Tal obligación

supone la adopción de políticas públicas y de medidas de prevención de la acción terrorista así como impedir la impunidad de hechos de esa naturaleza.

52. No obstante, todas las políticas públicas y medidas que deben implementar los Estados han de ser respetuosas de los derechos humanos de todas las personas, y el Estado pierde su legitimidad si ellas finalmente se traducen en violaciones de esos derechos.

53. Según la fuente, el delito motivo de la inculpación es el tipificado en el artículo 515 del Código Penal español, que dispone:

“Son punibles las asociaciones ilícitas, teniendo tal consideración: 1. Las que tengan por objeto cometer algún delito o, después de constituidas, promuevan su comisión, así como las que tengan por objeto cometer o promover la comisión de faltas de forma organizada, coordinada y reiterada. 2. Las bandas armadas, organizaciones o grupos terroristas. 3. Las que, aun teniendo por objeto un fin lícito, empleen medios violentos o de alteración o control de la personalidad para su consecución. 4. Las organizaciones de carácter paramilitar. 5. Las que promuevan la discriminación, el odio o la violencia contra personas, grupos o asociaciones por razón de su ideología, religión o creencias, la pertenencia de sus miembros o de alguno de ellos a una etnia, raza o nación, su sexo, orientación sexual, situación familiar, enfermedad o minusvalía, o inciten a ello.” El artículo 516 sanciona a “los promotores y directores de las bandas armadas y organizaciones terroristas, y a quienes dirijan cualquiera de sus grupos”, y a los integrantes de las citadas organizaciones”.

54. De la información proporcionada por el Gobierno pareciera desprenderse que el rol del Sr. Landa Mendibe sería el de ser integrante y pertenecer a órganos directivos de una organización terrorista. El Gobierno considera, con apoyo en sentencias de los tribunales Supremo y Constitucional de España, que el partido político Batasuna es un grupo terrorista.

55. El Relator Especial sobre la promoción y protección de los derechos humanos y las libertades fundamentales en la lucha contra el terrorismo sostiene —con razón— que en el artículo 515 ya transcrito no se establece una definición del término “organización terrorista”, manifestando que “ las medidas antiterroristas no deben utilizarse para limitar los derechos de las ONG, los medios de comunicación o los partidos políticos. Toda medida que afecte al ejercicio de los derechos fundamentales en una sociedad democrática debe aplicarse con arreglo a criterios precisos definidos por la ley y respetar los principios de proporcionalidad y necesidad” (A/HRC/10/3/Add.2). Critica también la aplicación que los tribunales españoles han dado al concepto de “organización terrorista”, pues “no parece ofrecer suficiente precisión y podría aplicarse a actividades que quedan fuera del ámbito de los delitos de auténtico carácter terrorista”. A ese respecto, recuerda que toda restricción de los derechos humanos fundamentales debe basarse en la ley y ser proporcionada y eficiente en relación con el objetivo de la lucha contra el terrorismo. El Grupo de Trabajo comparte estos juicios.

56. La acusación única que según el Gobierno se ha formulado al Sr. Landa Mendibe (presunta integración en la estructura y órganos directivos [Mesa Nacional] de Batasuna), sin atribuirle rol de promotor, organizador, conspirador, instigador, cómplice o encubridor de algún

acto de carácter delictivo o terrorista, y sin que se informe de su comisión y si se ejecutó y consumó, o si quedó en grado de proposición, tentativa o frustración, permite al Grupo de Trabajo entender que el único motivo de la inculpación de esta persona es su sola militancia en el ilegalizado partido político Batasuna, un hecho que en sí no es delito, sino el ejercicio de un derecho humano reconocido tanto en la Declaración Universal (artículos 19, 20 y 21), como en el Pacto Internacional de Derechos Civiles y Políticos (artículos 18, 19 y 22).

57. Por otra parte, según las informaciones proporcionadas al Grupo de Trabajo, las sentencias de los tribunales Constitucional y Supremo que declaran la ilegalidad de Batasuna, no transforman a dicha organización, por sí misma, en una organización ilícita o delictiva. La militancia y la dirigencia en un partido político, legal o ilegal, son conductas legítimas y manifestaciones indiscutibles de la libertad de expresión y opinión, así como del derecho de asociación.

### **El respeto de las reglas del debido proceso de derecho**

58. Luego de aquilatar debidamente las explicaciones formuladas por el Gobierno, el Grupo de Trabajo considera que se encuentran acreditadas diversas infracciones a las normas del debido proceso de derecho, tales como:

- a) No haber informado al Sr. Landa Mendibe al momento de su detención de las razones de la misma, pues —aun en el caso de que se le haya notificado el cargo de “presunta integración en la estructura y órganos directivos (Mesa Nacional) de Batasuna”—, no se

le comunicaron las “razones” ni la “naturaleza y causas” y “en forma detallada” en que esa acusación se apoyaba (artículos 9 y 14.3. a) del Pacto Internacional de Derechos Civiles y Políticos);

b) No habersele juzgado dentro de un plazo razonable y sin dilaciones arbitrarias, llevando ya 19 meses privado de libertad (artículos 9 y 14 c) del mismo Pacto);

c) No haber gozado del derecho a la libertad durante el juicio, aun adoptándose las medidas de aseguramiento (artículo 9.3), derecho que en la especie se justifica en atención a que el Sr. Landa Mendibe nunca ha pretendido eludir la acción de la justicia;

d) No haber respetado su derecho a la presunción de inocencia, hecho que se configura con los tratos o penas crueles, inhumanos o degradantes, a los cuales se alude en los párrafos 44 a 46 de esta Opinión, los que se produjeron desde el momento de su privación de libertad, y su inmediata consideración como reo peligroso, imponiéndosele en consecuencia el régimen carcelario reservado a éstos (artículo 14.2 del Pacto).

59. Habida cuenta de lo que antecede, el Grupo de Trabajo emite la siguiente Opinión:

La privación de libertad del Sr. Karmelo Landa Mendibe es arbitraria, ya que contraviene a lo dispuesto en los artículos 9, 10, 11 y 18 a 21 de la Declaración Universal de Derechos Humanos, y 9, 10, 14, 18, 19, 21 y 22 del Pacto Internacional de Derechos

Civiles y Políticos, y corresponde a la categorías I, II y III de las categorías aplicables al examen de los casos presentados al Grupo de Trabajo.

60. Consecuente con la Opinión emitida, el Grupo de Trabajo pide al Gobierno de España:

a) Que ponga remedio a la situación del Sr. Karmelo Landa Mendibe, de conformidad con las disposiciones de la Declaración Universal de Derechos Humanos y el Pacto Internacional de Derechos Civiles y Políticos, mediante la concesión de la libertad provisional hasta la terminación del juicio, adoptando además medidas para que el proceso que se sigue en su contra no sufra nuevas dilaciones indebidas.

b) Que adopte medidas de reparación pública y de otra naturaleza en favor de esta persona;

c) Sin perjuicio de hacer suyas, en lo que corresponde, las recomendaciones contenidas en el informe de misión del Relator Especial sobre la promoción y protección de los derechos humanos y las libertades fundamentales en la lucha contra el terrorismo (A/HRC/10/3/Add. 2), que adopte políticas públicas y medidas concretas para combatir el flagelo del terrorismo con perspectiva de derechos humanos; es decir, respetando los derechos humanos de todas las personas, y especialmente los de carácter procesal.

Adoptada el 4 de septiembre de 2009

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